

CONCURRING OPINION OF JUDGE EDUARDO VIO GROSSI
CASE OF GELMAN V. URUGUAY
JUDGMENT OF FEBRUARY 24, 2011
(Merits and Reparations)

I formulate this concurring opinion to the cited judgment, calling attention to various issues discussed in it.

The first is in relation to the close relationship between the situation of María Claudia García Iruretagoyena de Gelman and her daughter, María Macarena Gelman García, which, definitely, form a unit. In this sense, the enforced disappearance of the first, in that context, and the birth of the latter and her subsequent separation, abduction, and hand over to a third party, can be explained jointly and reciprocally. One could not have occurred without the other. Considering, in this way, the facts of the case, would lead one to also deem that which occurred to María Macarena Gelman as an enforced disappearance, and thus the clarification of those facts is also intimately linked to that which occurred to her mother, María Claudia García. In this sense, the situation at issue is one considered in Article II of the Inter-American Convention on the Forced Disappearance of Persons, upon establishing the elements of enforced disappearance of persons, to be the act of "*depriving a person or persons of his [or her] or their freedom,*" "*an absence of information on the whereabouts of that person,*" thereby "*impeding his or her remedy to the applicable legal remedies and procedural guarantees.*"¹

It should be evident, therefore, that in this case, what would be involved is the deprivation of liberty of two persons and that the lack of information about the whereabouts of one would prevent the exercise of remedies and procedural guarantees of the other. For this reason, then, both realities essentially constitute one international illegal act, although it obviously affects various rights enshrined in the Convention, and the victims of the violation of these are several persons, principally Maria Macarena Gelman and her grandfather Juan Gelman. And from there, as well, it could also be deemed that while the enforced disappearance of Maria Claudia Garcia does not come to an end, neither does that of Maria Macarena Gelman, although at the moment she is not deprived of her freedom and her identity has been established. Maybe, that which has been analyzed could have been better assessed if the judgment had stemmed from a single narration of the facts of the case presented prior to the basic foundations of law used to determine each of the corresponding violations of the relevant provisions.

A second aspect of the ruling that it is worth emphasizing is the partial acknowledgment made by the State. Indeed, that fact, which is assessed, allows for a more specific treatment of the case, since, in recognition thereof, the facts of the case could be divided into two periods. The first, includes those facts that occurred during the military dictatorship, that is, until February 1985, and the second, those

¹ Article II of the Inter-American Convention on Forced Disappearance of Persons: "*For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her remedy to the applicable legal remedies and procedural guarantees.*"

facts which have taken place since. Therefore, would acknowledgment allows for a for a distinction, providing more clarity, to the undisputed facts of the case and, therefore, deems them as proven, especially when some of them, particularly those referring to the context in which they developed in regard to Maria Claudia Garcia de Gelman and María García Macarena Gelman, are at this stage of historical development, "public and notorious facts" and therefore there is no need for them to be repeated, developed, or proven in the case. Also, it is possible that one narration of the facts in the judgment at hand, and carried out prior to the partial acknowledgment made by the State, would have made it possible to define more precisely those facts that occurred before the month where they were indicated as being effectively recognized, thereby further considering the scope of such a unilateral act.

The foregoing leads to the third observation, namely, that said acknowledgment would center the discussion around that which occurred during the democratic reign that the State has had since 1985 to date, and particularly, in regard to the application, in the case at issue and in terms of that period, of the Expiry Law. Under this perspective, it must be taken into account that, in regard to the origin of laws and their possible international unlawfulness, determined pursuant to International Law, and as a consequence, regardless of what Domestic Law provides,² the State incurs international responsibility for any fact attributable to it and that constitutes a violation of its international obligations. For said purposes, it is considered an act of the State pursuant to International Law, in particular, international custom,³ the behavior of any body of the State, be it that it exercises legislative, executive, judicial powers, or powers of any other type.⁴ From this, it is evident, as a consequence, that for an action deemed to be internationally unlawful to be attributable to the State, it merely needs to be carried out by any State body, among these, those that carry out legislative functions, to which the direct pronouncements of the citizenry related to the approval or ratification of a law could be deemed as part of these functions, and as such, that it, in the exercise of its powers, constitutes a part of the legislative body. So as to encompass more, and in what regards actions that are attributable to the State, the pertinent State body may also exercise powers of "any other type," that is, distinct from those that are executive, legislative, or judicial, which could include, among others, those that correspond to democracy.

² Article 3 of the Draft Articles prepared by the International Commission on International Law of the United Nations on State Responsibility for Internationally Wrongful Acts, encompassed in Resolution approved by the General Assembly [on the basis of the Report of the Sixth Commission (A/56/589 and Corr.1)] 56/83. State Responsibility for internationally wrongful acts, 85th plenary session, December 12, 2001, *Official Documents of the General Assembly*, Fifty-sixth Session, Supplement No. 10 and corrections (A/56/10 and Corr.1 and 2). 2 Ibid., Paras. 72 and 73. "Characterization of an act of the State as internationally wrongful. The qualification of the act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."

Article 27 Internal law and observance of treaties: *International law and the observance of treaties. A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.*"

³ Expressed in the Draft Articles Prepared for the International Law Commission of the UN on State Responsibility for Internationally Wrongful Acts.

⁴ "Article 4.1 of the same text: "The conduct of any State body shall be considered an act of that State under international law, whether the body exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as a body of the central Government or of a territorial unit of the State."

Therefore, also all of the citizenry, in the exercise of this or legislative functions, could infringe a rule of International Law, and consequently, compromise the State's international responsibility.⁵ It is for this reason that it is deemed that the mere existence of a democratic regimen does not guarantee, *per se*, the permanent respect of International Law, including the International Law of Human Rights. In this way it has been considered by the Inter-American Democratic Charter,⁶ which notes in its Article 3 that the respect for human rights is an essential element of a democratic society and in its Article 7 that it is indispensable for the effective exercise of fundamental freedoms and human rights. It also reiterates this in Article 8 that every person who believes their rights to have been violated has the right to file a complaint or petition before the Inter-American System of Human Rights, to which it only excludes, for these cases, the remedy before the political Inter-American bodies charged with defending the effective exercise of a representative democracy.

Related to the foregoing and also worth noting is the attitude assumed by the State, from June 23, 2005, of excluding this case from the application of the Expiry Law. On that day, the government of President Mr. Tabaré Vazquez informed the Supreme Court of Uruguay that the facts concerning this case were not covered by that Law, thereby allowing, the resumption of the court proceedings aimed at determining the facts and possible punishment of those responsible. Thus, this body of law ceased to be, from that date, as stated in this judgment, an obstacle. In a way that, therefore, the action of the State created a new situation where, at least in regard to this case, it stopped violating its international obligation to investigate and adjusted, for that matter, its conduct to comply with International Law; left pending, however, is the opportunity for the exercise of justice and its final resolution in the legislation.

Also, another separate observation should be considered regarding the participation of Argentina in the events in question. While it is true that the application in this in this case was filed solely in connection with the Oriental Republic of Uruguay and that, in the allegations, the Commission reiterated the foregoing, excluding said State from the suit at hand, to which the Court lacks jurisdiction over it,⁷ it is also true that international law addresses the situation where a third State has cooperated in the illicit act,⁸ to which it may have been more convenient to expressly

⁵ This would be even more evident when the norm of international law that is violated is *jus cogens*, that is, the meaning of Article 53 of the Vienna Convention on the Law of Treaties and that also includes that which is custom in the matter, imperative norms of general international law, and therefore, accepted and recognized by the international community of States as a whole as a norm where no derogation is permitted and which can only be modified by a subsequent norm of general international law having the same character.

⁶ Resolution of the General Assembly of the OAS approved on September 11, 2001.

⁷ Art 61(1) of the Convention: "1. Only the States Parties and the Commission shall have the right to submit a case to the Court."

⁸ Article 16, Draft Articles of the International Law Commission of the UN on State Responsibility for Internationally Wrongful Acts. Article 16. Aid or assistance in the commission of an internationally wrongful act. A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
- b) the act would be internationally wrongful if committed by that State."

Article 47. Plurality of responsible States. 1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

mention this circumstance in order for the corresponding institutions to take, if they deemed fit, the appropriate actions to enable the complete clarification of the facts of the case and establish responsibility that follows.

It is also important to highlight the treatment in the judgment given to the violation of the rights of María Macarena Gelman García concerning the suppression and substitution of her identity as enshrined in the Pact of San Jose. The judgment alludes to the "Right to Identity," but expressly recognizes that it is not expressly provided for in this Convention. Perhaps it is for this reason that in its operative paragraphs, the judgment does not expressly mention that the State violated this right. And although it would include the rights provided in this normative text, it also encompasses others referred to therein. The *Right to Identity* would therefore be more broad than the sum of the rights to the family, a name, a nationality, and to the rights of the child referred to by the American Convention on Human Rights.⁹ That is why the reference made by the judgment in regard to such right, should be understood precisely in relation to the function of the jurisprudence of the Court, which, as an auxiliary source of international law, does not create law, but interprets the meaning and scope established by an independent source, be it a treaty, custom, general principles of law, or unilateral legal act.¹⁰ In that sense, what is done with that reference should be understood as a catalyst for the competent bodies of the Organization of American States (OAS) or the States Parties of the Convention, if they so deem, to expressly and pursuant to the Convention enshrine and develop said law, thereby allowing that in the future and when the pertinent law is vague or in question, and is therefore susceptible to various alternative applications, the jurisprudence of the Court interpret it, establishing its true meaning and scope. In short, it must be taken into account that, in this regard, the Court need not head exclusively nor principally to its own jurisprudence, but rather to that which is established in the corresponding international law, established by a treaty, custom, general principles of law or unilateral legal acts, in force for the State Party to the case. From there, consequently, the relevance of citing and reproducing, in the judgments of the Court, the applicable rules subject to its interpretation can be concluded.

EVG.

Eduardo Vio Grossi
Judge

Pablo Saavedra Alessandri
Secretary

⁹ CJI/RES.137 (LXXI-O/07).The scope of the Right to Identity.

¹⁰ Article 38.1.d. of the Statute of the International Court of Justice." "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."