Trials for Crimes Against Humanity in Argentina

Secretaría de Derechos Humanos

Ministerio de Justicia y Derechos Humanos Argentina

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The Secretariat for Human Rights of the Argentine Republic present the English translation of extracts from trial rulings for crimes against humanity committed during the last military dictatorship (1976-1983). These trials took place between 2015 and 2017. The aim of this publication is to increase the dissemination of a globally exemplary policy known as the Argentine Policy of Memory, Truth and Justice.

Argentina reopened trials for crimes against humanity in 2003, and by 2023 had successfully convicted more than 1,100 perpetrators in a total of 320 judgments. The resulting jurisprudence has been groundbreaking, and just as many countries look to Argentina as a source of inspiration for their own processes of remembrance and justice, these excerpts can serve as valuable resources for disseminating, researching, analyzing, and understanding this experience in a widely spoken language around the world.

The selection does not represent the totality of the trials conducted or the legal debates surrounding them. Nevertheless, we believe it contributes to what we hope will be a valuable legal and social exchange.

Index

Trial record

1.

Fuerza de Tareas 5 - Escuela Naval -Vañek

This trial dealt with the responsibility for the genocide of five Navy chiefs, two from the Naval Prefecture, and an officer from the latter force, all linked to the so-called Task Force 5. The trial focused on the kidnapping, torture, disappearance and murder of workers from the Astillero Río Santiago, the Propulsora Siderúrgica, the YPF refinery, and the Polígono Industrial Berisso. It also highlighted the complicity and/or participation of the business and trade union sectors in the repression. The ruling granted the plaintiffs' demands for salary and pension reparations and called for the release of files from the Prefecture and the Navy. Significantly, the text points out that "the events committed in the area during the genocide that took place during the last civil-military dictatorship, which are the subject of study in various levels of state education, represent a possibility of social reparation that goes beyond the interest of the victims directly affected."

43 victims

110 witnesses

Convicted

Errecaborde, Jorge Alberto
Guitian, Roberto Eduardo Fernando
Meza, Eduardo Antonio
Schaller, Carlos José Ramón
Fernández Carro, José Casimiro
Herzberg, Juan Carlos
Rocca, Luis

1.

In the city of La Plata, on the nineteenth (19th) day of October, 2015 Judges from the Federal Criminal Oral Court n° 1 of La Plata, consisting of Judge Carlos Alberto Rozanski as President, and Court Members Judges César Álvarez and Germán Castelli, assigned substitute Judges and Judge María Antonieta Pérez Galimberti, fourth Judge appointed according to resolution N°1264/2015 from the Federal Criminal Cassation Chamber, assisted by the Secretary of the Court Karina Mabel Yabor, are gathered with the purpose of unveiling the verdict issued in accordance with article 396 and subsequent ones of the Criminal Procedural Code of the Nation, in case n° 17/2012/TO1, under the name **"Vañek, Antonio and others on infringement of article 144 bis section 1"** against:

1. Antonio VAÑEK, bearer of Enrollment book n°5102282, married, retired Armed Forces Vice Admiral, Argentine, born on August 9th, 1924, son of Antonio and Ana Bachanova, both deceased; domiciled in Sucre Street n°2050, 4th floor, apartment A in the Autonomous City of Buenos Aires, currently serving house arrest, represented by Mr. Gastón Barreiro and Mr. Fernando Buján, Public Defenders before this Court.

2. Jorge Alberto ERRECABORDE, bearer of Enrollment book n°5123829, retired Naval Officer, Argentine, born on May 19th, 1929 in the city of Tandil, Buenos Aires Province, domiciled in Luis María Campos Avenue n°360, 7th floor, apartment D in the Autonomous City of Buenos Aires, son of Alberto Martín Errecaborde and María Luisa Jaureguiberry, both deceased, currently serving house arrest, represented by Mr. Sebastián Olmedo Barrios.

3. Juan Carlos HERZBERG, bearer of Enrollment book n°5969310, Armed Forces retiree, Argentine, born on June 6th, 1927, in the city of Alcorta, Santa Fe Province, domiciled in Luis María Campos Avenue n°1419/35, 16th floor, apartment A in the Autonomous City of Buenos Aires, son of Juan and Juana María Rossi, both deceased, currently serving house arrest, represented by Mr. Gastón Barreiro and Mr. Fernando Buján, Public Defenders before this Court.

4. José Casimiro FERNÁNDEZ CARRÓ, bearer of Enrollment book n°5128691, lawyer and retired Armed Forces Commander in the Navy Infantry, Argentine, born on July 9th, 1930 in the Federal Capital, domiciled in Conde Street 2271, 6th floor in the Autonomous City of Buenos Aires, son of Antonia and Emilia Grecchi, both deceased,

currently serving house arrest, represented by Mr. Gastón Barreiro and Mr. Fernando Buján, Public Defenders before this Court.

5. Roberto Eduardo Fernando GUITIÁN, bearer of National ID n°4302874, Armed Forces retiree, Argentine, born on January 11th, 1940 in Capital Federal, domiciled in Luis María Campos Avenue n°294, 6th floor, apartment A in the Autonomous City of Buenos Aires, son of Lizardo and Elsa Rodriguez, both deceased, inmate in Ezeiza Women's Prison Unit n°3, represented by Mr. Sebastián Olmedo Barrios.

6- Carlos José Ramón SCHALLER, bearer of National ID n°5905303, retired dependent of Argentine Naval Prefecture, Argentine, born on February 28th, 1932, in the city of Brugo, Entre Ríos Province, domiciled in 11 de Septiembre Street n°2275, 10th floor, apartment C in the Autonomous City of Buenos Aires, son of Carlos Regino and Amanda Haydeé Mathieu, both deceased, currently serving house arrest, represented by Mr. Gastón Barreiro and Mr. Fernando Buján, Public Defenders before this Court.

7- Luis ROCCA, bearer of National ID n°4671145, Argentine Naval Prefecture retired, Argentine, born on January 26th, 1934 in the city of San Nicolás de los Arroyos, Buenos Aires Province, domiciled in Arzobispo Espinoza Street n°55, 10th floor apartment C in the Autonomous City of Buenos Aires, son of Luis and Martina Martín, both deceased, currently serving house arrest, represented by Mr. Gastón Barreiro and Mr. Fernando Buján, Official Defenders before this Court.

8- Eduardo Antonio MEZA, bearer of National ID n°5642647, Argentine Naval Prefecture retired, Argentine, born on August 3rd, 1932 in Villa Guillermina, Santa Fe Province, domiciled in Street 163 n°949 in the city of Berisso, Buenos Aires Province, son of Francisco Beltrán and Walde Diana Arguello, both deceased, currently serving house arrest, represented by Mr. Juan José Barragán.

Prosecutors Mr. Hernán Shapiro and Mr. Juan Martín Nogueira from the Assistance Unit concerned with cases involving human rights violations during the period of State terrorism in La Plata, created by the Attorney General's Office (PGN) resolution 46/02, complainants Mrs. Nilda Eloy and Mrs. Margarita Cruz for the Association of Former Detainees and Missing Persons, Anahí Foundation for Justice, Identity and Human Rights, Carlos Alberto Zaidman, Elsa Beatriz Pavón, Clara María Petrakos. Rosalía Isabella Valenzi and Tania Nuez represented by Ms. Carolina Vilches, Ms. María Luz Santos Morón, Ms. María Pía Garralda and Mr. Nicolás Tassara; Permanent Assembly for Human Rights of La Plata and National University of La Plata, represented by Mr. Oscar Rodríguez, Ms. Josefina Rodrigo, Ms. Gabriela Gómez and Mr. Marcelo Ponce Núñez, Grandmothers of Plaza de Mayo Association, represented by Mr. Emanuel

Lovelli and Ms. Colleen Wendy Torre; Argentine Human Rights Secretariat and Human Rights Secretariat of Buenos Aires Province represented by Mr. Adolfo Pérez Griffo, Mr. Ramón Baibiene and Mr. Maximiliano Chichizola; Argentine League for Man's Rights, Human Rights Unions of La Plata; Estela de la Cuadra, Eduardo Torres, María Fernanda and Leandro Nahuel Páez represented by Ms. Guadalupe Godoy and Ms. Verónica Bogliano intervene in the proceedings.

In view of the complexity and multiplicity of the several issues brought before the Court, the hearing is set for November 13th, 2015 at 12 noon, with the purpose of reading the legal foundation for the current ruling, according to article 400 second paragraph of the Criminal Procedural Code of the Nation, for which the parties have been duly notified.

As a consequence, after hearing all the parties and giving the defendants floor, the Court RULES:

FIRST:

1- BY UNANIMOUS DECISION, TO REJECT THE MOTION FOR DISMISSAL FOR FAILURE TO ALLEGE A CAUSE OF ACTION ON STATUTE OF LIMITATIONS GROUNDS regarding the accused Antonio Meza formulated by Mr. Juan José Barragán upon serving notice of the article 354 of the standard procedures and reformulated once again when presenting the closing arguments (Articles 340 section 2 -a contrario sensu- and consecutive ones, and 358 of the Criminal Procedural Code of the Nation).

2- BY UNANIMOUS DECISION, TO REJECT THE MOTION FOR DISMISSAL FOR FAILURE TO ALLEGE A CAUSE OF ACTION ON STATUTE OF LIMITATIONS GROUNDS regarding the accused Juan Alberto Errecaborde and Roberto Eduardo Fernando Guitián formulated by Mr. Sebastián Olmedo Barrios upon serving notice of the article 354 of the standard procedures and reformulated once again when presenting the closing arguments (Articles 340 section 2 -a contrario sensu- and consecutive ones, and 358 of the Criminal Procedural Code of the Nation).

3- BY UNANIMOUS DECISION, TO REJECT THE MOTION FOR DISMISSAL FOR FAILURE TO ALLEGE A CAUSE OF ACTION ON STATUTE OF LIMITATIONS GROUNDS regarding the accused Carlos José Ramón Schaller, Antonio Vañek, Juan Carlos Herzberg, Casimiro Fernández Carró and Luis Rocca, presented by Official Defenders Mr. Gastón Barreiro and Mr. Fernando Buján.

4- BY UNANIMOUS DECISION, TO REJECT the motion for annulment of the plea by the Argentine Human Rights Secretariat and the Human Rights Secretariat of Buenos Aires Province .

5- BY UNANIMOUS DECISION, TO REJECT the motion for annulment of the accusers'

closing arguments initiated by the Official Defense adhered by private attorneys Mr. Barragán and Mr. Olmedo.

6- BY UNANIMOUS DECISION, TO REJECT the motion for annulment of the defendant's preliminary depositions, initiated by the defense attorneys.

7- BY UNANIMOUS DECISION, TO REJECT the request for the discontinuance of criminal proceedings on the grounds of amnesty, initiated by Mr. Olmedo Barrios in representation of the defendants Errecaborde and Guitián.

8- BY UNANIMOUS DECISION, TO REJECT the request for the disqualification of the criminal proceedings on the grounds of violation of the reasonable time requirement, initiated by Mr. Olmedo Barrios in representation of the defendants Jorge Alberto Errecaborde and Roberto Eduardo Fernando Guitián.

9- BY UNANIMOUS DECISION, TO REJECT the request for the unconstitutionality of the annulment of Laws 23521 and 23492, known as Due Obedience and Full Stop, initiated by Mr. Olmedo Barrios in representation of the defendants Errecaborde and Guitián.

10- BY MAJORITY VOTE, TO REJECT the annulment of the extension of the accusation and additional criminal charges on the grounds of article 381 of the Criminal Procedural Code of the Nation initiated by Mr. Olmedo Barrios in representation of the defendants Jorge Alberto Errecaborde and Roberto Eduardo Fernando Guitián. Judge Germán Castelli has dissented.

SECOND:

1- BY MAJORITY VOTE, TO CONDEMN ANTONIO VAÑEK, besides other personal circumstances on record within the exordium, as co-perpetrator of the international crime of GENOCIDE committed during the latest civil-military dictatorship (1976-1983) to the sentence of 25 (TWENTY-FIVE) YEARS OF PRISON AND GENERAL DISQUALIFICATION FOR LIFE, and to impose the condemned THE PAYMENT OF LEGAL AND OTHER FEES OF THE PROCEEDINGS, for the enforced disappearance of Mario Horacio Revoledo (in accordance with articles 118 of the National Constitution; II of the Convention on the Prevention and Punishment of the Crime of Genocide -Decree Law 6286/1956; articles 5, 12, 19 section 4, 29 section 3, 45 and 142 ter paragraph 1 of the Penal Code according to Law 26679 and articles 530, 531 and 533 of the Criminal Procedural Code of the Nation). Judge Germán Castelli has dissented in part.

2- BY MAJORITY VOTE, TO CONDEMN JUAN CARLOS HERZBERG, besides other personal circumstances shown on record within the exordium, as co-perpetrator of the international crime of GENOCIDE committed during the latest civil-military dictatorship (1976-1983) to the sentence of 25 (TWENTY-

FIVE) YEARS OF PRISON AND GENERAL DISQUALIFICATION FOR LIFE, and to impose the condemned THE PAYMENT OF LEGAL AND OTHER FEES OF THE PROCEEDINGS, for the enforced disappearance of Mario Horacio Revoledo (in accordance with articles 118 of the National Constitution; II of the Convention on the Prevention and Punishment of the Crime of Genocide -Decree Law 6286/1956; articles 5, 12, 19 section 4, 29 section 3, 45 and 142 ter paragraph 1 of the Penal Code according to Law 26679 and articles 530, 531 and 533 of the Criminal Procedural Code of the Nation). Judge Germán Castelli has dissented in part. .

3- BY MAJORITY VOTE, TO CONDEMN JORGE ALBERTO ERRECABORDE, besides other personal circumstances on record within the exordium, as co-perpetrator of the international crime of GENOCIDE committed during the latest civil-military dictatorship (1976-1983) to the sentence of 25 (TWENTY-FIVE) YEARS OF PRISON AND GENERAL DISQUALIFICATION FOR LIFE, and to impose the condemned THE PAYMENT OF LEGAL AND OTHER FEES OF THE PROCEEDINGS, for homicide aggravated with malice and by premeditation of two or more people in perjury of Miguel Orlando Galván Lahoz and Roberto Pompillo; for joinder offencss like the enforced disappearance of Osvaldo Enrique Busseto, Roberto José de la Cuadra, Ricardo Nuez, Juan Carlos Blasetti, Diego Arturo Salas and Elsa Noemí Triana, and for aggravated enforced disappearance of a pregnant woman, Norma Raquel Raggio Baliño de Balbuena; the last four cases all constitute joinder offenses with torture inflicted by a public official to victims of political persecution; together with aggravated illegitimate deprivation of liberty and infliction of torture by a public official to Carlos Daniel Núñez, victims of political persecution (in accordance with articles 118 of the National Constitution; II of the Convention on the Prevention and Punishment of the Crime of Genocide -Decree Law 6286/1956; articles 5, 12, 19 section 4, 29 section 3, 45, 55, 80 sections 2 and 6 -according to Law 21338 ratified by 23077- and 142 ter paragraphs 1 and 2 according to Law 26679 and articles 144 bis section 1, with the aggravating factor stated in the last paragraph of such article, as it refers to sections 1 and 5 in article 142 and 144 paragraphs 1 and 2 of the Substantive Code according to Law 14616 and Law 20642 - applicable at the time of the events- articles 530, 531 and 533 of the Criminal Procedural Code of the Nation). Judge Germán Castelli has dissented in part.

4- BY MAJORITY VOTE, TO CONDEMN JOSÉ CASIMIRO FERNÁNDEZ CARRÓ, besides other personal circumstances on record within the exordium, as co-perpetrator of the international crime of GENOCIDE committed during the latest civil-military dictatorship (1976-1983)

TO THE SENTENCE OF LIFE IMPRISONMENT AND GENERAL DISQUALIFICATION FOR LIFE, and to impose the condemned THE PAYMENT OF LEGAL AND OTHER FEES OF THE

PROCEEDINGS, for homicide aggravated with malice and by premeditation of two or more people in perjury of Reina Ramona Leguizamón; for joinder offenses like the enforced disappearance of Diego Arturo Salas and Elena Noemí Triana, and for aggravated enforced disappearance of a pregnant woman, Norma Raquel Raggio Baliño de Balbuena; the last three cases all being joinder offenses with torture inflicted by a public official to victims of political persecution; together with aggravated illegitimate deprivation of liberty and infliction of torture by a public official in perjury of Luis Ramón Etchepare, Carlos García, Carlos Daniel Núñez, Mario Arturo Francisco Peláez and Marta Isabel Cáneva, victims of political persecution (in accordance with articles 118 of the National Constitution; II of the Convention on the Prevention and Punishment of the Crime of Genocide -Decree Law 6286/1956; articles 5, 12, 19 section 4, 29 section 3, 45, 55, 80 sections 2 and 6 -according to Law 21338 ratified by 23077- and 142 paragraph 1 and 2 according to Law 26679 and articles 144 bis section 1, with the aggravating factor stated in the last paragraph of such article, as it refers to sections 1 and 5 in article 142 of the Penal Code and 144 paragraphs 1 and 2 of the same body of regulations according to Law 14616 and Law 20642 -applicable at the time of the events- articles 530, 531 and 533 of the Criminal Procedural Code of the Nation). Judge Germán Castelli has dissented in part.

5- BY MAJORITY VOTE, TO CONDEMN ROBERTO EDUARDO FERNANDO GUITIÁN, besides other personal circumstances on record within the exordium, as co-perpetrator of the international crime of GENOCIDE committed during the latest civil-military dictatorship (1976-1983) to the sentence of LIFE IMPRISONMENT AND GENERAL DISQUALIFICATION FOR LIFE, and to impose the condemned THE PAYMENT OF LEGAL AND OTHER FEES OF THE PROCEEDINGS, for homicide aggravated with malice and by premeditation of two or more people in perjury of Reina Ramona Leguizamón, Miguel Orlando Galván Lahoz and Roberto Pompillo; for joinder offenses like the enforced disappearance of Diego Arturo Salas and Elena Noemí Triana, and for aggravated enforced disappearance of a pregnant woman, Norma Raquel Raggio Baliño de Balbuena; the last three cases all being joinder offenses with torture inflicted by a public official to victims of political persecution; together with aggravated illegitimate deprivation of liberty and infliction of torture by a public official in perjury of Luis Ramón Etchepare, Carlos García, Carlos Daniel Núñez, Mario Arturo Francisco Peláez and Marta Isabel Cáneva, victims of political persecution (in accordance with articles 118 of the National Constitution; II of the Convention on the Prevention and Punishment of the Crime of Genocide -Decree Law 6286/1956; articles 5, 12, 19 section 4, 29 section 3, 45, 55, 80 sections 2 and 6 -according to Law 21338 ratified by 23077- and 142 ter paragraphs 1 and 2 according to Law 26679 and articles 144 bis section 1, with the aggravating factor stated in the last paragraph of such article, as it refers to sections 1 and 5 in article 142 of the

Penal Code and 144 paragraphs 1 and 2 of the same body of regulations according to Law 14616 and Law 20642 -applicable at the time of the events- articles 530, 531 and 533 of the Criminal Procedural Code of the Nation). Judge Germán Castelli has dissented in part.

6- BY MAJORITY VOTE, TO CONDEMN CARLOS JOSÉ RAMÓN SCHALLER, besides other personal circumstances on record within the exordium, as co-perpetrator of the international crime of GENOCIDE committed during the latest civil-military dictatorship (1976-1983) to the sentence of 25 (TWENTY-FIVE) YEARS OF PRISON AND GENERAL DISQUALIFICATION FOR LIFE, and to impose the condemned THE PAYMENT OF LEGAL AND OTHER FEES OF THE PROCEEDINGS, for aggravated illegitimate deprivation of liberty and infliction of torture by a public official in perjury of María Adela Barraza, Carmelo Cipollone, Luis Alberto Díaz, Luis María Digaetano, Nicolás Luis Di Mattia, Alberto Dizzini, María Beatriz Horrac, Julio Alberto Machado, Ricardo Mario Melano, María del Carmen Miranda, Pedro Niselsky, Carlos Hugo Perdomo, Américo Horacio Piccinini, Juan Pombo, Dionisio Puz, Luis Aníbal Rivadeneira, Hugo Ernesto Ruiz Díaz, Eduardo Schaposnik, Jorge Alberto Arri, Ángel Oscar Revoledo, Jorge Estanislao Bogusa, Manuel Carrete, Rosa Francisca Nievas, Ana María Nievas, Adolfo Oscar Lanoo, José Luis Dervaric, Roberto Miguel Aguirre, all victims of political persecution (in accordance with articles 118 of the National Constitution; II of the Convention on the Prevention and Punishment of the Crime of Genocide -Decree Law 6286/1956; articles 5, 12, 19 section 4, 29 section 3, 45, 55, 80 sections 2 and 6 -according to Law 21338 ratified by 23077- and 142 paragraph 1 and 2 according to Law 26679 and articles 144 bis section 1, with the aggravating factor stated in the last paragraph of such article, as it refers to sections 1 and 5 in article 142 of the Penal Code and 144 ter paragraphs 1 and 2 in the same body of regulations according to Law 14616 and Law 20642 -applicable at the time of the events- articles 530, 531 and 533 of the Criminal Procedural Code of the Nation). Judge Germán Castelli has dissented in part.

7- By majority vote, to condemn Luis ROCCA, besides other personal circumstances on record within the exordium, as co-perpetrator of the international crime of GENOCIDE committed during the latest civil-military dictatorship (1976-1983) to the sentence of 25 (TWENTY-FIVE) YEARS OF PRISON AND GENERAL DISQUALIFICATION FOR LIFE, and to impose the condemned THE PAYMENT OF LEGAL AND OTHER FEES OF THE PROCEEDINGS for the enforced disappearance of Juan Carlos Blasetti, for joinder offenses like infliction of torture by a public official to a victim of political persecution; together with aggravated illegitimate deprivation of liberty, threats and violence with infliction of torture by a public official in perjury of Jorge Barontini, Ricardo Buergo, Luis Ramón Etchepare, Carlos García, Horacio García Gerboles, Vladimiro Klimaseski,

Roberto Adoníbal Páez, Ricardo José Reynoso, Luis Rivadeneira, Juan Carlos Sosa and Mario Roberto Zecca, victims of political persecution (in accordance with articles 118 of the National Constitution; II of the Convention on the Prevention and Punishment of the Crime of Genocide -Decree Law 6286/1956; articles 5, 12, 19 section 4, 29 section 3, 45, 55, 80 sections 2 and 6 -according to Law 21338 ratified by 23077- and 142 paragraph 1 and 2 according to Law 26679 and articles 144 bis section 1, with the aggravating factor stated in the last paragraph of such article, as it refers to sections 1 and 5 in article 142 of the Penal Code and 144 paragraphs 1 and 2 of the same body of regulations according to Law 14616 and Law 20642 -applicable at the time of the events- articles 530, 531 and 533 of the Criminal Procedural Code of the Nation). Judge Germán Castelli has dissented in part.

8- BY MAJORITY VOTE, TO CONDEMN EDUARDO ANTONIO MEZA, besides other personal circumstances on record within the exordium, as co-perpetrator of the international crime of GENOCIDE committed during the latest civil-military dictatorship (1976-1983) to the sentence of 25 (TWENTY-FIVE) YEARS OF PRISON AND GENERAL DISQUALIFICATION FOR LIFE, and to impose the condemned THE PAYMENT OF LEGAL AND OTHER FEES OF THE PROCEEDINGS for the aggravated illegitimate deprivation of liberty by a public official in perjury of Jorge Vladimiro Klimaseski, Luis Ramón Etchepare, Roberto Adonibal Páez, Luis Aníbal Rivadeneira, Ricardo José Reynoso, Ricardo Buergo, Jorge Barontini, Horacio García Gerboles, Carlos García, Juan Carlos Sosa, Jorge Alberto Arri, Jorge Estanislao Bogusa, Ángel Oscar Revoledo, Manuel Carrete, Ana María Nievas, Rosa Francisca Nievas, Adolfo Oscar Lanoo, José Luis Dervaric and Roberto Miguel Aguirre, victims of political persecution (in accordance with articles 118 of the National Constitution; II of the Convention on the Prevention and Punishment of the Crime of Genocide -Decree Law 6286/1956; articles 5, 12, 19 section 4, 29 section 3, 45, 55, 144 bis section 1 of the Penal Code, with the aggravating factor stated in the last paragraph of such article, as it refers to sections 1 and 5 in article 142 of the same body of regulations; 144 ter paragraphs 1 and 2 of the Penal Code according to Law 14616 and Law 20642 -applicable at the time of the events-, articles 530, 531 and 533 of the Criminal Procedural Code of the Nation). Judge Germán Castelli has dissented in part.

9- BY MAJORITY VOTE, TO ACQUIT CARLOS RAMÓN JOSÉ SCHALLER of cases involving Luis Córdoba, Miguel Reinaldo Aguirre and Juan Alejandro Aguirre. Judge Carlos Alberto Rozansky has dissented, as he votes in favor of the conviction.

10- BY MAJORITY VOTE, TO ACQUIT LUIS ROCCA of the case involving Luis Eduardo Bloga. Judge Carlos Alberto Rozansky has dissented, as he votes in favor of the conviction.

11- BY MAJORITY VOTE, TO ACQUIT

EDUARDO ANTONIO MEZA of cases involving Luis Ricardo Córdoba, Miguel Reinaldo Aguirre and Juan Alejandro Aguirre. Judge Carlos Alberto Rozansky has dissented, as he votes in favor of the conviction.

THIRD:

1- BY MAJORITY VOTE of Judges Rozansky and Álvarez, to REVOKE the house arrest of the defendants Antonio Vañek, Juan Carlos Herzberg, Jorge Alberto Errecaborde, Casimiro Fernández Carro, Carlos José Ramón Schaller, Luis Rocca and Eduardo Antonio Meza, It is required to immediately carry out the relevant medical tests in order to establish the most appropriate facilities for the condemned to serve the sentences hereby imposed. Judge Germán Castelli has dissented.

FOURTH:

1- UNANIMOUSLY, TO ORDER Astillero Río Santiago (Río Santiago shipyard) to keep the status of the job positions held and to keep granting salaries to Diego Barreda, Raúl José Biroccio, Luis Eduardo Bloga, Luis Ricardo Córdoba, Alberto Osvaldo Derman, Ángel Mario Decharras, Nicolás Luis Di Mattia, Oscar Rubén Flaminni, José Luis García, Julio Alberto Machado, Gabriel Oscar Marotta, Silvio René Marotte, Roberto Juan Muñoz, Pedro Niselski, Dionisio Puz. All workers at the shipyard and victims of State terrorism during the latest civil-military dictatorship are about the age to access pension. This order applies until conditions are given for their effective retirement from that company, considering the top category they would have achieved had they continued working steadily since the beginning of their contract. This measure must cover those families in which a member has died victim of said situation with the right to pension, as is the case of Horacio Santiago.

2- TO ORDER the measure established in the previous section to be applicable, once they have reached the required age to access pension benefits, to Raúl Benisola, Luís María Cinese, Luís María Digaetano, José R. Fiuza Casais, Ana María Nievas, Daniel Hugo Pastorino, Mario Arturo Peláez, Américo Horacio Picinini, Pedro Jacinto Rayab, Hugo Ernesto Ruiz Díaz and José Salum, all of them victim workers, reincorporated and currently serving the company.

3- To order what is stated in the previous points to be applicable, once the facts have been duly verified, to those people who might find themselves identified with the situations described.

4- UNANIMOUSLY, TO REQUEST THE NATIONAL AND PROVINCIAL STATES to adopt the pertinent measures conducive to remedy the harm suffered by the group of workers at Astillero Río Santiago, victims of State terrorism, and to regulate and implement the necessary mechanisms so that they are provided with the right to pension based on the top hierarchy or category they were denied access to due to the

lack of services provided because of their condition of victims. The State is made responsible for the integration of employees' contributions which were not reported since the arbitrary interruption of their activities until their reincorporation.

5- UNANIMOUSLY, TO ORDER the rectification of the files belonging to the victim workers in this case to acknowledge the real facts behind their cessation of activities in the companies Astillero Río Santiago, YPF, Propulsora Siderúrgica and Frigorífico Swift in the cases concerning detained and disappeared, killed and surviving workers.

FIFTH:

1- TO ORDER THE TRANSCRIPTS OF THIS TRIAL TO BE PLACED IN THE MAIN FILE, including verbatim trial records, all the testimonies recorded digitally and the sentence, and to be kept by the Federal Court nº3 of this city in order to be incorporated to case 17/2012 in which acts committed by the Army and the Prefecture, and the possible responsibility of the companies, their directors and heads (Astillero Río Santiago, YPF, Frigorífico Swift and Propulsora Siderúrgica) are investigated; to include statements by Luis Bloga and Raúl Pastor, who alluded to a possible clandestine detention center in the immediate surroundings of New York and Río de Janeiro Streets in the city of Ensenada so that those premises are investigated. Along the same lines, to incorporate the events in connection with activities performed by the Navy Intelligence Services in Task Force 5 jurisdictions.

2- TO ORDER THE TRANSCRIPTS OF THIS TRIAL TO BE PLACED IN THE MAIN FILE including the testimonies by Ana María Nievas, Américo Piccinini, Mario Peláez, Pedro Niselsky, Luis María Digaetano, Luis Córdoba, Silvina Arias, Dionisio Puz, Carmelo Cipollone, Luis Aníbal Rivadeneira, Jorge Alberto Arri, Ángel Almada and Estela de la Cuadra, and to be kept by the assigned Federal Court in this city so that all the trade-union officials representing the workers at the moment of the events are investigated for their possible connection with publicly prosecutable offenses.

3- TO ORDER THE TRANSCRIPTS OF THIS TRIAL TO BE PLACED IN THE MAIN FILE including verbatim trial records, all the testimonies and pleadings recorded digitally, and to be kept by the Federal Courts nº1 and nº3 of this city so that they are incorporated to the cases in which the conduct by those in Concentración Nacional Universitaria (National University Cluster), explicitly mentioning possible company and trade union participation, are investigated.

SIXTH:

1- TO INFORM the National Executive Power of the verdict in the current case in order to, once enforced, initiate the process of discharge of the condemned and to suspend any benefit in connection with retirement or pension payments

(according to article 19 of the National Penal Code).

2- TO URGE the National Executive Power, through the Ministry of Defense, to declassify, when applicable, files from the Navy and the Prefecture.

3- TO INFORM the corresponding Bar Association of the sentence hereby dictated in connection with the condemned José Casimiro Fernández Carró.

4- TO URGE the National Executive Power and the Executive Power of Buenos Aires Province to erect memorials with their corresponding signaling in the buildings where detention centers worked, according to evidence from this trial, and to allow victims to take part in the task.

5- TO URGE the authorities of the companies where Propulsora Siderúrgica, Destilería de YPF and Polígono Industrial de Berisso used to work, to allow the erection of a commemorative monument of the events therein occurred, where the workers of those companies were victims of the events hereby brought to trial, and to allow the victims to participate in the tasks.

6- TO URGE the authorities of Astillero Río Santiago to signal the place where the commemorative monument is and to allow victims to take part in the task.

7- TO INFORM the National Ministry of Defense of the sentence in the Court files so that they evaluate the inclusion of this ruling in the syllabi of the different educational institutions they have in charge.

8- In the same regard as the previous point, **TO MAKE THE JUDGMENT KNOWN** to the Department of Human Rights of the National University of La Plata, to the Dean of the Faculty of Law and Social Sciences and the Dean of the Faculty of Human and Educational Sciences, to the Minister of Education of Buenos Aires Province and to the School Boards of Berisso and Ensenada.

9- TO REFER A COPY OF THIS VERDICT TO THE JUDICIAL INFORMATION CENTRE to make it to the public domain.

10- TO CONSIDER the appeal for cassation of the federal case and to bring it before International Courts.

Be it recorded and be the parties notified by virtue of the reading hereby carried out.

Signed by Mr. Carlos Alberto Rozanski, Mr. César Álvarez y Mr. Germán Castelli, Judges, before Acting Secretary of the Court: Karina Mabel Yabor.

V. LEGAL CLASSIFICATION/ CHARACTERIZATION

A. LEGAL FRAMEWORK PROVIDED BY INTERNATIONAL LAW: GENOCIDE

Judge Carlos Rozanski has stated:

According to the verdict rendered, the defendants **Antonio Vañek, Juan Carlos Herzberg, José Casimiro Fernández Carró, Jorge Alberto Errecaborde, Roberto Eduardo Fernando Guitián, Carlos José Ramón Schaller, Luis Rocca y Eduardo Antonio Meza, as co-perpetrators of the international crime of GENOCIDE, perpetrated during the latest civil-military dictatorship (1976-1983)**, according to articles 118 of the National Constitution; II of the Convention on the Prevention and Punishment of the Crime of Genocide -Decree-Law 6286/1956-; articles 5, 12, 19 section 4°, 29 section 3°, 45, and 142 ter first paragraph of the Penal Code according to Law 26679 and articles 530, 531 and 533 of the Criminal Procedure Code.

Without limiting the grounds concerning the responsibility that each of the defendants hold, it is necessary to develop this point in connection with genocide, as the co-perpetration of those found guilty was demonstrated throughout the trial.

As the paragraph on the revocation of pretrial detentions stated, Michel Foucault defined the Law as "creator of truth" ("Genealogy of Racism." Montevideo. Altamira Publisher. 1993), and in agreement with that concept, I would like to recall once again, as I did in the other rulings on this kind of crime, the importance the acknowledgement of truth has for the construction of collective memory. In particular in societies like ours who have undergone genocide which has motivated, among others, the trial whose sentence we herein substantiate.

That construction, currently in progress, besides the specific penalties the defendants in this case and in those being carried out throughout the country, will allow us to continue exercising the memory of the various generations of direct and indirect victims, of the events that occurred and of the long years of impunity that followed. However, as will be seen, that continuity in the construction will depend on a political and legal will that must be renewed on a daily basis, and by no means does it end with the punishment of some of the co-perpetrators of the systematic plan that destroyed tens of thousands of lives.

To better understand the position of the undersigned on the subject, as stated in the sentence duly dictated in the case N° 2506/07 -today with the force of res judicata-, in which Christian Federico Von Wernich was condemned to life imprisonment, it is relevant to summarize the antecedents of genocide. In this respect, a worldwide discussion on what the most appropriate definition of the concept of genocide

was started after the Second World War. That discussion, which is still in place today, hit a milestone in the Convention on the Prevention and Punishment of the Crime of Genocide approved by the United Nations in December 1948.

Such Convention has, at the same time, an antecedent that must not be overlooked for its implications in the conclusions that this Court has reached in the ruling substantiated today.

In the Resolution 96 (I) of December 11, 1946, as a consequence of the events originated by Nazism, the United Nations invited the Member States to enact the necessary laws for the prevention and punishment of genocide.

In that respect, it was declared that: "*genocide is the denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations. Many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part.*" And it goes on to state that: "*The General Assembly, therefore, affirms that genocide is a crime under International Law which the civilized world condemns, and for the commission of which principals and accomplices whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds - are punishable.*"

It is clear from this transcription and it is relevant for this point that in the cited Resolution the international community, shocked by the crimes committed by the Nazis during the Second World War, added without hesitation "political and other groups" (SIC) and "on political or any other grounds" (SIC) to the concept of genocide in the first paragraph herein transcribed.

Similarly, article 2° of the first United Nations draft of the Convention on the Prevention and Punishment of the Crime of Genocide stated that: "*In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, religious or political group, for reasons based on racial or national origin, in religious beliefs or political opinions of their members: 1) killing members of the group; 2) causing serious bodily harm to members of the group; 3) inflicting on the group conditions of life calculated to bring about death: imposing measures intended to prevent births within the group.*"

As can be seen, the inclusive nature of political groups as well as the political opinions of their members was maintained in the draft.

However, due to prevailing political circumstances in some States around that time, the Convention sanctioned in 1948 defined the description of the crime as follows: "*genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: a) Killing members of the group; b) Causing serious bodily or mental harm to members of the group; c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in*

whole or in part; d) Imposing measures intended to prevent births within the group, *e) Forcibly transferring children of the group to another group*."

In this new writing, it can be appreciated that both political groups and political motivations were excluded from the new definition. From then on, and particularly in connection with the events occurred in our country during the military dictatorship which began in 1976, an interesting discussion was started on whether the tens of thousands of victims of that State terrorism integrate the so-called "national group" alluded to in the Convention or not.

As I pointed out in the aforementioned case 2251/06, I understand that the affirmative answer is valid, as the events occurred in our country in the said period must be categorized as genocide.

This assertion stems from the analysis that follows and it comes as the result of using the most elemental logics.

In the historical sentence for Case 13, the mechanics of the mass destruction implemented by those self-identified as the "Process of National Reorganization" was considered to have been proven.

In that way, the case 13/84 that condemned the former members of the Military Juntas established that: "the system implemented - kidnapping, interrogation under torture, clandestine and illegitimate deprivation of liberty and, in many cases, the elimination of the victims- was substantially the same throughout the territory of the Nation and prolonged over time."

This definition was reproduced in the sentence dictated on December 2, 1986 by the National Chamber of Appeals for Criminal and Correctional Matters of the Federal Capital in the Case n° 44, both introduced to the trial through reading. It is worth mentioning that Case 13 later on clarified that the "system" was carried out in a generalized way as from March 24, 1976 (chapter XX Case 13/84).

The description provided by the Court in the cited ruling, as well as the remaining ones there on the matter and which were developed later on in the Case 44 by which Etchecolatz was condemned for the perpetration of 91 cases of infliction of torture, marked the beginning of a formal, deep and official acknowledgement of the plan of extermination carried out by those who managed the country in those days and in which the herein accused performed a specific role, as was seen when responsibility was considered.

It is precisely that recognition of the perpetration of the acts as well as of the responsibility of the Argentine State on them that, to my understanding, the process of "creation of truth" begins, without which there would only be setbacks and impunity.

Obviously, that process was subjected to a great number of pressure factors, whose negation would result naive, through all these years. Despite that, significant progress has been made both in the national and the international spheres.

On the other hand, it is interesting to remember some concepts from Spanish justice on the matter.

On November 4, 1998, in the "Hearing before the Criminal Division of the National High Court" of Spain, with the signature of its ten magistrates, intervened in the case in which Adolfo

Francisco Scilingo was later sentenced. In connection with the issue herein discussed, they considered that the events occurred in Argentina constitute genocide, even when the applicable Spanish Penal Code itself ignores political groups as victims.

It is interesting to transcribe the key arguments developed by the Spanish magistrates on that occasion:

The judges stated that: "*The plural nature of the criminal action and the participation of multiple people, in the terms it appears in the summary trial, is an action against a group of Argentine individuals or residents of Argentina susceptible to differentiation and who, undoubtedly, was differentiated by the framers of persecution and harassment. The actions of persecution and harassment consisted in deaths, prolonged illegal detentions, in many cases without the possibility of determining the fate of the detainees -suddenly abducted from their homes, quickly expelled from society, and forever missing-, in this way giving birth to the uncertain concept of 'disappeared', tortures, confinement in clandestine detention centers, without any respect for the rights any legislation recognizes for detained, imprisoned or sentenced individuals in penitentiary centers, without their families knowing of their whereabouts, transfer of children of the detainees to be handed to other families -forcible transfer of children of the persecuted group to families of the other-. In the facts alleged to in the summary trial, object of investigation, the idea of extermination of a group of the Argentine population, without excluding the residents, is inevitably present. It was an action of extermination, which was not random or indiscriminate, but which responded to the will to destroy a specific sector of the population, a greatly heterogeneous group but differentiated. The persecuted and harassed group was integrated by those citizens who did not comply with the predefined type by the promoters of repression as the new order to be established in the country. The group was integrated by citizens who opposed the regime, and citizens who were indifferent to the regime as well. Repression was not intended to change the group's attitude in connection with the new political system; instead, it tried to destroy the group through detention, death, disappearance, forcible transfer of children from a group to another, intimidation to the members of the group. These facts constitute the crime of genocide.*"

In connection with the aforementioned omission in the Convention, the magistrates pointed out:

> "*The sense of validity of the 1948 Convention in terms of the necessity felt by member countries to criminally hold genocide accountable, and to avoid its impunity, because it is considered a horrendous crime within international law, requires that the terms 'national group' does not mean 'a group formed by members who belong to the same nation', but, simply, a human national group, a human differentiated group, characterized by something, integrated by a higher collectivity...That social conception of genocide -felt and understood by the collectivity in which horror and rejection to the crime lays the foundation for it- would*

not allow those kinds of exclusions" (Appeal 84/98 - Section Three - Case Number 19/97).

What the judge of the National High Court of Spain, Baltazar Garzón, stated on the issue in his ruling on November 2, 1999, is equally important: "*In March 1976, the Military Juntas seized power in Argentina through a coup d'état, a regime of horror based on the calculated and systematic elimination from the State, which lasted several years, disguised under the denomination 'war against subversion', of thousands of people (in the Case there is already a list of over ten thousand accredited missing people), in a violent way. The aim of this systematic action was to establish a new order, just as Hitler intended to do in Germany, in which there was no room for certain categories of persons who did not fit the stereotype of nationality, Western civilization, and Western Christian morality. That is to say, all of those who, according to the dominant Hierarchy, did not defend a concept of ultra-nationalism fascist-inclined society, but followed 'international slogans such as Marxism or atheism'. In accordance with these views, a plan was schemed to achieve 'selective elimination' or elimination by sectors of the population, members of the Argentine peoples. In this way, it can be affirmed that the selection was not so much on targeted people, as the regime disappeared or killed many with no kind of political or ideological affiliation, but for their membership to specific collectives, sectors or groups of the Argentine Nation; this means, the elimination of those (National Group) who, in their inconceivable criminal dynamics, were considered opposers of the Process. In fact, the selection for the physical elimination by sectors of the population is distributed as follows, according to data collected by the National Commission on the Disappearance of Persons: Never Again (CONADEP): workers 30.2%, students 21%, employees 17.9%, educators 5.7%, autonomous workers and others 5%, professionals 10.7%, housewives 3.8%, journalists 1.6%, actors and artists 1.3%, religious people 0.3%, subordinate personnel of the Security Forces 2.5%. The goal of this selection, arbitrary in terms of individual persons, was perfectly calculated if we take into consideration what the objective was: the so called 'Process of National Reorganization' based on the 'necessary' disappearance of a 'specific' number of people located in those sectors of society that hinder the ideal configuration of the new Argentine Nation, those who were 'the enemy of the Argentine soul', as General Luciano Benjamín Menéndez, defendant in this Case, used to call them, and who upset the balance and thus had to be eliminated.*"

From the historical Argentine rulings mentioned above (Cases 13 and 44), as well as from the concepts provided by the Spanish justice, it is clear that we are not before a mere accumulation of offenses. Moreover, the characterization of the event herein judged as crimes against humanity does not prevent us from analyzing whether those facts occurred in isolation or whether they were part of a major plan.

In this respect, the Argentine sociologist Daniel Feierstein, in a work that has not been published yet, refers to this issue as follows: "*The concept of crimes against humanity does not cover the richness and potential present in the concept of genocide, which refers to the attempt to destroy a group and not merely indiscriminate civilian*

population, as would be the case of crimes against humanity. And this difference is essential from the legal point of view as well as from the historical-sociological one, as it distinguishes indiscriminate violence and not intentional violence from a scheme to use horror for the transformation of group identity. This last idea was present in the foundations of Raphael Lemkin's brilliant intuition in the coinage of the neologism 'genocide'."

This undoubtedly provides a perspective on genocide, one which allows us to understand several actions carried out the time of the events herein judged, not just like violent activity by armed groups of different security forces but like the specific part of an organized machinery in complicity with other sectors of society with the purpose of achieving a goal which only a genocide could reach.

What is more, in an essential work of 2004, Feierstein and Levy make reference to the division of the national territory into operational areas and subareas, and hundreds of clandestine detention centers. They mention: "*One of the elements that catches everyone's attention is the exhaustive, prior planning (...) The extermination was carried out at a speed and precision which showed years of conceptual elaboration and prior training. The perpetrators did not hesitate to apply any of the mechanisms for the destruction of subjectivity used in previous genocidal or repressive experiences. Argentine concentration camps were a compendium of the worst experiences from the concentration camps during Nazism, from the French internment camps in Algeria and from American counterintelligence in Viet Nam. Crimes like torture through the use of electric prod, the practice of 'submarine' (systematically submerging the victims' head into a bucket of water until asphyxiation), introduction of rodents into the human body, daily humiliation and denigration, ill treatment, blows, overcrowding, hunger; added to this, the Argentine experience displayed a series of specific practices such as torture in the presence of the victim's children, or torture to the children or partners in the presence of their parents or spouses, and illegal appropriation of minors (to hand them to military families), many of whom were children of the 'disappeared'...As if it were a horror competition, Argentine genocidal officials evaluated and put into practice the most degrading of each of the previous genocidal experiences and took them to a level of sophistication which raises questions as to the possibility of improvisation or a spontaneous feeling of hatred...*" (Daniel Feierstein/Guillermo Levy. "*Till Death Do Us Part: Social Genocidal Practices in Latin America.*" Al Margen Editions, Buenos Aires, 2004, pages 63-64).

In connection with whether the events occurred in our country should be included in the concept of "national group" according to the final version of article II of the Convention, our affirmative answer has already been given, reason for which its transcription is essential for the ruling today substantiated.

It is also illustrative to consider the cited authors' reflections on the issue: "*...the characterization as a 'national group' is absolutely valid for examining the events that took place in Argentina, since the perpetrators intended to destroy a particular web of social relations in a State in order to bring about a change substantial enough*

to alter the life of the whole. Given the definition in the 1948 Convention of 'in whole or in part,' it is evident that the Argentine national group has been annihilated 'in part' and in a part substantial enough to alter the social relationships of the nation itself... The annihilation in Argentina is not spontaneous, it is not causal, it is not irrational: it is the systematic destruction of a 'substantial part' of the Argentine national group, destined to transform it as such, to redefine its way of being, its relationships, its fate, its future" (cited work, page 76).

I understand that everything that has been stated makes it clear that, as mentioned before, we are not before a succession of crimes but before something significantly larger which deserves the classification of "genocide." However, it is necessary to clarify that this should not be interpreted as a disregard for the important differences between what happened in Argentina and the exterminations which had the Armenian population (more than a million) as victims (the first genocide of the twentieth century since 1915), the millions of victims of Nazism during the Second World War or the mass killings of a million people in Rwanda in 1994, to name some notorious examples.

It is not, as stated in the case 2251/06, a competition as to which peoples suffered more or which community has the greatest number of victims. It is about calling these phenomena by their name, which, even with contextual differences and occurred in different times and places, bear a similitude that must be recognized. As Feierstein concludes when giving the reasons for which different historical contexts can be called in the same way, "*...using the same concept does imply the existence of a common denominator connected to a technology of power in which 'denial on the other' reaches its ultimate expression: their material disappearance (of bodies) and symbolic (of the memory of their existence*)" (cited word, page 88).

Moreover, in a later work, this author incorporates a concept for the analysis of this topic on a genocidal modality from the experience of Nazism which he labeled ***"reorganizing genocide."*** He pointed out that one of the peculiarities of this modality is the role of concentration devices of power as a key feature for their operations.

In connection with the events occurred in our country, he stated that "*The Argentine case may be thought of complementarily as one of the most concise experiences achieved by this "reorganizing genocide" as a model for destruction and refounding of social relationships. In fact, such social process explicitly implies the character of its practice through the self-designation as "Process of National Reorganization," a novelty in comparison with other dictatorships with genocidal processes that occurred in previous years*" (Daniel Feierstein, *Genocide as Social Practice: Between Nazism and the Argentine Experience*. Page 356. Fondo de Cultura Económica Publisher. Buenos Aires. 2007).

He also stated that a novelty of this model of genocide is that it aims at transforming social relationships from within a pre-existent nation state, but in such a deep way that it manages to alter all the social patterns themselves (page 358).

This "reorganizing" mind in the modern genocidal mind is appreciated in some of the numerous statements that the key managers gave

the media during the years of that process. What follows is a small yet illustrative selection to understand the concept described before.

"Once the sense of nationality has disappeared, as well as the sense of neighborliness, of friendship, of brotherhood, everything turned shady and dirty. The situation's name was mud, and in that mud, a war was fought for the love of God, in the name of the Nation and the family. It is the kind of love we prioritize and hence legitimize the soldiers' actions (...) In the war we have fought, the love for the social body which we tried to safeguard is the one that primed in all our actions. Because, ultimately, being Marxism the modern heresy, what we are witnessing is the 'actual event' of that constant war between Good and Evil." (page 21) Camps, Ramón J. A. Timerman Case. Full Stop. Banfield, Tribuna Abierta Publisher, 1982.

"Subversion is to subvert values, being the guerilla the only objective consequence of it. When values are disrupted, there is subversion (...) Besides fighting subversion, we must govern, and governing begins by making the traditional values of our lifestyle clear." (Videla, Jorge Rafael, in La Prensa, May 13, 1976).

"Fight will take place in every field, besides the strictly military. Any solvent or anti national action will not be allowed in the areas of culture, mass media, economy, politics or unionism." (Videla, Jorge Rafael, in La Prensa, July 8, 1976).

"[It is good to look at each other] for what we are, the constitutive part of a transcendental phenomenon that exceeds us as a Nation (...) During the past thirty years a true world war has been developing, a war which has the spirit of Man as the preferred battlefield (...) Amidst this war of cultures and countercultures, Argentina went through a moment of acute weakness in her social controls, and every act of illicit persuasion committed against the peoples, every distortion, every lie, has accelerated the process of deception through which, with time, the destructive gospel of totalitarianisms filtered (...) Words, unfaithful to their meanings, disrupted reasoning, and t.he murderers even tried to make use of the Word of God to invent a theology to justify violence (...) We must reconquer the Western world. But, what is Western? Do not search on a map. The Western world is today an attitude that serves the soul which is no longer bound to any geography." (Massera, Emilio E., in La Prensa, May 16, 1977).

"No one is deprived of their liberty for the mere fact of thinking differently in our style of life, but we consider that it is a serious crime to act in perjury of the Western and Christian way of life, attempting to change it by another one which is alien to us. And in this kind of fight, it is not only consider an aggressor whoever plants a bomb, fires a gun or kidnaps but also those who want to change our system through ideas which are particularly subversive; that is to say, they subvert values, change or disrupt values (...) The terrorist is not only considered so because of killing with a weapon or planting a bomb, but also for encouraging other people with ideas which are contrary to our Western and Christian civilization." (Videla, Jorge Rafael, in La Prensa, December 18, 1977).

"The documents issued in 1976 have clearly defined Argentina within the Western and Christian world. This definition, supported in the affirmation of their own values, is not conditioned to random and erratic attitudes shown by other countries

members of the Western world. That West is for us a historical unfoldment more than a geographical location. A process that is born in Greece and projects through Rome, fecundated by the Catholic faith. The West is found where the ideas of freedom and faith in Christ govern the duties of Man." (Brigadier O. Agosti, in La Prensa, August 11, 1978).

"It would be absurd to suppose we have won the war against subversion because we have eliminated an armed hazard (...) It is the religious, political, educational, economic, cultural and labor spheres that the residual elements of subversion currently point to." (Suárez Mason, Carlos, in la Prensa, July 7, 1979).

[The guidelines of the Process of National Reorganization] "will ratify the clear definition of Argentina as a Western and Christian Nation. Because the Argentine Nation has been part of that civilization since its origin. We are united in society by the great commonalities of our love to God, to Homeland, to family, to property, to justice, to peace, to law and to order." (Brigadier General Graffigna, in La Prensa, August 11, 1979)

"I came here from my country, which had just emerged from a war against the enemies of the Nation, against the permanent enemies of our civilization, of a war in which I intensely participated by God's grace (...) [The subversives acted] without God, without family, without freedom, without hope, without the concept of beginning and end of the creation, with Satan at the lead." (General Omar Riveros, in Le Monde Diplomatique -in Spanish-, October 14, 1980. Speech given before the Inter-American Board of Defense).

"The Nation is a kind of feeling which is shared and it goes beyond abstract institutions and questions of procedures. It is a unit of destiny (...) We will hold that the Nation is a living symbol of identity and solidarity of human existence, the perfect synthesis of a culture and a lifestyle. That is why we can talk about a 'Western Nation'." (Camps, Ramón J., in La Prensa, January 30, 1981).

"Almost without realization, the Marxist ideology grew without limitations, developed all its mechanisms, invaded our lives. There was no leadership capable of stopping it, nor demagogy capable of preventing it from reaching power, institutions and even Argentine traditions. In this context of ideological anarchy, the crisis of intelligence, the absence of power and the generalized threat to our spiritual unity, our Armed Forces carried out the Process of National Reorganization." (Camps, Ramón J., in La Prensa, May 17, 1981).

It is worth mentioning that those who stated these thoughts have been prosecuted or convicted for crimes against humanity.

These quotations (taken from the book "Censorship, Authoritarianism and Culture: Argentina 1960-1983." Andrés Avellaneda, CEDAL, 1986) and their key line of thought have also been mentioned by the victims in their statements provided during the court hearings when they recalled the interrogations under torture, which frequently focused on activities in connection with unions, education and politics, and which reflect the philosophy that characterized the Process of National Reorganization. In that way, and prior to the coup of March 24, 1976, the concept of "the other" was gradually built: an enemy to be

destroyed through the characterization of a heterogeneous profile delineated by the Regime's top officials as well as, in many cases, by the executioners themselves. This concept was so heterogeneous that it included -the case in the Case "Almirón," judged before these proceedings in the city of Junín- from artists to citizens who to date it is not known for sure the reasons for which they were kidnapped, tortured and then released from some of the clandestine centers which operated in the city of Junín and nearby cities. In this case, it was clearly workers and in particular union activists resistant to the dictatorial process who paid with their freedom, their work and in many cases with their lives, the ones who confronted the tyrant.

In this respect, Feierstein highlights the intentionality behind reorganizing genocide and its capacity to alter, through death and horror, the hegemony of social relationships. He refers to the arguments which suggest the need to impose a specific economic model and to the resistance which opposed it from different political mediations (page 358).

In an identical sense, Mántaras points out that "*in Argentina, there existed an operation to destroy a national group which was not preexistent but which was shaped as individuals who opposed the implemented economic plan were found. The national group was gradually composed of workers, students, politicians, adolescents, kids, employees, housewives, journalists and any other individual who was considered suspicious for hindering the goals of the genocides.*" (Mirta Mántaras. "Genocide in Argentina," page 68. Taller del Sur).

A work by Professor Osvaldo Delgado which was recently published, stated in the same direction: "*The point was to create a state of terror in the public domain in order to create the necessary conditions for the implementation of a neoliberal model of exclusion for the sake of benefitting a few and in detriment of most of the social sectors. Those purposes demanded the disarticulation of social networks, the break and disintegration of the social and supportive nets and the bonds with others with the goal of hampering, impeding and eliminating the different forms of resistance*." (Osvaldo Delgado in "Subjective Consequences of State Terrorism." Grama Ediciones, Buenos Aires, 2015).

It is worth remembering the work by the brilliant Argentine playwright and psychoanalyst, who died a few days ago, which is equally illustrative in this sense. One of his characters uttered "***For every one we touch, a thousand remain paralyzed. We act by irradiation***" (in the play "Mr. Galíndez" by Eduardo Pablovsky, written in 1973). This irradiation has remained because of the deep scar that State terrorism has left on our culture, but which has begun to heal thanks to the process of truth, justice and memory which society initiated more than a decade ago.

This quotation also leads us to remember the disappearance of Jorge Julio López -a clear consequence that genocide has irradiated-, during the first of the trials which took place after the invalidation of the laws of Due Obedience and Full Stop (through which

Miguel Etchecolatz was sentenced to life imprisonment), a tragedy that put our theoretical legal system to the test as well as our capacity as society to continue the process of memory and justice, a guarantee of a future full of hope for our children.

To conclude, it is relevant to highlight that the reconstruction of collective memory is not achieved only by sentencing some genocidal individuals but by also facing responsibly the challenges that the consequences of genocide continue to bring. One of them is the need to accelerate the processes and duly judge the violations of human rights including, when applicable and as we will see later on, those who were accomplices of terrorist State in different spheres.

Complicity

According to the aforementioned and to the development of the trial in this case, as well as to the jurisprudential precedents today with force of res judicata –Cases 2251/06 - Miguel Osvaldo Etchecolatz- and 2506/07 - Christian Federico Von Wernich-, and as pointed out in the sentence Almirón quoted before, complicity between different social sectors and State terrorism is evident. It is not possible to conceive of a genocide carried out after the violent overthrow of a democratic government to be exclusively perpetrated by the security forces. The magnitude and the characteristics of the tens of crimes committed in the aftermath of the coup of March 1976 leave no room for doubt as to the active participation, and in many cases essential, of several social sectors, which I will try to summarize and which keep on shedding light into the context in question. It is necessary for the summary that follows, in accordance with the line of thought expressed in the quotation by Michael Foucault on "the Law as creator of truth." It is precisely that continuous search for truth and the use of the Law as the standard to achieve that goal, as well as of the courts for its concretion, that obliges the Argentinian society to compromise every day to call a spade a spade and condemn every regrettable yet necessary contribution made by a sector of our community to the perpetration of genocide.

Those contributions to the process in question, made by different civil servants, have been observed throughout the years in the numerous trials carried out in our country.

Priests

Statements today with force of res judicata have revealed the active participation of priests of the catholic church, as the case of Von Wernich mentioned before -someone endowed with police hierarchy but a clergyman dressed in cassock on a daily basis-, who played a key role in the infliction of torture in Clandestine Detention Centers, as well as in the killing and later disappearance of the bodies of

several victims. Others, who have been mentioned repeatedly and who are under investigation, received valuable information from the families of disappeared victims who came to them in desperate need for help in the search for their beloved ones, trusting the institution these priests belonged to.

It is worth highlighting, however, that numerous catholic priests, devoted human right defenders, worried about and collaborated with the victims. In many cases, these priests were imprisoned, received tortures and even paid with their lives for their unconditional love for life and justice.

Judges and public officials

It was proven in this and numerous other trials that, in a similar way, numerous members of the judicial system, judges, secretaries and other officials not only knew about the events but also played a specific role in the genocidal process by rejecting thousands of habeas corpus submitted by the families of the disappeared. Such role, far from being a mere act of indifference or neglect, constituted a key element in the genocidal process as it operated as clear discouragement for the rest of the families (a sinister message which included the "payment of the legal proceedings") on the one hand, and validating in person the detention centers -legal or clandestine- where the repressors' illegal activities took place on the other. We are not making reference to judges identified with the dictatorship, but to true "frameworks" of repression within which they fulfilled their roles sitting at the stands. The different proceedings that are taking place are a proof of that, with judgements already rendered to judges and public officials. In fact, this Court has already acted in trials judging crimes against humanity and has denounced several judges whose complicity with the genocidal regime was evidenced in different hearings in which we intervened.

Similarly to the church, it is only fair to stress the job of those within the judicial system who honored their positions and did what was right, risking their freedom and even lives in many cases.

Doctors

It cannot be ignored that many doctors acted in complicity with the regime, dishonoring the oath to preserve life, allowing many lives to be humiliated and degraded. It is a self-evident truth that in the genocidal process in our country there was practically no torture without a doctor. Numerous victims have reported that during the infliction of torments there was a doctor present, not to take care of their condition but to authorize the continuation of the tortures, because if the victims died "they were no longer useful," as has been heard so many times during the hearings throughout these years.

The role played by the defendant Aldo Antonio Chiacchietta in the events judged in the case "Almirón" is a clear example. This defendant, a police medical officer in Junín in those days, actively participated in the torture sessions, checking on the victims' health to determine how far torture could go, as was proven in that trial.

Once again, it is fair to remember that simultaneously, and opposite to the aforementioned practices, hundreds of doctors who opposed the genocidal process, as they were committed to life, faced persecution, imprisonment, torture, disappearance and even death, honoring their Hippocratic Oath.

The Media

It must be highlighted that some media also played a role by openly supporting genocide, besides sharing an ideological community and identifying with the economic interests -the first and last interest of State Terrorism in the region. In fact, and as the continuity of specific interests has shown, this Court, composed differently but integrated by the subscriber, has been subjected to pressures by some national and local media -who have explicitly supported the defendants in the context of the oral debates- on the occasion of the trials that have been taking place.

Once again, it is fair to remember the hundreds of journalists from our country who have suffered persecution, imprisonment, torture and death -the same as priests, judges and doctors- for defending the right to be informed and for exercising their role as communicators with the honesty and social commitment that a democratic society needs.

Union representatives

Evidence introduced in the trial and developed in the corresponding paragraph in connection with the complicity of some union sectors with the events that motivate this trial cannot be ignored. In fact, as many witnesses, victims and experts summoned for the trial pointed out, the victims -unionists, some of whom were kidnapped and murdered, or survivors- belonged to the lists opposed to the official ones. The members of these latter were not victims of repression during those times. Contrarily, as seen in the trial, several official unionists may have handed the repressors the lists of workers and delegates who were later on, as stated, kidnapped, tortured and disappeared.

The aim of the summary herein discussed is not only to make the alluded to complicities visible, which the Court will be in charge of investigating, but also to highlight that there are always different ways of getting things done, different ways of performing professional duties. One may choose to act in defense of life or with disdain for it. During the events herein judged, those accused, are clearly co perpetrators of the genocide committed, as

they acted with total disdain for the other. For that reason, together with the descriptions of the crime in the verdict, let the sentence be imposed and the penalties applied be duly served.

Hence my vote.

Judge César Álvarez has stated:

According to the verdict, the defendants have been sentenced as co perpetrators of the genocide committed during the latest civic military dictatorship (1976-1983), following articles II and III of the Convention on the Prevention and Punishment of the Crime of Genocide.

This Court has incorporated all the discussions which allow for this characterization along the succession of sentences rendered.

As stated in the cases 2251/06 and 2506/07 in the sentences to life imprisonment of Miguel Osvaldo Etchecolatz and Christian Federico Von Wernich (today in status of res judicata), it was stated in connection with this characterization that the affirmative prevails, as the events occurred in our country during the period in question had members of what the Convention calls "national group" as victims. At that time, sentences were rendered following the formulation of acts committed "in the context of the genocide perpetrated by the latest civic military dictatorship."

However, even with changes in the members, this Court has advanced in the sentences N° 2901/09 (Unit 9) and in the case known as "Circuito Camps" as the defendants' conducts, which unequivocally aimed at the extermination of a national group, imply the commission of the International Crime of Genocide, although the original characterization was not modified there.

Later, and with different members, in the Case "Manacorda," in the Case "La Cacha," and in the Case "Almirón," the defendants were sentenced for "complicity in the crime of Genocide."

At this point it is necessary to remember the words by Roxin, who states that only an open system can prevent "dogmatic stagnation." In this respect, I find it necessary to ask the following rhetorical question, asked about previous resolutions. If they were accomplices, who were the authors of the genocide? That is why it is key to take a new step in these grounds to conclude that those herein judged are co perpetrators of the genocide committed.

The application of the description of the crime of genocide allows us to make a reasonable analysis of the events we judge here, as it provides the possibility to analyze the even as a whole, which is not possible if we limit ourselves to consider the overt violations of human rights separately.

It has been proven in this trial that the different events obeyed to a preconceived plan, destined to significantly modify the conformation of the Argentine society through the elimination of entire sectors of the national group, by killing or severely harming their members.

It must not be assumed that this modification in the social structure, which at the same time pursued the establishment of a new scheme of economic relationships at the service of interests clearly identified, was casual and even spontaneous.

The political scheme of extermination should not be hidden: the aim was to annihilate a disruptive social force who fought, in different ways and on many occasions without true awareness of the magnitude of the fight they were in, for a radical transformation of society. What is more, a large sector of the population rejected the kind of country that was being imposed, the victims in this trial being some of them. The Armed Forces seized power and carried out a process of disciplining against society.

We are able to claim without hesitation that "The goal of the repressive scheme was to eliminate the best social referents and to paralyze the rest of the population through terror with the purpose of breaking down any resistance and of 'depoliticizing' national life. Repression was also intended to 'rid' the public spheres of any plebeian presence" (Ezequiel Adamovsky, "A History of Popular Classes in Argentina 1880-2003," Sudamericana Publisher, Buenos Aires, 2012, page 329).

In the several cases in which I have participated I have qualified what happened in our country as genocide. In this respect, I did so as a substitute in the Federal Court of Appeals of Mar del Plata in the case under the name "Av. Crime Qualifying to Public Indictment (CNU)" submitted before the Criminal Secretariat of that Court under the N° 23/32, in several resolutions among which we might cite the aforementioned of October 5, 2011, and others that followed. In this regard and in coherence with the framework of that case, in the issuance of the judgment of September 26, 2013 on the resolution of "*Appeal of Bill of Indictment (Demarchi),"* together with judges Ferro and Bava, we stated that "...we consider that the characterization of the events as crimes against humanity could not in itself reach the objectives mentioned , and that the description of genocide provided in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide contemplates the killing of members of a group with the intention of destroying a national group in whole or in part, it accounts for the dimension of collective harm caused to the Argentine national group by the murder of a sector of its population. Understanding the events in the context of a genocide allows us to value not only the physical existence of victims and their individual rights but also their social,

political and cultural mark in the dynamics of the Argentine society as a whole. In this respect, the work by the sociologist Daniel Feierstein "*Genocide as Social Practice: Between Nazism and the Argentine Experience*" (Fondo de Cultura Económica Publisher. Buenos Aires. 2008)- to which we may add the work on criminology by Zaffaroni "*The Word of the Dead. Conferences on Precautionary Criminology*" (Ediar Publisher, 2011)- constitute a complementary guide for the trier and for the law as both provide better knowledge and deeper understanding of the social and criminological phenomenon in which the criminal offenses have been framed, with the purpose of reaching a legal characterzation close to the social conflict herein exposed and which allows us to form collective memory and a symbolic reparation of the harm caused. All of this without limiting the elements that characterize the social genocidal practice, according to the sociological study mentioned before, which have already been duly exposed and corroborated in the specific circumstances of the events and in the current state of affairs accredited in this case -for which we resort to the resolution issued in the incident 23/32-, which means that it is appropriate to apply the description of genocide besides the characterization of the events as crimes against humanity without this being a substitution of the judicial investigation for a bibliographic reference as the defense has stated, but a necessary interdisciplinary complementation with the purpose of judging the events properly."

In equal terms, I adhered to the enlightened vote by Judge Pablo Daniel Vega in the resolution of the case "Almirón" of this same Court, sentence of February this year.

It is worth remembering that the Argentine Republic subscribed to the Convention on the Prevention and Punishment of the Crime of Genocide through Decree 6286/56 on April 9 (Official Bulletin 25/4/56) and submitted an instrument of accession before the United Nations Secretariat on June 5 of that same year, that is, 20 years before the beginning of the latest civic military dictatorship, within which the events herein judged took place.

It is interesting to remember some of the concepts of Spanish justice on the subject as an antecedent from a foreign court. On November 4, 1998, the National High Court" of Spain, with the signature of its ten magistrates, intervened in the case by which Adolfo Francisco Scilingo was sentenced, and in connection with the issue herein discussed, they considered that the events occurred in Argentina constitute genocide, even when the Spanish Penal Code ignores political groups as victims. It is relevant to transcribe the main arguments developed by the Spanish magistrates on that occasion: The Judges stated: "The plural nature of the criminal action

and the participation of multiple people, in the terms it appears in the summary trial, is an action against a group of Argentine individuals or residents of Argentina susceptible to differentiation and who, undoubtedly, was differentiated by the framers of persecution and harassment. The actions of persecution and harassment consisted in deaths, prolonged illegal detentions, in many cases without the possibility of determining the fate of the detainees -suddenly abducted from their homes, quickly expelled from society, and forever missing-, in this way giving birth to the uncertain concept of 'disappeared', tortures, confinement in clandestine detention centers, without any respect for the rights any legislation recognizes for detained, imprisoned or sentenced individuals in penitentiary centers, without their families knowing of their whereabouts, transfer of children of the detainees to be handed to other families -forcible transfer of children of the persecuted group to families of the other-. In the facts alleged in the summary trial, object of investigation, the idea of extermination of a group of the Argentine population, without excluding the residents, is inevitably present. It was an action of extermination, which was not random or indiscriminate, but which responded to the will to destroy a specific sector of the population, a greatly heterogeneous group but differentiated. The persecuted and harassed group was integrated by those citizens who did not comply with the predefined type by the promoters of repression as the new order to be established in the country. The group was integrated by citizens who opposed the regime, and citizens who were indifferent to the regime as well. Repression was not intended to change the group's attitude in connection with the new political system; instead, it tried to destroy the group through detention, death, disappearance, forcible transfer of children from a group to another, intimidation to the members of the group. These facts constitute the crime of genocide."

As Feierstein and Levy illustrate it: "One of the elements that catches everyone's attention is the exhaustive, prior planning (...) The extermination was carried out at a speed and precision which showed years of conceptual elaboration and prior training. The perpetrators did not hesitate to apply any of the mechanisms for the destruction of subjectivity used in previous genocidal or repressive experiences." (Daniel Feierstein/Guillermo Levy. "*Till Death Do Us Part*" Buenos Aires, 2004, Al Margen Editions, p63).

As to whether the events occurred in our country should be included within the concept of "national group" according to the final draft of article II of the Convention, as was resolved in the verdict, it is worth mentioning a reflection by the cited authors: *the characterization as a 'national group' is absolutely valid for examining the events that*

took place in Argentina since the perpetrators intended to destroy a particular web of social relations in a State in order to bring about a change substantial enough to alter the life of the whole. Given the definition in the 1948 Convention of "in whole or in part," it is evident that the Argentine national group has been annihilated "in part" or in a part substantial enough to alter the social relationships of the nation itself...The annihilation in Argentina is not spontaneous, it is not causal, it is not irrational: it is the systematic destruction of a "substantial part" of the Argentine national group, destined to transform it as such, to redefine its way of being, its relationships, its fate, its future" (cited work, page 76).

We understand that everything that has been mentioned makes it clear that we are not before a succession of crimes but before something significantly larger which deserves the name "genocide." It is about calling a spade a spade and naming phenomena which, even with contextual differences and occurred at different times and places, bear a similitude which must be acknowledged. As Feierstein concludes when giving the reasons why different historical processes can be called in the same way "...making use of the same concepts implies the existence of a connecting thread which suggests a technology of power that reaches its highest point: material disappearance (of the bodies) and symbolic disappearance (of the memory of its existence)" (cited work, page 88).

"The Argentine case may be thought of complementarily as one of the most concise experiences achieved by this "reorganizing genocide" as a model for destruction and refounding of social relationships. In fact, such social process explicitly implies the character of its practice through the self-designation as "Process of National Reorganization," a novelty in comparison with other dictatorships with genocidal processes that occurred in previous years" (Daniel Feierstein, Genocide as Social Practice: between Nazism and the Argentine Experience, page 356. Fondo de Cultura Económica Publisher. Buenos Aires. 2007).

What was novel about this model of genocide is that it intends to transform social relationships within a preexistent Nation State but in such a way that it manages to alter all the prevailing social patterns (page 358).

The group to be eliminated had been built prior to the coup of March 24, 1976. The concept of the "other" was defined as the enemy to be destroyed through the characterization of a heterogeneous profile which was delineated by the regime's top officials and in many cases by the executioners as well. In this respect, Mántaras points out that "in Argentina, there existed an operation to destroy a national group which was not preexistent but which was shaped as individuals who opposed the implemented

economic plan were found. The national group was gradually composed of workers, students, politicians, adolescents, kids, employees, housewives, journalists and any other individual who was considered suspicious for hindering the goals of the genocides." (Mirta Mántaras. "Genocide in Argentina," page 68. Taller del Sur, Buenos Aires, 2005).

We agree with Feierstein that from the origin of this international crime comes the need of differentiating it from a simple accumulation of common homicides. It is essential to address this issue for a pronouncement capable of presenting society with the most possibly accurate account on the truth hidden behind these massive crimes.

In a genocide, victims are not differentiated, they are rather the target of systematic and massive aggression because they are members of a group and not individuals as such, being the members of that group defined by the actions carried by the authors or perpetrators of the genocide.

However, the requirement of identification of the group previously and independently of those who planned the genocide cannot be demanded. This is so because the categories enumerated in the Convention, that is "national, ethnic, racial or religious," are completely mutable and questionable in social sciences and it is even possible, if not convenient, to deny a limited and immutable scope to their concepts.

In the case "The Prosecutor vs. Goran Jelisic," the International Court for former Yugoslavia reached the same conclusion. This means that the groups mentioned in article II of the 1948 Convention are always arbitrary for the perpetrators. For their part, the International Court for Rwanda in the previously mentioned case "Akayesu" claimed that for the purpose of applying the 1948 Convention it must be considered that a national group is any group of people who share legal bonds based on citizenship in a broad sense. Making reference to the intention of the writers of the Convention, this sentence fixed the criteria that the protected groups must not be limited to the enumerated ones, but that it must be understood that all the groups which have the characteristics of stability and permanence are protected. The use of logics and the reality of social data for the interpretation of a legal text can never be absent.

For this reason, it is a perpetrator of genocide the authority who executes a plan of extermination against the mentally ill, the homeless, the persistent offenders or the foreigners who inhabit the country. Because whatever the category the individual declared of no value by the authority is in, as long as they are under the State jurisdiction, the entirety of the population affected is considered a national group. It has been demonstrated that the legal classification of genocide for the proven facts

according to article II of the 1948 Convention is the only correct one from the legal point of view, which is the only one which matters in a trial. But in this case, the fairness of this classification is proven because it is the one that expresses what the defendants have done better than any other. If we classified an act of robbery as theft, we would be hiding essential information about the facts. In general, penal law seeks to ensure that the description of an offense reflects all the possible magnitude of the unlawfulness, that is, what the perpetrator did and what they intended to do. The criminal classification tells the story of the crime committed by the perpetrator. It is absurd from every legal, sociological or historical point of view to consider that the defendants simply committed a reiteration of torments or a reiteration of homicides or a reiteration of enforced disappearances. Nobody would hesitate to assert that the events in which the defendants participated are completely different from any of those crimes because it is evident that they account for another illicit reality.

To summarize what was developed in this point, it can be said that what happened in Argentina was a genocide occurred during the latest civic military dictatorship which, apart from affecting a national group that was defined by the perpetrators through kidnappings, torture and disappearance of people, it also carried out forcible transfer of children from their families to another one. Throughout this progressive definition, all those people who could somehow oppose the regime and, in particular, what matters in this trial, those who could oppose, as workers, to the establishment of the new social order, were included.

To characterize the events analyzed in this trial as genocide serves the purpose of giving a correct and precise interpretation of the legal order to describe reality. The interpretation of the laws must be brought in harmony with the context. As Zagrebelsky teaches us, “Interpretation must be at the service of law and reality...To eliminate any of these two aspects would mean to deny the link between the judicial activity and positive law, turning it into an equitable resolution of the case, or to deny the practical character turning it into a mere description of valid regulations in themselves. In the first case, it would not be a true interpretation of the Law, but an occasional creation of it by the judge who resolves the specific dispute. In the second, the interpretation would limit to a meaningless speech on the Law, disconnected from its essential regulatory function and thus deprived of its fundamental purpose... A jurisprudence which is completely closed in its legal formulations, without any awareness of the phenomena which the normative force is directed to, would be extravagant works by “pure jurists" (as there exist not a few, proud

and useless) which would not interest anyone" (Gustavo Zegrebelsky, "Ductile Law. Law, Rights and Justice," Trotta Publisher, Madrid, Sixth edition, 2005, pages 132/133).

Hence I vote.

B. CRIME DEFINITIONS IN DOMESTIC LAW:

LEGAL CLASSIFICATION/ CHARACTERIZATION

Judges Carlos Rozanski and César Álvarez have stated.

In view of the considerations developed throughout this decision-making process, in which we have reflected the diversity of legal assets injured by the defendants, members of the scheme plotted and executed by the latest civic military dictatorship, we can assert that in the context of the genocide perpetrated, individuals have been illegitimately deprived of their freedom, inflicted torture, killed and forcibly disappeared.

In connection with the events whose materiality and rate of participation have already been proven, we understand that the following legal descriptions must be subsumed according to the designated reach in the treatment of each defendant's situation:

Illegitimate deprivation of liberty aggravated by violence and threats in the cases individualized in the verdict, according to article 144 bis section 1° and last paragraph, subject to article 142 section 1° -text in compliance with laws 14646 and 20642 of the Penal Code.

Infliction of torture by a public official with the aggravating factor of being the victim subject to political persecution, in compliance with the provisions of article 144 ter, paragraphs first and second -according to laws 14616 and 20642 of the Penal Code.

Homicide aggravated with malice and by premeditation of two or more people in compliance with article 80, sections 2° and 6° according to Law 21338, ratified by Law 20077 of the Penal Code.

Enforced disappearance of a person and enforced disappearance of a person with the aggravating factor of being the victim a pregnant woman, according to article 142 ter -in compliance with Law 26679 of the Penal Code.

It is now necessary to elaborate on each specific criminal definition:

Illegitimate deprivation of liberty. Aggravating factors.

The crime of illegitimate deprivation of liberty is one by which the legal asset "liberty" is injured, when by "liberty" we understand a physical or corporal sense, such as freedom of movement which not only means the possibility to move or use the body on one's own will but also the freedom to move from one place to another without any

interference or restrictions ("Handbook of Criminal Law, Special Section," Jorge Eduardo Buompadre, page 288 and subsequent ones). The protection to the right of freedom is enshrined in article 18 in our Magna Carta and in International Treaties incorporated by article 75 section 22 in that regulatory body.

It is clear that not all deprivation of liberty is *a priori* disapproved by law, which is why in the description herein analyzed the normative element of "illegitimacy" must be present. Such extremes have been proven on the grounds of court records, as in every deprivation of liberty no factual or formal element was provided to legitimize them. Instead, they were full of evident acts and practices outside the law.

In the case of article 144 bis section 1° of the Code proclaimed, according to the law applicable mentioned before, it is also necessary to prove that the action was committed by a public official who, at the same time, turned it into an illegal offense by the infringement of their duty or in the absence of the formalities prescribed by the law, negligently.

Each and every element in the criterion of this offense has been proven through the evidence provided in the trial. To corroborate the infringement of the ***formalities prescribed*** by law, required to carry out a deprivation of liberty legally, it is crystal clear from the diverse and extensive testimonies in which the absence of any legal requirement was evidenced that the illegal action took place because there existed "black lists." From then on, the bodies of those illegitimately deprived of their freedom of movement were left to the will of the public officials who exercised material power over them.

As a consequence, the illegality of the deprivations of liberty of some victims -the survivors- is evident from the fact that -after a period of time had passed- the National Executive Power was made available to "legalize" their situation.

In connection with the existence of ***abuse of office***, it is necessary for it, from the functional point of view, that the official does not have the power or, from the substantive character, when someone is detained for no reason, for which abuse of office is applied in cases not covered by the law. Both cases apply to the cases herein discussed.

Additionally, in the framework of the systematic plan charted by the Military Juntas and in the repressive normative incorporated to the trial, all the detainees kept in different clandestine detention centers were detained without any of the necessary requirements for their apprehension.

What is more, the doctrine has established that the active party to the crime in the description in question will be the one who orders as well as the one who executes; and from the point of view of omission, that who does not interfere even when it is within their possibilities, will also be considered active party to the crime. In the current proceedings, all the defendants had the status of 'public official' as they occupied different posts in the Argentine Naval Prefecture or in the Armed Forces, according to article 77 of the Penal Code.

As regards the injured party, any citizen illegitimately deprived of their freedom will be considered so.

Similarly, the judgment for case N°3389/12 "Hidalgo Garzón Carlos del Señor and others on infringement of articles 144 section 1°, last

paragraph, 142 sections 1° and 5°, aggravated by article 144 section 1°, according to Law 14616 in concurrence with article 80 sections 2, 146 and 139 of the Penal Code in concurrence with other offenses," and the judgment rendered for case N°10630 "Almirón Miguel and others on illegitimate deprivation of liberty, article 144 bis section 1° and infliction of torture, article 144 ter section 1°," both recorded in this Federal Criminal Oral Courts N° 1 of La Plata.

In connection with the aggravating factor included in article 144 bis, last paragraph of the Penal Code, as it refers to article 142 section 1° "***committed with violence or threats,***" it can be affirmed that there exists violence when the commission of the crime involves the use of physical force against the victim's body or a third party, while threats imply the warning of a serious and imminent harm by the active party to the crime or a third party that has the purpose of overcoming any resistance that the victim or a third party could offer ("Handbook of Criminal Law, Special Section," Carla V. Amans - Horacio S. Nager, page 182 and subsequent ones), all of which includes numerous mechanisms.

The *modus operandi* deployed by the members of the Task Force N°5 has been sufficiently proven by the applicable repressive normative of those times and by the statements provided by the victims and their families during the trial.

It was proven that violence was inherent in every procedure. The characteristic elements in every kidnapping involved, from the very first moment, the indiscriminate use of physical and psychological violence. They were usually carried out by a large number of officials bearing weapons, making it evident that the defenseless victims were unexpectedly apprehended in absolute disproportionality.

The raids were carried out using vehicles both from the Navy and from the Prefecture, in some cases without any official identification. On some occasions, the raids that ended up in deprivation of liberty were carried out in clear violation of private property, spending several hours there; on others, they were carried out on the public road and, finally, there is evidence that some raids were massively carried out in the workplace, at the moment the victims entered, after queuing for a long time, being frisked and being required to submit their identifications, to later on be thrusted into buses or trucks.

This was clearly evidenced during the trial when María Adela Barraza stated that she "*...was kidnapped by members of the Navy Infantry, clarifying that they entered and took her while she was sleeping; it was around 5 in the morning. She remembered that it was a violent episode; she saw people at the door, by the window and on the roof...they entered the house...she was blindfolded and her hands were tied behind her back and she was taken in a car...*"; similarly, Américo Horacio Piccinini stated that "*...at the entrance of the shipyard there was a long queue and military officials decided if you were allowed to enter or not, depending on whether you appeared on a list. When it was his turn, he saw it said "extremely dangerous," so he was taken to his locker...they returned to the entrance, they thrust him into a truck and hooded him; he realized there were 4 other people...*" among other testimonies.

Infliction of torture. Aggravating factors.

In connection with this legal description of the crime -infliction of torture- and one of the aggravating factors -being the victims subject to political persecution- some considerations will be made taking into account article 144 ter first and second paragraph of the Penal Code of the Nation.

It is worth clarifying that for the offense under analysis it is enough for the public official to have an individual, detained legally or illegally, under *de facto* power.

The expressed prohibition of the infliction of torture is recognized by the Universal Declaration adopted and proclaimed by the 1948 United Nations General Assembly, the International Covenant on Civil and Political Rights (Resolution 2200A, December 1966), the American Declaration of Human Rights (ADHR), Pact of San José, Costa Rica (1969), and the 1984 Convention against Torture. It is widely known that these instruments were incorporated into our Magna Carta trough article 75 section 22, although article 18 already states that "*any kind of tortures and whipping, are forever abolished.*"

In this respect, we must remember the definition provided in article 1 of the Convention against Torture, which claims that torture is: "*any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity...*" This means that the National Constitution provides us with a definition in which it is possible to read that the pain or suffering inflicted may be physical or psychological and for any of the motives described.

In this sense, let us share Sancinetti's ideas in turn taken from *Never Again*, as they make reference to the fact that torments do not begin the moment the victims are placed in a clandestine detention center but at the moment they are illegally apprehended: "...the first act of torture was inflicted at the moment of the apprehension, or at the moment the kidnapped was removed from their home; the next step was the so called "tabicamiento," that is, respiratory obstruction and deprivation of the senses, by which detainee was deprived of their sight by using bandages, a piece of cloth or their own clothes; and they were introduced in a vehicle where they were ordered to lower their heads, which were covered until they arrived at the detention center, and as a rule, they remained in this way during captivity." ("Criminal Law and the Protection of Human Rights," Sancinetti-Ferrante, Hammurabi).

We can assert that the **detention in a clandestine center** itself and the detainees' captivity in those conditions, in which they were systematically subject to cruel, inhuman or degrading treatment, imply in themselves, independently of the physical harassment that they may have suffered, the infliction of torments contained in article 144 third of the Penal Code.

What is more, as it is clear from the trial, different testimonies full of distressing content have evidenced that torture was inflicted following different modalities and in an indiscriminate way but always with the same purpose: degrading the individual as a human being.

Respiratory obstruction and deprivation of the senses. Illegal detainees were deprived of speech, sight and hearing, making the confinement complete and absolute. In connection with this, the Inter American Court of Human Rights considered that "*...prolonged isolation and solitary confinement are in themselves cruel and inhumane treatments, harmful to psychological and moral integrity and to the right to respect for the inherent dignity of human beings...*" (Inter-American court of Human Rights in the case "Velázquez Rodríguez," sentence of July 29, 1988, paragraph 156). As an example, let us consider what Adolfo Oscar Lannoo stated: "*...he was blindfolded and tied...he does not know for sure what time they left the meat processing plant but he thinks it was somewhat between 9 and 11 in the morning...he was taken to some kind of backyard, with other people, where he was untied but remained blindfolded, there were people who threatened him...he could hear noises, like explosions, like gunshots, he couldn't tell what it really was; sometimes one person approached them and said nothing would happen...at about 2 or 3 in the morning he was taken to the port, he was shoved in a ferry or a motorboat of the Prefecture; there he was threatened that they would cast him into the water...he was always blindfolded and with his hands tied at his back...* "

Moreover, what is known as ***positional torture or stress position*** was also frequent, by which victims were forced to remain in the same position for a prolonged period of time, as a large number of witnesses have declared during the trial when they stated that they were forced to remain with their arms against the wall in a 45° angle during their stay at a branch of the National Naval Prefecture. It was thus stated, among others, by Hugo Ernesto Ruiz Díaz, who claimed "*...later, he was taken outside, to a backyard, he thinks, and he was placed against a wall with his arms up; they opened his legs and he remained in that position for hours; he could only put one arm up because the other one was in a sort of cast; they had kicked his legs open, because he had the ankles all swollen...*" and Julio Alberto Machado "*...narrated that they were all taken downstairs, their hoods were removed and they were placed facing the wall with their hands against it, and he pointed out that after a few hours in that position sic. [the pain in the arms kills you]...*"

It was also known that victims were subjected to ***mock executions***, that is to say, detainees were made to feel the possibility, almost permanent, of losing their lives, through threats and intimidation. Victims have made reference to multiple simulacra in which they were taken to a backyard or a location in the open air where an execution was staged. Those victims who were transferred to the Military College lived a similar experience; they were shoved in a boat, hooded and with their hands tied, where they were threatened to be cast into the river as they heard noises of objects falling into the water.

Along those lines, among other testimonies, is Américo Horacio Piccinini's who "*Assured he was in [the National Naval] Prefecture...he was subject to another interrogation mediated by a mock execution in which they pointed a gun at his head...*"; Ricardo Mario Melano said that they "*...arrived at [the National Naval] Prefecture...he heard a guy being threatened that they would execute him, and he said that if he was going to be executed at least they should remove the blindfold, trying to take it off, and they said it was a mock execution so he should stay put...*"; Arturo Mario Peláez "*...said that that place was BIM 3 (Marine Infantry Battalion 3) ... he also had 6 mock executions with a gun into his mouth...*"; and Machado Julio Alberto narrated that "*...He supposed the was taken to the Naval Academy...and when they arrived they were subject to mock executions, he could hear the guns clicking...*"

Psychological torture was also employed, through which it is intended to disintegrate personality, destroy mental and psychological balance and to crush the spirit and willingness, and it may be caused by sensory deprivation (blindfolds, hoods, etc.), isolation, verbal and physical humiliation (nakedness), manipulation of information about the detainees and their close circle, physical and mental disorientation, mock executions which led to demoralization. In this respect, the statements provided by Adolfo Oscar Lannoo are illustrative: "*...he was beaten both at [the National Naval] Prefecture and at the Base, although he says that the kind of torture he suffered was psychological...*"; Dionicio Puz narrated that "*...two uniformed officers took him to his workstation, they carried long weapons and he was hit on the back constantly, he was psychologically harassed...*"; Melano Ricardo Mario mentioned that "...when he was at *[the National Naval] Prefecture he was not beaten or physically tortured, but psychologically...*"; Pedro Nielsky said that "*...when they were shoved in the boat they were told they would be cast in the river, that they would be killed, it was all part of psychological torture...*"; Nievas Ana María "*...added that they arrived at a place that had three or four steps. She was naked in a room full of men dressed in green and she was asked about people she knew, people who, except for Peláez, are still disappeared...* "; and Carmelo Cippolone said that "*...they took him to a workshop located in the quay of Astilleros [the shipyard], at that moment he didn't know where he was. There were Prefecture officials, it was midday and they were undressed and checked, their teeth were checked too, whether they had any personal mark and they were beaten...* "

Torture in perjury of a third party as a way of inflicting psychological torture, like those cases in which the victims were made to hear recordings of screams and were told they belonged to family members or friends, as well as those cases in which victims were taken to interrogations and were made to hear other people's screams of pain; what is more, two victims specified they were forced to witness how two female colleagues were sexually abused. This was stated by Jorge Alberto Arri, who "*said he was kept lying on the floor, and there were two girls being raped on a desk...*" and Carlos Hugo Perdomo "*...described that at the Naval Academy he was kept in a dark jail, and he was ill-treated and forced to sign a document; he*

never spoke with anyone and he was not interrogated. He just saw people hooded and heard screams...that was the common atmosphere in the place..."

The use of ***electric shocks*** applied through an electric prod in different parts of the body was common, as it happened in the case of Mario Arturo Peláez who "*described that he was taken to a basement which was half underground and half above ground level; it was a garage, and there he was tortured. There was an old iron bed like the ones that have metal spikes; he was undressed, hands and feet tied; they wetted the foam and started beating him and applying electric shocks for a long time, until he felt he was about to faint...*";Ricardo José Reynoso "*...clarified that when he said the Marine he meant he had been at the Marine Sub-prefecture, and he had to go there and was forced to declare; by using the famous electric prod they asked him about So-and-So, but he didn't know them...* " and Ángel Oscar Revoledo, expressed that "*...after he was taken on foot to the Naval Academy...they crossed a football pitch and once they were at the changing rooms he was interrogated; he was beaten and he received electric shocks; they asked him once again about weapons, about money and about Fonseca, and he remembers that Meza witnessed that situation...* "

The permanent, ***brutal beating of all kinds and with all kinds of elements***, as many witnesses have stated in connection with the blows they received; they were made to bump into the door frames or desks, and they have also declared to have been thrown into trucks or against the floor as if they were potato bags. This is evident from Luis Ricardo Córdoba's statement, who said that "*...then they were taken to the dock, off the vehicles, they were made to undress and were put against the wall where they received all kinds of blows...then, they were taken to the pier and led them into a boat...he clarified that the way they were treated was far from humane; some victims were in such poor condition that they had to be held so that they didn't fall; and then they were taken to a building close to the pier...*"; Julio Alberto Machado said that "*...he estimates it was the [Naval] Academy...and specified that torture consisted in undressing them, making them wet, keeping them hooded and beating them...*"; Ricardo Mario Melano said that "*...they arrived at [the National Naval] Prefecture ... their hands were tied and they were cast into a truck, as if they were potato bags; there was someone already in the truck, and then they cast another person into a truck and as he complained, he was struck with rifle butts so as to shut him up...*"; and Raúl Horacio Pastor said that "*...he woke up in [the National Naval] Prefecture...the worst part was when he was taken out for interrogation; he was taken to an office and he was made to bounce against a table or a desk; he was also beaten along a corridor, but when they removed the hood, he saw it was like a gallery...* "

What is more, torture was also present because of **the dreadful dietary and sanitary conditions, lack of hygiene and nakedness**, which were humiliating and disregarded the victims by treating them as mere objects. Hugo Ernesto Ruiz Díaz, among other victims, claimed that "*at [the National Naval] Prefecture a uniformed officer asked him if he was hurt or if he had to take any medication; the officer told him to raise his hand* to give him medication, but instead *he was struck*

with the rifle butt; officers did that every 4 or 5 hours, that was the medication..."; Carlos Hugo Perdomo "*...stated that slept on a concrete bed in the hole in the Naval Academy, he didn't have anything to cover himself, he didn't remember whether it was cold; to go to the toilet, he had to ask and he was taken there, hooded...*"; María Beatriz Horrac made reference that she "*...thinks she was at the BIM3 (Marine Infantry Battalion 3)...she was forced to go to the toilet with a man looking at her, and she started screaming that she wanted privacy, but she couldn't get it...*"; Carmelo Cippolone stated that "*...he spent the month of March at the Naval Academy, it was a cold month and they were all practically without clothes, and he remembers there were other men in underwear...*"; and Mario Arturo Peláez "*...said that place was BIM3...for a few days they received no food or anything to drink, the water used was only to apply electric shocks while they were tortured...*"

In connection with the ***aggravating factor of being the victim subject to political persecution***, there is no doubt that such extreme has taken place as stated in this court file, as the perpetrators' final goal and clear objective pointed in that direction. The systematic plan established, in this particular case, had the purpose of eliminating a collective of workers and university students, as we have already stated in this sentence, and what Laura Lenci and Paula Eva Ivonn Barragan Saenz have contributed with has been of vital importance, as their theses exposed in the trial have shown. What José Montes and Gonzalo Leónidas Chávez expressed has been equally clarifying.

On their part, the doctrine is unanimous when sustaining that the victim of political persecution "*is not only charged with a crime for political reasons, but is also arrested or detained for a political motives, such as opposing the established regime or the people who exercise power in the government*" (Criminal Law Treaty, Ricardo Núñez, Marcos Lerner, Córdoba Publisher, 1992, Volume IV, page 57).

In sum, the crime of torture is a crime of malicious injury which is consummated at the moment the torment is inflicted.

As has been stated, the victims were beaten from the moment they were apprehended, tied and cast, in general, at the back part of a vehicle or inside a truck or bus, to their reception at some clandestine detention center. Then, the victims were subject to all the ordeals described and, in many cases, to sessions in which they received electric shock and blows through which it was intended to obtain information.

All of this coincides with the sentence rendered in case N° 2955/09 under the name "*ALMEIDA, Domingo and others on Infringement of Articles 80, 139. 142, 144, 146, 45, 54 and 55 of the Penal Code*" in the Federal Courts records.

Specifications in connection with the crime of homicide and the different aggravating factors

It is known that the basic description of the crime (homicide, article 79 of the Penal Code) implies willfully or negligently taking someone's life.

For a better development of this point, we consider it necessary to draw a distinction between

the homicides of Reina Ramona Leguizamón on the one hand, and Pampillo and Galván Lahoz on the other. The elements of such offenses were described in the aforementioned recitals which we have referred to for the sake of brevity, and we consider they must be classified as homicides aggravated with "malice and by premeditation of two or more people," description provided by article 80, sections 2 and 6, of the Penal Code.

Having said this, it is relevant to analyze the requirements for the aggravating factors of the criminal descriptions stated in each of the cases.

Malice and the premeditation of two or more people (article 80, sections 2 and 6, of the Penal Code)

Homicide of Reina Ramona Leguizamón

In the first place, we can affirm that the defendants made, without a shadow of doubt, essential willful contributions to the crimes of homicide.

Those contributions were carried out in a context of absolute clandestine conditions, with high levels of violence, while the victim was deprived of liberty, a modality which certainly guaranteed her state of defenselessness and her lack of resistance.

The grounds for the aggravating factor of the crime is the idea of assurance about the execution, avoiding the risks of the victim's possible act of defense, and the officer's willfulness is supported by his awareness of that absence of risk or danger and because this circumstance has been key for his action presupposing the impossibility the injured party had of self-defense.

In the homicide described, the perpetrators had preordained plans to "kill in complete powerlessness" on the victim's side, and without any risk or danger for them, as they made criminal use of state power -which has been proven- in order to neutralize her. That is to say, the homicide was perpetrated through a brutal regime of detention characterized by the weakening of the victim as a result of cruel captivity which prevented any kind of resistance; there was a complete state of helplessness and defenselessness for the victim.

According to the bundle of evidence that stems from the trial, it is clear that there was an agreement prior to the perpetration of the crime and this complies with the requirement of section 6 of article 80 of the Penal Code.

On the other hand, it is relevant to mention the method used to make the victim's body disappear. In this respect, it has been reliably verified that the victim was found with her body totally destroyed as a result of the explosion of an artifact designed for that purpose, her remains having to be identified through fingerprints.

Moreover, it has been verified that two or more people intervened because perpetrators always acted in large groups, this being a characteristics of all the events analyzed and a common way of acting during their "war against subversion," directed and coordinated by authorities of different security forces who, at the same time, had total control over the events. Without the plurality of those who intervened, Leguizamón could not have been deprived of her liberty, kept in illegitimate captivity, relocated at

least more than once and killed by the total destruction of her body, which means it was all part of a huge clandestine organization and machinery integrated by many people.

It is worth mentioning, added to the description provided before, what Mirta Sarnachiaro expressed: "*...on July 14 both of us were apprehended and Reina Ramona Leguizamón as well, who was a neighbor...one day, her brother in law came and told them that their mum would return but the one who would not return was Reina...her mum said that she was taken from the hole where she was with Reina at around 12 midnight and when they returned 20 minutes later, Reina was no longer there; her brother in law added that she had been found at some place in Costa del Este...*"; as well as what Pedro Niselsky declared: "*...his wife was taken together with a neighbor called Marta Caneva, whose married name was Sarnachiaro; it was the month of July and they were taken to the BIM3; they stayed together and at midnight they took Marta from the hole and when she returned, his wife was no longer there. In the early hours of the morning the pieces of his wife's body appeared on the way to Costa Azul in Magdalena...*"

Homicides of Miguel Orlando Galván Lahoz and Roberto Pampillo

In the first place, and in connection with the characteristics of this penal classification and the repressive modalities in the actions, we refer back to the pertinent framework provided for the "homicide" of Reina Ramona Leguizamón.

In the second place, in connection with malice, we can affirm that the conditions of the raid in which Miguel Orlando Lahoz and Roberto Pompillio were killed have been corroborated, as well as their complete state of defenselessness due to the unmeasurable attack with firearms they received, as it was clear from the evidence in the trial.

From the subjective point of view, the modality of criminal offense requires preconception as to the way of killing, which implies a previous agreement because it is presumed that every willful crime committed by a plurality of active parties requires specifications in terms of its commission. It must be noted that the modality of attack the victims suffered could not have taken place without a previous agreement, the co-participation of the intervening forces, the support by a large number of personnel, weapons and vehicles, which must be added to the cordoning off of the area and the street lights turned off, as the testimonies in the trial stated.

In connection with the element "malice," it is necessary to highlight that it is produced in the context of the aggressor's hiding of the crime or the crime itself. That is to say, the homicide is perpetrated by the author's harassment in the absence of risk for the active party. The perpetrators must have looked for their own personal safety before executing the victim and, lastly, they made sure that the victim was in a state of defenselessness -for which, in the first place, they must have the possibility of defending themselves-, and for this reason the perpetrators acted with malice.

It is argued that for the classification to be "malicious" it is essential for both the execution and for avoiding the possible risks the victim's defense could imply to go together with the modalities included in the description of "malicious homicide," that is, the modality characterized by harassment, persecution and stalking implies certain willfulness and the plotting of a criminal plan.

What is more, it has been stated that the key aspect of this action is the absence of risk for the perpetrator, which is inferred from the conditions in which it was executed and the means employed. This allowed the perpetrator to rationally determine that they could perpetrate the crime without any risk for themselves.

The legal basis for the criminal definition is the idea of assurance of the execution avoiding the risks of the victim's possible defense and the agent's willfulness will be present in their awareness of the lack of risk or danger, and because this circumstance has been key for their action, presupposing the injured party's possibility to defend themselves. Such element has been clearly demonstrated simply by comparing the offensive capabilities of both parties. In this sense, it is possible to assert that there were two parties: on the one hand, the victims, who were two civilians inside an apartment, and on the other hand, as it has been proven, multiple security forces with military preparation and heavily armed, integrated by a large number of people each of them, vehicles and support elements, together with the prior plotting of a criminal plan for which each of them were summoned. In this way, it is evident that there existed a flagrant disparity of force and the clear "malice" with which the active parties acted with respect to the "state of defenselessness" in which the victims of the homicide were.

It is clear from the above mentioned that the perpetrators of the charged homicide planned a scheme to carry out those actions, collected information about the place, date and time the victims would be present to ambush them and achieve their criminal goal.

Added to this, it has been proven that after the homicides were consummated, the victims' bodies were not properly identified and there was no intention of contacting their families. On the contrary, one of them was found thanks to the individual efforts of a family, and at the moment of receiving the body they could corroborate that he had the initials "N.N.," while the other victim is still disappeared.

We must highlight that both the logistics and the prior planning to formalize the raid that ended with the death of both victims require information collected previously and illegally, and they were planned, ordained and executed by members of the state apparatus, to act with malice and to ensure the result, beyond any resistance that the injured party may have conferred, all of which, as I have previously stated, was followed by maneuvers to later hide the bodies of the victims.

All the description above coincides with Elda Mabel Lois's testimony that "*...at that moment [she] lived in a building on Street 58 N° 607 in the city of La Plata...on October 19, 1976...there was a man in gray suit who said it was not possible to go up because they were carrying out a routine inspection...it was around 6:30 in the evening, there were many cars outside, double parked, and many people were coming back from*

work...she saw they were on the fourth floor because the elevator was there; a few moments later, they heard shots, like machine guns. The man in gray opened the door and told everyone to leave immediately...on the corner, there was a flower shop where people sheltered, because there were two block had had been cordoned off, many assault vehicles and officers...the operation lasted for many hours, many gunshots were heard and then there was silence...they loaded things in trucks...one bag was cast inside one of the vehicles by two or three people. Then the neighbors reached the conclusion that it could have been a body because it was a big bulk, and they found out later that the boys who used to run a law firm there had been killed..."; Herminia Galván stated that "*...she heard from her grandmother that her grandfather had been a marine; it was him who could find out what had happened to her dad and on October 21 they were given his body. According to what she was told, the body was at one Marine division...*"; and Fernando Galván "*...explained that his father's body was found a few days later by his grandfather, who was a civilian worker at Puerto Belgrano, and he knew a person whose daughter had disappeared too; his mother told him that s father's body had N.N. painted...*"

Enforced disappearance of persons, and aggravated enforced disappearance for being the victim a pregnant woman

The events in connection with violations of human rights during the period of State terrorism that struck the Argentine Republic (1976-1983) for which we have convicted Antonio Vañek, Jorge Alberto Errecaborde, Juan Carlos Herzberg, José Casimiro Fernández Carró, Roberto Eduardo Fernando Guitián and Luis Rocca , and which have Mario Horacio Revoledo, Osvaldo Enrique Busseto, Roberto José de La Cuadra, Ricardo Nuez, Juan Carlos Blasetti, Diego Arturo Salas, Elsa Noemí Triana and Norma Raquel Raggio Baliño de Balbuena as victims, meet the attributes of enforced disappearance of an individual, even though the description was not contemplated as such by domestic legislation at the moment the events began, but were incorporated later -moment in which the perpetration of the crime is still valid-, resulting in full implementation in virtue of the permanent character those crimes present.

We do not overlook the fact that the application of that criminal offense, in connection with the events initiated by the latest dictatorship that our country suffered, has provoked some kind of resistance from some sector, as they consider that it opposes the principles of legality and retroactivity. Hence the defensive position.

In contrast, we understand that that position analyzes legality and retroactivity as solitary and stark principles, and not as part of the legal system as a whole.

The rationale of humanitarian law requires, necessarily, a universal perspective of the legal system, inspired in the general principles of law as well as of positive law. Only a contextual and dynamic analysis will be useful to position the issue in the right place.

The key point is to find the right normative balance, a reconciliation between the principles and

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What is more, it has been stated that the key aspect of this action is the absence of risk for the perpetrator, which is inferred from the conditions in which it was executed and the means employed. This allowed the perpetrator to rationally determine that they could perpetrate the crime without any risk for themselves.

The legal basis for the criminal definition is the idea of assurance of the execution avoiding the risks of the victim's possible defense and the agent's willfulness will be present in their awareness of the lack of risk or danger, and because this circumstance has been key for their action, presupposing the injured party's possibility to defend themselves. Such element has been clearly demonstrated simply by comparing the offensive capabilities of both parties. In this sense, it is possible to assert that there were two parties: on the one hand, the victims, who were two civilians inside an apartment, and on the other hand, as it has been proven, multiple security forces with military preparation and heavily armed, integrated by a large number of people each of them, vehicles and support elements, together with the prior plotting of a criminal plan for which each of them were summoned. In this way, it is evident that there existed a flagrant disparity of force and the clear "malice" with which the active parties acted with respect to the "state of defenselessness" in which the victims of the homicide were.

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Added to this, it has been proven that after the homicides were consummated, the victims' bodies were not properly identified and there was no intention of contacting their families. On the contrary, one of them was found thanks to the individual efforts of a family, and at the moment of receiving the body they could corroborate that he had the initials "N.N.," while the other victim is still disappeared.

We must highlight that both the logistics and the prior planning to formalize the raid that ended with the death of both victims require information collected previously and illegally, and they were planned, ordained and executed by members of the state apparatus, to act with malice and to ensure the result, beyond any resistance that the injured party may have conferred, all of which, as I have previously stated, was followed by maneuvers to later hide the bodies of the victims.

All the description above coincides with Elda Mabel Lois's testimony that "*...at that moment [she] lived in a building on Street 58 N° 607 in the city of La Plata...on October 19, 1976...there was a man in gray suit who said it was not possible to go up because they were carrying out a routine inspection...it was around 6:30 in the evening, there were many cars outside, double parked, and many people were coming back from*

the criteria for interpretation which allow us to make a realistic and efficient application, in accordance with the international obligations assumed in terms of more elemental human rights, without overlooking constitutional principles which must be enforced in every criminal procedure.

For this reason, we sustain that the harmonious interpretation of constitutional and conventional provisions, within the framework of which enforced disappearance of an individual is inscribed, currently enforced in domestic law through article 142 ter of the Penal Code -law 26679-, allows for the legal application to the present case for which a conviction was dictated.

Along this argumentative line, the Supreme Court of Justice of the Nation has held that "...***it does not constitute a violation to the principle of legality to typify these events as enforced disappearance of persons, as this offense is already -and was- typified by several articles in our domestic criminal legislation.*** *More specifically, the cases of 'enforced disappearance of persons' must be considered as a more specific kind of the criminal offense 'illegitimate deprivation of liberty,' which is more generic. The specificity is given in connection with the perpetrator -State agents or people who act under their command, support or acquiescence- added to the lack of information on the victim's whereabouts*" (Supreme Court of Justice of the Nation, Julio Héctor Simón and others on the illegitimate deprivation of liberty, case number 17768, June 14, 2005) (the rest belongs to our writing).

Both the jurisprudence and the doctrine have provided different theoretical formulations in connection with the legality of the definition of enforced disappearance of persons within our legal system, bringing into play the norms in the National Constitution as well as in International Treaties (especially the International Convention for the Protection of All Persons from Enforced Disappearances and the Rome Statute) and the *ius cogens*.

Along these lines, Ezequiel Marino (Enforced Disappearance of Persons, Comparative International Analysis, Coordinator of Kai Ambos) explains that: "*The crime of enforced disappearance of persons was introduced into the Argentine legal system through law 26200, which adopted the Statute of the International Criminal Court (SICC) and which was published in the Official Bulletin on January 9, 2007, as an individual conduct of the crime against humanity...*" In this way, article 7, section 1, i establishes that "*enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.*"

Moreover, our country has ratified and incorporated two international conventions on the matter into domestic law, namely the Inter-American Convention on Forced Disappearance of Persons, adopted by the OAS General Assembly on June 9, 1994, approved by law 24556 and published in the Official Bulletin on October 11, 1995, which came into force in the international sphere and in Argentina on March 28, 1996; law 24820, published in the Official Bulletin on May 29, 1997, gave it

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constitutional hierarchy. Also, the International Convention for the Protection of All Persons from Enforced Disappearances, adopted by the UN General Assembly on December 20, 2006, approved by law 26298 and published in the Official Bulletin on November 30, 2007.

In connection with the cited regulation, Marino sustains that according to the jurisprudence of the Supreme Court of Justice of the Nation in the ruling "Ekmekdjian," the provisions in the International Treaties which are precise enough are directly applicable.

As the author stated in his work "... *the classification of the events as crimes against humanity of enforced disappearance of persons has as a result the possibility to apply the special regulatory system with respect to the normal penal laws that the international law considers international crimes. This special regime, on the other hand, greatly coincides with exceptional laws for serious violations of human rights established by the Court in the case Barrios Altos vs. Peru, a jurisprudence that many Argentine Courts considered mandatory application. This differentiated penal law for the international crimes applied by the Argentine jurisprudence basically has the following characteristics: impossibility to grant amnesty or pardon, non-applicability, non-effectiveness -or weak effectiveness- of the principle of legality, inapplicability of the ne bis in idem, etcetera. The Supreme Court of Justice of the Nation confirmed this law of exception in the judgment Arancibia Clavel on August 24, 2004, Simón, on June 14, 2005 and Mazzeo on July 13, 2007.*"

Just as an example, in the first of the above mentioned rulings it was said that "*the statute of limitations matters when the event under scrutiny of the jurisdiction has lost validity because of the pass of time; however, the exception to this rule is given to those acts which constitute crimes against humanity (...). Although the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity was not applicable at the moment of the events, it is possible to apply it retroactively through public international law of customary origin. In this way, the presupposition of prohibition of the retroactive effect of the penal law is not being forced...* " This somehow confirms what has already been stated in previous pronouncements in connection with the superiority of international law over domestic law (Arancibia Clavel, Enrique Lauraro on aggravated homicide and unlawful association and others, case N°259 -24/08/2004 - Rulings: 237:3312).

Just like the Supreme Court of Justice of the Nation has pointed out, Argentina's ratification of the Inter-American Convention on Forced Disappearance of Persons has meant the reaffirmation in a conventional way of the character of crime against humanity held before in connection with that state practice. As regards the evolution of international law, it allows us to assert that by the time the events herein judged happened, international law human rights already condemn enforced disappearance as crime against humanity.

To clear any kind of questioning, invalid because of what we have been explaining, and, in close connection with the guidelines of the international system of human rights, as mentioned before, our country expressly regulated enforced

disappearance of persons through law 26679, incorporating article 142 ter of the fundamental Code, a type of criminal offense which must be interpreted in a comprehensive way together with regulations of international law and the jurisprudence of the Inter- American Court of Human Rights and the Supreme Court of Justice of the Nation.

On their part, the jurisprudence of the Inter-American Court of Human Rights has reached the conclusion in several rulings that the crime of enforced disappearance is a permanent crime, of multiple and continuous violations. It has stated that "*... The Court may make a pronouncement on a supposed enforced disappearance even if this was initiated prior to the date in which the State recognizes the Court's competence, as long as that violation is still underway or continues after that date...*"

Along the same argumentative lines, Juan Luis Modolell González (Enforced Disappearance of Persons, Comparative International Analysis, Coordinator of Kai Ambos) sustains that the Inter-American Court of Human Rights has established that "*...Enforced disappearance is the affectation of different legal assets which goes on according to the will of the supposed perpetrator, who refuses to provide information on the whereabouts of the victim and keeps the violation of rights at every moment...*"

The permanent character of the crime makes the crime to be perpetrated in time as long as the omission of providing information on the victim's fate continues, which is an "obligation imposed by the State through State agents or people who act under their command, support or acquiescence." In the specific cases that we herein judge, that omission is to date valid, which means that the criminal description contained in article 142 ter of the Penal Code is applicable, as the criminal acts which began during the latest civil military dictatorship that struck our country continue to be executed.

In connection with this, Mir Puig claims that "*A permanent crime implies keeping an unlawful action for as long as the perpetrator's will dictates...that duration in time constitute the description, that's why the crime continues to be consummated until the unlawful action is stopped*" (Puig, Santiago, "Criminal Law, General Section," Barcelona, 5th Edition, page 202).

On his side, Roxin claims that "*Permanent crimes are those events in which the crime itself is not complete with the realization of the description, but which is kept in time by the perpetrator's criminal willfulness as long as the unlawful state by them created still exists*" (Roxin, Claus, "Criminal Law, General Section, Volume 1, Arguments, The Structure of Criminal Theory," Civitas Publisher, page 329).

The character of permanent crime of enforced disappearance of persons, as we have seen, is unquestionable. For this reason, we must analyze the jurisprudence in connection with the legislation to be applicable in this kind of crime. It is necessary, then, to review some precedents linked this legal classification which actually bear similitude with the case under scrutiny. For this purpose, we consider that the cases of withholding and hiding a minor, because of their permanent nature and because of their nature strongly

constitutional hierarchy. Also, the International Convention for the Protection of All Persons from Enforced Disappearances, adopted by the UN General Assembly on December 20, 2006, approved by law 26298 and published in the Official Bulletin on November 30, 2007.

In connection with the cited regulation, Marino sustains that according to the jurisprudence of the Supreme Court of Justice of the Nation in the ruling "Ekmekdjian," the provisions in the International Treaties which are precise enough are directly applicable.

As the author stated in his work "... *the classification of the events as crimes against humanity of enforced disappearance of persons has as a result the possibility to apply the special regulatory system with respect to the normal penal laws that the international law considers international crimes. This special regime, on the other hand, greatly coincides with exceptional laws for serious violations of human rights established by the Court in the case Barrios Altos vs. Peru, a jurisprudence that many Argentine Courts considered mandatory application. This differentiated penal law for the international crimes applied by the Argentine jurisprudence basically has the following characteristics: impossibility to grant amnesty or pardon, non-applicability, non-effectiveness -or weak effectiveness- of the principle of legality, inapplicability of the ne bis in idem, etcetera. The Supreme Court of Justice of the Nation confirmed this law of exception in the judgment Arancibia Clavel on August 24, 2004, Simón, on June 14, 2005 and Mazzeo on July 13, 2007.*"

Just as an example, in the first of the above mentioned rulings it was said that "*the statute of limitations matters when the event under scrutiny of the jurisdiction has lost validity because of the pass of time; however, the exception to this rule is given to those acts which constitute crimes against humanity (...). Although the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity was not applicable at the moment of the events, it is possible to apply it retroactively through public international law of customary origin. In this way, the presupposition of prohibition of the retroactive effect of the penal law is not being forced...* " This somehow confirms what has already been stated in previous pronouncements in connection with the superiority of international law over domestic law (Arancibia Clavel, Enrique Lauraro on aggravated homicide and unlawful association and others, case N°259 -24/08/2004 - Rulings: 237:3312).

Just like the Supreme Court of Justice of the Nation has pointed out, Argentina's ratification of the Inter-American Convention on Forced Disappearance of Persons has meant the reaffirmation in a conventional way of the character of crime against humanity held before in connection with that state practice. As regards the evolution of international law, it allows us to assert that by the time the events herein judged happened, international law human rights already condemn enforced disappearance as crime against humanity.

To clear any kind of questioning, invalid because of what we have been explaining, and, in close connection with the guidelines of the international system of human rights, as mentioned before, our country expressly regulated enforced

violating human rights, must be particularly taken into consideration.

Among these precedents, it is necessary to consider, in particular, the court file under the name "Manacorda, Nora Raquel - Molina, Silvia Beatriz on the withholding and hiding of a 10-year-old, suppression and supposition of marital status and ideological falsehood," Chamber II of the National Chamber of Criminal Appeals of La Plata, court resolution of December 16, 2010, file record n°5634, which discussed the issue of temporary validity of law 24410.

In a vote registered by Judge Leopoldo Schiffrin, which was adhered by Judge Olga Clitri and Judge César Álvarez (who also integrates the Court in the current proceedings), solid foundations have been provided as to why it was correct to apply law 24410 to the case.

In the vote that leads the agreement it was asserted that: "*The principle of extended validity of the most favorable law is of easy application for instantaneous crimes, but it is more complex for permanent or continuing crimes (also known as successive), and for crimes committed remotely, in which there can be considerable time intervals between the action by the active party to the crime and the consummation by the result...with respect to permanent and continuing crimes, opinions frequently vary greatly. In connection with this, we might say that neither article 2 of the Penal Code, nor article 9 of the American Convention on Human Rights, or article 15.1 of the International Covenant on Civil and Political Rights, help solve the issue, as they only refer to the moment the offense is committed but they do not state anything about being covered by two laws in case it were permanent. There are opinions in the doctrine which have chosen either extreme. On the one hand, those who argue that the law which has to be applicable is the one which exists at the moment the crime ceases. Fierro (Legality and Retroactivity of Criminal Laws, Hammurabi, 2003, page 328 and consecutive ones) makes a clear case when he states that the perpetrator of a permanent crime may voluntarily stop the action from continuing the moment the most favorable law is applied, but if they do not do it, they renew their criminal willfulness, committing the crime under the rule of a more burdensome law, and, as a consequence, this must be applied. Others complement this line of reasoning supported by an analogous solution offered by the Argentine Penal Code in article 63: The prescription of the action will begin to run from midnight on the day the crime ceased to be committed (see Attorney General Mr. Becerra's opinion in the case "Jofré" files in Rulings 327:3279). Argentine jurisprudence, following similar arguments, has leaned in the direction of enforcing the law applicable at the moment in which the permanent crime ceases to be committed, when analyzing the consequences of law 24410 with respect to article 146 of the Penal Code (National Chamber of Appeals for Criminal and Correctional Matters, Chamber I, file 30254 "Massera," dated 9/9/99; "Berthier, Enrique J.," dated 9/9/2004; Chamber II, 17592 "Gómez, Francisco on preventive imprisonment," on May 3, 2001, among others). This solution is also offered by international authorities such as Paul ROUBIER (Le DroitTransitoire -conflits des loisdans le temp-, París, Dalloz et Sirey, 1960, page 468 and subsequent one, especially, page 470), who, after*

insisting that it is not a premise of a more favorable law, he asserts that it would be a mistake to take into account the first or last action to determine the applicability of the law that must be enforced, as the crime is not constituted by acts but by a state of facts which is constantly renewed and remains the same throughout the entire duration. In this way, he considers that, as the infringement is followed by the new law, this has immediate effects on the fact and it is naturally applicable, no matter how severe. Similarly, in Germany, this solution is imposed by law, as the StGB states in paragraph 2II that "if the penalty is amended during the commission of the act, the law which is in force at the time the act is completed is to be applied," and because of this, German authors conclude that the law which must be applied for permanent crimes is the one applicable at the moment the conduct ceases, even when it is more burdensome" (Claus ROXIN, Criminal Law, General Section, Volume 1, Civitas Publisher, 1997, page 162, 2nd Edition, translation by de Diego-Manuel Luzón Peña, Miguel Díaz and García Conlledo, and Javier de Vicente Remesal; Reihart MAURACH, Criminal Law, General Section, Volume I, Buenos Aires, Astrea Publisher, page 200, 6th edition, updated by Heinz ZIPF and translated by Jorge Bofill Genzsch and Enrique Aimone Gibson)...Seen in this light, the law which establishes the aggravated sentences for this type of crime, and which includes disobedience of the provisions of ceasing the unlawful state, cannot be seen as a retroactive application of the new law if those amendments were introduced after the sanction. The question to be asked is what happens to the previous amendments, but evidently, the maximum penalty of the last phase absorbs the one that would correspond to the precedent ones...For this reason, the German law is considered the solution as ANTOLISEI (cited work, page 191), BETTIOL (cited work, pages 122-123), de MAGGIORE (cited work, page 202 and subsequent ones) and GRISPIGNI (cited work, pages 395-396) emphatically asserted in connection with the later more burdensome law being applied for permanent crimes if the permanence remains...As a consequence, because during the last phase of the development of the crime which affected Sebastián law 24410 came into force, that law must be applied in the current case."

Judge Álvarez, who adhered to the aforementioned, expressed: "*I agree with the analysis that Judge Schiffrin has carried out in connection with the moment the crime (covered by article 146 of the Penal Code) ceases. However, I consider that the fact that the victim reaches adulthood does not imply the elimination of the unlawful character the conduct by that who for years kept the victim -even at their age of majority- uninformed about their true identity...The clarification as to the moment in which the crime included in the cited article 146 is useful to determine that the law is applicable. This crime was in turn covered by laws 11179 and 24410, the latter bearing more severe penalties. As this is not a case reached by the principle of a more favorable law, I consider the solution offered by before by my colleague to be reasonable and well-grounded, that the latest norm should be applicable to the case, a line of reasoning which is not affected by the fact that the permanent crime covered by article 146 of the Penal Code ceases. In fact, Sebastián José Casado continued to be a victim until his notification*

of the results of the expert review in the month of February 2006, a date in which the crime ceased."

In this respect, in the Case N° 14168 bis in the record of Chamber II of the National Chamber of Criminal Appeals under the name "ALONSO, Omar and other on cassation appeal," it was said that: "...*it is worth mentioning that the issue concerning which law should be applicable has been solved the Supreme Court of Justice of the Nation in cases substantially analogous to the current one. Among them, we can mention: Rulings 327:3279 ('Jofré') and 327:3274 ('Gómez') -joint vote by Judges Petracchi, Fayt and Maqueda, concurrent vote by Judge Boggiano- and 330:2434 ('Rei') -joint vote by judges Petracchi, Fayt, Maqueda and Highton de Nolasco-. In connection with the guidelines provided by the Attorney General, it was argued that 'permanent or continuing crimes implies keeping an unlawful situation over a period of time by the will of the perpetrator, period during which the crime continues to exist, which means that the offense continues to be consummated until the unlawful situation ceases. And when reference is made as to the duration of the consummation, it means that permanence involves action and not its effects. That is why these criminal structures, 'it is within the agent's power to cause that unlawful situation to continue or to cease, but as long as it lasts, the crime is committed at every moment in its constitutive framework' (Maggiore, G, Criminal Law, translated by Ortega Torres, Volume 1, Bogota, 1956, page 295) (Rulings 327:3279).*"

"On that occasion the Court ruled out that the application of the new law meant disregarding article 2 of the Penal Code. In connection with that, it was said that in the case of permanent crimes 'we do not position ourselves in the hypothesis of article 2 of the Penal Code, which only considers the supposition of a change of law between the commission of the crime and the sentence or, eventually, in the middle. Nor do we position ourselves in the one in article 9 of the American Convention of Human Rights, or article 15.1 of the International Covenant on Civil and Political Rights, because these instruments argue about the 'moment the crime is committed but they do not mention anything if that moment is prolonged or whether two different laws are applicable' (ibid)."

"*What is more, it was affirmed that withholding and hiding included in article 146 of the Penal Code is a 'continuing crime and legally indivisible, and that during the lapse of their consummation two laws ruled, both fully applicable -without them being a case of extended validity or retroactivity- based on the general principle of article 3 of the Civil Code (tempus regit actum). Therefore, it is not about a case of succession of criminal laws (hypothesis of article 2 of the Penal Code where the most favorable must be applied), but a crime of coexistence taking into account the legal nature of permanent crimes' (ibid).*"

"On the other hand, it was established that: 'had he consummated the crime beforehand, he would have received a more favorable penalty; as he continued perpetrating the crime -according to the accusation- after the applicability of law 24410, a higher penalty is given. This worsening factor lies on the fact that, as we have previously mentioned, the willfulness to continue perpetrating the crime, to prolong the consummation of the illicit action. That is to say, the solution we suggest is consistent

insisting that it is not a premise of a more favorable law, he asserts that it would be a mistake to take into account the first or last action to determine the applicability of the law that must be enforced, as the crime is not constituted by acts but by a state of facts which is constantly renewed and remains the same throughout the entire duration. In this way, he considers that, as the infringement is followed by the new law, this has immediate effects on the fact and it is naturally applicable, no matter how severe. Similarly, in Germany, this solution is imposed by law, as the StGB states in paragraph 2II that "if the penalty is amended during the commission of the act, the law which is in force at the time the act is completed is to be applied," and because of this, German authors conclude that the law which must be applied for permanent crimes is the one applicable at the moment the conduct ceases, even when it is more burdensome" (Claus ROXIN, Criminal Law, General Section, Volume 1, Civitas Publisher, 1997, page 162, 2nd Edition, translation by de Diego-Manuel Luzón Peña, Miguel Díaz and García Conlledo, and Javier de Vicente Remesal; Reihart MAURACH, Criminal Law, General Section, Volume I, Buenos Aires, Astrea Publisher, page 200, 6th edition, updated by Heinz ZIPF and translated by Jorge Bofill Genzsch and Enrique Aimone Gibson)...Seen in this light, the law which establishes the aggravated sentences for this type of crime, and which includes disobedience of the provisions of ceasing the unlawful state, cannot be seen as a retroactive application of the new law if those amendments were introduced after the sanction. The question to be asked is what happens to the previous amendments, but evidently, the maximum penalty of the last phase absorbs the one that would correspond to the precedent ones...For this reason, the German law is considered the solution as ANTOLISEI (cited work, page 191), BETTIOL (cited work, pages 122-123), de MAGGIORE (cited work, page 202 and subsequent ones) and GRISPIGNI (cited work, pages 395-396) emphatically asserted in connection with the later more burdensome law being applied for permanent crimes if the permanence remains...As a consequence, because during the last phase of the development of the crime which affected Sebastián law 24410 came into force, that law must be applied in the current case."

Judge Álvarez, who adhered to the aforementioned, expressed: "*I agree with the analysis that Judge Schiffrin has carried out in connection with the moment the crime (covered by article 146 of the Penal Code) ceases. However, I consider that the fact that the victim reaches adulthood does not imply the elimination of the unlawful character the conduct by that who for years kept the victim -even at their age of majority- uninformed about their true identity...The clarification as to the moment in which the crime included in the cited article 146 is useful to determine that the law is applicable. This crime was in turn covered by laws 11179 and 24410, the latter bearing more severe penalties. As this is not a case reached by the principle of a more favorable law, I consider the solution offered by before by my colleague to be reasonable and well-grounded, that the latest norm should be applicable to the case, a line of reasoning which is not affected by the fact that the permanent crime covered by article 146 of the Penal Code ceases. In fact, Sebastián José Casado continued to be a victim until his notification*

with the principle of fault and, from another perspective, it does not harm the principle of equality (article 16 in our National Constitution) because it is not possible to compare the situation in which someone ceased to commit the crime once the legal duress became more severe to that in which someone continued perpetrating the crime despite that.' (ibid)."

"Along these lines, the precedents in Ruling 330:2434 stated that: 'the legal definitions of the crimes of withholding and hiding of a 10-year-old integrate the category of permanent crimes, in which the action of consummation does not cease to be performed but lasts in time, which means that the illegitimate action continues to be consummated until unlawful situation is stopped. Before these events, the reform introduced to law number 24410 does not introduce the arguments contemplated by article 2 of the Penal Code (the hypothesis of a change of law between the time of commission and the time of the sentence, or eventually, in the middle); instead, its application to the case must be resolved according to the general rule of article 3 of the Civil Code (tempus regit actum) in virtue of which the crime (in this case, one which continues to be perpetrated) must be ruled by applicable laws.'"

"It is worth mentioning that the same criteria was held by the Inter-American Court of Human Rights in their understanding of enforced disappearance of persons 'Since this is a crime of permanent execution, that is, its consummation is prolonged in time, if at the time the definition of the crime of forced disappearance of persons when into force in the domestic criminal law, the author maintains his criminal behavior, the new law is applicable' without harming the principle of legality enshrined by article 9° by the American Court of Human Rights (cfr. IACHR, "Tiu Tojin vs. Guatemala," sentence of 26/11/2008, Series C, n° 190, § 87)."

"*On the other hand, the doctrine has held that, as we are in the presence of a permanent crime: "if the individual continues [...] to perform their action despite knowing what the new, more severe law dictates, that legal provision must be applied as they voluntarily and deliberately insist on infringing the law, and without the possibility of appealing to modify their situation [in] the circumstance of having committed part of the permanent crime under the applicability of the most favorable law ´ (Fierro, Guillermo J., 'Legality and Retroactivity of Criminal Laws,' 1st Edition, Hammurabi, Buenos Aires, 2003, page 330).*"

"*Therefore, once the new, more burdensome law has been sanctioned, 'the perpetrator is able to change their conduct based on the new appraisals and correlative legal demands - a possibility which, by the way, is not present in regular cases-, for which reason they will not be able to invoke the principle of the most favorable criminal law' (cited work, page 331).*"

"*This doctrine was supported by this Chamber in the precedent 'Rivas, Osvaldo Arturo and others on cassation appeal' (supra cit.), as well as by Chamber IV in the Case n°6331 under the name 'Fernández, Margarita Noemí on cassation appeal' (resolved on 30/05/2007, file n°8740.4) and in Case n°2947 under the name 'Landa, Ceferino and other on cassation appeal' (resolved on 27/11/2002, file n° 4466.4)."*

"In virtue of the aforementioned, it can be affirmed that if, by definition, the permanent crime is one which implies the agent voluntarily keeping their will to execute an action previously initiated, and in the same way, the continuation of the consummation is a product not the effect of an instantaneous crime, but the permanence of an action (Fontana Balestra, Carlos, 'Criminal Law Treaty,' 1st Edition, Abeledo-Perrot Publisher, Bueno Aires, 1977, Volume 1, page 482; Soler, Sebastián 'Argentine Criminal Law, General Section,' 4th Edition, TEA, Buenos Aires, 1970, Volume II, page 154), then the law applicable at the moment the crime ceases must be applied. In this case, as stated in point a) in this recital, that moment was when...his true identity was discovered, that is to say, on June 1st, 2006."

"It is clear that, without limiting the proper consideration, at the moment of grading the penalty of the period in which the conduct lasted under the applicability of the previous, less severe law in compliance with the principle of fault" (vote by Judge Pedro David, adhered by Judge Alejandro Slokar)."

It is relevant to observe, on equal terms, the sentence -final- in the case N°366-368-370/2013, in the record of Chamber III of the National Chamber of Criminal Appeals, under the name "MANACORDA, Nora Raquel and other on cassation appeal," registered on 14/05/14.

In an analogous sense, Judge Carlos Rozanski's vote in dissidence in the case N°2955/09 in this Federal Criminal Oral Courts N° 1 of La Plata, under the name "ALMEIDA, Domingo and others on infringement of Articles 80, 139, 142, 144, 146, 45, 54 and 55 of the Penal Code," argued that "*...In permanent crimes, the conduct is constantly renewed. And this determines that when a permanent crime is being executed and a new law that elevates the penalty is sanctioned, the new, more severe one is applicable, as long as the permanent unlawful offense is kept, renewing at each instant the criminal willfulness, the previous, more favorable law is not to be applied, because of the mere fact that the crime has not ceased.*"

"It has been repeatedly mentioned that 'the crimes of withholding and hiding a 10-year-old belong to the category of permanent or continuing crimes, which last in time, period during which the crime continues to exist, which mean that the offense continues to be consummated until the unlawful situation ceases.' (Guidelines by the National Attorney General in the Case 'Rei,' on 15/8/06. Supreme Court of Justice of the Nation, 29/5/07)."

"The same criteria is verified in the ruling 'Jofré' (Supreme Court of Justice of the Nation, 24/8/04 - Rulings 327:3279), where, in connection with the guidelines by the Attorney General, it was affirmed that '...the permanence of the consummation of the crimes of withholding and hiding a ten-year-old is a lapse that extends from the child's possible birthdate...to the date of the genetic test...which, in principle, would make the situation of hiding to cease,' and that '...law 24410 must prevail, as it is the one applicable in the last period of the punishable conduct. On the other hand, it is clear that this criminal conduct continued to be executed during the validity of this new law, which is acknowledged by the perpetrator (article 20 of the Civil Code), and which being subsequent derogates the previous one'."

The characteristics of this type of crime is the lack of information about the victim's whereabouts, by omission or refusal, which implies eliminating the possibility to control a person's detention through the mechanisms prescribed by law ("Handbook of Criminal Law, Special Section," Buompadre).

As regards the active subject to the crime, this must be a particular one, in this case "a public official or a person or member of a group of people who act under State command, support or acquiescence" performs the criminal conducts. In this case in particular, it has been duly accredited by each of the defendants' personal files brought to trial that they comply with the specific requirements to be considered active parties to the crime. The injured party may be any human being.

In the context of the crime under scrutiny, it has been proven during the trial that the defendants -illegitimately- deprived the victims of their freedom, according to the individualized section in connection with materiality and the fact that nothing has been known about them since then.

Several witnesses we have been able to listen to during the different hearings of the trial have referred to this issue, some of whom have shared captivity with the victims of enforced disappearance, some are family members and some became aware that those victims had been deprived of their liberty from accounts by their detention partners who survived, but nothing was ever known after that, not until today, not in an official or unofficial way. This is what witnesses have expressed, among whom, Mariana Lilian Busetto said that *"her father was operated on a wound at the Naval Hospital, then he was taken to Arana, where he stayed several months and then to Banfiend, but nothing was known after that..."*; Reoledo, Ángel Oscar said that *"...Mario used to work at YPF, he was affiliated to the Justicialist Party and participated in union activities; by word of mouth, he knew Mario had been taken to the Naval Academy and then to BIM3, but he is still disappeared..."*; Estela de a Cuadra stated that *"...her mother, who answered the phone, was told that her brother, Roberto José de la Cuadra, who is the victim of enforced disappearance, was fine, and so were Elena la Cuadra, her pregnancy and her husband; that is what they were told and nothing else was known..."*; and Taia Anahí Nuez, who said that *"...it was really difficult for her to rebuild her father's, Ricardo Alberto Nuez's, life and as a consequence her own identity...her mum submitted an habeas corpus and reported his disappearance to the police, but she has also carried out her private search..."*

Because it was not possible for the victims' families to have access to information on their whereabouts, the uncertainty as to whether they are still alive or where they are, or, if they have lost their lives, in which circumstance or where their bodies are, the crime continues and will continue to be executed until their fate is known.

The aggravating factor for the crime because of the victim's special circumstance, being her a ***pregnant woman***, acts as a factual situation just by verifying such condition for it to be considered.

In the specific case of Norma Raquel Baliño de Balbuena, it has been proven without a shadow of doubt that al the moment she was abducted and

"In the ruling 'Gómez' (Supreme Court of Justice of the Nation, 30/06/09): The Court stated that: 'in the case 'Jofré' (Rulings 327:3279) in which the same criminal offense was investigated, resulting in the conviction of Jorge Luis Magnacco in capacity of direct accomplice, the Court adhered to the considerations made by the Attorney General who, following Ricardo Núñez, argued that 'the abduction, whose consummation begins with the divestment of holder's child or with the impossibility of the holder's recovering the child's custody, is prolonged turning the crime into a permanent one, outside the legal scope of their custody .' And bearing in mind what has already been expressed in connection with the permanent character of the crime, the time of commission 'is a lapse which extends by a quo criteria, not discussable by sub judice from the child's possible birthdate, by the end of 1978, to the date of the genetic test on August 30, 2000, which, in principle, would make the situation of hiding to cease.'"

Everything that has been said until now, has simply reinforced the fact that problems in connection with the requirements for the crimes do not exist *sub examine* and as a consequence, legality and retroactivity either, because, after all, the cases of enforced disappearance of persons encompass illegitimate deprivation of liberty in concurrence with torture or other descriptions included in our legal order, such as homicide aggravated with malice in and by premeditation of three or more people. This means that they are crimes which have always deserved more severe penalties than the ones in our positive legislation.

Along this line of reasoning, there is no doubt that the conducts deemed reproachable by the current article 142 ter of the Penal Code were already prohibited in the sphere of international legislation integrated to our National Constitution, as well as in domestic legislation in different articles of the Penal Code and the law of nations. Because of this and because the crimes herein judged continue to be executed until the present -after issuing law 26679-, it is correct to classify the act that constitute the unique action of enforced disappearance of persons within article 142 ter of the Penal Code, in compliance with the applicable law, to the extent that such crime definition is more specific with respect to the conducts of which Mario Horacio Revoledo, Osvaldo Enrique Busseto, Roberto José de La Cuadra, Ricardo Nuez, Juan Carlos Blasetti, Diego Arturo Salas, Elsa Noemí Triana and Norma Raquel Raggio Baliño de Balbuena are victims.

The positive rendering of the crime of enforced disappearance of persons in our country means adjusting to international criteria -from the adoption of international commitments in the field of human rights assumed by the Argentine Republic-, as well as the application of the law as an effective, and not just merely formal, instrument to achieve the judgment and punishment of the conducts that display the characteristic elements of the criminal offense under scrutiny.

In connection with these, enforced disappearance of persons is a multiple-offense crime, a multiple violation, whose main conduct is deprivation of liberty, either legal or illegal, followed by other or several other acts that accumulate, such as the lack of information provided, the denial of the deprivation of liberty or the refusal to provide information about the detainee's whereabouts.

disappeared she was going through an advanced stage of her pregnancy -of about 8 months-, according to the relatives who testified in connection with her kidnapping and to the witness who assured he had shared captivity with her. During the trial, Horacio Balbuena said that "*...one of his brothers and a pregnant sister-in-law were missing...*"; Núñez Carlos "*...stated that he spent 12 days in that place where he could see Norma Raggio, who was pregnant...As regards Norma, he could specify that she was suffering from a lot of pain, lying on a blanket; he thought she was about to give birth...*"

Even though there is no doubt in connection with the victim's pregnancy at the moment of the detention, nothing was heard about her or the baby within her womb. In this way, the grounds for the criminal definition of enforced disappearance of persons with the aggravating factor of being the victim a pregnant woman is therefore corroborated.

For all the above mentioned, being this crime of a permanent or continuing nature, whose execution is continuously renewed, and keeping in mind that during the execution of a crime of these characteristics a new law was sanctioned which describes more specifically the reproachable conduct of the perpetrator -although it was already prohibited in the law by different legal classifications, as stated before-, therefore, the new law is applicable as long as the unlawful situation is kept permanently, being renewed continuously by criminal willfulness, since the crime has not ceased to be committed. Thus, article 142 ter of the Penal Code, according to law 26679, rules.

Joinder of offences

As stated in the verdict, we understand that the illegitimate deprivation of liberty is joinder offense with torments in a way that there exists plurality of independent actions and plurality of injuries to the penal law according to the hypothesis provided by article 55 of the Penal Code.

In this sense, each of the actions attributed to the defendants includes the necessary trifold identity to be defined independent from the rest of the crimes, that is to say, each one is integrated by an external behavior (objective factual aspect), goal-oriented willfulness (subjective aspect) and a legal classification (normative aspect), perfectly defined in each hypothesis as behaviors typical of illegitimate deprivation of liberty and torments in perjury of each one of the victims in an independent way.

Along these lines, Soler has argued that "*Deprivation of liberty has nothing to do with infliction of torments against the individual imprisoned -legally or illegally-, with harassment, ill-treatment or illegal coercion. If the perpetrator of these is, at the same time, perpetrator of the illegitimate deprivation of liberty, they must be penalized for both infractions as joinder ofences*" (Soler, Sebastián 'Argentine Criminal Law, Volume IV, TEA, Buenos Aires, 1994, page 52).

Selective kidnapping of specific individuals -as in the case of factory workers in the area of Berisso and Ensenada, and university students involved in social activities-, their abductions and transportation in violent ways and the infliction of all kinds of torture -electric prod, mock executions, threats, inhumane conditions, blows, among

others-, executed in perjury of different victims, are individual behaviors independent from one another, which allows us to affirm that there has existed criminal plurality in each of the events the defendants are judged for. There is factual and normative independence.

We must clarify that in this point that we are not in the presence of two-fold valuation assumptions of one single circumstance because, in the case of the torture, it was inflicted on the victim who had been deprived of their liberty and who also suffered disregard for their physical and psychological integrity and for their dignity, characteristics of torture which are verified as "*a supplementary activity exceeding any legality of the detention*" (RAFECAS, Daniel E.; "Torture and Other Illegal Practices in Perjury of Detainees," Editores del Puerto Publisher, Buenos Aires, 2009, page 137).

The unlawfulness exhibited by both criminal offenses does not overlap, which means that joinder is applicable, as there is plurality of independent, autonomous actions, and plurality of infringement to the penal law (article 55 of the Penal Code).

The same joinder is to be applied when the above mentioned are joinder offences with enforced disappearance of persons and/or homicide, as we have mentioned before, as they all injure different legal assets, their legal description is dissimilar and independent plural actions underlie.

Hence our vote.

C. CRIMINAL INVOLVEMENT:

Judges Carlos Rozanski and César Álvarez have stated:

CRIMINAL INVOLVEMENT.

The relative approach to the conundrum of criminal involvement in cases like the ones we analyze imply beginning their development by highlighting -just like the Office of the Public Prosecutor has developed it- that the generalized and systematic attacks against a civilian population or national group defined by the perpetrator lay their foundations on the power apparatus, which constitutes a functional order, supported by a system of orders that disseminate in hierarchical descending order, which generates segmentation or fragmentation of the functions carried out by those people who participate in the organization, intermingling different ways of acting, parallel or concomitant, individual or collective, as it happens with commanding figures and direct executors who, in both cases, can even take the roles of perpetrators or participant.

In contrast with such a criminal structure, the contest of people understood in traditional terms seems to have been thought of for more or less simple crimes, at best, relatively complex ones, in which the concept of perpetrator is based on the Welzelian notion of *control of the fact* before the failure of both formal objective theory and the subjective thesis, defining criminal participation as an intervention which is accessory to the perpetrator's offense, which consists of the malicious contribution to someone else's malicious crime.

disappeared she was going through an advanced stage of her pregnancy -of about 8 months-, according to the relatives who testified in connection with her kidnapping and to the witness who assured he had shared captivity with her. During the trial, Horacio Balbuena said that "*...one of his brothers and a pregnant sister-in-law were missing...*"; Núñez Carlos "*...stated that he spent 12 days in that place where he could see Norma Raggio, who was pregnant...As regards Norma, he could specify that she was suffering from a lot of pain, lying on a blanket; he thought she was about to give birth...*"

Even though there is no doubt in connection with the victim's pregnancy at the moment of the detention, nothing was heard about her or the baby within her womb. In this way, the grounds for the criminal definition of enforced disappearance of persons with the aggravating factor of being the victim a pregnant woman is therefore corroborated.

For all the above mentioned, being this crime of a permanent or continuing nature, whose execution is continuously renewed, and keeping in mind that during the execution of a crime of these characteristics a new law was sanctioned which describes more specifically the reproachable conduct of the perpetrator -although it was already prohibited in the law by different legal classifications, as stated before-, therefore, the new law is applicable as long as the unlawful situation is kept permanently, being renewed continuously by criminal willfulness, since the crime has not ceased to be committed. Thus, article 142 ter of the Penal Code, according to law 26679, rules.

Joinder of offences

As stated in the verdict, we understand that the illegitimate deprivation of liberty is joinder offense with torments in a way that there exists plurality of independent actions and plurality of injuries to the penal law according to the hypothesis provided by article 55 of the Penal Code.

In this sense, each of the actions attributed to the defendants includes the necessary trifold identity to be defined independent from the rest of the crimes, that is to say, each one is integrated by an external behavior (objective factual aspect), goal-oriented willfulness (subjective aspect) and a legal classification (normative aspect), perfectly defined in each hypothesis as behaviors typical of illegitimate deprivation of liberty and torments in perjury of each one of the victims in an independent way.

Along these lines, Soler has argued that "*Deprivation of liberty has nothing to do with infliction of torments against the individual imprisoned -legally or illegally-, with harassment, ill-treatment or illegal coercion. If the perpetrator of these is, at the same time, perpetrator of the illegitimate deprivation of liberty, they must be penalized for both infractions as joinder ofences*" (Soler, Sebastián 'Argentine Criminal Law, Volume IV, TEA, Buenos Aires, 1994, page 52).

Selective kidnapping of specific individuals -as in the case of factory workers in the area of Berisso and Ensenada, and university students involved in social activities-, their abductions and transportation in violent ways and the infliction of all kinds of torture -electric prod, mock executions, threats, inhumane conditions, blows, among

Strictly speaking, the atrocious experience our country has suffered, moved by that bloodily criminal apparatus which deployed horror through the perpetration of the most appalling crimes, surpasses classically dogmatic categories which prove inadequate to render account of the penal responsibilities of such a complex criminal plan that materialized that genocide which, clearly, encompasses the events herein judged.

The peculiarities of cases like the one under examination have given place to numerous legal assessments in connection with the degree of criminal intervention that can converge over the very same events, and the criteria defined by the different Courts in the country have been truly diverse by consideration of the different dogmatic interpretations.

The truth is that this Court, albeit with a different composition and in the judgment of other cases of crimes against humanity, has considered it pertinent to apply the criterion of *control of the functional act* (co authorship). However, the perspective on the subject we are about to analyze is different in view of the roles the defendants performed as part of the criminal plan carried out by Task Force 5 (FT5). In fact, we consider it appropriate to adopt the disposition proposed by the Office of the Public Prosecutor and by the complaint of Grandmothers of Plaza de Mayo, and to analyze "perpetration and criminal involvement" from the perspective of the theory of control over the act by an organized power apparatus, according to the analysis of the largest number of cases and direct authorship in order to assign responsibility in three cases.

It is not our intention to further develop the extensive discussions by the doctrine around the cited theory. Instead, we will consider the key aspects that shape it.

Nonetheless, we must warn in the first place that this Court has condemned Antonio Vañek, Juan Carlos, Herzberg, José Casimiro Fernández Carró, Eduardo Antonio Meza, Carlos José Ramón Schaller, Luis Roca, Jorge Alberto Errecaborde and Roberto Eduardo Fernando Guitián as co-perpetrators of the crime of genocide, as part of a criminal plan perpetrated by all of them, as well as for their different degrees of involvement in the perpetration of crimes described in domestic law.

This is so because we consider that "*only in exceptional cases does a sole perpetrator commit an international crime. The key aspect of an international crime -that is, its core unlawfulness- typically consists of individual attitudes playing a part in a general structure. However, in the end there must always be some criticism of individual culpability. Therefore, it is not necessary to be able to corroborate individualized and attributable parts of the crime. Because of their macro criminal nature, international crimes are frequently characterized by those responsible 'whose hands do not get dirty' but who order the crimes from their 'desks'. Oftentimes, responsibility does not lower the further you are from the perpetration of the crime, but it increases*" (Helmut Satzger, article on "Models of Involvement in International Criminal Law" - Magazine of Criminal Law, special edition on International Criminal Law, directed by Edgardo Alberto Donna, Rubinzal Culzoni Publishers, Buenos Aires, 2012).

Preliminarily, we must point out that the criterion we will use does not contradict the principles that support the above mentioned theory, as there are no formal restrictions to consider hypotheses of co-perpetration within the theory of control over the act by an organized power apparatus.

In this respect, it is clarifying to resort to Sancinetti when he refers to the possibility of command responsibility and a co-perpetration coexisting, and he claims that: "there shouldn't be any contrast between one and the other. If one has command responsibility, in the sense that they dominate the power apparatus without intervening in the execution and concurrently making others perpetrate the acts, as direct perpetrators, between one and the other there is actual co-perpetration, because with their contribution each of them control the co-perpetration of the act, although they 'lose control' at different times. This kind of co-perpetration could be seen as a sort of vertical co-perpetration (someone who has command responsibility and direct perpetrators being at different levels) in contrast with the current case of horizontal co-perpetration (at the same level)" (Marcelo Sancinetti, "Theory of Crime and Intentional Harmful Conduct," Hammurabi, Buenos Aires, 1991, page 714).

Sancinetti himself goes back to this issue and develops it when he considers the different strategies seeking impunity contemporary to the trials to the former commanders for restriction of individual responsibilities and he coherently expands them. When explaining the concept of vertical co-perpetration as a kind of co-perpetration, he is in favor of using the theory of command responsibility organized by the power apparatus, and, on the other hand, he claims that "every act of participation should be penalized as soon as the participant has lost power over what the main perpetrator can do with their actions" (Marcelo Sancinetti, Marcelo Ferrante, "Criminal Law and the Protection of Human Rights," Hammurabi, Buenos Aires, 1999, pages 310 and subsequent ones; quotation on page 314).

Having clarified this point, it is necessary to analyze some brief considerations in connection with the chosen classification, originally formulated by Claus Roxin and later on modified and increased in complexity by other numerous authors.

Since the publication of the work "Control Theory of Perpetration" by Claus Roxin in 1963, there has been consolidation and systematic formulation of the theory of control over the act. In this opportunity, we differentiate ways in which control over the act can manifest: control over one's own action, like direct perpetratorship; functional control over the act jointly executed with others, like co-perpetration; and control over a third party's will, direct perpetration. Within the category of direct perpetration there is a sub-category, control over the will through organized power apparatuses.

According to the renowned German jurist, the configuration of an organized power apparatus depends on the consent of three extremes: in the first place, the existence of an organization outside the margins of the law, with a functioning which is automatic or independent of the contributions made by its members; in the second place, the power to give orders to subordinates or to put regulated processes into motion; finally, it is

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essential that the direct perpetrators are interchangeable or expendable and/or show great predisposition to carry out the executor's plan.

In connection with the first requirement, it is necessary for one individual inside the organized power apparatus to be related to a position from which they can issue orders. Because there is an independent organization within that apparatus, it is possible to see the complete control by those who dominate the system over the perpetration of the acts because, eventually, if one concrete executor refused to comply with the orders, they would be replaced by another.

On this point in particular, Ambos explains that: "there is parallelism between two ´legal' orders: the 'regular' system, which fights against common criminality, and the 'perverted' one, which constitutes the legal basis for the state power apparatus that operates in a clandestine way. The only purpose of the latter is to execute a plan of destruction."

In this kind of system, the subordinate executor, in the case of the power apparatus disconnected from the Law, can at least be oriented based on the legal order (according to the Rule of Law) which exists in parallel, when the concentration of Law and unlawfulness in the hands of state power without any possible orientation takes place.

Furthermore, this concept was taken for the sentence in "Case 13," which, in its pertinent section, states: "*while this system was being enforced, Argentine society was governed under the Rule of Law and the Constitution (with the obvious limitations of a de facto regime) was still in force, as well as the Penal Code. The police detained criminals and the judges ruled sentences. This normative system, however, was excluded in order to combat the 'guerilla' because one implies the negation of the other. The incredible parallel existence of both these systems for such a prolonged period of time was only possible thanks to the defendants' presence in the highest levels of power. From that position, efforts were made to hide what was happening, lying to the judges, to the victims' families, to national and international organizations and to foreign governments; pretending to carry out investigations and giving false hopes of clarification, providing puerile explanations and deceiving community as a whole with such a schizophrenic attitude that has provoked tremendous harm in society with unpredictable consequences*."

This aspect was also considered by this Court -with a different composition- in the case 2901/09 "Dupuy Abel and other on torments and others." "The existence of two parallel legal orders, one regular and one clandestine, enforced by the repressive apparatus" was therein explained. On that occasion, the Court said that "...*From that moment onwards, in parallel with the formal penitentiary regime, there was a regime of illegal repression which was characterized by the practice of systematic infliction of torture to political prisoners with the purpose of breaking their physical and moral resistance and to achieve their depersonalization; by the perpetration of homicide inside and outside the prison, and for the enforced disappearances and the illegitimate deprivations of liberty, by events that implied, inside the prison, the operation of a true clandestine center of detention, torture and death*."

In connection with the second extreme, that is, the power to give orders to subordinates, we understand, in agreement with the majority of legal experts, that orders can be explicit or non-explicit, in the case that the acts committed by the subordinates respond to the objectives of the organization; in this case, to annihilate the enemy constructed and identified as "subversive."

We understand it is possible to value the actions performed by intermediate functions in the light of this theory, taking one step aside from the Investigation Unit and following Roxin's concepts, the category extends to middle-ranking officials who not only received orders from the top commanders but who also had the power to give orders to their subordinates, indicating that: "Therefore, we can affirm, in general, that whoever is an employee in an organization machinery at any place, in such a way that they can give orders to subordinate, that employee has command responsibility in virtue of the power assigned to them if they use their competences to perpetrate a punishable act. The fact that they do it moved by their own will or in response to the interest of higher bodies and their orders is irrelevant, because for the perpetration to happen the only decisive element is the circumstance that they can manage the part of the organization they subordinate, without leaving in other people's hands the perpetration of the crime" (Claus Roxin, "Control Theory of Perpetration in Criminal Law." Seventh Edition. Marcial Pons. Page 275).

Taking into consideration the current case, no one would disagree that Vañek, in his capacity as Chief of Naval Operations of the Army, held a middle-ranking position. He was not, however, the highest authority in the genocide perpetrated in our country. The same goes to those who were in charge of Task Force n°5.

Because of this, in this hypothesis, what must be analyzed it the defendant's capability of "*managing the part of the organization they subordinate,*" something that has been extensively been developed in the case, as it has been possible to prove that those who took intermediate positions in the repressive network enjoyed considerable autonomy to execute orders that were given to them, sometimes implicitly, and at the same time, gave orders, in full compliance with the macro plan, regulated by the Placitara, which organized the genocide.

To achieve the goal of annihilating the so called "subversion," several other actions were carried out, in a minor scale but which also contributed to the concrete events that led to the genocide, and they are also described as crimes in our domestic law.

Finally, the third and last extreme to be analyzed is what Roxin denominates the "decisive factor to substantiate control over the will in those cases (...) [which] resides in the replacement of the executor" (Cft. Roxin, cited work, page 272).

We must indicate, in this respect, that the classical concept of replacement contemplates the fact that the absence of one executor initially assigned to fulfill an order does not prevent the execution from taking place.

In this way, it is considered that the instrument is not for the individual person but for the mechanism of power that works practically automatically. The "apparatus" continues to work

essential that the direct perpetrators are interchangeable or expendable and/or show great predisposition to carry out the executor's plan.

In connection with the first requirement, it is necessary for one individual inside the organized power apparatus to be related to a position from which they can issue orders. Because there is an independent organization within that apparatus, it is possible to see the complete control by those who dominate the system over the perpetration of the acts because, eventually, if one concrete executor refused to comply with the orders, they would be replaced by another.

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with no difficulties even though the individual declines their intervention.

In fact, the executor, although they cannot be superseded from their control over the act, is, however, at the same time, a mere cog -replaceable at any moment- in the machinery of power; and it is precisely this double perspective the one that drives the man standing behind, together with them, to the center of the action.

Finally, it is necessary to add the executor's willfulness to act within this third requirement.

This aspect, discussed and developed by Schroeder, was taken by Roxin, who ends up accepting that there is no contradiction but complementariness between replacement and the high degree of commitment to the fact.

This characteristic must be understood as a psychological predisposition that makes the executor refer to their superior authority, that is, implicitly and indirectly their conduct will submit to commands. These characteristics imply being "committed to the fact," being "willing to perpetrate the offenses for the organization." These circumstances increase the probability of success a command has and they contribute to the control of the man "standing behind." (ROXIN, "Organisationsherrschaft und Tat Entschlossenheit," ZIS, 7/2006, page. 298).

The requirement alluded to was considered by the Supreme Court of Justice of the Republic of Peru, Special Criminal Court, in the judgment of conviction of Fujimori, where it was affirmed that: "*The direct perpetrator's predisposition implies that they no longer act as individual entity but start acting as a part of a strategic, operative and ideological whole, which integrates the hierarchical organization.*"

"Individuals who executed unauthorized interventions also had different levels of initiative and autonomy; the personnel chosen to carry out these events were always guaranteed in their loyalty to the apparatus of state terrorism, which means they were willing to commit the offenses. This allows them to overcome the possible devaluation of the intervention by the immediate perpetrator."

Along the same argumentative lines, De Luca claims: "*This is why Roxin's theory is the one that best explains the mechanics of the events. The 'man standing behind' can count on the order given by him being performed without the need to employ any constraint or to know the one who perpetrates the action. These just take a subordinate position in the power apparatus, they are replaceable and cannot prevent the man standing behind, the 'perpetrator at his desk', from reaching the objective because it is him the one who keeps the decision about the consummation of the planned offenses; he is the dominant central figure in a crime ordered by him, and the henchmen who carry it out, while the fungible executors, despite being liable as perpetrators due to their control over the act, cannot compete with the superior domination of the one issuing the order, derived from his position of leadership in the apparatus. Clearly, "when Hitler or Stalin ordered their opposers' death, this was their work, although not their work alone. To say that they may have ordered their subordinates the resolution on whether the ordained acts had to be executed or not contradicts the reasonable principles of social,*

historical and legal imputation of the perpetrators." The lack of immediacy with the events of the spheres in command of the apparatus is exponentially substituted by organizational control, in such a way that the higher you climb the spiral of criminal bureaucracy, the higher the power of decision over the crimes committed by the executors. This means that with such orders they are "taking part in the execution of the act," in the literal sense as well as in the criminal sense." ("*Authorship in Organized State Apparatuses. Argentine Case*." Tribute Book to Mr. Andrés D'Alessio. Mimeo).

Notwithstanding the above mentioned, it is relevant to mention that we will step aside the theory in question, only in connection with the analysis of the participation of Roberto Eduardo Fernando Guitián and Eduardo Antonio Meza, who will have to respond as direct perpetrators.

In the first case, in connection with the homicides of Miguel Orlando Galván Lahoz and Roberto Pompillo, and in the case of Meza, for the illegitimate deprivation of liberty and for the torments inflicted to Ángel Oscar Revoledo.

About this criterion, it is worth mentioning, following Zaffaroni, that "there is no doubt that there is control over the act when a subject personally carries out the totality of the conduct described for the crime (...) In the theory of control over the act, the perpetrator must fulfill the crime not only objectively but also subjectively" (Eugenio Raúl Zaffaroni. Alejandro Alagia, Alejandro Slokar. "Handbook of Criminal Law. General Section." EDIAR Publisher. 1st Edition Buenos Aires, 2005, Page 607).

In this way, it is understood that when the perpetrator performs objectively and subjectively the criminal conduct, there is no doubt that they hold the course of the resolution of the act in their hands.

We understand that in view of the events herein judged and from the perspective described, all the ones who intervened, each of them in their role as part of a macro structure, played a key part to support the illegitimate deprivations of liberty, the disappearances, the torments and the homicides, so that they were performed directly and without authorization by some defendants in particular.

The concrete contributions by those who held command posts were not limited, in the context of this macro-organization, to issuing and reproducing orders and to providing material resources for the achievement of their goals; in fact, the contributions were much more extensive and, in all, as stated by our prosecutors, quantitative enough to determine the criminal sense of the acts.

On their part and in connection with the direct perpetrators, that is to say, the ones who had control over the action, the substantial contribution during the executive phase of the events consisted of: in the case of Guitián, direct participation and unauthorized intervention in the confrontation which ended with Miguel Orlando Galván Lahoz's and Roberto Pompillo's lives.

In the case of Meza, the unauthorized intervention by blows to the face and use of electric shock while Ángel Oscar Revoledo was being interrogated.

For all the above mentioned, the defendants must be held responsible for the events

and with the degree of participation specified in the verdict, highlighting that Vañek, Errecaborde, Herzberg, Fernández Carró, Schaller, Rocca, Guitián and Meza acted for the organized state apparatus and were immediate co perpetrators of the crimes they were accused of.

Moreover, Guitián will have to be held responsible as direct perpetrator for the homicides of Galván Lahoz and Pompillo, while Meza is to be held responsible for the illegitimate deprivation of liberty and infliction of torture suffered by Ángel Oscar Revoledo.

Hence our vote.

Trial record

2.

Céparo - Sánchez

This case is the first to convict a police officer from the province of Entre Ríios. Ricardo Atilio Céparo, who was a driver for the Superior Court of Justice and the father-in-law of the then judge, Emilio Castrillón, was investigated and convicted for the crimes of illegal deprivation of liberty, illegal coercion and torture.

1 victim

26 witnesses

Convicted
Céparo, Atilio Ricardo

2.
Sentence N° 69/16

In the city of Paraná, Entre Ríos Province, on the 26th day of October 2016, Judges from the Federal Criminal Oral Court of Paraná, Ms. Lilia Graciela Carnero, Ms. Noemí Marta Berros and Mr. Roberto Manuel López Arango, under the presidency of the first aforementioned, assisted by the Secretary of the Court, Ms. Valeria Iriso, are gathered with the purpose of handing down the sentence **FPA 1300001/2012/TO2**, under the name **"CÉPARO, ATILIO RICARDO ON VIOLATION OF ARTICLE 144 BIS FOLLOWING ARTICLE 142 SECTIONS 1, 2, 3, 5"** written in accordance with Chap.4, Heading I, Third Book of the Criminal Procedural Code of the Nation (CPPN). The proceedings are hereby conducted against **Atilio Ricardo CÉPARO**, no by-names, Argentine, National ID Number 5406654, born on November 18th, 1948, in the city of Hasenkamp, Paraná Department, Entre Ríos Province; 67-year-old; married; domiciled at Moreno Street N°1375 in the city of La Paz, Entre Ríos Province; official driver at the Judicial Power of Entre Ríos; currently suspended from his duty; with completed primary education, son of Emma Raquel Franco and Atilio Luis Céparo, both deceased; currently accommodated at Prison Unit N°1 in the city of Paraná.

During the hearing he expressed that he perfectly understands the instances that constitute these proceedings, as he does not suffer from any illness or disorder that impedes comprehension.

The Office of the Public Prosecutor was represented by Attorney General *Mr. José Ignacio Candioti*, HIJOS was represented by complainants *Mr. Marcelo Boeykens and Ms. Sofía Uranga*, and the defendant's technical defense was exercised by *Mr. José Esteban Ostolaza.*

The defendant is held responsible, by request of the Public Prosecutor on pages 738/744 and by accusation of the complainant HIJOS, whose summary is contained on pages 1057/1063, for the following events: on September 23rd, 1976, in the hours of the morning, performing his role as a police supernumerary officer at Entre Ríos Police, holding the position of Assistant Police Officer delivering services for the Office Division at the Regional Police Headquarters in Paraná, accompanied by other people -whose identity has not been established-,he illegally captured and deprived citizen Eudelia Epifanía Sánchez of her freedom, detaining her at her workplace, "La Entrerriana" sanatorium in the city of Paraná. He immediately drove her to the Regional Police Headquarters of Entre Ríos and later on moved her to San Agustín Neighborhood Police Station in this city, where she remained illegitimately deprived of her freedom for approximately six days. During that time, she was transferred from the said Police Station to the Regional Police Headquarters

indicated above, where the defendant -together with other people whose identity is unknown- intervened in the victim's interrogation under torture by repeatedly applying electric shocks with a prod. These behaviors took place within the framework of the systemic plan of criminal persecution that broke out in Argentina during the military coup that seized Power on March 24th, 1976.

2.

IN CONNECTION WITH THE SECOND ISSUE, MS. LILIA GRACIELA CARNERO HAS STATED:

According to the conclusion in the previous issue, it is relevant to subsume the verified conducts into the crime of illegitimate deprivation of liberty committed by abuse of power as public official and in the absence of the formalities prescribed by the law, aggravated by the use of violence (article 144 bis, section 1 and last paragraph -Law Number 14616 as it refers to section 1 in article 142 -Law 20642 both of the Penal Code) and into the crime of torture inflicted to a victim of political persecution (article 144 ter first and second paragraphs -Law 14616 of the Penal Code), both being joinder offences (article 55 of the Penal Code); all of these constitute criminal offenses within the framework of crimes against humanity occurred during the historical context of State terrorism that struck our country between 1975 and 1983, when the national genocide under discussion was perpetrated.

The standards under which these crimes were treated in the case under the name "Harguindeguy" will serve as a guide to treat the selected criminal offenses, taking into consideration that the defendant acted in a coordinated and organized manner with the Argentine Army and in the context of the Army Corps II, Subarea 22, "Paraná."

The crimes stated during this proceedings are not isolated facts but part of a scheme for systematic extermination. Only within this context is it possible to explain the role performed by the defendant Céparo as one more cog, making essential not banal contributions, in the genocidal extermination machinery.

The norms which have been considered applicable are those in force at the time the criminal offenses were committed in order to safeguard the principle of non-retrospectivity in the penal law, which, according to article 2 of the Penal Code, admits the application of a subsequent one as an exception, as long as the latter is more favorable for the defendant.

1) Aggravated illegitimate deprivation of liberty

Given the historicity recreated, it ratifies, in the first place, article 144 bis, section 1 and last paragraph -Law Number 14616 as it refers to section 1 in article 142 -Law 20642 (Official Bulletin 29/1/74) both amendments in the Penal Code, norm which describes and penalizes the conduct by the

public official who abused of power and, in the absence of the formalities prescribed by the law, deprived someone of their personal freedom, in this case aggravated by the use of violence.

In this respect, E.E.S.'s detention happened following the sole judgment of police officers of this Province who, abusing of their function, got involved in State terrorism. The offense was undoubtedly committed by abuse of power and in the absence of the formalities prescribed by the law, as Céparo detained the victim for no valid reason and without a court order, in complete disregard for the constitutional mandates which demand an order by competent authorities, and which assures the first generation guarantee in article 18 of the National Constitution. The reference in connection with the reason for such events being the phone call to San Martín Hospital that E.E.S. made to ask her friend for a leave is framed in the context of State macrocriminality.

In fact, Céparo's behavior is aggravated by the circumstances referred to in section 1 in article 142 of the Penal Code: the use of violence. This is noted in the fact that this criminal offense is part of the category of permanent crimes, whose peculiarity consists in the consummative activity not ceasing but persisting in time in such a way that any particular moment along its duration may be charged as consummation (Cft. Sebastián Soler, Argentine Criminal Law, volume IV, page 160). In this case, the restriction to freedom was significant enough, as the victim was kept in captivity from the 23rd until the 28th of September, 1976, which means that the consummative activity took place during that period.

In this case, the use of violence did not occur at the moment of detention, as Mr. Attorney General said, but during her captivity. Not only did physical violence exist when the transportation from the Regional Police Headquarters to San Agustín Neighborhood Police Station, but also psychological violence because of the uncertainty created by the sudden, unexpected situation of oppression and dependency by police officers who threatened "you have no idea what awaits you."

Besides, the acts of blindfolding and interrogating the victim as to how many times she had opened her legs constitute acts of violence committed during the illegitimate deprivation of liberty.

It is known that the aggravating fact of using violence against a victim comprises any means which objectively paralyzes, harms, impairs or impedes their movements. It is also considered violence to lash suddenly and unexpectedly at someone. This course of events was always

present in this context, where arbitrary and abusive treatment was a sign of those times.

In fact, despotic confinement, isolation or detention is a valid means to conclude that there existed violence. In this respect, the victim's account cannot be more telling. She was deprived of her freedom without her knowing why, as Police Superintendent **Claverie** let her know when he interrogated her about the reason for her detention; she was kept in appalling conditions, such as isolation, solitary confinement, restriction of movements, sudden and unexpected relocations and even groping.

In this course of events, **Céparo** acted by abusing the powers attached to his public duties because, as stated, the defendant lacked the authority to detain and imprison. Besides, the illegality also came from the failure to comply with the formal procedures required to order or execute measures against freedom and dignity, showing a clear violation of the law and the Constitution, which constitute the type of criminal offense hereby selected.

The protected legal asset is undoubtedly freedom of the individual, of the movements that contribute to their complete development as a human being, their dignity in an organized civil society; it is freedom that allows them to have a project of life or life plan, as indicated in the "Harguindeguy" cause, hence the legislator has sanctioned the undue State interference over individual freedom.

Illegitimate deprivation of liberty is a special crime because it requires a public official to be executed, and it is precisely this fact that the defendant conforms to, as stated in the first point.

Finally, as regards the subjective elements, there is certainty that the perpetrator committed this offense intentionally, as he acted as part of a common scheme whose guidelines he kept secret but together with accomplices with whom he planned the offenses in full awareness of the illegality; he did not comply with the legal order, but he engaged in the association which delineated each of the criminal offenses perpetrated.

2) Aggravated torture

As demonstrated in this cause, the events can be considered torture, as the victim was not only inflicted with direct physical torture (electric prod and suffocation) but she was also made to endure vexatious conditions, just like thousands of people did throughout this country. As this is the case, it is expected that this behavior, independently of the previous one, is subsumed in article 144 ter, first and second

paragraphs according to Law 14616, applicable at the time of the events.

The punitive sanction established by that norm was of 3 to 10 years of prison plus general disqualification for life for the public official who inflicted any kind of torture to the detainee; the punishment is aggravated for up to 15 years when torture is inflicted to citizens who suffer political persecution.

The Defense Attorney understood that because the victims suffered political persecution, the principle of congruence was being violated, thus affecting the defendant's right to defense, as this situation was not formally charged during the proceedings, without concretely exposing which procedural activity was constrained or undermined.

It is known that the principle of congruence is one of the main derivations of another principle with constitutional hierarchy, which is *the right to a legal defense*. And it is understood by it in terms of criminal procedural law that "*the requirement that a permanent and immutable identity must mediate, between the fact delineated by Office of the Public Prosecutor in the indictment, which incriminates the defendant in his first statement and for which he is prosecuted, accused of and held responsible for; it is not possible to change the factual delimitation in any of these steps, as the judicial body has limited power to do so, having to resolve only in connection with that event, convicting or acquitting the defendant*" (Conf. Eduardo M. Jauchen in The Rights of the Defendant, Rubizal-Calzoni, Santa Fe, year 2007, page 1173).

To weigh when the principle is being violated it has been rightly claimed that: "*Everything which, during the sentence, appears as a surprise for the defendant, like a key piece of information that the defendant and their counsel were not informed about and therefore cannot question or confront it with evidence, violates the principle analyzed.*" (Conf. Julio B. Maier, Criminal Procedural Law, Buenos Aires, year 1996, p336).

In these proceedings, there hasn't been an unannounced accusation as exposed by the Attorney, therefore, this argument cannot be accepted. Right from first driver of these proceedings, that is, the request for investigation -pages 9/13 overleaf-; as well as other legal instruments, pre-trial declaration -pages 235/238-; proceedings -pages 259/275 and overleaf- and the Prosecutor's request of trial -pages 738/744-. This means that in all these acts which are articulators and communicative of the criminal charge, the defendant was notified and informed that his behavior was framed in the context of illegal repression that persecuted people for political

reasons; thus, he was able to defend himself extensively and freely, without compromising his constitutional rights. What is more, in the accusation by representatives of HIJOS -pages 795/805-, chapter IV.b. is entitled "On the aggravated infliction of torture to victims of political persecution."

Following the second behavior that was formally attributed to the defendant, it is known that torture is an internationally despised. Article 5 of the 1948 Universal Declaration of Human Rights, article 7 of the 1966 International Covenant on Civil and Political Rights and article 5 of the 1969 American Convention of Human Rights are rules that impose that no one may be subjected to torture or to cruel, inhumane or degrading treatment or punishment.

In domestic law, torture was banned since the enactment of the National Constitution, in article 18 that reads "All kinds of torture are to be abolished." The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment -constitutionalized in article 75, section 22 of the National Constitution- develops this significance. In its first article, it defines torture as "*any act by which one person is intentionally inflicted with either severe physical or mental pain with a view to obtaining information or a confession from them or a third party, punishing them for an act they have committed or are suspected of having committed, or intimidating or coercing them or others, or by any reason based on discrimination of any kind, when those pains and sufferings are inflicted by or at the instigation of or with the consent or acquiescence of a public official.*"

Soler's definition is also appropriate, as he points that torture or torment implies "...*any infliction of pain with a view to obtaining specific statements. When that purpose exists, many actions that normally may not be but harassment or distrain turn into torture*" (Cft. Sebastián Soler, cited work, page 52).

Despite these definitions, the type of criminal offense does not claim any purpose, thus being able to differentiate itself from the conducts defined in article 144 bis, section 3 of the Penal Code, only in the intensity of the affectation of physical and moral integrity or the instruments employed, as vexations are considered degrading treatment while torture is inhumane treatment.

Even though article 144 ter of the Penal Code does not make reference to psychological torture, it is implicit in the norm when it states "any kind of torment," as one cannot lose sight of the fact that every human being is endowed with

physical and moral faculties. In this sense, the Case law is unanimous (Cft. Sebastián Soler, cited work, page 54).

It is not a minor detail for this crime to be constituted, that the illegitimate deprivation of liberty and the captivity of the kidnapped occurred in the Regional Police Headquarters, which is expected to ensure compliance with security and prevention policies; however, misusing that function, it was used to keep the victims of political persecution detained in a clandestine way.

Back in those times, all the institutions were corrupted by the illegitimate Power, the government of that Province had been usurped, the top hierarchies were military and illegitimacy was recurrent. Our country had become a huge concentration camp, as all citizens were deprived of civil and political rights, being the Judges denied the access to any information to petition Habeas Corpus. The phrase by General Ibérico Saint Jean, back when he was de facto governor of Buenos Aires Province, should not be forgotten; he threatened "*First we will kill the subversive, then we will kill their collaborators, then...their followers, right after that...those who remain indifferent, and we will finally kill the timid*" (statements to the International Herald Tribune, May 26th, 1977).

In this context, definitely, captivity may be conceptualized as part of the torments and torture that E.E.S received, which is denominated ubiquitous torture, although it was complemented and suffering elevated by the use of electric prod (direct torture). The "Harguindeguy" cause was indicated as follows: *"It has been observed that the Clandestine Detention Centers (CDC) combined and reproduced in time different techniques and conditions for detention that went beyond a threshold, that in which infliction of physical or mental pain turns into torture*."

Within this factual and legal framework, there is no doubt that the defendant inflicted torments, performed cruel acts not only because of the relocations he participated in but also because of the uncertainty he created in the victim's existential level (indirect or ubiquitous torture), and because of his collaboration during the electric prod session applied to the tormented body of the victim, especially on her breasts and genitals, while she was tied by hands and legs and was grossly insulted, in which the defendant remained at her feet, holding her.

The "gang" acted with malice; they were before a defenseless young woman who could only writhe in pain, as she could not emit any sound or scream because they pressed some sort of pillow or

cushion against her mouth, which also suffocated her.

These acts have left indelible marks in the victim's subjectivity, scars that can still be measured, traumas that make it impossible for the victim to face these proceedings, a natural reaction as a consequence of the events, which, as mentioned above, was notified by the Court.

As highlighted in the sentence rendered in the cause 13/84, the Federal Chamber stated "*Right from the moment of the arrest it was clear that nobody would help. Added to this, the victim was immediately hooded, moved inside a car trunk or shoved on the floor of a car or lorry, with their hands tied. The arrival at an unknown place where they were usually beaten or inflicted with torture; accommodation in 'cuchas' (inhospitable, usually dirty, small room), boxes, 'pipes', on a pallet or directly on the floor; the discovery that there were other people in the same conditions and who had been there for long, the uncertainty of what the outcome would be or how long it would last; the threats, the poor and scarce food, the dreadful or absent sanitary conditions to satisfy basic needs, the lack of hygiene and medical assistance, the moans; the contempt and maltreatment. All of this surely contributed to the victim's sense of helplessness and panic, impossible to understand or imagine, but which in itself is also a horrendous torture.*"

It should be pondered that this rule establishes the protection of an individual's dignity, that they deserve respectful treatment simply in virtue of the fact that they are part of humanity. In this sense, the doctrine and the jurisprudence are peaceful when it is established that "*Accordingly, being the modality a particularly harmful affectation of freedom for its destructive effects on the individual with themselves, their dignity, their psycho-physical integrity, the absolute subjugation and colonization at the perpetrator's sovereign will, the nullification of the being, the protected legal asset comprises the fundamental dignity of the individual and the moral integrity of the citizens with no distinction whatsoever*" (Cft. Penal Code and complementary rules, Analysis of legal statutes and case laws, directed by Baigún David-Zaffaroni Eugenio R., Volume 5, special section, Hammurabi, 2008, page 371).

In the Inter-American context, the Inter-American Court of Human Rights repeatedly asserted that certain conditions of detention could constitute psychological and moral torture. In the case "Maritza Urrutia," it was considered that "*there existed psychological torments, in relation*

with the conditions of detention which she described as follows: the prisoner had been hooded, kept in a room, handcuffed to a bed, with the lights on and the radio out loud, which kept her from sleeping. Besides, she had been subjected to lengthy interrogations, during which she was shown photographs of people who bore signs of torture and she was threatened that she would be found in the same conditions by her family, to whom they made the threats extensive. It was also claimed that isolation from the outside world provokes moral suffering and psychic disturbances in any person, as [victims] are placed in a particularly vulnerable situation" ("Matitza Urrutia vs. Guatemala," 27/11/2003 sentence).

This Court had mentioned before that "the prolonged isolation and the coercive solitary confinement that the victims were subjected to are, in themselves, considered inhumane or cruel treatment, harmful to individual psychic and moral integrity, to the right of every prisoner to be treated with the respect and dignity inherent to human beings" (Inter-American Court of Human Rights, "Velázquez-Rodríguez vs. Honduras," 29/7/1988 sentence).

The protected legal asset is the dignity of the human being; the disregard for the other person as such and not treating the other as a human being is punished, although it also safeguards the proper functioning of the State, which is responsible for the care of citizens.

The active party to the crime (offender) is a public official; what matters is that they have de facto power over the detained person, as Céparo did, and the injured party (victim) is the prisoner to be kept. It does not matter whether the injured party has been legally or illegally detained.

The aggravating factor is that **E.E.S**. was detained precisely to investigate activities by people that State terrorism had stereotyped as subversive. She was kidnapped, as the active parties to the crime believed she held information concerning her friend, Silvia Ramírez, who had been kidnapped a day before and had also been interrogated about other victims of political persecution like **Alicia Wenseintel, Cristelda Godoy and Silvia D'Agostino.**

In the cause Nast (Feced II), sentence nº 21/2014, it was stated that "*the victim of political persecution is not only charged with a crime for political motives, but is also arrested or detained for a political reasons, such as opposing the established regime or the people who exercise power in the government" (*quoted by **Auat and Parenti***). "Political militancy" clearly defines one of the victim's qualities or activities, which may be true or*

not because it is indifferent to accredit the aggravation in connection with the perpetrator's offense. The legal description of the crime does not contemplate it; what is described is a characteristics of the injured party (victim of political persecution) which is only associated with the action of the active party of the crime (persecutor), and it is independent of -I insist- the quality of political militancy being or not effective of the victim of political persecution. The injured party (the persecuted) is the objective or "target" to whom the actions of the perpetrator (the persecutor) are directed, which is the motive or the motivation that drives the active party of the crime (to persecute for political reasons).

The crime of torment requires the action to be executed by a public official, which is a special crime. For its execution, the act of keeping and relocating the victim in degrading conditions without the possibility of her receiving help is also considered, holding an institutional role with wide availability of spaces at his disposal, where the unlawful detention took place.

The conjunction of these offenses reveals the defendant's willfulness to commit them; in this case, a person illegitimately deprived of their liberty, with violence, subjected to physical and psychological injuries, for the kidnappers believed that the persecuted could provide information about some political or union militants, a factual background which makes the said aggravating factors applicable.

As regards the subjective elements, the crime torment is a willful offense which requires acknowledgement and awareness in order to carry it out, as it happened in this case, because Céparo acted with the willfulness required by this scienter element present in article 144 ter of the Penal Code, as he acted with intention of causing severe harm in order to obtain information in that damning way, reason for which he tied the victim's feet or held her in order to prevent her from breaking free.

3) Perpetratorship/Authorship:

The facts described above and their legal description make it possible to ascertain, in all the cases, that the defendant acted in such a way that he deserves full criminal charges, that is, he performed the role as co-perpetrator, with operational distribution of tasks, but imbued and deeply engaged in the criminal plan forged in this Province, as was previously exposed.

It must be added that the illegitimate deprivation of liberty and the torments applied were most certainly planned by the Regional Police Headquarters and by the military agents in the area,

but the defendant intervened with total command of the situations he was involved in, he managed the course of events at will and was present at the consummation. He performed a direct and personal action against the victim, with total awareness of his participation in the macrocriminal scheme during the military dictatorship.

Another point to consider is the defendant's official role in the events, as this condition endows him with particular transcendence. The police functions that Céparo performed had provided him with special institutional obligations because the criminal acts in which he intervened were conceived of in the exercise of a public function. He had the obligation of not harming legal assets, as he was a guarantor of legality.

It is relevant to mention that "*The creation of a framework within which thousands of executions took place is of extreme significance. This is because the so-called 'war on subversion' shows that those involved joined in solidarity with the consequences, that is, with all the political scheme plotted to annul political dissidence;" "that is why, those who took part in this scheme and carried out the criminal apparatus become executors, direct perpetrators of the crime of infringement of the duty of public officials they held, in view of the establishment of genuine State duties. We are not here before simple instruments with human appearance (only nature), but before subjects of accusation*" (Cft. Roberto Falcone, published in "Magazine of Criminal Law and Criminology," La Ley Publisher, year II, nº 4, page 20).

On another note, if culpability lines with the possibility of the conscious disapproval of the legal penal system and the possibility of motivating themselves according to that awareness-capacity of motivation in the strict sense, as stated in the "Harguindeguy" sentence, there is no doubt that the degree of instruction and preparation shown by the defendant, police officer from the Province, together with the cultural level attested in the preliminary declaration, added to this ideological commitment to the so-called "war against the avowed enemy: stateless subversion," is clear evidence of his personal culpability for the offense. For the reasons herein exposed, the defendant must be declared perpetrator of the proven criminal offenses, as stated in article 45 of the Penal Code.

4) The plotted criminal offenses are different conducts; although committed during the same period, are independent from one another. "*They are two different criminal distinctions that point to different areas of protection: illegitimate deprivation of liberty focuses on what the*

detention implies, affecting freedom of movement, while infliction of torture focuses on how the detention was carried out, violative of dignity within the remaining ambit of freedom that every detainee has the right to. This determines that the intentional harmful conduct of both distinctions do not overlap and it is this what allows the legal doctrine in article 55 of the Penal Code to be applied. There is not unity of action and plurality of framings described by law, proper of joinder criminal offenses (article 54 of the Penal Code); there clearly exist plurality of individual actions and plurality of detriments to the Criminal Law (article 55 of the Penal Code)" (Cft. Nast sentence).

Finally, it is relevant to point out that the defendant had and keeps the capacity to understand the offenses, he showed himself lucid at the moment of exercising his material defense at the preliminary investigation unit and before the Court; at the moment of recognition, he acted in full awareness of his behavior, with enough competence to find motivation in the norms; he was completely free of deceit but fully committed to the macrocriminal plan in his scope of intervention; he also had the capacity to refuse to comply with illegitimate orders because the institution he belonged to was established to protect individual guarantees and institutional order.

As a consequence, the defendant's behavior cannot be justified or exculpated, as he was basically required to act in accordance with the norms, and despite his police training, he acted in flagrant violation of the legal procedures; he is therefore deserving of a punitive sanction.

This issue is illustrated by Colonel Ballester's statement, as in the "Harguindeguy" sentence, claiming that, as a military official, no one is forced to comply with illegal orders: the military is not a robotic compliant of orders, but an individual endowed with intelligence and awareness.

The military official clarified that he was aware of the existence of a manual or rules of procedures to combat subversion and that it indicated how to break the detainees' will, considering that, according to him, genocide took place.

In connection with the acts committed within the framework of State terrorism, he stated that "military regulations say that when a chief is appointed, they establish who is to be obeyed and respected in everything they order for the sake of service and compliance of military regulations, and that the witness does not know any set of rules which allows larceny, torture of detainees, murder and even appropriation of detainees' children."

ON THE SAME ISSUE, MS. NOEMÍ M. BERROS HAS STATED:

I) Crimes against humanity

Although the events herein judged and which delimit this Court's field of knowledge and decision have been attributed to *one defendant* (Céparo) and have been committed in perjury of *one victim* (Eudelia Epifanía Sánchez), it is evident that we are not in the presence of an isolated case faced by the defendant on his own, as rightly proclaimed by the Plaintiff. The events which hurt E.E.S. integrate and are part of a colossal criminal act by the Argentine State with which a systematic and generalized plan of persecution, illegal repression and annihilation was carried out during the latest civil-military dictatorship and which make it possible to consider and configure them, in light of international law, as ***crimes against humanity***.

The illegitimate deprivation of liberty and the torture herein charged are replicated in several other cases of identical configuration and similar MO committed in the country and in our jurisdiction (Entre Río Province, Defense Subarea 22), by public officials, in the same historical and political context and within the framework of the same state criminal scheme, although their victims' final fate was very diverse and dissimilar. Some of these officials have already been charged by this Court in proceedings like **"Zaccaria"** (21.10.2011) and "Harguindeguy" (04.04.2013), as well as by some or all the members of the Court who took part -as substitute judges- in the Federal Oral Courts of Santa Fe (sentences **"Brusa"** I and II on 15.02.2010 and 13.06.2014) and the Federal Oral Courts 1 and 2 of Rosario -respectively- in the causes **"Porra"** ("Guerrieri II," 24.02.2014) and **"Nast"** ("Feced II," 02.12.2014).

This is why -as stated before and in so many other sentences throughout the country-, although these facts lead to types of crime in the Penal Code and the penalties therein contained and which were applicable at the moment of the events, with strict regard to the principle of legality -as seen before-, their legal description is not complete or comprehensive enough taking exclusive consideration of the criminal legislation in the national law because they -as stated in "**Priebke**" (National Supreme Court of Justice, 02.11.1995, Verdicts 318:2148)- "[they] *do not fully cover the gravamen of the infringement*" because they are "*criminal acts clearly contrary to the popular feeling*

of civilized peoples given their specific cruelty and immorality."

This determines -along the lines of "**Simón**" (14.06.2005, Verdicts 328:2056)-, that besides subsuming the facts in those legal descriptions in the Penal Code -which is valid, but partial and insufficient-, their legal classification must be completed to address their additional attribute, that criminal *plus* added to the illegitimate act itself without which the criminal offense cannot be assessed to its full extent. For that matter, it is necessary to address their concrete configuration and the specific context in which the events took place, called "*contextual pattern*," whose qualification comes from international sources and makes them **crimes against humanity**.

Their qualification, therefore, comes from International Law and that international source must be resorted to by operation of what is stated in article 102 of the National Constitution (in the original version of 1853-1860, current article 118), which directly acknowledges and receives the mandatory rules of customary international law (*ius cogens*) and which imposes their application by national courts when they have to judge crimes against the *law of nations* (cfr. National Supreme Court of Justice, from Verdicts 7:282; 43:321; 176:218, among many others that followed).

The rules in the *law of nations* are binding for our country; they are part of national domestic law and their principles must be interpreted in a dynamic way, in line with the evolution they have experienced, as stated by the best constitutional doctrine (Sagués and Bidart Campos, et.al.) and the National Supreme Court of Justice itself (cfr., et.al., "**Priebke**"). In this respect, article 18 of the National Constitution must be conceived of as a reception rule of the modern postulates about these crimes.

The definition of **crimes against humanity** was delineated, delimited and defined during a long and turbulent process of doctrinal and jurisprudential development that the international community elaborated and formalized in a customary and conventional way, in response to the succession of state massacres that humanity suffered throughout the 20th century.

Some of the key milestones in this evolutionary itinerary have already been alluded to in the "Harguindeguy" cause, which is worth considering.

It is after World War II that the specific category ***crimes against humanity*** came to integrate -together with *crimes against peace* and *war crimes*- the trilogy formally contemplated by the International Military Tribunal held at Nuremberg to prosecute war criminals who

belonged to the powers in the European axis, signed on August 8th, 1945 (London Charter) and approved by the General Assembly of the United Nations on December 2nd, 1946. They were formally received -after the trials- in the so-called "Nuremberg Principles," approved on 31.12.1950 by the UN International Law Committee as principles or guidelines that should regulate the punishment of those crimes under international laws.

According to the definition contained in article 6, section "c" of the Statute, the category encompassed two kinds of crimes against humanity; on the one hand, the inhumane acts against the civil population stated in the first part (assassination, annihilation, slavery, deportation and other inhumane acts committed "*before or during the war itself*"), and on the other hand, political, racial or religious persecution, stated in the second part. The categories of *crimes against humanity* and *genocide* are derived and developed according to the doctrine from the former and the latter, respectively, independent of any war situation (cfr. PARENTI, Pablo F; *Crimes Against Humanity and Genocide in International Law: Origin and Evolution of the Legal Model. Statutory Elements. International Jurisprudence*. Ad. Hoc, Buenos Aires, 2007, page 298). Genocide was immediately recognized in the 1948 Convention -as will be seen- and both were received decades after the Rome Statute.

Since its earliest days, Argentina has integrated the international community and has actively accompanied this process, especially since the subscription to the Charter of the United Nations on 26/06/1945, approved by law 12195 and other legal instruments and collective agreements in protection of human rights that followed, both in the international and inter-American spheres: the 30/04/1948 OAS Charter, the 02/05/1948 American Declaration of the Rights and Duties of Man, the 09/12/1948 International Convention on the Prevention and Punishment of the Crime of Genocide and the 10/12/1948 Universal Declaration of Human Rights. Added to this, our country ratified the four 1949 Geneva Conventions on International Humanitarian Law by law 14467 and the 1969 Vienna Convention on the Law of Treaties by Decree Law 19865/72. It is relevant to conclude that -for the times of the events being judged- customary international law was applied as *ius cogens* and that Argentina found herself conventionally forced to prosecute and judge crimes against humanity as crimes against the *law of nations* or *international law*.

Finally, the international community approved, in 1988, the Rome Statute which created

the International Criminal Court, with jurisdiction over the crimes of "*genocide*" (article 6), "*crimes against humanity*" (article 7), "*war crimes*" (article 8) and "*crime of aggression*" (not described). The concept ***crimes against humanity*** -as previously stated- was more of a broad and encompassing notion of both these conventional autonomous categories: ***genocide*** and ***crimes against humanity***, related to each other in a type-genre relationship.

The Rome Statute was ratified by Argentina through law 25390 (Official Bulletin 23.01.2001) and through law 26200 (Official Bulletin 09.01.2007), which implemented it; the criminal offenses in the International Criminal Court entered positively in our criminal law with a penalty legally established.

Article 7 of the Statute defines ***crimes against humanity*** as "*any of the following acts* (assassination, annihilation, slavery, illegitimate deprivation of liberty, torture, sexual abuse, political persecution, etc.) *when committed as part of a generalized or systemic attack against civilian population and in full awareness of such attack*," understanding that it is done "*in conformity with State policies...or to promote those policies*."

As observed, two key and crucial elements characterize **crimes against humanity**. On the one hand, they imply serious violations of human rights which, by total opposition to the human essence, sicken the conscience of humanity. They are crimes which harm the most essential legal assets: life, freedom, physical and mental integrity, individual dignity; rights and assets which are -as stated in "**Harguindeguy**"- natural and human, preexisting the State. The perpetration of such crimes implies the infringement of international customary and conventional rules which reflect fundamental values that nations acknowledge as inherent to their members as human beings.

On the other hand, they are ***State crimes***, perpetrated *by order of* state power, by public officials in association with or as part of a state criminal plan, carried out in a generalized and systematic way. In this respect, it has been said that "*an offense is characterized as crimes against humanity when the pertaining actions have been committed by a state agent executing a governmental action or program...* (Bassiouni, Cherif M.; *Crimes Against Humanity in International Criminal Law*, Kluwer Law International, The Hays, 1999, Chapter 6, pages 243/246 and 275)" (in "**Simón,**" Ms. Argibay's vote).

It is clear that if the illegitimate deprivation of liberty and the torments -both aggravated- that we are judging and that have always been crimes

which deserve serious penalties in our positive law have been perpetrated in a massive and systemic way, from the very same State apparatus and against civilian groups under its jurisdiction, it is not about ordinary crimes in *domestic law* -the ones perpetrated by one citizen against another, no matter how cruel they are- but more serious crimes and substantially different.

This is because, when in the presence of "*the political organization massively attacking those they are supposed to protect*" (expression employed by the National Supreme Court of Justice in "Law," 11.07.07, Verdicts 330:3074), not only is the availability of individual victims' legal assets (life, freedom, physical and mental integrity, dignity) being affected, but also humanity as whole is being harmed and offended. This is what justifies the competence of the International Criminal Court and the universal jurisdiction, as well as the State international responsibility for such crimes. The perpetrator commits a crime *against* humanity and not only in perjury of a direct victim, which is not determined by the nature of the individual act itself, but by its special configuration and its attachment to that specific context that frames it as a ***state crime***.

In accordance with this conceptualization, it is relevant to highlight that the description of the crimes for which the defendant **Céparo** -by then a police officer from the Province- was interrogated, prosecuted, charged with the indictable offenses that opened the plenary proceedings and at the moment of the final discussion during the trial, shows that the reprehensible behavior occurred in September 1976 which hurt E.E.S by harming her freedom, her physical and mental integrity and her dignity, is compatible with this notion and category from international law and it must be classified as **crimes against humanity**, as stated by public and private prosecutorial bodies.

It is clear that, at the time of the events, the behaviors which the defendant is accused of were prohibited -described and repressed- by our Penal Code; hence, it is not necessary to judge them by applying international laws directly and exclusively without mediation of the criminal descriptions in the Penal Code, as these can be used to subsume the facts and determine the penalties for conducts which -*at the same time*- imply crimes against humanity.

In this sense, the Supreme Court of Justice of the Nation held in "**Simón**" that the criminal liability of conducts solely based on the law of nations is not a requirement by international law but a law which makes sense when State Criminal Law does not consider those conducts punishable,

and, as a consequence, its criminal nature is not left to the will of the States but it even rules *against* them (*ius cogens*). Conversely, when the local criminal laws take those unlawful conducts in the light of international law, it is natural that the facts are subsumed in those criminal laws and that, *at the same time*, the "contextual pattern," that plus added to the illegitimate act itself, is contemplated for its legal characterization and makes them **crimes against humanity**.

As a final thought for this subheading, it is pertinent to highlight that their classification as crimes against humanity has not been a subject of controversy by the defendant's technical defense in any of the steps of these proceedings. Mr. Ostolaza did not even allude to it during the oral plenary proceedings nor at the moment of the key pleadings. In this way, having the defense consented to the validity of the trial 40 years after the occurrence of the facts that his represented is accused of, he has recognized that it is undoubtedly a case of **crimes against humanity**, that its framing in the descriptions of the Penal Code is complemented by its characterization sourced in international law, whose inescapable consequence is -among others- the imprescriptibility of the criminal action. In their capacity of imprescriptibility, not eligible for amnesty or clemency and, besides extraditable, they constitute the legal status of these crimes of international law.

II) Genocide

At the moment of the final trial, Mr. Boeykens, in representation of the complainant H.I.J.O.S. Civil Association, proposed that -apart from framing the criminal distinctions in domestic law- the charged conduct is consistent with the **international crime of genocide**, described in article 2 of the 1948 International Convention on the Prevention and Punishment of the Crime of Genocide, applicable in our country at the time of the events.

As alternative request, when pleading, he also asked to declare that such conduct was perpetrated "*in the context of a genocide*," which was the claim contained in the requesting party.

Along these lines, the lawyer stated that "*what happened in Argentina was a genocide*," he highlighted the value of law as creator of truth and quoted the precedents "Etchekolatz" (Federal Oral Courts of La Plata) and "Harguindeguy" (Federal Oral Courts of Paraná) to support his claims.

In his turn, the Attorney General of Paraná -Mr, Candioti- simply classified the events as **crimes against humanity** and omitted every consideration on this topic. On his side, the defendant's technical defense -in charge of Mr.

Ostolaza- did not speak in this respect nor disapprove of the complainant's request, in the same way he had not done so in connection with the classification of the events as crimes against humanity.

It is worth mentioning, in a preliminary way, that the members of this Court in the cause "**Harguindeguy**" (04.04.2013, Sentence 13/13), as substitutes in the Oral Federal Courts 1 of Rosario in the cause "**Porra**" (24.02.2014) and two of its members as substitutes in the Oral Federal Courts 2 in the cause "Nast" (02.12.2014) have adopted a position that we keep at present and by which we classify the crimes charged -of identical nature to the ones herein judged and which occurred within the same historical context- as "***crimes against humanity occurred during the historical context of State terrorism that struck our country between 1975 and 1983, when the national genocide under discussion was perpetrated***."

For this purpose, it is relevant to resort to the grounds expressed in the aforementioned precedents for the sake of brevity, which are to be considered. In any case, the motivational self-sufficiency that each sentence must exhibit as an autonomous judicial act demands and justifies the following grounds to be expressed in their support.

Their treatment implies defining some questions and navigating different stepped levels of analysis.

II.1) In the first place: seeing that -as stated before- we are in the presence of ***crimes against humanity***, the point consists in unraveling which the specific configuration is -objective, subjective and contextual- in connection with the charged criminal act in order to define the *complementary* international legal source to classify the facts. That is, to settle whether its international illegality only comes from the mandatory force of *ius cogens* which, at the moment of the events, had the mandatory customary laws that defined the ***crimes against humanity*** for domestic law, or whether, conversely, it comes from conventional international law which, in those times, already described the ***crime of genocide***. Let us be reminded that the Convention on the Prevention and Punishment of the Crime of Genocide was approved by the 3rd General Assembly of the United Nations on 09/12/1948, was enforced on 12/01/1951 and Argentina adhered to it on 9/04/1956 though Decree Law 6286/56, ratified by law 14467; that is to say, it was already applicable in our country 20 years before the coup in 1976 (today constitutionalized in article 75, section 22 of the National Constitution).

Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide understands that genocide is "*any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such...*"

Despite the innumerable criticisms that this restricted definition adopted by the Convention has received, for it excludes -among others- political groups, it has been accepted on equal terms by the Rome Statute (article 6) and it has been incorporated with that reach to our domestic law by law 25390.

By operation of the principle of legality (*lex stricta*), any attempt to subsume involves determining whether any of the groups contemplated -such as the national group- allows the crimes herein charged to be included in the conventional international criminal distinctions.

This Court has given a positive answer to this question. Although this issue has divided the accepted legal principles, as we have said, the term "national" does not identify only and necessarily with "nationality," and "**national group**" must be understood as any group of the population which is legally bound to the National State they inhabit, because the mere fact of inhabiting it creates rights and obligations which imply the legal term of the social fact of belonging and binding to that National State (cfr. International Court of Justice, "Nottebohm" case or "Liechtenstein vs. Guatemala" on 06.04.1955).

In this way, the term national group in article 2 of the Convention is pertinent to classify the crimes charged. For this purpose, we bear in mind that the Argentine national group was annihilated 'in part' ("*totally or partially*") and that the delimitation of the (sub)group to be 'destroyed' or annihilated -labeled "subversive" or "terrorist"- came from the same subjective perspective as the perpetrators, including from armed political groups to any expression of political opposition to the regime, of social or union activism, social clusters, dissidents or rebellious within such blurry concept. The individual victims were selected just by the supposed belonging or adherence to any group defined by the perpetrator as (internal) *enemy*.

It has been said that "*group is any collectivity of individuals who are defined as such by the active party to the crime, even when it does not correspond to reality*" (cfr.Chalk, F and Jonasson, K., *The History and Sociology of Genocide*, Yale University Press, 1989, quoted in Ollé Sensé, Manuel, T*he Concept of National and Religious Group in the Crime of Genocide*, Journal of Criminal

Law and Criminology, La Ley, Year VI, N°8, September 2016, p83).

This subjective perspective for the configuration of the group in the crime of genocide is the one that is becoming stronger in the field of International Criminal Law, as it stems from the precedents by the International Court for Rwanda ("Kayishema," 21/05/1999; "Rutanga," 6/12/1999; "Musema," 27/06/2000) and the Cassese Briefing (UN General Secretary, 25/01/1995) (ibid, p83).

As a willful criminal offense, genocide requires a *solus specialis* (in the role of active party) which guides the agent in their action to totally or partially destroy a human group as such and which occurs together with malice (direct or oblique intent); this accompanies the commission of any specific crime (*actus reus*) as a way of perpetrating genocide (homicide, severe injury, illegitimate deprivation of liberty). In the case of Argentina, this is sufficiently proven by annihilation decrees, secret directives to identify enemy national groups and their classifications as "active" and "potential" opponents, the operational rules "*against subversive elements*" and even the order of not accepting surrenders contained in R.C.9-1, which documents that willful intent to exterminate.

In contrast with crimes against humanity, where the attack on civil population is *undifferentiated*, genocide is a differentiated attack on specific groups of such population for their destruction, which is what happened in our country.

The differentiated attack on individuals because of their supposed belonging to a national group labeled by state power as *subversive* or the sort, as part of a systematic plan of persecution and repression designed with the purpose of exterminating the appointed group for their destruction and for the subsequent *reorganization* of society as a whole in order to "*make another country from Argentina*" (Calveiro, Pilar. Power and Disappearance, Colihue Pub., 6th reprint, Buenos Aires, 2008, p11), which was the one executed during the latest civil-military dictatorship, is in accordance with the inherent logics of the modality of the crime of genocide as a crime within international law.

II.2) This stated, in the second place, it is necessary to verify whether their complementary framing as *international crime of genocide* injured or not the principle of legality or, in this case, the principle of consistency.

The complainant's requirements do not place the principle of legality at risk, as they have not demanded the *exclusive* application of the Convention or the subsumption of the events *directly* in the description of article 2 of

the Convention on the Prevention and Punishment of the Crime of Genocide, which -although applicable- is not a criminal distinction with a designated penalty in domestic law and, therefore, is not exclusive or directly applicable since it lacks applicability. They have categorized the events in the criminal distinctions in the Penal Code applicable in those times and have classified them in a *complementary* way as international crime of genocide, leaving the principle of legality unaffected.

What is key for the requirements to be excluded, is that the defendant was not interrogated nor summoned to a trial with a complementary international classification for the crime of genocide, neither did he have the possibility to defend himself from an accusation of this kind. Even in his requesting documents (whose summary was introduced when read during the trial), when defining the classification in the International Criminal Law, the complainant stated that "*the crimes perpetrated by the defendant are crimes against humanity committed within the framework of genocide, classification contemplated by international legal orders*."

To accept the requirements presented when alleging, would violate the **principle of consistency**. This demands the factuality of genocide itself -with its very special and particular objective and subjective elements- to be formally introduced to the proceedings and to be equally analyzed by means of the attributive entity in all its charging moments because, otherwise, it would violate the principle of defense.

And, although the judges are entitled to modify the legal characterization by the principle of *iura novit curiae*, and although we are only related by the facts of the case and the facts complained of, a relevant variation in the legal classification, like the one in the case in question, may have repercussions on the factual basis and therefore thwart the defendant's defense strategy, preventing him from presenting his defense arguments. Such complementary classification, after all, would not comply with article 18 of the National Constitution, and would additionally affect the adversarial principle (cfr. National Supreme Court of Justice, "Sircovich," 31/10/2006, Verdicts 329:4634).

II.3) In this case, it is still necessary to examine and define -in the third place- that the end of those requirements is to establish that the events charged, subsumed in criminal distinctions in domestic law and classified as crimes against humanity, have been perpetrated "*within the framework*" of a genocide.

In this sense, the Court has claimed that a judicial ruling which declares it as such takes into consideration the criminal jurisdiction, as exercise of power, and cannot dismiss the **role of the law as creator of truth**. Not only truth in a closed and linear case, but a case within a *context* and the factual weaving in which it takes place, which gains special relevance when we are in the presence of state crimes at a big scale in the *context* of a dictatorship. Because when "*the execution of an individual act is consequence of a genocide, organized by a state and in bureaucratic way…the offense must be considered within that framework of reference and it will also be necessary to take the historical events into account as the subject of judicial proceedings*" (Werle, Gerhard, Past, *Present and Future of the International Criminal Legal Crimes*, Hammurabi, 1 Ed., Buenos Aires, 2012, p21).

It is also necessary to assess the law's symbolic power of nomination, which demands that we are able *nominate* the facts *by their names*, to make them intelligible and to understand them, reason for which and beyond any imposition of legal penalties, **to *nominate* what happened in Argentina as genocide is to create *truth***.

At the same time, to declare that what happened to us as society occurred within the framework of a genocide, has an added value to elucidate the real nature of such context (given the uniformity and systematicity in the criminal practice employed), the causal mechanism that explains what has happened and the willful criminal act, clearly the partial extermination of an Argentine national group and the *reorganization* or reconfiguration of society as a whole. The historical meaning is thus recreated, non-punitive functions (reparations) are recovered in the act of judging, collective memory is gradually built, collaboration is fostered so that what happened is not repeated; all this without compromising the due legal process nor the guarantees for the defendant, and without accountable tort -after all- for the defense.

That said, on the one hand, even in the absence of historiographic precision, it is an undeniable truth that neither the plan nor the genocide acts began with the assault to political power on March 24th, 1976, but had started as such, in their modality of extermination in a clandestine way, -at least- the year before, reason for which they must be dated as from the year 1975.

And, on the other hand, given that it is possible to classify the examined genocide, as seen before, as ***reorganizing genocide*** (such was the self-nomination proposed by the dictatorship as a "National Reorganization Process") for their impact

on the effective reconfiguration of the post-genocide society, a previous genocide cannot be overlooked: the ***constituent genocide*** **(or "organizing")**, occurred in the context of the so-called process of national organization and definite territorial configuration of the State-Nation in the 19th century, through the extermination of indigenous peoples, labeled by the perpetrator as "*savages*" or "*barbarians*," and excluded from the rising state covenant. This, in fact, constituted the first genocide of a national group.

What is herein expressed provides enough grounds to accept the complainant's requirements with this reach and to conclude -as anticipated- that the events charged and tried configure **crimes against humanity** occurred during the historical context of **State terrorism** that struck our country between 1975 and 1983, when the **National Genocide** under discussion was perpetrated.

Sentence:

1.- TO DECLARE that **Atilio Ricardo CÉPARO**, whose personal details are filed in the case, is criminally responsible for the crime of illegitimate deprivation of liberty committed by abuse of power by a public official and in the absence of the formalities prescribed by law, aggravated by violence (article 144 bis, section 1 and last paragraph -Law Number 14616 as it refers to section 1 in article 142 -Law 20642 both in the Penal Code), and for the crime of torture inflicted to a victim of political persecution (article 144 ter paragraph 2 -according to Law 14616 in the Penal Code), both constituting joinder offences (articles 45 and 55 in the Penal Code). All of these constitute criminal offenses within framework of crimes against humanity occurred during the historical context of State terrorism that struck our country between 1975 and 1983, when the National Genocide under discussion was perpetrated.

2. TO CONDEMN, correspondingly, **Atilio Ricardo CÉPARO** to the sentence of ELEVEN (11) YEARS OF PRISON AND GENERAL DISQUALIFICATION FOR LIFE.

3. TO DEFER dealing with the request for House Arrest until resolution of the respective incident.

4. TO ORDER THE TRANSCRIPTS OF THIS TRIAL TO BE PLACED IN THE MAIN FILE, including testimonies of the statements by E.E.S., Brasseur, Lucca, Tissera and Fernández, together with copies of the CDs, to be kept at the Office of the Public Prosecutor of Paraná, as requested by the Representatives of the Complainants.

5. TO INITIATE a new formal criminal complaint through the proper channels, following the request for investigation in connection with other people's participation and complicity in the illegitimate deprivation of liberty and torture in perjury of E.E.S and Atilio Ricardo Céparo's engagement with an unlawful association.

6. TO IMPOSE the condemned the payment of legal and other fees of the proceedings (Article 531 of the Criminal Procedural Code of the Nation).

7. TO ORDER the Secretariat of the Court to carry out the prison term calculation of the sentence hereby established (article 493 of the Criminal Procedural Code of the Nation).

BE IT RECORDED, notified, published; let the Offices rid themselves of the case, and, in due course, be it filed.

Trial record

3.

Quinto Cuerpo del Ejército - Boccalari

In this trial, Gustavo Abel Boccalari was convicted for the kidnapping, torture and disappearance of Julio Argentino Mussi in 1977. Mussi, who was 32 years old at the time, lived in the city of Comodoro Rivadavia, Chubut, with his wife, Tina, and their 3-year-old son, Alejandro. He worked as an instrument welder and was about to start working for the state-owned oil company, YPF. On March 22, 1977, he was kidnapped by military personnel during an illegal raid on his home, during which they also took personal documents and stole his car. Mussi was not the only victim. On the same day, about ten other people were kidnapped. They were later flown to Bahía Blanca in a Hercules C130, in an operation carried out by the Buenos Aires Investigation Brigade, in which Boccalari and his superior, Commissioner Luis Cadierno, participated. They were held captive in a wagon located in the yard of the Cuatrerismo Delegation of the Provincial Police, a clandestine detention center that the victims remember as "El avión de madera" or "Vagón." They were bound, blindfolded, deprived of food and water, and subjected to various forms of torture. Witnesses saw and heard Mussi being brutally beaten and left to die. They heard his agonizing screams for a long time. It is believed that he died as a result of the beatings. He was never seen again after this incident. Boccalari died without a final sentence on December 18, 2018. His defense appealed the verdict, but the Appeals Chamber did not issue a ruling.

1 victim

6 witnesses

Convicted
Boccalari, Gustavo Abel

3.

Human Rights Secretariat

13194/2014/TOT001

In Bahía Blanca, Buenos Aires Province, at 10:25 on May 5th, 2017, the Federal Criminal Oral Courts of this city, presided by **MR. LUIS ROBERTO JOSÉ SALAS** and consisting of magistrates **MR. PABLO RAMIRO DÍAZ LACAVA AND MR. CARLOS JAVIER AGUERRIDO**, together with Secretaries of the Court, Mr Francisco Manuel Pereyra and Ignacio Ahargo, for the purpose of reading the verdict in Case N°FBB 131943/2016/TO1, under the name "Boccalari Gustavo Abel, on violation of art. 144 ter paragraph 1 -according to Law 14616; violation of art. 144 bis section 1 and last paragraph -according to Law 14616 on the basis of art. 142 section 1- Law 20642; **HOMICIDE AGGRAVATED WITH MALICE"** against **Mr Gustavo Abel Boccalari**, Argentine, National ID Number 7650005, born on January 29th (twenty-ninth), 1949, in the city of Salliqueló, Buenos Aires Province, son of Abel Darío (deceased) and Otilia Springer (deceased), Retired Chief Inspector of the Buenos Aires Province Police force, married, last domiciled in Sargento Cabral Street 280, Malvinas, General Rodríguez District, Buenos Aires Province, where he is held in pre-trial detention serving house arrest. The Public Prosecutor's Office has been represented by **MR. JOSÉ NEBBIA AND MR. MIGUEL ÁNGEL PALAZZANI**, and the Argentine Human Rights Secretariat, dependent on the Argentine Ministry of Justice and Human Rights, has been represented by **MS. M□NICA FERNÁNDEZ AVELLO**; **MR. WALTER ERNESTO TEJADA** has performed his role as the defendant's defense attorney. All of them have contributed to the trial. Having finished the deliberation required by articles 396, 398 and 400 of the Criminal Procedural Code of the Nation, given the extension of this case, the complexity and multiplicity of the several issues brought to trial, this **COURT UNANIMOUSLY RULES:**

1°) TO REJECT the request for *autrefois convict* and the discontinuance of the criminal proceedings on statute of limitations grounds submitted by Mr Walter Ernesto Tejada in his role as Gustavo Abel Boccalari's defense attorney.

2°) TO CONDEMN Gustavo Abel Boccalari, whose other personal circumstances are shown on record within the exordium, to **LIFE IMPRISONMENT, GENERAL DISQUALIFICATION FOR LIFE, AND PAYMENT OF LEGAL AND OTHER FEES OF THE PROCEEDINGS**, for his criminal responsibility as co-perpetrator of the crimes of **illegitimate deprivation of liberty committed by abuse of power in his role as a public official and in the absence of the formalities prescribed by the law, aggravated by violence or threats**, together with t**orture inflicted to a victim of political persecution, all of which constitute joinder offenses with homicide aggravated with malice and by premeditation of two or more people with the purpose of achieving immunity**, under the modality of enforced disappearance of Julio Argentino Mussi, events that in their entirety constitute crimes against humanity; and by majority, to condemn the defendant for **genocide** (according to articles 2, 29 section 3, 45, 55; 144 bis section 1 and last paragraph -Law 14616- as it refers to section 1 in article 142 -Law 20642-; 144 ter paragraph 2 -according to Law 14616-; 80 sections 2, 6 and 7 -Law 21338-; articles 530 and 531 of the Criminal Procedural Code of the Nation; articles 118 of the National Constitution, 1º of the "Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity" and article 2 of the "Convention on the Prevention and Punishment of the Crime of Genocide").

3°) TO REJECT the request presented by the Public Prosecutor's Office about revoking the defendant's house arrest (in accordance with article 34, *a contrario sensu* and related sections of Law 24660).

4°) TO ORDER, once this judgment has the force of res judicata, Gustavo Abel Boccalari's **discharge** from the Buenos Aires Province Police force, and to notify the Governor so that they execute the measures in article 62 section b in Law 13201 and in articles 86 and 114 section "b" in their regulatory decree Nº3326/04, through the Ministry of Justice and Security of Buenos Aires Province.

5°) TO URGE the National Executive Power, through the Human Rights Secretariat, dependent on the Argentine Ministry of Justice and Human Rights, to make it possible by all means within their reach, to establish the "*Sitio de la Memoria del Terrorismo de Estado*" (Site of Memory of State Terrorism) in the premises where the Anti Cattle-Rustling Division of the Buenos Aires Province Police, located on the corner of Chile and España streets, used to work (Law 26691, regulatory decree 1986/14 and Law N°13584).

6°) TO CONSIDER the appeal for cassation of the Federal case and bring it before the Inter-American Court of Human Rights.

7°) TO ORDER the Secretariat of the Court to carry out, in due course, the calculation of times of detention and expiry date of the sentence hereby established (article 24 of the Penal Code and 493 of the Criminal Procedural Code of the Nation).

8°) TO SET the hearing for the reading of the legal foundation of the case for May 19th this year, at 9:00am (in accordance with Article 400, second paragraph of the Criminal Procedural Code of the Nation).

BE IT RECORDED, NOTIFIED AND PUBLISHED, in accordance with Order N°15/2013 by the CSJN (National Supreme Court of Justice). Once this judgment has the force of res judicata, release the proper communications, comply with the orders herein issued and, in due course, **BE IT FILED**.

3.

5°) LEGAL CLASSIFICATION/ CHARACTERIZATION

In view of the considerations already expressed, this Court understands that it is essential to develop the legal descriptions of the crime in which the defendant's conduct is subsumed, with due regard to a brief reference which will be considered when discussing the essence of the case under investigation.

Under the principle of retroactivity of the most favorable criminal law, it is possible to apply laws 11179, 11221, 14616, 20642 and 21338 to the events herein judged, according to the details that follow. The aforementioned principle, contained in article 2 of the Penal Code, has enjoyed constitutional status since the reform to our Magna Carta in 1994 (article 75, section 2 of the National Constitution), with the incorporation of the following international instruments to its text: the American Convention on Human Rights (article 9); the International Covenant on Civil and Political Rights (article 15.1); the Universal Declaration of Human Rights (article 11, second section).

In this sense, the National Chamber of Criminal Appeals has stated that: "*the most favorable criminal law is one in which the legal status of the defendant is more lenient or favors them somehow, either because the alleged offense -subject of conviction- is no longer considered a crime or an offense, or because the penalties imposed are less severe, or because there are more requirements to punish them or less requirements to penalize them more favorably or to exempt them from penalty or to agree on a benefit*" (from the vote in dissidence by Mr. Fégoli) (National Chamber of Criminal Appeals, Chamber II, "*Rivas, Olga E.*" closed on 16/03/2001; quoted by DONNA, Edgardo Alberto, "Criminal Law. General Principles," Rubinzal Culzoni, 1st Ed., Santa Fe, 2006, Volume I, page 417).

With the implementation of the criminal plan devised by the latest civil-military dictatorship, several legal assets were violated, as was evidenced during the trial through the many testimonies given. The defendant was part of a power structure designed to put forward such plan, whose materialization involved a general and systematic practice which started with the victims' illegitimate deprivation of liberty, followed by their relocation to clandestine detention centers where they were interrogated under the infliction of torture. Their fate was finally decided: freedom, being taken before the National Executive Power or death.

I) ILLEGITIMATE DEPRIVATION OF LIBERTY

The events being tried, which started with the kidnapping of Julio Argentino Mussi, are subsumed in the classification of illegitimate deprivation of liberty by a public official and in the absence of the formalities prescribed by the law aggravated by the use of violence, according the description of the materiality of the events. Such classification is contained in article 144 bis, section 1 and last paragraph -according to law 14616-, as specified in article 142, section 1 -according to law 20642 of the Penal Code.

In connection with the legal description of the crime in article 142 of the Penal Code, it is relevant to note that the events occurred since the enforcement of law 21338 (Official Bulletin 01/07/1976) are judged following the text in law 20642, as the legal provisions are more favorable. It is important to highlight that the former punished the mentioned offense with a penalty of 3 to 15 years of imprisonment, while the latter considered a term of imprisonment between 2 and 6 years.

Additionally, law 20642 is applicable in considering the principle of retroactivity of a more favorable penal law, since law 23077 derogated law 21338 in its first article, with the exception of article 80 in it.

The gravity of the wrongful acts every time citizens' freedom is at the mercy of the state has already been manifested by Delgado, Seco Pon and Lanusse Noguera, who comment on the said legal asset: "*if the abuse comes from the State itself, the issue is an intolerably grave concern for the legal order, and it constitutes a contradiction of the terms and the non-compliance with the conceptual preconditions for the existence of the Rules of Law. It should be noted in these cases that in each abusive deprivation of liberty the latter are compromised, at least the obligation to guarantee rights with the particular case. It should not be forgotten that in the context of the Argentine military dictatorship this is paradigmatic, and the traditional legal categories were jeopardized, given the systematization and the political goals put into practice when these crimes were committed...*" (DELGADO, Federico / SECO PON Juan C. / LANUSSE NOGUERA Máximo, in: BAIGÚN, David y ZAFFARONI, Raúl Eugenio directors of "Penal Code", Hammurabi, Buenos Aires, 2008. Volume 5, page 350).

On the other hand, with respect to the legal asset intended to safeguard the norm that follows the criminal definition herein analyzed, we must

highlight that the goal is to protect "*...individual physical freedom in its broad sense, taking into account freedom of body movement and freedom of moving from one place to another*" (DONNA, Edgardo Alberto, "Criminal Law. Specific Principles...," Rubinzal Culzoni, 2nd Ed., Santa Fe, 2006, Volume II-A, page 132-133), in accordance with articles 14, 18 and 19 of the National Constitution.

That said, when analyzing the legal description of the crime, for it to be fulfilled, it is necessary that the active party to the crime is a public official, a circumstance already accredited in the case herein analyzed, as the defendant was member of the Buenos Aires Province Police at the time of the events and he is therefore included in the definition established by article 77 of the Penal Code. This is stated in Gustavo Abel Boccalari's *personal file*, which has been incorporated in the reading as part of the trial.

The criminal definition we describe may be configured by *abuse of office*, when the public official lacks the authority to detain the injured party in a specific case, or when they exceed the authority they do possess; or by *formal illegality*, if the agent carries out the deprivation of liberty without an order issued by a competent authority, or even when an order has been issued, it exhibits formal deficiencies (DONNA, cited work, 2011, Volume II-A, page 205).

In the case developed, the defendant has abused his position and deprived individuals of their freedom without complying with the formalities prescribed by law. The procedure by which the victim was kidnapped was characterized by the consent of members of the Armed Forces and Security Forces, who practiced several detentions in the city of Comodoro Rivadavia without an order issued by a competent judicial authority which allowed them to carry out raids and arrests.

Julio Argentino Mussi was illegitimately apprehended in obvious violation of the guarantee stated in article 18 of the National Constitution, being then subordinated to his captors' free will and relocated to a clandestine detention center where there were no official controls, therefore becoming a target for the infliction of torture, as detailed in the following paragraphs.

In the sentence rendered by the Federal Criminal Oral Courts Nº 1 of La Plata, on 25th March, 2013, in the context of the cause Nº 2955/09 in connection with the crimes occurred in the so-called "Cicuito Camps" (Camps Circuit), the context of violence that we intend to evidence was detailed: "*...procedures were mostly carried out at night, which indicates a higher state of helplessness and*

defenselessness for the victim. It also constitutes an act of violence, the fact of being snatched in the presence of their families, minors and elderly." Mussi's detention was carried out in those same circumstances, before his mother and his sister.

With regards to the law establishing the crime in section 1º, article 142 of the Penal Code, from the dogmatic point of view, we must analyze the *regulatory concepts*. On the one hand, what we understand by *violence*: that is, the use of physical force against another person, be it the victim's body or a third party who is trying to prevent the attack from happening or to repel it. In this way, the means equated to this definition in the terms exposed in article 78 of the Penal Code are taken into account.

It is also relevant to mention that only those injuries necessarily presupposed in the context of the deprivation of liberty are considered part of this aggravating circumstance. This means that any bodily harm more serious than minor abrasions, represents, together with the description in question, joinder offenses. Finally, we understand that a *threat* is the utterance of a serious harm to the victim or a third party, which determines the person to act in a way that is oriented to avoid such harm (DONNA, Edgardo Alberto, cited work, 2011, Volume II-A, page 143-144).

It is relevant to differentiate the kind of violence that the cited aggravating factor configures, the one that enters the realm of torture, as duly described in the corresponding subheading. In this respect, Chamber IV from the National Chamber of Criminal Appeals, has stated: "*violence against a woman, once she had illegally been deprived of her liberty, who is forced to witness a shooting in which her husband is wounded or dead, and whose daughters are taken from her and handed to a neighbor, notoriously exceeds the context of the detention and falls -at least- in the category of psychological aggression which leads to the concept of torment*" (National Chamber of Criminal Appeals, Chamber IV, Cause Nº 14537, Verdict of October 7th, 20013).

On the other hand, as regards the context and the operational dynamics that the armed forces developed, the National Chamber of Appeals for Criminal and Correctional Matters, when giving the judgment in cause nº1 13/84, stated that: "*a common trait among all these events was the participation of groups of armed individuals who responded to the operational command of some of the three forces -dressed in uniform or in civilian clothing- and who subjugated the victims through*

the use of their weapons or direct physical force after entering the victims' homes or intercepting them in the streets or spotting them when they were leaving their jobs, many times as part of dramatic procedures, to take them to clandestine detention centers. There never were detention orders or search orders issued by competent authorities mediating these situations" (National Chamber of Appeals for Criminal and Correctional Matters, Cause nº1 13/84, Verdict of December 9th, 1985, 5th, point I).

Everything that has been expressed above proves that the circumstances configure the aggravating factor in article 142, section 1º of the Penal Code.

II) TORMENTS

In the first place, we must point out that we refer to the practices banned by the laws in the *ius cogens*, and which have been rejected from the start by our Constituent, having the 1813 Assembly ordered the burning of the instruments of torture. Such position was reaffirmed in article 18 in our National Constitution as it establishes that "...*any of tortures and whipping...are forever abolished...*"

However, the criminal definition in question was introduced into our Legislation in the year 1958, as article 144 ter in our substantive Code through law 14616. It has been said that "...*in connection with the application of article 144 ter of the Penal Code, it was necessary to point to what is stated in law Nº 14616 -Official Bulletin of 17-10-1958- as it was the law applicable at the time of the events (principle of nullum crimen, nulla poena sine lege) and its modification (law nº 23097, Official Bulletin of 29.10.1984) which establishes an ostensibly more serious penalty, and which does not allow to choose the new version in light of the principle of more favorable criminal law...*" (National Chamber of Criminal Appeals, "*Acosta, Jorge Eduardo and others on appeal for cassation*," Chamber II, cause 15496, page 335).

Before going into the detailed analysis of the crime described in this subheading, it is relevant to make reference to the concurrency of the criminal offenses of illegitimate deprivation of liberty, torments and homicide. This collegial body agrees with Judge César Álvarez's position, held at the Federal Criminal Oral Courts Nº 1 of La Plata in the cause "Almirón." We understand that we are before alleged joinder offenses, as there exist different factual units "...*One of them consists of a unique action guided by the initial decision to deprive the detainee of their freedom, and composed of a series of executive acts such as their*

kidnapping, relocations, accommodation and imprisonment in clandestine detention centers. The other one temporally coincides with the first one but derives from a different motivation, which consisted in inflicting the detainee with torture and was composed of executive actions such as the repeated application of electric prod or the detainee witnessing tortures inflicted to their colleagues. Both actions keep their autonomy, even though the second one occurred in the same time and space frames as the first one..." (Federal Criminal Oral Courts Nº 1 of La Plata in the cause "*Almirón, Miguel Ángel and others on illegitimate deprivation of liberty* (article 144 bis, section 1) *and infliction of torture* (article 144 ter, section 1)" Record nº 10630/2009/TO1, page 458)."

Finally, as will be seen later on, homicide also constitutes a different independent crime, which, in the case under analysis, was consummated under the modality of enforced disappearance.

Now, in concrete reference with the crime of torments, article 144 ter of the penal code, according to law nº 14616 (Official Bulletin 17.10.1958), penalizes the public official who imposes the prisoners they keep any kind of torment, and the penal consequence increases in case the injured party is subject to political persecution. When making reference to the said law, Soler referred, in general, to torture as "..."*any infliction of pain with a view to obtaining specific statements. When that purpose exists, as a simple subjective element in the event, many actions that normally may not be but harassment or distrain turn into torture...*" (Sebastián Soler, "Argentine Criminal Law," 10º Ed., TEA, Buenos Aires, 1992, Volume 4, page 55).

It is relevant to highlight that the protected legal asset is human dignity. And one cannot but stress that we are before a multiple-offense crime, as it attacks freedom, individual integrity and life. The prohibited scope delineated by this legal description of the crime encompasses a series of conducts which have been internationally repudiated, as their perpetration implies depriving an individual of their dignity as a human being.

Numerous international treaties address this topic, among which we can mention: the American Declaration on the Rights and Duties of Man (article 25); the Universal Declaration of Human Rights (article 5); the International Covenant on Civil and Political Rights (article 7); the American Convention on Human Rights (article 5, section 2); and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It is relevant to highlight that after the

reform of the National Constitution in 1994, such instruments were incorporated into our Magna Carta with constitutional status (article 75, section 2 of the National Constitution), reason for which our country cannot disregard the commitments made without the risk of being held liable before the international community.

In this sense, it is important to remember what Mr. Sergio García Ramírez exposed in his Reasoned Opinion in the cause "*Bulacio vs. Argentina*": "*There is, then, a clear border between legitimate State action and the illicit behavior of its agents. It is the State's responsibility to inform, explain and justify, in each particular case, an individual's reduction of their rights, and, of course, the loss itself of their assets, mainly the asset of life, when this occurs while the State exercises its function of guarantor, either when the wrongful outcome is produced as a consequence of active behavior -or when this means in itself a violation of international laws-, or when it is a consequence of omissive or negligent behavior, which is the relevant hypothesis in this case, in the penal order, when one perpetrates a crime by omission or negligence. In any hypothesis, it would be any kind of irregular, abusive or unlawful action in the function of public duties, which implies the corresponding requirement of responsibility for those who violate them: State responsibility and individual responsibility. The latter must be demanded in accordance with the duty of criminal justice which constitutes, as I have mentioned on several occasions, a variety in the genre of reparations*" (Reasoned Opinion by Judge Sergio García Ramírez, International Court of Human Rights, case "Bulacio vs. Argentina," Verdict of September 18th, 2003, paragraph 25).

It is now relevant to address the concept of torment or torture to later on go into details with the different procedures that the victim endured. In article 1 of the Declaration on the Protection of all Persons against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted by resolution 3452 by the United Nations General Assembly, on December 9th, 1945), torture is defined as "*any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for*

the Treatment of Prisoners. 2º Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."

It can be observed that torture is any severe suffering, physical or psychological, inflicted to an individual deprived of their freedom, regardless of the purpose the active party to the crime had in mind, as article 144 ter does not make a distinction ("...any kind of torment..."). However, our starting point was Soler's definition of this concept, as we understand that the illicit conducts described in this subheading always focused on obtaining information.

This Court understands that the detainees were treated as "subject-object of intelligence" in the context of the conditions of detention which will be described below, which makes it clear that the only way to obtain information was through the infliction of torture to the prisoners.

The doctrine has been unanimous (Soler, Núñez, Creus and Buompadre) in considering that the crime of torments includes both physical and psychological torture, even though the text in law 14616 did not make express reference to these two as the current article 144 ter, according to la 23097 does.

The key characteristics of the crime referred to is found in the *intensity* with which the victim suffers the affection of their physical and moral integrity. In this sense, the Inter-American Commission on Human Rights (IACHR, "Caesar vs. Trinidad and Tobago," Verdict of March 11th, 2005, paragraph 50, b) and the European Court of Human Rights (ECHR, "Ireland vs. United Kingdom," Verdict of January 18th, 1978, paragraph 176; "Aksoy vs. Turkey," Verdict of December 18th, 1996, paragraph 63) have sustained this criterion.

The question lies in determining which the gravity threshold is that a physical or psychological suffering must cross in order to be subsumed to the crime of torment. For this purpose, it is essential to carry out a thorough analysis of the circumstances in which they are produced, as has been developed as regards the materiality of the facts, and therefore value the evidence.

Even though many of the actions that will be detailed below, when assessed in isolation, may not configure the crime in question, it is their combination and reiteration in time that constitutes the crime of torment.

Throughout the trial, this Court had the chance to hear testimonies by witnesses who credit the systematic and generalized perpetration of these abhorrent practices, carried out by the latest civil-military dictatorship to put forward their criminal plan in a "war against the subversive

enemy." It is enough to resort to those statements to verify the varied modalities of the crime herein analyzed:

RESPIRATORY OBSTRUCTION AND DEPRIVATION OF THE SENSES: it was the first torment inflicted to the "detainee," who was deprived of their sight by using blindfolds or bandages, a hood or their own clothes, and they were forbidden to talk, from the moment they were abducted, remaining in this way during captivity. The moment the individual was apprehended, they were "hooded."

CONFINEMENT IN A CLANDESTINE DETENTION CENTER: the circumstances narrated by the witnesses give an account of the suffering inflicted in the different centers under the jurisdiction of the armed forces and security forces. This is consistent with what was exposed in the cause nº 13/84 "Juicio a las Juntas" (Trial of the Juntas): "*From the accounts provided by all the witnesses who were victims of abduction, it is clear that they were in a complete state of helplessness, as they were both physically and verbally harassed, making it clear that they were totally unprotected and subdued by their captors' free will. Right from the moment of the arrest it was clear that nobody would help. Added to this, the victim was immediately hooded, moved inside a car trunk or shoved on the floor of a car or lorry, with their hands tied. The arrival at an unknown place where they were usually beaten or inflicted with torture; accommodation in 'cuchas' (inhospitable, usually dirty, small room), boxes, 'pipes', on a pallet or directly on the floor; the discovery that there were other people in the same conditions and who had been there for long, the uncertainty of what the outcome would be or how long it would last; the threats, the poor and scarce food, the dreadful or absent sanitary conditions to satisfy basic needs, the lack of hygiene and medical assistance, the moans; the contempt and maltreatment. All of this surely contributed to the victim's sense of helplessness and panic, impossible to understand or imagine, but which in itself is also a horrendous torture.*" (Cause Nº13/84, recital 2, Chapter XIII).

Such imprisonment constitutes in itself psychological torment which does not require any death threat or that a person explicitly announces a torture to be inflicted in order to be materialized, but it is constituted just by the risk of that happening, as a result of objective factual circumstances (IACHR, "Niños de la Calle," Villagrán Morales et.al. vs. Guatemala, Verdict of November 19th, 1999, paragraph 163).

CONDITIONS OF DETENTION, LACK OF PROPER FOOD, and HYGIENE AND SANITATION:

in the case of Julio Argentino Mussi and the other individuals who remained tied and blindfolded in a "wooden wagon" located in the premises of the Cattle-Raiding Division of Bahía Blanca, they were stacked, facing each other, without food or water, constantly surveilled by guards. The Inter-American court of Human Rights considered that circumstances like these represent psychological torture (IACHR, "Maritza Urrutia vs. Guatemala," verdict of August 18th, 2000, paragraphs 85, 102 and 104).

ISOLATION: when they entered the clandestine center, the individual was segregated from the outside world. The aforementioned international court has explained the serious perjury this situation brings about: "*prolonged isolation and solitary confinement are in themselves cruel and inhumane treatments, harmful to psychological and moral integrity and to the right to respect for the inherent dignity of human beings...*" (Inter-American court of Human Rights in the cause named "Fairén Garbi y Solís Corrales vs. Honduras," Verdict of March 15th, 1989, paragraph 149).

BEATING: from the moment they were entered in a clandestine detention center, abducted individuals were beaten and subjected to interrogations through the APPLICATION OF ELECTRICAL CURRENT in different parts of their body with the purpose of obtaining information, which was later on classified according to its value in connection with the "war against subversion." Such information was later on used to carry out new detention procedures; this is how the criminal plan fed itself with each torment and each operation carried out by the forces.

Even though it would be absurd to believe that torture could have been regulated in the armed forces and security forces rulebooks, we must highlight that those individuals who were captured for being "subversive criminals" were considered sources of information who could be exploited by means of interrogations. In light of the testimonial evidence provided during the trial, we are led to conclude that torment was an instrument used to make the interrogated individuals talk.

On the other hand, in connection with the *aggravating factor of being the victim subject to political persecution* in article 144 ter of the Penal Code (cf. law 14616), the doctrine considers that [someone who is] *"...the victim of political persecution is not only charged with a crime for political motives, but is also arrested or detained for a political reasons, such as opposing the established regime or the people who exercise power in the government...*" (Núñez, Ricardo C., cited word, volume IV, page 57).

Such is the way in which the aggravating factor was interpreted by Chamber II from the National Chamber of Criminal Appeals when confirming the sentence by the Federal Criminal Oral Courts nº 5 of the city of Buenos Aires in the cause "ESMA:" "*...with the purpose of identifying the aforementioned aggravating element, it is necessary to assess the situation from the perspective of the plan that was used as motive by the active party to the crime, regardless of the victim being associated or not with a concrete political-activist militancy at the moment of the events. From the cases analyzed in the current trial it was demonstrated that what motivated the infliction of torments was a political cause which responded to a systematic plan implemented by the armed forces that seized power...*" (National Chamber of Criminal Appeals, "*Acosta, Jorge Eduardo and other on appeal for cassation*," Chamber II, cause 15496, pages 342-343).

From the point of view of evidence, it is of utmost importance to resort to Cause N1 9405, record Nº 317 from the year 1977, labeled/captioned "*VEGA, Vicente Federico and others for criminal association, reiterated robbery and theft and falsification of Public Documents*," Criminal Court Nº3, which was incorporated to the reading during the trial as these conducts materialized all the military and police procedures which led to the kidnapping of the victim and other individuals because of their supposed participation in "subversive activities."

Finally, the systematic and generalized plan of ideological persecution was credited by the military documentation incorporated to the reading. More specifically, by the Directive of the Army Commander General nº 404/75 (fight against subversion) on 28/10/1975, which ordered the Armed Forces and other elements made available to them "*to exercise constant pressure in time and space on subversive organizations.*"

III) HOMICIDE

Before beginning the analysis of this particular description, it is relevant to point out that in the case of Julio Argentino Mussi, his death *is presumed* despite not having found his body, as his physical disappearance was preceded by kidnapping and a stay at a clandestine detention center, and it all happened in the context of the systematic plan developed by the armed forces to "*annihilate subversive elements.*"

In the first place, we must make reference to the regulations applicable at the moment of its consummation. Specifically, article 80 of the Penal

Code -according to law 20642- established: "*Life imprisonment or life sentence will be imposed, and the provisions of article 52 may apply ...2º To those who kill with cruelty or treachery, by price or remuneration promise, severe ill-treatment, perverse impulse or by use poison, flooding, derailment, explosion or any other means capable of causing severe damage. 3º To those who kill to prepare, facilitate, consummate or hide another crime or to ensure its results or to seek impunity for oneself or for another or for not having achieved the proposed end by attempting another crime.4º To those who kill by premeditation of two or more people.*"

Such article was reformed through law 21338 (published in the Official Bulletin of 01/07/1976), without the modification of the penalty for the serious offenses, and its new text reads: "*Life imprisonment or life sentence will be imposed, and the provisions of article 52 may apply ...2º To those who kill with cruelty, treachery, poison or other insidious procedure; 6º By premeditation of two (2) or more people; 7º To prepare, facilitate, consummate or hide another crime or to ensure its results or to seek impunity for oneself or for another or for not having achieved the proposed end by attempting another crime...*"

As we explained in the subheading in connection with illegitimate deprivation of liberty, law 21338 was repealed by law 23077, article 80 from the former being still applicable. For this reason, the legal classification of the events is carried out in accordance with law 21338 (Official Bulletin of 01/07/1976) because they occurred after this law was enforced.

A) MALICE: the homicide tried is covered by this aggravating element. This legal description of the crime contemplates those events in which the victims are in a state of helplessness that prevents them from struggling against the agent who perpetrates the offense. (D'Alessio, Andrés José, "*National Penal Code, Commentated and Annotated...*" La Ley, 2nd Ed. Updated and enlarged, Volume II, page 15).

The elements corresponding to the aggravating element have been exposed by the Federal Criminal Oral Courts nº 5 of the city of Buenos Aires in the cause "ESMA," and then ratified by National Chamber of Criminal Appeals, Chamber II: "*...For the perpetration of this aggravating factor, three objective elements must be present: hiding of the intention to kill the injured party, lack of risk for the perpetrator and, finally, the victim's state of helplessness...in connection with the victim's state*

of helplessness, this is understood as the incapacity to exercise any kind of resistance, for either physical or psychological reasons, against the aggressor's conduct. Incidentally, it is not necessary to completely neutralize the victim, it is enough to subjugate them pretty ostensibly...At the same time, in connection with the subjective element in this aggravated crime, they expressed: 'it is necessary that the behavior of the active party to the crime is negligent and that they also want to take advantage of the situation, acting without any risk for them and in a treacherous way..." (National Chamber of Criminal Appeals, "*Acosta, Jorge Eduardo and other on appeal for cassation*," Chamber II, cause 15496, page 373-374).

The aggravated crime is therefore configured, as the active party to the crime was driven by their own willfulness to take advantage of the victim's state of helplessness (subjective element different from the description of negligence) [Zaffaroni, Eugenio Raúl; Alaggia, Alejandro; Slokar, Alejandro, "Criminal Law. General Principles." 1º edition, Ediar, Buenos Aires, 2000, pages 517/520].

As described at the moment of analyzing the types of crimes, illegitimate deprivation of liberty and torments, from the moment of their abduction, the victims' fate was in the hands of the kidnappers. The latter had the necessary infrastructure and resources (human and material) at their disposal, provided by the state itself in the context of the execution of the criminal plan previously mentioned. In this way, from the very first moment, the active party to the crime, driven by their will, made sure the result was met.

For this reason, the fact that the victim was deprived of their liberty in a clandestine detention center, subjected to different kinds of torture, allows us to ascertain that the conditions of vulnerability the victim suffered prove that the defendant acted taking advantage of a situation of helplessness.

B) PREMEDITATION OF TWO OR MORE PEOPLE: it has been proved that several individuals were involved in the procedures of detention, infliction of torture and homicide, and that by previous agreement of intent and responding to orders in a chain of commands, carried out the conducts defined as criminal. Such circumstances configure the legal description of the aggravated crime, whose grounds lie on the minimum possibility of defense the victim had because of the actions performed by the various agents (D'Alessio, cited work, page 24).

The characteristics of the aggravated crime, together with their objective and subjective elements, was specified in the aforementioned "ESMA" cause, and confirmed by Chamber II of the National Chamber of Criminal Appeals: "*in connection with the aggravating factor included in the former section 4º of article 80 (according to law nº 20642), the court stated:' the premeditation of a series of crimes by two or more people who intervene in the perpetration of the event is justified by the fact that the author does not act on their own, which diminishes the victim's possibility to defend themselves. The way in which this offense is perpetrated, leaves the victim before an organized structure intended to end their life'...Not only do the material executors of death take part in the perpetration of the crime, but also those who are present in and during the context in which the actions leading to that execution takes place, giving orders or encouraging those who act [...]. From the subjective point of view of the crime, the aggravating factor requires a premeditated set of offenses [...]. The aggravating factor is premeditation if it responds to 'a prior convergence of intentions, where the actions of each of the perpetrators appears to be, subjectively and objectively, connected to the others' or by an ad hoc meeting...*'" (National Chamber of Criminal Appeals, "*Acosta, Jorge Eduardo and others on appeal for cassation*," Chamber II, cause 15496, page 374-375).

C) RELATED CRIME: we understand that the crime herein tried, perpetrated under the modality of enforced disappearance, fits into the legal description of aggravated crime. The homicides perpetrated by members of the armed forces or security forces had the objective of hiding the crimes of illegitimate deprivation of liberty and infliction of torture previously committed.

Chamber II of the National Chamber of Criminal Appeals confirmed what was resolved in the ESMA case in connection with this aggravating factor: "...the Court affirmed, with Núñez's quote: '*the perpetrator of a homicide tends to rid themselves from the punishment or rid those who participated with them in another crime that originate the punishment...*" "*The motive that drives the perpetrator to commit the crime has to be determinative, without the need for it to be premeditated, and it is only necessary for them to make the decision, even improvised, at the moment of the execution...*" (National Chamber of Criminal Appeals, "*Acosta, Jorge Eduardo and others on appeal for cassation*," Chamber II, cause 15496, page 375).

It has been proved that the objective the agents had in sight was to *hide* the different crimes that were perpetrated from the moment an individual was deprived of their liberty, thus attempting to achieve *impunity* for the perpetrators and participants of the events.

D) HOMICIDE UNDER THE MODALITY OF ENFORCED DISAPPEARANCE: this criminal offense is characterized by the fact that the victim's body has not yet been found. Even though we are in the presence of a result crime, we must consider that it was perpetrated by the state itself, in compliance with a criminal scheme planned to make a sector of the population disappear just for the fact that it supported political ideas which did not coincide with the "values of the process of national reorganization." In this sense, aggressors were provided with a wide variety of human and economic resources to eliminate the *corpus delicti*.

Bearing in mind the circumstance that Julio Argentino Mussi's body has not been found, and considering the fact that his disappearance happened 40 years ago in the context of systematic and generalized violence, this does not represent an obstacle to take his death as a fact. We have reached this conclusion after taking into account the testimonials provided by the family, who witnessed the procedure by which he was kidnapped, and by individuals who shared captivity with him and survived the tortures inflicted in clandestine detention centers.

Therefore, the fact that he was last seen under the custody of the Buenos Aires Province Police in the context mentioned above allows us to prove that his death was violent.

Such circumstance was stressed in the "Trial of the Juntas:" "*...Contemporarily to the episodes narrated, other events, which appear to be connected, took place; and they gain special significance because they lead us to infer that those kidnapped were neither released, nor brought before the National Executive Power, or subjected to legal proceedings, but physically eliminated...*"(Cause nº 13/84, Recital 2, Chapter XVI).

Furthermore, in connection with the disappearance of the *corpus delicti*, it is relevant to highlight that the Inter-American Court of Human Rights has already intervened in the cause "CASTILLO PÁEZ vs. PERÚ," in connection with the possibility of taking the death of an individual as a fact even though their body has not been found: "*The argument provided by the State cannot be admitted because the failure to determine a person's whereabouts does not necessarily mean*

that they have been deprived of their life, as 'the body of the crime...would be missing,' as the contemporary criminal doctrine requires. This rationale is inadmissible, as it would only be enough for the perpetrators of an enforced disappearance, who in these circumstances intend to eliminate every evidence of the crime, to hide or destroy the victim's body, which is frequent in these cases, for the offenders to achieve total impunity" (IACHR, "Castillo Páez vs. Perú," paragraph 73, Verdict of November 3rd, 1997).

In this respect, such Court stressed that the existence of repressive practices of enforced disappearance of individuals for political reasons, added to the presence of corroborating evidence, allows the Court to reach the conclusion that the victims were indeed object of such practices (IACHR, "Fairén Garbi y Solís Corrales vs. Honduras," paragraph 157, Sentence of March 15th, 1989. In the same respect, "Godinez Cruz vs. Honduras," paragraphs 154/155, Sentence of January 20th, 1989).

For the aforementioned reasons, this Court understands that having the kidnapped victim stayed in a clandestine detention center and his presence being credited by the individuals whose testimonials were considered, we must take his death as a fact, since, as of today, his whereabouts are unknown.

E) ENFORCED DISAPPEARANCE

In the first place, we must highlight that at the time the events herein tried occurred, the kind of crime against humanity that we nowadays know as a legal description of the crime regulated in article 142 ter of the Penal Code (according to law Nº 26679, Official Bulletin 09/05/2011), constituted one modality within the crime of homicide. This interpretation is respectful of the principle of retroactivity of the most favorable criminal law, enshrined in article 2 of the Penal Code and in international instruments that have constitutional status, which we have mentioned in the subheading entitled "Legal classification and special descriptions to the crime."

With the purpose of analyzing this regular systematic practice put into practice by most Latin-American dictatorships during the 20th century to get rid of political opposers, we can take the definition provided by article 7, paragraph 2 section i) in the Rome Statute (implemented by law nº 26200, Official Bulletin 09/01/2007): "'*Enforced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or*

It has been proved that the objective the agents had in sight was to *hide* the different crimes that were perpetrated from the moment an individual was deprived of their liberty, thus attempting to achieve *impunity* for the perpetrators and participants of the events.

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a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time."

In this way, through this practice, ordered by the state itself, thousands of people were put in the shadows, depriving them of essential rights, condemning their families to everlasting uncertainty for those victims whose bodies have not been found yet. After the disappearance, family members initiated a tortuous pilgrimage before the authorities seeking for information about their beloved ones, receiving generalized negative information about their whereabouts. This situation motivated the initiation of *habeas corpus* actions, which were systematically dismissed based on reports provided by the armed forces and security forces who alleged that the missing people "were not detained" within their jurisdiction.

In this way, a great number of people have been forced to go on with their lives without knowing where the remains of their loved ones are located and therefore without the possibility of proper mourning.

At the same time, it is necessary to highlight that it was the de facto government itself the one which authorized the enforced disappearance of persons. Sancinetti and Ferrante refer to laws 22062 and 22068 in this respect: "*The Argentine government's implicit recognition (or perhaps explicit) of the enforced disappearance of persons had the striking generality of being constituted by two laws sanctioned in August and in September of 1979. The first law, 22062, enacted by the 28/8/79 decree law, regulated the possibility of receiving pension benefits upon prolonged absence of an individual whose death would provide those benefits... 'the interested party' had to 'accredit through documents like judicial certification and report of disappearance, and had to justify the circumstances to carry out an investigation on the missing person's whereabouts' before the corresponding social security body. The second was law 22068. This one gave a more general 'solution' to the patrimonial issues derived from the disappearance of people, establishing the possibility of a summary proceeding -in some cases, initiated ex officio- to declare the presumed death of a person whose disappearance from their home or residence had been reliably reported between November 6th, 1974, date declared for the 'state of siege' (decree law 1368/74) and the date of*

enactment of such law on September 12th, 1979...” (SANCINETTI, Marcelo A. / FERRANTE, Marcelo, CITED WORK, page 135).

The cited authors also made reference to the many answers that were rehearsed by governmental authorities to try to explain the existence of disappearances “*1. That the individuals had died during a confrontation and that their bodies were in such terrible conditions that it was impossible to identify them. 2. That the individuals had left the country clandestinely. 3. That they had been executed by subversive groups for being deserters. 4. That they were living clandestinely. Some time later, possibly because of the lack of verisimilitude that these justifications offered, it became customary to attribute a certain number of disappearances to ‘excess or abuse’ in repression in the context of the so-called ‘dirty war’ or ‘untidy war.’ According to those authorities -as stated in the report by the IACHR- ‘there may have been cases of excesses in the repression of subversives that meant the disappearance of people during that ‘war’...*” (SANCINETTI, Marcelo A. / FERRANTE, Marcelo, CITED WORK, page 133-134).

In connection with the official documents that accredit the enforced disappearance of people as a systematic practice carried out by the latest dictatorship, the Federal Criminal Oral Courts of Tucumán in the cause “Arsenal Miguel de Azcuénaga,” in the same way as Sancinetti and Ferrante in the cited work, enumerate: a) the Report on the Situation of Human Rights in Argentina elaborated by the Inter-American Commission of Human Rights in connection with complaints received and the visit that body made to our country in the year 1979; b) the Report by the National Commission for Disappeared Persons submitted to President Mr. Raúl Alfonsín on September 20th, 1984; and c) the verdict issued by the National Chamber of Appeals for Criminal and Correctional Matters in the cause nº 13/84 (Federal Criminal Oral Courts of Tucumán, file nº A-81/12 under the name “Arsenal Miguel de Azcuénaga and Tucumán Police Headquarters,” verdict of 19/03/2014).

In the cited documents, as described before in the legal descriptions of the crimes, the *modus operandi* displayed by the armed forces to “make people disappear,” particularly those labeled as “subversive elements,” is detailed: kidnapping, isolation in clandestine detention centers, infliction of torment, and finally “disappearance of the individual,” which, according to the referenced evidence, makes it possible to consider the deaths a fact.

We find ourselves before a complex practice we have already specified to have had different stages in the framework of the criminal plan, whose execution implied the affectation of the right to freedom of movement, to psycho-physical integrity and to life (articles 4, 5 and 7 in the American Convention of Human Rights).

Finally, the conclusion of this Court when we understand the enforced disappearance as an execution modality for the crime of homicide, besides respecting the principle of non-retrospectivity of criminal law, finds support in the jurisprudence of the Inter-American Court of Human Rights: "*The practice of enforced disappearances, in fact, has frequently meant the execution of the detainees, in secrecy and without mediating trials, followed by the hiding of the body with the purpose of eliminating any material evidence of the crime and achieving the impunity of those who perpetrated it, which means a brutal violation of the human right to life, recognized in article 4 of the Convention...* " (IACHR, "Velázquez Rodríguez vs. Honduras," paragraph 157, Verdict of July 29th, 1988).

IV) CRIMES AGAINST HUMANITY

With the evolution of modern States, a new sense of awareness has been developed in terms of specific crimes configuring aberrant behavior and violations of the fundamental rights of man. It has been said in this respect that these cannot be judged exclusively from the internal point of view, as they move humanity as a whole. For this reason, taking into consideration the reason exposed below, we consider that the conducts that have been proved throughout the trial and for which the defendant has been convicted constitute crimes against humanity.

It is a category through which the international community has decided to assume and regulate those offenses that, in connection with the legal asset they infringed, resulted particularly offensive to humanity as a whole. They are excessive criminal offenses from any point of view because what is at risk is collective good: the attack to civilians through procedures that violate the most essential principles of humanity (Lorenzetti, Ricardo L. y Kraut, Afredo J., "*Human Rights: Justice and Reparation*," Sudamericana, 2011, page 22).

Once the Second World War was over, throughout the second half of the 20th century, a new regulatory body began to be developed with the purpose of judging those events considered atrocious and horrendous for the most elemental

rights of man. However, it is important to highlight that such conducts were already considered reprehensible in the sphere of customary law for their gravity and their harm to the human being.

In this context, it must be clarified that this kind of crime finds its classification in international rules, recognizing customary and conventional norms (treaties, declarations, covenants) as its sources, which have been shaping its main characteristics such as imprescriptibility, non-applicability of amnesty and retroactivity. It is, therefore, in this regulatory field of conventional and non-conventional international law that the offenses perpetrated by Gustavo Abel Boccalari are judged.

In this respect, "*The Law of Nations (especially after the Nuremberg Trials), has built a body of regulations held by the international community (which has been named "international criminal law") that safeguards the most essential rights for a human being and that is translated into principles and rules of law assumed -mostly- as mandatory by the international community. The prohibition of certain conducts considered of extreme seriousness (which are called crimes against the law of nations or international law crimes) and the legal consequences derived from any of those conducts considered crimes against the law of the nations are ius cogens"* (Gil Domínguez A., "*Constitution, Pardon and crimes Against Humanity: There Will Be More Penalties and No Oblivion*," La Ley, 2004 -D, 4).

Ius cogens is the set of imperative international norms with the feature of non-derogability or unavailability (Bidart Campos, Germán J., "*Guide to the Reformed Constitution*," Buenos Aires, 1996, Ediar, p413). They are customary law norms that have been accepted, either explicitly through treaties or tactically by custom, to protect the public morals recognized in them, which cannot be set aside by treaties or by acquiescence but by the formulation of another customary law with reverse effect (Inter-American Commission of Human Rights, Report 62/02, case 12285, "Michael Domínguez vs. the United States," Verdict of October 22nd, 2002).

That international customary law referring to conducts that violate the essential rights of man has been gaining more recognition through different instruments, initially in humanitarian law, providing it with international validity (as we will see in the next section).

The community of states expressly recognized the *ius cogens* in the 1969 Convention on the Law of Treaties (which was ratified by Argentina in 1972). The importance of the treaties

as a source of international law and the existence of a customary law that would still be applicable is established there (see the Convention preamble). Among others, there are two norms that are particularly relevant for the formation and recognition of the irrevocable international customary law; article 43 states: "Obligations imposed by international law independently of a treaty. The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfill any obligation embodied in the treaty to which it would be subject under international law independently of the treaty;" and in the second place, article 53 states that: "a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

One of the distinctive aspects of peremptory international general law is that the norm can never be derogated; this characteristics stems from the previously mentioned article 53, which only makes reference to the possibility of modifying the imperative norm in *ius cogens*. Once the common law is installed, it can only be "changed" through an analogous procedure. It happens that "we are in the presence of a necessary law as a means of developing peaceful cooperation among nations, which takes the essential values and principles that constitute the true international public order." The International Court of Justice, in the case Barcelona Traction, Light & Power Co. (Verdict of 5/02/70) recognized the existence of customary and conventional laws in terms of human rights, expressly stating that all States have a legal interest for those laws to be respected. Such human rights norms are *erga omnes*, that is to say, they are norms that oblige all states equally. In other words, the respect for human rights is part of imperative international law.

In this respect, our country, as a member of the International Community, has contributed, since the foundation stages, to the formation of International Humanitarian Law and has recognized the existence of a supranational order that includes imperative, non-derogable and

obligatory norms for all the countries. The 1853-1860 constituents did not disregard that the law of nations -current human rights- constitutes an issue in constant evolution as a measure of progress and togetherness among the nations, and as a pathway toward protecting the fundamental rights of man (Gil Domínguez, Andrés, "*Constitution, Law of Nations and Crimes Against Humanity*," Buenos Aires Bar Association Magazine, Nº68, August 2003).

Custom law is recognized by our legal order in several norms. The first one to recognize the importance of custom as a source of law is article 118 of the National Constitution, which states: "The trial of all ordinary criminal cases not arising from the right to impeach granted to the House of Deputies, shall be decided by jury once this institution is established in the Nation. The trial shall be held in the province where the crime has been committed; but when committed outside the territory of the Nation against public international law, the trial shall be held at such place as Congress may determine by a special law."

Furthermore, article 21 of Law 48 includes the law of nations when it establishes the implementing legislation for national courts and judges in the exercise of their duties: "National courts and judges in the exercise of their duties will proceed applying the Constitution as supreme law of the Nation, the laws that the Congress sanctions or has sanctioned, international treaties with foreign countries, specific laws of the provinces, general laws that have ruled before the Nation and the law of nations, according to the different requirements the respective cases present, in the established order of precedence." It is also important to consider Article 4, Law 27.

To conclude, it is worth mentioning the Supreme Court of Justice of the Nation, which in the case "Arancibia Clavel" stated that: crimes such as genocide, torture, enforced disappearance of people, homicide and any other kind of conducts directed to persecute and exterminate political opposers (among which we must mention being part of groups formed to carry out his persecution), can be considered crimes against humanity because they harm the law of nations as described in article 118 of the National Constitution (SCJN, Verdicts 327:3312, recital 16, majority vote, subscribed by Mr. Eugenio Zaffaroni and Ms. Elena Highton Nolasco). Both crimes against humanity and the traditionally called war crimes are crimes against the law of nations which the world community has committed to eradicate (same verdict and vote, recital 21).

EVOLUTION OF THE SOURCES OF IHL

On the basis of the first definitions and the actions of the International community on crimes against International Law, there begins a cascade of Conventional Rights of Human Rights that tends to consolidate the principles of Nuremberg, which we will analyze when conceptualizing crimes against humanity and developing them further though their positivization, but always with the view to reaffirming the postulates which already constituted the law for the community of States in correlation with international practice. The notion of tragedy now encompasses humanity as a whole and concerns everything that constitutes disregard to or negation of the value of life and all the possibilities to develop it. This strong belief in life and its value, in opposition to the massive and ruthless destruction by individuals and groups in fascist States, to the contempt for the human being and to the relationships between the individual and the State in democratic States lies in the origin and at the other extreme of the process of internationalization of human rights and of the birth of the very idea of these rights. As a consequence, it was necessary to elevate those rights to the category of international laws and to obtain a sure and certain protection (Raffin, Marcelo, "*The Experience of Horror*," 2006, Editores del Puerto).

The development of international law shows that crimes against humanity started to be considered by the international community since specific relevant milestones in connection with armed conflicts and regulations in connection with belligerent activities and customs of war.

In that context, we can resort to the norms in the Geneva Convention (August 22, 1864) for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, the foundation for international humanitarian rights, *which is a body of legal rules that seek to protect the victims in armed conflicts* and grant neutrality to humanitarian assistance. The 1864 Geneva Convention was modified in 1906, 1929 and once again after the Second World War.

Crimes against humanity were considered in the PREAMBLE OF THE 1899 HAGUE CONVENTION (II) WITH RESPECT TO THE LAWS AND CUSTOMS OF WAR ON LAND (MARTENS CLAUSE) which established a code of conduct for States in a war situation, subjecting them to the emerging principles of the law of nations, enshrining and enforcing customary laws in the international community. This precept was so important that it was reiterated in the 1907 HAGUE

CONVENTION (IV) WITH RESPECT TO THE LAWS AND CUSTOMS OF WAR, introduced in similar terms in the four Geneva Conventions in 1949 and both Hague Conferences in 1899 and in 1907 discussed the need for international law to limit hostilities.

The second paragraph of the preamble notes that the Contracting Parties are "*animated by the desire to serve, even in this extreme hypothesis, the interests of humanity and the ever increasing requirements of civilization*," in this respect, the 8° paragraph of the preamble -the so-called Martens Clause- states that "*the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience*."

This clause reflects the spirit that should guide international law in connection with armed conflicts and the protection of victims and humanitarian assistants, which establishes that in cases not explicitly included in normative provisions "*populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience*."

This second peace conference of The Hague also discussed the problem of maritime war and adopted eight conventions in connection with several aspects of this kind of conflict. Finally, in 1925, the League of Nations summoned a conference that resulted in the adoption of a Convention which prohibits the use of toxic gasses and bacteriological weapons. In 1929, the regulations established in Geneva in 1864, which had consolidated a minimum protection for combatants, were subject to revision and resulted in the adoption of a convention on the status of war prisoners, which constitutes a true code for these subjects. After the Second World War, these provisions were developed in the framework of the Geneva Convention relative to the Treatment of Prisoners of War, adopted on August 12, 1949.

The 1949 GENEVA CONVENTIONS are considered the main legal instruments constitutive of International Humanitarian Law, based on the principles of humanity, impartiality and neutrality, which include specific norms designed to protect wounded, sick or stranded combatants (members of the armed forces), prisoners of war and civilians, as well as medical personnel, military chaplains, civil

personnel from the Armed Forces, together with their Additional Protocols that complement and extend humanitarian standards.

The UN CHARTER constitutes the first positive organic set of standards of international law with respect to human rights, which from the preamble expresses the desire to reaffirm the faith in the protection of the fundamental rights of man, opening the way for the adoption of legal instruments for their protection, stating in its prologue: "*We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law...*"

In this respect, Mr. Juan Carlos Maqueda has pointed out that "*the UN Charter marks the beginning of a new international law and the end of the old paradigm (the Westphalia model) communicated three centuries ago, after the end of the European Thirty Years' War. It represents an authentic international social pact (historical, not metaphorical; an actual constitutive act and not a metaphorical or philosophical theory) through which International law was structurally transformed from a pragmatic system of bilateral treaties inter pares to an authentic supra-State legal system...*" (Recital 40 in his vote in the case "Arancbia Clavel," Verdict: 327:3312, SCJN).

On December 10, 1948, the UNIVERSAL DECLARATION OF HUMAN RIGHTS was declared within the United Nations Organization, which details the list of human rights that will be granted protection and establishes the principle that all human beings are born free and equal in dignity and rights, implementing the effective protection of both civil and political rights, as well as economic, social and cultural ones.

In the regional sphere, the inter-American system of protection of human rights was developed under the supervision of the Organization of American States, an organization created during the Ninth International Conference of American States in Bogota (1948) and which adopted the AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN. With the purpose of counting on an instrument to consider this issue in a comprehensive way, the Inter-American Specialized Conference carried out in the city of San José, Costa Rica in 1969 approved the INTER-AMERICAN CONVENTION ON HUMAN RIGHTS.

The Inter-American Commission on Human Rights, as the main body of the Organization of American States, takes the primary function of promoting the respect for human rights and of serving as advisory body for the Organization, highlighting the elaboration of special reports on the situation of human rights in a specific country together with the Inter-American Court of Human Rights, which is recognized for its contentious jurisdiction and its consultative capacity.

So far, we have provided a brief summary of the deep concern that the international community has shown to act unanimously in order to generate mechanisms for the protection of human rights (motivated by the non-repetition of atrocious events). The process we intend to highlight has continued evolving in a series of specific legal instruments which we will only list, taking into consideration the context of their genesis.

At world scale, the CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, celebrated on December 9, 1948, enforced on January 12, 1951, adding the Argentine Republic to this Treaty on June 5, 1956; the CONVENTION ON THE NON-APPLICABILITY OF STATUTORY LIMITATIONS TO WAR CRIMES AND CRIMES AGAINST HUMANITY, adopted on November 26, 1956, applicable as from November 11, 1970; the CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, celebrated on December 10, 1984 and enforced on June 27, 1987 and ratified by Argentina on September 24, 1986; and the INTERNATIONAL CRIMINAL COURT STATUTE ANNEXED TO THE TREATY OF ROME celebrated on June 19, 1998 and approved by Law 25390.

At an inter-American scale, the system of protection of human rights established through the Pact of San José, Costa Rica (American Convention on Human Rights) has been enhanced around three conventions: the INTER-AMERICAN CONVENTION TO PREVENT AND PUNISH TORTURE (1985, enforced in 1987); the INTER-AMERICAN CONVENTION ON THE FORCED DISAPPEARANCE OF PERSONS (1994, enforced in 1996). All of these are binding for our country.

What is more, the expression “crimes against humanity” appears in a non-technical sense in the declaration by the governments of France, Great Britain and Russia on May 28, 1915, in which the Armenian massacres by the Ottoman Empire against the Armenian population in Turkey was denounced. Also, the TREATY OF SEVRES, on August 10, 1920, celebrated between Turkey and

for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law; 3- The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law; 4- The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him; 5- Any person charged with a crime under international law has the right to a fair trial on the facts and law. 6- Complicity in the perpetration of a crime against peace, a crime of war or a crime against Humanity is punishable as a crime under international law.

At the Nuremberg Trials it was said that: "*It was submitted that International Law is concerned with the actions of sovereign States and provides no punishment for individuals...In the opinion of the Tribunal, both these submissions must be rejected. That International Law imposes duties and liabilities upon individuals as well as upon States*" (Nuremberg Trials, p52). This is the great legacy of Nuremberg and the cornerstone of international criminal law. It was reaffirmed by the Statutes of the Courts for former Yugoslavia and Rwanda and by the Draft Code of 1954, as well as the current Draft Code of Crimes against the Peace and Security of Mankind, articles 2 to 7 in the general principles (Barzola, Julio, "International Public Law," Zavalía). The tripartite division of Nuremberg crimes (a-; b-, c- crimes against humanity) has remained in other projects and essays in the creation of the Code of Crimes formulated by the International Law Commission upon request of the United Nations General Assembly. Upon request of the United Nations General Assembly the International Law Commission had presented projects back in 1951 and 1954, which were postponed on the grounds of disagreement in connection with the definition of aggression.

In this brief summary of the evolution towards the concept we will herein consider to qualify the proven facts in the trial, we cannot omit the CONVENTION ON THE NON-APPLICABILITY OF STATUTORY LIMITATIONS TO WAR CRIMES AND CRIMES AGAINST HUMANITY (1968), which adopted the concept that the Nuremberg Statute had previously mentioned in its article 1°, hence declaring the imprescriptibility (whatever the date of perpetration) of: "*(b) Crimes against humanity whether committed in time of*

the allies, mentions crimes against humanity, although that treaty was never ratified. This concept was also used in declarations after World War I, for example, by the Commission of fifteen member States established through the Preliminary Peace Conference in January 1919 to investigate responsibilities in connection with this war.

Besides the above mentioned antecedents, the first description of crimes against humanity in an instrument of international law that was actually enforced was the was in article 6, section c of the CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL AT NUREMBERG (October 6, 1945) which judged the crimes perpetrated by the National Socialist regime according to the Charter of London. As previously mentioned, its article 6, section c defined crimes against humanity as "*namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.*"

The importance of this concept and the individualization of the conducts contained in the statute of the Tribunal lies in the fact that for the first time the judgment of certain crimes mandates the jurisdiction of international courts. It is also relevant that the statute also includes two new categories of crimes, crimes against peace and crimes against humanity, and, at the same time, the fact that it incriminates the leaders and the organizers of acts of aggression and of other inhumane acts who had acted as State organs during the commission of the offenses.

It is important to highlight that the principles established in Nuremberg have been relevant in the constitution of International Criminal Law, as the UN General Assembly declared the principles recognized by the Statute and by the verdicts of the Nuremberg Trials unanimously pronounced by the General Assembly in the Resolution N°95 on December 11, 1946 as principles of international law. These principles establish that: 1- Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment; 2- The fact that internal law does not impose a penalty

war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nurernberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid , and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed."

This definition was also adopted by article 4 (or 5) of the Statute of the International Criminal Court for former Yugoslavia, and by article 2 (or 3) of the Statute of the International Criminal Court for Rwanda.

Finally, the DRAFT CODE OF CRIMES (1996) was the foundation for the last outstanding point in this evolution we make reference to, that is to say, the ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (1998), which describes what crimes against humanity are, a concept that differs from the previously mentioned ones, as it encompasses different and new criminal offenses. Article 7 establishes: "*For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.*"

DESCRIPTION OF THE CRIME-ELEMENTS/REQUIREMENTS

From a formal point of view in the criteria for classification, it could be said that they are "crimes against humanity" because they affect the individual as a member of "humanity," opposing the most elemental concept of human shared by all the civilized countries, and they are perpetrated by a state agent in their execution of governmental duties or by an organization with the power to exercise dominance or perform analogous state duties (Lorenzetti, Ricardo. and Kraut, Alfredo J., "*Human Rights: Justice and Reparations*," 2011, Sudamericana, p30/31).

When analyzing the legal description of the crime herein discussed, it must be pointed out that crimes against humanity are conceived of in its latest writing as independent from war crimes, without subordinating their existence to an international or local armed conflict. The definition established in article 6 of the Statute of the Nuremberg Military Court is left behind, as it demanded the connection between crimes against humanity and war crimes. On the other hand, it is worth mentioning that it expands the conducts defined as criminal and it establishes the requirement of systematicity and massivity as elements for their typification.

When analyzing crimes against humanity in terms of their characteristics and requirements, these points have been developed in the ruling by the Attorney General in the cause "Derecho, René Jesús on the extinguishment of the criminal action," N°24079 (Verdicts: 330:3074), which makes use of the grounds and conclusions of the national highest court we have referred to. We have already mentioned that the protected legal assets are the fundamental rights of human beings, which makes crimes against humanity different from ordinary offenses because the former not only harm the victim, who sees their basic rights severed, but they also *constitute an injury to humanity as a whole* (Verdicts: 330:3074). According to their nature, it has been stated that: "*The cases of crimes against humanity are precisely the perpetration of the worst of those threats, the one carried out by a political organization massively attacking those they are supposed to protect. 'Humanity,' then, in this context, refers to the universal characteristics of being a 'political animal' and the characterization of these attacks as crimes against humanity fulfills the function of signaling the common interest, shared by human beings, that political organizations do not turn into that perverse*

machinery. The criterion for distinction lies not on the nature of each individual act (for example, each murder) but in their attachment to a specific context: 'The high degree of depravation, in itself, does not distinguish crimes against humanity from the cruelest facts that the local systems criminalize. Instead, what distinguishes crimes against humanity is the fact that the atrocities perpetrated by the government or quasi-governmental organizations in perjury of civilian groups under their jurisdiction and control" (Verdicts: 330:3074).

According to Gerhard Werle ("Principles of International Criminal Law"), in connection with the protected interest in this description, the fact does not affect exclusively the individual victim but the international community as a whole. And he adds that, together with these supra-individual interests, this type also protects concrete victims' individual interests such as life, health, freedom and dignity.

On that occasion it was mentioned that the international community has made a joint effort to define, in an evolution whose latest outstanding point is the Rome Statute of the International Criminal Court, what constitutes crimes against humanity. The definition they agreed on was not only the result of arduous discussions but it also constitutes, as previously mentioned, the latest statutory step in a long and historical evolution.

The Statute of the International Criminal Court for former Yugoslavia included the following text in its article 5°: "*Crimes against humanity. The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment;(f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts.*" On the other hand, the Statute of the International Criminal Court for Rwanda incorporated some distinctive elements later on adopted by the Rome Statute, in which article 3° contemplates the definition of crimes against humanity: "*The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment ; (f) Torture; (g) Rape; (h) Persecutions on political, racial and religious grounds; (i) Other inhumane acts.*"

The most relevant requirement for an event to be considered a crime against humanity consists

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global fact, can the existence of a crime against humanity be considered."

In connection with the element "civilian population," he explains that as a subject of the global fact, crimes against humanity are directed against any civilan population and not only against individuals. This does not mean that the entire population of a State or territory is affected by the attack. What he tries to highlight is the collective characteristics of the crime and the exclusion of the attacks to individual subjects as random acts of violence (Verdict "Tadic. Trial Chamber," dictated by the International Criminal Court for former Yugoslavia on May 7, 1997). The global fact must be directed against a civilian population and the individual act against civilians. What is decisive to determine the belonging to a civilian population is the need for protection of the victim, which derives from their helplessness with respect to the organized violence, be it state, military or any other kind. On the other hand, it is not necessary that the entire population of a region where an attack takes place is the injured party of the attack; it is enough that a considerable number of individuals and not only a few random people are attacked ("Kumarac," International Criminal Court for former Yugoslavia, Verdict of June 12, 2002).

Following Werle, the element attack describes a line of conduct in which individual facts must be integrated, which implies "the multiple perpetration" of the acts mentioned in article 7.1 of the Statute of the International Criminal Court. In this respect, a multiple commission exists when the same conduct defined as criminal is perpetrated on several occasions, in the same way as when different typical alternatives are perpetrated. It is not necessary for them to be committed by the same actor in every case, which means that one "single" act of murder can be constitutive of a crime against humanity when this individual act is part of joint functional relationship (International Criminal Court for former Yugoslavia, sentence of May 7, 1997, *"Tadic. Trial Chamber*").

The generalized character is a quantitative element of the global fact, which will be determined from the quantity of victims, as highlighted by the Commentary of the International Law Commission in correspondence with article 18 point 4 of the 1996 Draft Code, which states: the second alternative requirement demands the commission on a large scale, which means that the acts are directed against a multiplicity of victims. As Werle affirms, the international jurisprudence has followed this interpretation.

The systematic character is of a qualitative nature and it refers to the organized nature of the acts of violence and to the improbability of them happening by mere coincidence ("*Kunarac,*" *Appeals Chamber*, International Criminal Court for former Yugoslavia, Verdict of June 12, 2002). The jurisprudential interpretation of this requirement is also based on the Commentary of the International Law Commission in correspondence with article 18 point 3, which establishes: "... [it] requires that the inhumane acts are committed in a systematic manner, that is, in response to a preconceived of scheme or policy."

In relation with the requirements of generality and systematization, it is worth mentioning that there is a general consensus that it is not necessary for them to occur cumulatively; instead, each of them is enough in themselves. Despite the fact that in reality both characteristics co-occur, the requirements of generality and systematicity only have to co-occur alternatively (International Criminal Court for former Yugoslavia, Blaskik, Verdict of March 3, 2000).

As regards the demand for a "political element," Werle explains that the requirement is inspired in the 1996 Draft Code, which introduced the condition of punishability for the crimes instigated or directed by a Government or by any organization or group. The Commentary in article 18 point 5 states: "This alternative has the objective of excluding the case in which an individual perpetrates an inhumane act on their own initiative when carrying out their own criminal plan. The concept must be understood in a wider sense as the perpetration of a crime in a planned, directed or organized way, as opposed to spontaneous violent and isolated acts" ("Tadic. Trial Chamber," International Criminal Court for former Yugoslavia, sentence of May 7, 1997). Those who carry out the policy must be a specific unit, a State or an organization. The concept of State must be interpreted in a broad sense, where the forces which de facto dominate a region where they exercise their duties are included.

In brief, as we will see later on, this Court understands that the proven facts in these criminal proceedings, namely illegitimate deprivation of liberty, torments and homicide under the modality of enforced disappearance, added to the elements of context (systematicity, generality) and the operating procedures carried out by the armed forces and security forces (in this case the Army and the Buenos Aires Province Police, the defendant being enlisted in the latter), without a shadow of doubt constituted crimes against humanity.

in this being carried out as part of an attack which at the same time -and this is the central point- being generalized and systematic. It explains that the characteristics of generality and systematicity of the attack were treated by the international jurisprudence where the inclusion of the requirements of generality and systematicity had the purpose of excluding isolated or random cases of the notion of crimes against humanity; where generality means the existence of a number of victims and systematicity means the existence of a pattern or a methodical scheme (Verdict: "Prosecutor vs. Tadic," dictated by the International Criminal Court for former Yugoslavia, sub-section 647 and subsequent ones). At the same time, the requirement of generalization has been conceptualized as massive, frequent, actions at large scale, carried out collectively with considerable seriousness and directed to a multiplicity of victims. The requirement of systematicity as completely organized and consistent with a regular pattern on the basis of a common policy that involves substantial public or private resources (Verdicts: "Prosecutor vs. Jean-Paul Akayesu, International Criminal Court for Rwanda, case N° ICTR-96-4-T).

On the other hand, the Prosecutor states that "the attack" must have been carried out by conformity with a state or organization policy, that is to say, the events must be connected with some kind of policy, in the sense of the term which means "guidelines or directives that govern the conducts of a person or entity in a particular case or field," without the need for that policy to come necessarily from a central government. However, when the force that encourages the policy of horror and/or persecution is not the government, the requirement to be verified is that it must at least come from a territory or can move freely in it (Verdict "*Prosecutor vs. Tadic*," dictated by the International Criminal Court for former Yugoslavia on May 7, 1997). In this point such a requirement is clarified, known as "political element," which is useful to exclude isolated cases, not coordinated or random from the category of crimes against humanity.

The doctrinaire GERHARD WERLE, on his part, claims, in this presentation in connection with this topic ("Principles of International Criminal Law," p356 and subsequent ones), that it is only possible to consider crimes against humanity those individual events mentioned in the description as long as they are perpetrated "*as part of a generalized systematic attack against a civilian population. Only when this contextual element takes place, which can briefly be denominated*

SUBSUMPTION OF THE EVENTS TO THE SUBJECT OF DEBATE

a) The Inter-American Commission on Human Rights of the Organization of American States, which visited our country in 1979, made the report dated April 11, 1980 on the situation of Human Rights in Argentina, based on serious allegations received in previous years about violations of human rights in the country, to which they provided statutory status. Besides, on different occasions they informed the Argentine Government of their concerns for the growing number of accusations and the information received from different sources which alleged serious violations, generalized and systematic, to fundamental rights and freedoms of man. The Commission states that it received reports, testimonies and statements that indicated cruel treatments and tortures in Argentina, in open violation to the fundamental rights of the human being, to the constitutional provisions and to the purposes enumerated by the Governing Military Junta of "*providing the validity of Christian moral values, national tradition and the dignity of the Argentine person, adding that physical harassment and torture may have been carried out mainly during the process of interrogation, as seen in the allegations submitted to the Commission in connection with detainees in Argentinian prisons and with disappeared or abducted individuals whose situation has transcended.*"

As recommendations to the Argentine Government it sustained: "*The Commission estimates that the problem of disappearances is one of the most serious in the field of human rights that the Argentine Republic faces, and it urges [the authorities] to report on the disappearance of persons, understood by this, those who have been abducted during raids which, according to the conditions in which they were carried out and their characteristics, it may be assumed that the public forces have intervened; it is suggested that the necessary orders are given to competent authorities so that minors who have disappeared due to their parents' and family's detention and those born in detention centers, are given back to their ancestors or close relatives; it is recommended that pertinent measures are taken so that procedures that brought disappearances as a consequence are stopped. In this respect, the Commission has observed that there have recently been cases of this nature which, just like the rest, must be clarified as soon as possible.*"

The Commission sustained that through the 1976 military takeover, the Argentine constitutional

legal order was altered by guidelines issued by the new Government, which affect the full compliance with human rights, pointing out as a conclusion that "*due to the actions or the failure to act on the part of the governmental authorities and their agents, numerous serious violations of fundamental human rights, as recognized in the American Declaration of the Rights and Duties of Man, were committed in the Republic of Argentina during the period covered by this report – 1975 to 1979.*"

In particular, the Commission considered that these violations have affected: "*a) the right to life, by virtue of the fact that persons belonging to or connected with government security agencies have killed numerous men and women subsequent to their being placed in detention; the Commission is particularly concerned about the circumstances relating to the thousands of detainees who have disappeared and who, for the reasons set forth in the report, based on the evidence, may be presumed dead; b) the right to personal freedom, in that numerous persons have been detained and brought to the National Executive Power, in an indiscriminate manner and without reasonable cause; who have continued to be held in detention sine die, which in effect is tantamount to their serving an actual sentence; this situation has been aggravated by the severe restrictions and limitations placed on the right of option (to leave the country) provided for in Article 23 of the Constitution, thus undermining the true purpose of this right. Similarly, the prolonged residence in embassies of persons seeking asylum constitutes an infringement on their personal liberty which, again, is tantamount to their serving an actual sentence; c) the right to personal integrity and security, by means of the systematic use of torture and other cruel, inhuman and degrading treatment, the practice of which has taken on alarming characteristics; d) the right to a fair trial and due process, by virtue of the limitations the Judiciary is encountering in exercising its functions; the lack of proper guarantees in trials before military courts, and the inefficacy that has been demonstrated, in practice and in general, with respect to writs of Habeas Corpus in Argentina, all of which is aggravated by the serious difficulties encountered by defense counsels in their work on behalf of persons in detention, for reasons of security or public order, some of whom have died, disappeared or are presently in prison for having taken on defense work of this kind.*"

In turn, in connection with other rights with respect to the American Declaration of Rights and Duties of Man, it states that freedom of opinion, expression and information has been limited, labor

rights have been affected and political rights have been suspended.

b) Afterwards, with the objective of clarifying and investigating the enforced disappearance of people occurred during the period denominated "process of national reorganization" between 1976 and 1983, Raúl Ricardo Alfonsín's government created the National Commission for Disappeared Persons (CONADEP), which, after working between December 1983 and September 1984, submitted the Never Again Report, published for the first time in 1984 by Editorial Universitaria de Buenos Aires - Eudeba (Buenos Aires University Publisher). Such report turned out to be fundamental for the clarification of events that occurred during the civic-military dictatorship.

After receiving thousands of testimonies and verifying the existence of clandestine detention centers, the investigation accounted for the disappeared, the clandestine detention centers, the mechanisms of abduction and torture, demonstrating the existence of a systematic plan of disappearance, torture and extermination put into practice in Argentina as from March 24, 1976. Such report was a key document in the Trial of the Juntas carried out in 1985, and a source of constant reference in the trials which take place in connection with these events.

The report sustained, from the vast amount of documentation collected, that human rights were violated in an organic and dutiful way by the Armed Forces, not violated sporadically, but systematically, always in the same way, through abductions throughout the territory.

c) In addition, in the verdict of December 9, 1985 dictated by the National Chamber of Appeals for Criminal and Correctional Matters of Buenos Aires, in the **CAUSE 13-84** under the name "*Cause initially instructed by the Supreme Council of the Armed Forces in compliance with decree 15-883 by the National Executive Power,*" a criminal methodology in response to a systematic plan of extermination occurred during the time of the events herein tried were proven. In this respect, it was corroborated that the actions and conducts perpetrated (at different scales and in different modes) were part of a systematic plan and not random or isolates cases.

That Court sustained that "*it has been proven in this cause...that some of the defendants, in their capacity as Commanders in Chief of their corresponding Forces, ordered to fight against the terrorist subversion that basically consisted in: a) capturing those who might be suspected of having connections with subversion, according to intelligence reports; b) taking them to places*

located within military units or under their supervision; c) once there, interrogating them under torture with the purpose of obtaining information about other people possibly involved; d) subjecting them to inhumane living conditions with the purpose of breaking their moral resistance; e) carrying all this out in an absolute clandestine way; f) providing freedom of action to subordinates who decided on the detainees' fate, who could be either released, taken before the National Executive Power, subjected to military or civil proceedings, or else physically eliminated....Besides, they integrated an organized system which granted impunity for the executors at the same time it was ensured that the legal organisms for crime prevention did not interfere with the realization of the procedures...It has also been proven in this trial that the orders provided gave rise to numerous crimes of illegitimate deprivation of liberty, infliction of torture and homicides. What is more, it has been evidenced that in the course of the execution of the events, the subordinates committed other crimes which had not been directly ordained but which could be considered a natural consequence of the system adopted"("The Sentence," published by the National Congress Printing Press, 1987, Volume II, pages 787/788).

On the other hand, in the context of Cause N°450/86, that Chamber ordered the preventive imprisonment with a view to extradition against Carlos Guillermo Suárez Mason. It was stated there that two legal systems coexisted during the de facto period: regulations that formally covered the actions of the armed forces and guidelines which were predominantly verbal, secret and mostly overlooked by the formal order. The latter was employed in everything concerning the treatment of suspicious individuals, and consisted in detaining those people, torturing them to obtain information and eventually killing them, making the body disappear or framing an armed confrontation to justify the deaths (Cfr. Invalidity Decision of laws 23492 and 23521 in the cause 8686/2000 under the name "Simón, Julio, Del Cerro, Juan Antonio on the abduction of minors under the age of 10," Federal Criminal and Correctional Court n°4).

d) In the process of transition carried out in our country, it is possible to say that the last decade has seen numerous courts in different jurisdictions and in connection with different Forces prove the systematic methodology put into practice during the latest military dictatorship, concluding that there exited repression against civilian population instrumented through a systematic and generalized plan conducted by the Armed Forces -and in many

cases with the intervention of other forces like the security forces- to achieve the goals set by the military forces, a clandestine repressive scheme which has already been proven, as previously exposed in Cause 13/84.

Moreover, the Chamber II of the National Chamber of Criminal Appeals in the cause N°15496, "*Acosta, Jorge Eduardo and others on appeal for cassation*," Register N° 630/14 it was resolved that "*...we must not lose sight of the conducts attributed to the defendant, who were involved in the abduction of individuals, concealment of their whereabouts from their relatives, infliction of horrendous torture and captivity in inhumane conditions, and decease of the victims in some cases, some of whom were drugged, boarded on planes and thrown in the sea. All of this, for their supposed political or ideological affiliation, a circumstance that characterizes the accusations as crimes against humanity...*"

The events herein judged are not beyond the context described and proven by different courts in the country, as it has been demonstrated that the kidnapping, the torments and the homicides in perjury of the victim were perpetrated during the said systematic plan implemented by the Armed Forces during the State terrorism of the latest military dictatorship. In particular, there existed an effective coordination between the Army and the Buenos Aires Province Police to carry out the conducts defined as criminal.

So much so that the actions each force implemented internally, following internal organic and operative regulations, add up to an evident systematic cooperation and coordination between the different forces and among different jurisdictions in order to carry out the global criminal scheme. This is evident in the case herein judged, in which members of the Buenos Aires Province Police traveled to the province of Chubut to kidnap the victim in coordination with the Army to later on take him to a clandestine detention center in the city of Bahía Blanca.

The forces involved in the events investigated -the Army and the Buenos Aires Province Police- have acted in an organized, connected and coordinated way, involving more than one jurisdiction to carry out the systematic criminal plan, which leads us to the conclusion that the events herein judged constitute a crime against humanity.

V) GENOCIDE JUDGES MR. LUIS ROBERTO JOSÉ SALAS AND MR. PABLO RAMIRO DÍAZ LACAVA HAVE STATED:

Once the accusation was over, the Representatives of the Office of the Public Prosecutor as well as the members of the Secretariat of Human Rights of the Justice Ministry sustained that the events should be qualified as genocide. Therefore, it is necessary to analyze the application of this definition to the case from the regulatory framework which has provided content.

The first author to refer to this concept was Raphael Lemkin, who claimed that "*genocide has two phases: one, destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor*" (Raphael Lemkin; *Axis Rule in Occupied Europe*, Carnegie Endowment for International Peace, Washington DC, 1994). The key feature of genocide is that it intends to destroy a group and not just the members who integrate that group.

The evolution of the concept of genocide hit a central milestone in the approval of the "Convention on the Prevention and Punishment of the Crime of Genocide" (1948), which our country ratified later on through decree-law number 6286/56. In this respect, the Convention was applicable in our national statutory order at the moment in which the conducts comprised here took place.

Prior to that, as a consequence of the events lived during "Nazism," the United Nations Organizations invited, through the Resolution 96 (I) of December 11, 1946, the Member States to enact the necessary laws for the prevention and punishment of genocide. There, it was declared that "*Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations.*"

What is more, article 2 in that project stated that: "*In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, religious or political group, for reasons based on racial or national origin, in religious beliefs or political opinions of their members: 1) killing members of the group; 2) causing serious bodily harm to members of the group; 3) inflicting on the group conditions of life calculated to bring about*

death: imposing measures intended to prevent births within the group."

As can be identified in the said reading, that initial project not only accounts for "political groups" but also for "political reasons." This category was not included for reasons which are not worth analyzing here in the definition of Genocide provided by the United Nations General Assembly in article II of the Convention.

It was established there that the acts "*committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: a) Killing members of the group; b) Causing serious bodily or mental harm to members of the group; c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d) Imposing measures intended to prevent births within the group; e) Forcibly transferring children of the group to another group.*" This concept was reproduced by article 6 in the Rome Statute of the International Criminal Court.

In connection with the Convention, Daniel Feierstein explains that it generated a paradoxical fact in International Law: "*on the one hand, it accounted for the resolution to make the systematic annihilation of groups an imprescriptible and extra-territorial crime. On the other hand, the exclusion of different groups from the definition implied that it became a useless tool which did not have any application in the fifty years that followed its enactment -and scarce application later on-, in spite of the persistent reiteration of genocides in our planet*" (cited author, "*The Trials in Argentina, the concept of national group and the teachings for international law*").

In fact, the key issue discussed on the policy analysis is whether it is possible to apply the concept of genocide in the case of our country due to the exclusion of the category of "political group" both in the Convention and in the Rome Statute.

This exclusion has been criticized by bibliography specialized in the subject (see Frank Chalk and Kurt Jonassohn; The History and Sociology of Genocide: Analysis and Case Studies, Yale University Press, New Haven, 1990; Ward Churchill, A Little Matter of Genocide: Holocaust and Denial in the Americas, 1492 to the Present, City Lights Books, San Francisco, 1997. Helen Fein; Accounting for Genocide, The Free Press, New York, 1979. Leo Kuper; Genocide. Its Political Use in the Twentieth Century, Yale University Press, New Haven & London, 1981. Vahakn Dadrian; "A typology of Genocide", in International Review of Modern Sociology, 15, 1975, page 204. Barbara Harff and Ted Gurr; "Toward empirical theory of

genocides and politicides", in International Studies Quarterly 37, 3, 1988. Matthias Bjornlund, Eric Markusen y Martin Mennecke; "What is genocide: In search for a common denominator in legal and non-legal definitions," in Daniel Feierstein (comp.); Genocide. The Administration of Death in Modernity, EDUNTREF, Buenos Aires, 2005. Bibliography cited in "Trials. On the Making of Genocide III, 2015, Fondo de Cultura Económica).

"*The concept of 'partial destruction of a national group' is contained in the 1948 Convention and all subsequent legal definitions of genocide, and it summarizes the essence of genocidal practices as Lemkin understood them ('the destruction of the identity of the oppressed group'), which might live under colonial rule, as was common in Lemkin's time, or form part of a nation-state, as tended to be the case in the second half of the twentieth century, with the national security doctrine in force by national armies, which worked as 'occupying armies' within their own borders, replacing the colonial armies of the past"* (Daniel Feierstein, cited work).

In this respect, as the author states, there exist two ways to interpret the concept of genocide. One which is related to "ancestral hatred" or "irrational discrimination," that is, one that makes it impossible to apply the concept of "*partial destruction of a national group"* when it refers to the group itself, and a second way of interpreting the concept, which tends to analyze it as a *"technology of power whose objective is the destruction of social relationships of autonomy and cooperation and of the identity of a society through the annihilation of a relevant fraction (either by their number or the effects of their practices) of that society and through the use of terror, product of the annihilation for the establishment of new social relationships and identity models"* (see Daniel Feierstein, "*Genocide as Social Practice*," Buenos Aires, 2011, Fondo de Cultura Económica, p.83).

We understand that the difference in perspective is clear, that the second point of view not only allows us to identify the acts of extermination of the group but also to see the *intentional* component that characterizes genocide: its finality.

In conclusion, "*the characterization as a 'national group' is absolutely valid for examining the events that took place in Argentina since the perpetrators intended to destroy a particular web of social relations in a State in order to bring about a change substantial enough to alter life as a whole. Given the definition in the 1948 Convention of "in whole or in part," it is evident that the Argentine national group has been annihilated "in part" or in a*

part substantial enough to alter the social relationships of the nation itself... The annihilation in Argentina is not spontaneous, it is not causal, it is not irrational: it is the systematic destruction of a "substantial part" of the Argentine national group, destined to transform it as such, to redefine its way of being, its relationships, its fate, its future" (Feierstein and Guillermo Levy, "*Till Death Do Us Part*" Buenos Aires, 2004, Al Margen Editions, p76).

Moreover, this is the thesis defended by the Magistrate of the High National Court of Spain, Baltasar Garzón, who exposed, on November 2, 1999: "*the Military Juntas seized power in March 1976 in Argentina, through a coup d'état, a terror regime based on the calculated and systematic elimination of thousands of people by the State, for many years, and disguised under the denominated war against subversion (in the Cause there are more than ten thousand proven disappearances so far). The purpose of that systematic action is to achieve the establishment of a new order just like Hitler intended to do in Germany, where specific classes of people were not included, especially those persons who did not fit the stereotype of nationality, Western civilization, and Christian morality.*"

The comparisons made by the thesis herein sustained can not and must not be interpreted as a disregard for the differences between what happened in Argentina and the exterminations that had other peoples as victims (different in scale and methodology). Instead, they show that there exist different typologies of genocide and that our country may apply the concept contained in the Convention.

These elements are not only corroborated in these judicial proceedings but they also have their source in the sentence rendered by the National Chamber of Appeals for Criminal and Correctional Matters of Buenos Aires which, in the framework of the Cause 13/84, which condemned (former) members of the Military Juntas. It was determined there that "*the system implemented - kidnapping, interrogation under torture, clandestine and illegitimate deprivation of liberty and, in many cases, the elimination of the victims - was substantially the same throughout the territory of the Nation and prolonged over time.*" It was established that such system was implemented in a generalized way as from March 24, 1976.

These events allow us to infer the formal recognition of a scheme for extermination carried out by the de facto government that took control of the institutions since that date.

This systematic action has been verified in sentences throughout our territory, beyond the

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Moreover, this is the thesis defended by the Magistrate of the High National Court of Spain, Baltasar Garzón, who exposed, on November 2, 1999: "*the Military Juntas seized power in March 1976 in Argentina, through a coup d'état, a terror regime based on the calculated and systematic elimination of thousands of people by the State, for many years, and disguised under the denominated war against subversion (in the Cause there are more than ten thousand proven disappearances so far). The purpose of that systematic action is to achieve the establishment of a new order just like Hitler intended to do in Germany, where specific classes of people were not included, especially those persons who did not fit the stereotype of nationality, Western civilization, and Christian morality.*"

The comparisons made by the thesis herein sustained can not and must not be interpreted as a disregard for the differences between what happened in Argentina and the exterminations that had other peoples as victims (different in scale and methodology). Instead, they show that there exist different typologies of genocide and that our country may apply the concept contained in the Convention.

These elements are not only corroborated in these judicial proceedings but they also have their source in the sentence rendered by the National Chamber of Appeals for Criminal and Correctional Matters of Buenos Aires which, in the framework of the Cause 13/84, which condemned (former) members of the Military Juntas. It was determined there that "*the system implemented - kidnapping, interrogation under torture, clandestine and illegitimate deprivation of liberty and, in many cases, the elimination of the victims - was substantially the same throughout the territory of the Nation and prolonged over time.*" It was established that such system was implemented in a generalized way as from March 24, 1976.

These events allow us to infer the formal recognition of a scheme for extermination carried out by the de facto government that took control of the institutions since that date.

This systematic action has been verified in sentences throughout our territory, beyond the

final classification given to the facts. In fact, it has been proven in this city that state terrorism and the extermination scheme existed, as seen in the Causes "Bayón" (93000982), "Stricker" (93001067) and "Fracassi" (93001103). It was established in those resolutions that the proven facts constituted genocide. It is worth highlighting that these legal proceedings was filed and brought to trial in the framework of the Cause 15000005/2007 which gave birth to the aforementioned, and, as a consequence, cannot be analyzed as an individual and episodic event (it was proven that the enforced disappearance of the victim took place in the context we have indicated).

The Federal Criminal Oral Courts Nº 1 of La Plata indicated so in the Cause "Circuito Camps," which was sentenced on March 25, 2013, and in which it was established that the events occurred in our country during the period under assessment must be catalogued as genocide.

In brief, the events herein judged are the result of the actions of a specific modality of State terrorism which was deployed in the local sphere in compliance with the same repressive machinery which was deployed to eliminate a national group whose identity was defined by the victimizing agents, whose devastation had national outreach to the point of counting on a kind of sub continental criminal coordination with the union of dictatorships in the Southern Cone known as "Condor Plan."

Finally, we must not ignore that the concept of crimes against humanity does not include the intentionality that defines genocide and as a consequence is not representative of the whole event. We insist, it was not homicides, disappearances, kidnappings, tortures, among other abhorrent events, carried out indiscriminately, but an intentional selection with a specific purpose.

For all the above mentioned reasons, we understand that there is no doubt that the classification is applicable for the Argentine case.

HENCE OUR VOTE.

Mr. MARCOS AGUERRIDO HAS STATED:

As stated in the Federal Criminal Oral Courts of Neuquén in the cause under the name "Castelli, Néstor Rubén and others on crimes against liberty and others" (file N° FGR 83000804/2012/TO1), I will herein provide the arguments which lead me to dissent with the position adopted by Mr. Luis Roberto Salas and Mr. Pablo Ramiro Díaz Lacava, upon request of the representatives of the Office of

part substantial enough to alter the social relationships of the nation itself... The annihilation in Argentina is not spontaneous, it is not causal, it is not irrational: it is the systematic destruction of a "substantial part" of the Argentine national group, destined to transform it as such, to redefine its way of being, its relationships, its fate, its future" (Feierstein and Guillermo Levy, "*Till Death Do Us Part*" Buenos Aires, 2004, Al Margen Editions, p76).

Moreover, this is the thesis defended by the Magistrate of the High National Court of Spain, Baltasar Garzón, who exposed, on November 2, 1999: "*the Military Juntas seized power in March 1976 in Argentina, through a coup d'état, a terror regime based on the calculated and systematic elimination of thousands of people by the State, for many years, and disguised under the denominated war against subversion (in the Cause there are more than ten thousand proven disappearances so far). The purpose of that systematic action is to achieve the establishment of a new order just like Hitler intended to do in Germany, where specific classes of people were not included, especially those persons who did not fit the stereotype of nationality, Western civilization, and Christian morality.*"

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In brief, the events herein judged are the result of the actions of a specific modality of State terrorism which was deployed in the local sphere in compliance with the same repressive machinery which was deployed to eliminate a national group whose identity was defined by the victimizing agents, whose devastation had national outreach to the point of counting on a kind of sub continental criminal coordination with the union of dictatorships in the Southern Cone known as "Condor Plan."

Finally, we must not ignore that the concept of crimes against humanity does not include the intentionality that defines genocide and as a consequence is not representative of the whole event. We insist, it was not homicides, disappearances, kidnappings, tortures, among other abhorrent events, carried out indiscriminately, but an intentional selection with a specific purpose.

For all the above mentioned reasons, we understand that there is no doubt that the classification is applicable for the Argentine case.

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Mr. MARCOS AGUERRIDO HAS STATED:

As stated in the Federal Criminal Oral Courts of Neuquén in the cause under the name "Castelli, Néstor Rubén and others on crimes against liberty and others" (file N° FGR 83000804/2012/TO1), I will herein provide the arguments which lead me to dissent with the position adopted by Mr. Luis Roberto Salas and Mr. Pablo Ramiro Díaz Lacava, upon request of the representatives of the Office of

the Public Prosecutor and the Claimants in connection with the application of the classification of genocide to the events judged in these proceedings.

In this respect, I must anticipate that my dissent is based on legal grounds without considering the valuable contributions that sociology provides for the approach to such a complex issue.

In the first place, I must resort to the "*Convention on the Prevention and Punishment of the Crime of Genocide*" (adopted by the UN General Assembly in their resolution 260 A - III- of December 9, 1948), which in its article II establishes that "*genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: a) Killing members of the group; b) Causing serious bodily or mental harm to members of the group; c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d) Imposing measures intended to prevent births within the group; e) Forcibly transferring children of the group to another group.*"

Additionally, article V of the said Conventions states that "*The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.*"

It is worth highlighting that even though the aforementioned international instrument enjoys constitutional hierarchy, in article 75 section 22 of our Magna Carta since its reform in the year 1994, the Argentine legislator has omitted the inclusion of genocide within the Penal Code, thus breaching the commitment which stems from article V of the Convention.

So much so that the application of the legal classification of genocide results inappropriate by operation of the principle of legality (article 18, National Constitution), as the legal description of the crime, as well as the penalty to be applied, are not described in the legislation of our country.

In the second place, notwithstanding the foregoing, I feel pertinent to stress that article II in the analyzed Convention, has strictly individualized the crime of genocide as configurative act to those that intend to destroy in whole or in part "a national, ethnical, racial or religious group" without including political collectives as subjects under guardianship.

final classification given to the facts. In fact, it has been proven in this city that state terrorism and the extermination scheme existed, as seen in the Causes "Bayón" (93000982), "Stricker" (93001067) and "Fracassi" (93001103). It was established in those resolutions that the proven facts constituted genocide. It is worth highlighting that these legal proceedings was filed and brought to trial in the framework of the Cause 15000005/2007 which gave birth to the aforementioned, and, as a consequence, cannot be analyzed as an individual and episodic event (it was proven that the enforced disappearance of the victim took place in the context we have indicated).

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As stated by the Court, the events judged in the current proceedings took place in the context of a systematic criminal plan carried out by the armed forces during the latest civic-military dictatorship, perpetrated with the objective of "annihilating" a sector of the national population labeled as "subversive elements," basically for supporting an ideology contrary to the *de facto* government.

In such context, it is not possible to categorize the victims of state terrorism in our country in any of the protected collectives in terms of the definition by the *Convention on the Prevention and Punishment of the Crime of Genocide.* It is worth highlighting the analysis conducted by Daniel Feierstein on the discussion carried out between the years 1946 and 1948 in the context of the United Nations in order to determine whether it was appropriate to include or not to include the political groups among the "protected" ones. In concrete, two blocks of state representatives confronted each other, as a consequence of which the collective in question resulted excluded from the guardianship (Feierstein, Daniel, "*The Convention on Genocide: sociological and historical data for legal discussions*," in Magazine of Criminal Law and Criminology, La Ley publishing company, year V, nº 1, February 2015, page 137).

For all the above mentioned, I understand that the legal classification of genocide must be rejected.

Secretaría de
Derechos Humanos

Ministerio de Justicia
y Derechos Humanos
Argentina