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GLOBAL GOVERNANCE: DIALOGUE BETWEEN COURTS

Ricardo Lorenzetti

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE
ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES
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Global Governance: Dialogue Between Courts

RICARDO LORENZETTI
President of the Argentine Supreme Court

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Abstract

Judicial diplomacy can be seen as a cooperative action and interaction among domestic courts, usually highest judicial bodies, towards regional legal integration. It has manifested itself in two ways: (1) through dialogue and exchange of information among judges, lawyers, and law schools; and (2) through cooperative activities among national Supreme Courts.

Dialogue among the Supreme Courts has been taking place for over a decade in the Mercosur, the Ibero-American Judicial System, the Organization of Supreme Courts of the Americas and the Inter-American Court of Human Rights.

These organizations were created for the cooperation, agreement and exchange of experiences among the highest instances of Ibero-American judiciaries.

Crimes against humanity cases shown in this paper illustrate the relationship between different Courts and the dialogue between sources of law as the real challenge of the judicial decision.

Keywords

Global governance-Judicial diplomacy-Crimes against humanity-legal integration-constitutional pluralism-dialogue between sources of law

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Part I: Judicial diplomacy

Judicial diplomacy can be seen as a cooperative action and interaction among domestic courts, usually highest judicial bodies, towards regional legal integration. It has manifested itself in two ways: (1) through dialogue and exchange of information among judges, lawyers, and law schools; and (2) through cooperative activities among national Supreme Courts.

I would like to present four examples of "judicial diplomacy" in South America.

1) The Permanent Forum of the Supreme Courts of Mercosur

Dialogue among the Supreme Courts of Mercosur has been taking place for over a decade. Within the last ten years, the Chief Justices of the Mercosur Supreme Courts of Justice have met on different occasions in order to promote activities towards raising awareness and familiarizing every Member State with the legal systems of their fellow members. In 1996, for example, the Supreme Federal Court of Brazil promoted the Fifth Meeting of Presidents of Supreme Courts of the Southern Cone.

However, these meetings began to be held on a regular basis only in 2003, with the First Meeting of Supreme Courts of Mercosur Member States and Associate Members. The main purpose of these conferences is to create a forum for the discussion of the role of judiciaries in the integration process, aimed at enforcing Mercosur regulations, increasing judicial cooperation and promoting the harmonization process of Member States legislation. Soon after, in 2004, these meetings were formally consolidated in the Charter of Brasilia, which established the "Permanent Forum of Supreme Courts of Mercosur Countries for judicial matters relevant to Latin-American integration, with emphasis on Mercosur".

The Charter creates a permanent forum on the grounds that national judiciaries are essential to the functional structure of Mercosur, since (a) they are to apply Mercosur rules within their respective domestic jurisdictions; and (b) the integration process is a State commitment and that is why all government branches should be involved.

This declaration stated a clear intent to strongly deepen the Mercosur block through judicial diplomacy, or more specifically, through yearly *ad hoc* preparatory meetings among the Chief Justices of Mercosur members.

Some particularly promising initiatives include the organization of legal debates among judges of Mercosur countries, as well as an exchange program for law students, faculty and even judges. These ideas, pushed forward during the 2006 meeting, led to the signature of a Protocol of Intentions. The Supreme Courts of Member and Associate States further agreed to foster data exchange and make useful information available, as well as to expedite relevant personal and institutional contacts in their respective countries.

Beyond these initiatives, the Permanent Forum also reached an important benchmark in November 2006, when judicial diplomacy among Supreme Courts resulted in significant contributions to the Mercosur dispute settlement system. Indeed, in 2005, the Permanent Forum decided, under Olivos Protocol, to draft a proposal for a mechanism that would allow Mercosur Supreme Courts to request the Permanent Review Tribunal for advisory opinions as to the interpretation of Mercosur legal rules. On January 18th, 2007, the Common Market Council approved the Rules of Procedure on Requests for Advisory Opinions by the Supreme Courts of Justice, the final rules relying heavily on the Permanent Forum's proposal.

Last year, at the VIIth Meeting of the Supreme Courts of Mercosur, the Justices of these tribunals urged to continue the ongoing debate on the creation of a Mercosur Supreme Court. To this end, they established a working group that would outline a proposal based on the following

principles: (1) the new tribunal would be linked to the domestic court's systems in order to preserve the separation of powers; (2) the implementation of the new tribunal would be progressive, including a stage in which it would work as an *ad hoc* tribunal; (3) the other branches of the Mercosur Member States' governments would be consulted, as well as Mercosur Parliament members.

Moreover, Member States judiciaries also decided to start a working group, created at a previous meeting, to work towards the enactment of a "Mercosur Charter of Fundamental Rights". This group would prepare a report on the central issues to be debated during the seventh meeting of the parties and would open up communication channels with those national authorities working on the human rights area. Furthermore, they decided to create another working group focused on detecting and overcoming obstacles to the approval of a common legal framework for the adoption of a shared system of arrest warrants within the Mercosur region.

2) The Ibero-American Judicial Summit[1]

The Ibero-American Judicial Summit is, above all, an organization for the cooperation, agreement and exchange of experiences among the highest instances of Ibero-American judiciaries.

Its ultimate goal is "the adoption of coordinated projects and actions, based on the conviction that a shared cultural heritage constitutes an exceptionally valuable instrument for strengthening the Judiciary and, by extension, democracy, while maintaining a necessary respect for difference". The Summit seeks to strengthen the rule of law by improving the administration of justice.

Some of the most relevant results achieved by the Summit are:

- The adoption of the Statute of the Ibero-American Judge, which aspires to be the paradigm or benchmark for identifying the values, principles, institutions, processes and minimum resources needed to guarantee judicial independence, and the role of judges in a democratic society, as well as to encourage the efforts made by the judiciaries of the region in this area.
- The approval of the Ibero-American Model Code for Judicial Ethics, designed as a reference guide for professional ethics.
- The creation of the Ibero-American Commission of Judicial Ethics, which is responsible not only for contributing to strengthen Ibero-American judges' ethical awareness, but also for giving advise to the various judiciaries and even to the summit itself on ethical issues, as well as for enabling the dissemination and development of judicial ethics through a variety of activities and publications.
- The establishment and maintenance of the Ibero-American Classroom, which is a training program for Ibero-American judges aimed at:

  - sharing experience in judicial training with the Ibero-American legal community;

  - providing a framework for academic meetings of Spanish and Ibero-American judges and senior judges, that would serve as a reference to the various areas related to the exercise of the jurisdictional function;

  - creating an Ibero-American judicial community to enable the exchange of experiences, information and research projects;

[1] www.cumbrejudicial.org.

- creating the Ibero-American Judicial Information and Documentation Network (IberIUS), designed as a mutual-assistance forum for Ibero-American judicial information and documentation centres;

- creating the Ibero-American Judicial Schools Network (RIAEJ, standing for its name in Spanish), originally constituted as a link-up community for the cooperation, agreement and reciprocal support among Ibero-American judicial schools and public judicial training centres to contribute to the exchange of information on judicial training systems, methodologies and programs;

- implementing the Ibero-American Virtual Judicial Training Centre, created by the 6th Ibero-American Summit of Presidents of Supreme Courts and Tribunals of Justice, held in the Canary Islands in May 2001, initially designed as an instrument for reinforcing the judiciary, providing judicial schools with an instrument for giving consistent, effective training to Ibero-American judges through avant-garde technology distance learning programs. Thus, judicial schools may overcome significant limitations associated with in-class education programs;

- implementing an Ibero-American Judicial Assistance Network (in Spanish, the IberRed), designed as an instrument for international judicial assistance and as a fundamental step towards the establishment of an Ibero-American Judicial Area, the latter understood as a "specific scenario on which judicial cooperation is the result of reinforced mechanisms, dynamics and instruments for certification and improvement which, without affecting the jurisdiction of the legislative and executive powers of the represented States, enables an appropriate activity that meets the requirements of the process by which it is produced as an essential condition for obtaining effective judicial protection";

- creating the Ibero-American Judicial Information System, aimed at providing institutions and citizens permanent access to information for them to gain mutual knowledge of the structural, organizational, legislative and most essential descriptive aspects of their respective judicial systems, and at confirming and documenting the progress and success achieved by our respective systems in the implementation of the projects, declarations, actions and commitments assumed throughout the different editions of this project having resulted in the recent publication of the Ibero-American Judicial Map and the Experiences Board;

- passing the E-justice project, which seeks to support the incorporation of new technologies into jurisdictional activities;

- completing comparative studies on our fundamental institutions;

- passing the "Rules of Brasilia on Access to Justice by Vulnerable Individuals", which contain the bases for reflection and lines of action primarily directed at the public authorities so that they can foster the development of public policies that guarantee such access as well as the accessibility to all the judicial servers and operators in order to ensure that they assist vulnerable people in a way that is appropriate to their particular circumstances. A monitoring commission has been set up to assess the effectiveness of these rules.

3) The Conference of Supreme Courts of the Americas

The Organization of Supreme Courts of the Americas was founded, by means of its Charter, on October 26, 1995. Its fundamental objectives are to be accomplished through specific activities, including: serving as a permanent link between the judicial systems of the Americas and promoting international judicial cooperation in the Hemisphere, by supporting judicial education programs, sharing information, and promoting regional technical assistance to judiciaries.

Last year, the Supreme Courts of the Americas met in Buenos Aires to talk about the role of judiciaries and about how the Courts in the Americas work to protect and promote the rule of law. This meeting was a continuation of the one organized in 1995 by the Supreme Court of the United States. Its main purpose was to discuss how the judiciaries were working from an institutional point of view, and what we, as public servants, could do for our countries and for our region. I think the major significance of this meeting lies in the fact that it gave us an opportunity to listen to and to learn from each other, enriching our understanding of the different judicial systems of the Americas.

Although on this meeting we did not directly focus on the integration process, I think we laid the foundations for future meetings where we will work to develop a common structure and organization.

4) The Inter-American Court of Human Rights

In 1994 we amended our national constitution to grant constitutional status to the specific human rights instruments mentioned in Section 75.22 “under the conditions of their applicability”. This provision has been read to mean not only the method by which Argentina approves and ratifies treaties (i.e., treaties should not be ratified with a reservation that is "incompatible with the object and purpose of the treaty"), but also the interpretative scope given to the clauses of the treaty by the international legal system.

Indeed, the American Convention on Human Rights created the Inter-American Court of Human Rights, and raised the question of what deference, if any, Argentine courts should give to its precedents.

When Argentina approved the American Convention on Human Rights (Pact of San Jose, Costa Rica) in 1984, it recognized "the jurisdiction of the Inter-American Commission on Human Rights and the jurisdiction of the Inter-American Court of Human Rights”.

In *“Giroldi, Horacio David”*, decided on April 7th, 1995, the Supreme Court unanimously held that the Constitution includes not only the treaties on human rights, but also the case-law of international tribunals, since the interpretations of those tribunals indicate the conditions under which the international instruments are “in force.” The Court pointed out that "the said case-law should serve as a guide for the interpretation of the Convention regarding how the Argentine State recognizes the Inter-American Court jurisdiction in all cases relating to the interpretation and application of the American Convention." In *“Lavado, Diego J.”*, decided on September 6th, 2006, the Supreme Court, in a unanimous decision, ordered the National State and the Province of Mendoza to submit a report on the concrete measures adopted in the case to effectively fulfill the provisional measures issued by the Inter-American Court of Human Rights. The decision of that international tribunal prompted the Supreme Court to adopt the necessary measures to guarantee the respect for the National Constitution and the international treaties.

Part II. Constitutional pluralism in "crimes against humanity" cases

1) Constitutional pluralism

Professor Poiares Maduro defines "constitutional pluralism" as a phenomenon of plurality of constitutional sources, which creates a context of potential conflicts between different constitutional orders to be solved in a non-hierarchical manner. We can distinguish between an internal pluralism, which mainly derives from the acceptance of the supremacy of the regional legislation over the national legislation, and an external pluralism, deriving from the increased communication and inter-dependence of international legal orders creating different kinds of relationships, such as legal integration[2], interpretative competition[3] and legal externalities[4].

2) The cases

I would like to present a case on "constitutional pluralism" that arose in a "crime against humanity" trial, which illustrates the relationship between the Inter-American Court of Human Rights and the Argentine Supreme Court.

As you know, between 1976 and 1983 we experienced a harsh dictatorship, under which severe violations of human rights were committed. I would like to talk, briefly, about the events concerning the bringing to justice of those responsible of such crimes, as well as about some legal issues raised by the amnesty measures of the democratic governments that followed the military rule.

The first case is *"Arancibia Clavel, Enrique Lautaro"*, decided on August 24th, 2004. The facts of the case are the following: Arancibia Clavel was accused of being involved in the car-bombing which killed the Chilean General Carlos Prats and his wife, in Buenos Aires in 1974. An Argentine federal tribunal sentenced him to life imprisonment for his participation in a criminal association. The National Court of Criminal Cassation partially reversed the lower court ruling and declared that the conviction for criminal association was barred by statutory limitations. The Supreme Court reversed this judgment and held that the behaviour of Mr. Arancibia Clavel had to be considered as a *crime against humanity* and as such, it was not time-barred. According to the Court, these activities constitute crimes against humanity since the group of which Arancibia Clavel formed part had as its purpose the persecution of Pinochet's political opponents by means of homicides, forced disappearances and torture with the acquiescence of government officials. To support this assertion, the Court's judges cited the Rome Statute of the International Criminal Court, the Convention on the Prevention and Punishment of the Crime of Genocide, the Inter-American Convention on the Forced Disappearance of Persons, and some decisions of the Inter-American Court of Human Rights. In addition, the Court stated that crimes against humanity were against the law of nations as stipulated in article 118 of Argentine National Constitution. Having established that these are crimes against humanity, the majority went on to say that the applicable law governing the statute of limitations is the 1968 United Nations' Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, which had acquired constitutional status through national law No. 25.778. The Supreme Court noted that the notion that crimes against humanity were not subject to statutory limitations had been part of customary international law even before the adoption of the 1968 Convention. Therefore, the Court concluded that holding Arrancibia Clavel criminally liable for such crimes would not

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2 Where one country participates in another legal order.

3 Where albeit the Union is not part to another legal order, it shares a similar set of norms and, possibly, jurisdiction with that legal order.

4 Where the decision taken in certain jurisdiction has a social and economic impact in another jurisdiction.

require a retroactive application of the law and thus the prohibition on irretroactivity of law would not be breached. The Argentinean State had also contributed to the formation of the customary international rule of non-applicability of the statutory limitations to the crimes against humanity in the 1960s, and in a previous case (*"Priebke"*, Fallos: 318:2148) the Supreme Court had recognized that the statute of limitations was not applicable to the right to bring a criminal action regarding other international crimes, namely genocide and war crimes. Consequently, the majority stated that the crimes for which Mr. Arancibia Clavel had been convicted were not time-barred and the right to bring the criminal action was not terminated even if the time stipulated in article 62, section 2 of the Criminal Code had elapsed.

The second important case is *"Simón, Julio Héctor"*, decided on June 14th, 2005. Julio Héctor Simón, a former federal police officer, was indicted for the crimes against humanity of illegal arrest, torture and forced disappearance of José Poblete Roa and his wife, and for the appropriation of their daughter Claudia. The couple had been detained in November 1978 and held at the "Olympus", a secret detention centre run by the federal police during the Argentinean military dictatorship. The defense of Julio Simón argued that they benefited from the immunity from prosecution established in the so-called "due obedience law" (Law No. 23.521) and "full-stop law" (Law No. 23.492).

The Supreme Court, by a majority of 7 to 1, confirmed the lower court decisions and held that the amnesty laws were null, void and unconstitutional. The majority went on to say that even if article 75, section 20 of the Constitution maintained the authority of the legislative branch to grant general amnesties, this right was subject to important limitations in its scope. In light of the fact that the "full stop" and "due obedience laws" were passed to "forget" past human rights abuses, they are in flagrant contradiction with the provisions of the American Convention on Human Rights and the International Covenant on Civil and Political Rights (article 75, section 22 of the Constitution). The majority also based its decision on the rulings of the Inter-American Court of Human Rights, in particular, in the *Barrios Altos v. Perú* case, in which it held that "all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law" (Inter-American Court on Human Rights, *Barrios Altos v. Perú*, March 14th, 2001, Series C, N° 75, para. 41). The majority stated that the Inter-American Court's interpretation was fully applicable to the circumstances of the Argentinean amnesty laws. Thus, the majority reiterated that Argentina could invoke neither the prohibition of retroactivity of criminal laws nor the *res judicata* to escape its duty to prosecute grave violations of human rights.

The third important case is *"Mazzeo, Julio"*[5], decided on July 2007. Santiago Omar Riveros, a high-ranking commander during the 1976 Argentinean military dictatorship, known for his harsh direction of the army's clandestine detention centre "Campo de Mayo", was accused by a federal judge of San Martín (Province of Buenos Aires) for his participation in 14 killings and 20 cases of torture at army institutes under his command. He was later acquitted, the acquittal having been confirmed by the Court of Appeals of San Martín on the grounds that he had been pardoned by Presidential decree No. 1002 of 1989. Seventeen years later, a group of people under the representation of the Argentine League for Human Rights filed a petition to the federal judge of San Martín asking him to declare the Presidential pardon unconstitutional and thus to cancel the acquittal of Riveros. The federal judge accepted the petition and held decree 1002/1989 unconstitutional.

[5] "Mazzeo, Julio Lilo y otros s/ rec. de casación e inconstitucionalidad –Riveros", Fallos: 330:3248.

The Supreme Court, in a 4 to 2 decision (with one abstention) held that Riveros could be tried for illegal abductions, torture and killings of dissidents during the military dictatorship, as the presidential pardon (decree 1002/89) that had acquitted him was unconstitutional. The majority highlighted that both international human rights law and international humanitarian law prescribe the obligation of all the international community to "prosecute", "investigate" and "adequately punish those responsible" of committing crimes against humanity. The majority went on to say that in the case under analysis it was necessary to declare the unconstitutionality of the presidential pardon to authors and participants in crimes against humanity since that government act inevitably carries with it the renunciation of the truth, of the investigation of the facts, of the identification of their authors and of the availability of effective remedies to combat impunity.

The presidential pardon power is embodied in article 99, section 5 of the National Constitution, but it is designed to remedy judicial errors and to mitigate punishment. However, in the case of crimes against humanity, it is not possible to consider any discretionary decision of any of the governmental brances in light of the international obligation to investigate. These types of conclusions were also arrived at by the Inter-American Court in *Barrios Altos* and ratified in *Almonacid*. In the latter decision, the Inter-American Court held that a judgment rendered in the foregoing circumstances produces an "apparent" or "fraudulent" *res judicata* case.

In light of the aforementioned considerations, the Court declared the unconstitutionality of Presidential Decree No. 1002/89 that pardoned the appellant in that case, as going against articles 18, 31, 75, sect. 22, 99, sect. 5, and 118 of the National Constitution; 1, 8.4 and 25 of the American Convention on Human Rights; and 14.7 of the International Covenant and Civil and Political Rights.

3) Plurality of legal sources

These cases having been taken into account, a plurality of sources can be identified:

- the Rome Statute of the International Criminal Court,
- the Convention on the Prevention and Punishment of the Crime of Genocide,
- the United Nations' Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity,
- the International Covenant on Civil and Political Rights,
- the law of nations,
- the Inter-American Convention on the Forced Disappearance of Persons,
- the decisions of the Inter-American Court of Human Rights,
- the National Constitution,
- case-law of the Supreme Court, and
- the American Convention on Human Rights.

This is a nice picture of what "constitutional pluralism" really means: the Court needs to decide a case based on different national and international legal sources, which are often in a non hierarchical order.

In other times, the rationality of the legal system was an "a priori" matter, defined Congress. In our times, it is a "a posteriori" matter, set by a judge, on a case-by-case basis.

All in all, when faced with a case, dialogue between sources of law is the real challenge of the judicial decision.

Author contacts:

Ricardo Lorenzetti

Email: rlorenzetti@csjn.gov.ar


European
University
Institute
European University Press