Christiane Wilke
WilkC097@newschool.edu

Of Spiders, Cogs, and Persons:
Reconstructions of Criminal Responsibility in post-authoritarian Argentina[*]

La vida no es la que uno vivió, sino la que uno recuerda y cómo la recuerda para contarla.
Gabriel García Márquez

Trials for human rights violations are often praised as vehicles for moral deliberation and collective memory.[1] In these trials, the past is summoned for pedagogical purposes: the people should learn what happened, condemn the perpetrators, solidarize with the victims, and be inspired by the stories of those who risked their lives to oppose the injustices. But how is the past portrayed in the courtrooms and in the laws that are the basis for the trials?

This paper examines the legal reconstructions of criminal responsibility for human rights violations in Argentina from 1983 to 1987. I will argue that the constructions of responsibility vacillate between three perspectives: first, an understanding of the historical record; second, the requirements of the evaluative legal concepts that are employed; and third, considerations about the appropriateness of ideas about human agency and responsibility for the project of democratic politics. The various constructions of legal responsibility were simultaneously political arguments about which conduct was "normal" during the dictatorship, and who committed "aberrant" acts that need to be accounted for in the new democracy. These reconstructions of normality facilitated a normative inclusion of those whose conduct was declared "normal," while "deviant" acts led to legal

[*] This paper is based on dissertation research in Buenos Aires, Argentina, in Summer 2004, which was supported by a Janey Summer Field Research Grant, and by a Mellon Foundation Inter-University Consortium Fellowship on Security and Humanitarian Action.
[1] See, for example, *Mark Osiel, Mass Atrocity, Collective Memory, and the Law* (New Brunswick: Transaction, 1997).

scrutiny and social disapproval. In the prosecutions of human rights violations, "the present contains and constructs past experience and future expectations."[2]

From 1983 on, Argentina's newly elected democratic President Raúl Alfonsín pursued a project of prosecuting those who were deemed responsible for the thousands of forced disappearances, murders, and abuses during the military dictatorship 1976-1983. Between 1983 and 1987, criminal responsibility for the atrocities committed in a military chain of command was redefined numerous times in different arenas. The scope of criminal responsibility was successively limited during the years examined here, prefiguring the pardons by the next President Carlos Menem in 1989. Reconstructions of responsibility were chosen and contested from three distinct perspectives: First, responsibility was constructed on the basis of the actors' understanding of the relevant facts. Which facts are relevant, in turn, is determined by the second perspective: evaluative legal and moral concepts have certain factual requirements. For example, most participants thought it was important to know whether the lower-level officers knew, or had reason to suspect, that torturing and killing detainees was illegal. The degree of the officers' knowledge matters for assessing their responsibility, although different notions of responsibility disagree on the precise relevance of such knowledge. Finally, responsibility and agency in the chain of command were constructed and contested on the basis of arguments about which notions of the human person and of human agency are appropriate for a democratic society. On the one hand, holding a large number of perpetrators responsible means excluding them and their sympathizers from "normal" society: crime is deviancy, and the decision to exculpate someone implies their normative inclusion into the polity. This might be strategically necessary even if it is morally undesirable. On the other hand, concepts of responsibility and human agency are inextricably linked to ideas about personhood that are conceptual underpinnings of political projects.

[2] Elizabeth Jelin, *State Repression and the Struggles for Memory* (London: Latin America Bureau, 2003), 4.

Responsibility and human agency are not descriptive but evaluative concepts. Responsibility is a legal or moral imputation that someone has to account for (good or bad) acts because they could have acted differently. Human agency, in turn, refers to the potentiality of acting differently. A situation is scrutinized: Could the person have recognized alternative paths of action, and could she have followed them? Was she able to make these judgments for herself, or was she inhibited by the institutional context, ideological indoctrination, tradition, temper, or other factors? Was she potentially able to judge and act differently from the way she did? Human agency is thus a construction of a space in which a person could have acted—but she didn't, otherwise we would not scrutinize the situation. The scope of this space of action is imagined on the basis of more general ideas about the human person. Are persons, for example, solely constituted by their culture and upbringing, or can they redefine themselves? Can persons judge new situations without falling back on conventional rules, and are there norms of thinking and acting that are common to all persons? Liberal, authoritarian, communitarian, and libertarian conceptions of the person will yield different conclusions about human agency, and about criminal responsibility.[3] Ideas of the human person and of human agency, in turn, determine which concepts of politics—democratic, communitarian, liberal, authoritarian—are possible to advocate. Democratic politics, for example, relies on a concept of personhood that imputes the ability to express one's preferences, and to engage in rational deliberation, contestation, and bargaining with others. As a consequence, the constructions of responsibility for past abuses have implications for the viability of certain political projects because

[3] For example, Charles Taylor gives the theory of the dialogical construction of personal identity a communitarian twist that would make him more inclined to accept the argument that ideological indoctrination and authoritarian upbringing prevented a perpetrator from developing a sense of agency that is necessary for responsibility, see Charles Taylor, *The Politics of Recognition* (Princeton: Princeton University Press, 1994), 25, 32. Seyla Benhabib, in contrast, follows the idea of a dialogical construction of personal identity but argues that persons are not reducible to "their" cultures. Thus she would be less inclined to accept the indoctrination excuse because she insists that "socialization and acculturation do not determine an individual's life story." Seyla Benhabib, *The Claims of Culture* (Princeton: Princeton University Press, 2002), 15. Writers like Jürgen Habermas and Hannah Arendt also need to presume that humans have the capacity for rational deliberation and judgment, *see* Jürgen Habermas, *Between Facts and Norms* (Cambridge: MIT Press, 1996), and Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958).

they imply or reject certain conceptions of personhood. A contrast between Hannah Arendt's construction of responsibility in the case of the Eichmann trial on the one hand, and the prosecutor's portrayal of the Argentine juntas' responsibility, on the other hand, should illustrate this point.

Spiders, Cogs, or Persons?

Hannah Arendt's account of the trial of Adolf Eichmann in Jerusalem is an influential purposeful reconstruction of human agency. Although Eichmann was, from a functional perspective, a "cog in the machine," this is not the perspective from which the court should approach him, she insists: "all the cogs in the machinery, no matter how insignificant, are in court forthwith transformed back into human beings."[4] The defendant, if he "happens to be a functionary, […] stands accused precisely because even a functionary is a human being, and it is in this capacity that he stands trial."[5] Persons, according to Arendt, have a robust agency and capability of judgment. They have to think, and they can act unpredictably. At no point should humans allow themselves to function like mechanical cogs. Once we abdicate this uniquely human agency either for ourselves or in the person of someone else, we lose what it means to be human. This construction of criminal responsibility is based on Arendt's conception of human agency and unpredictability as a necessary ingredient of political life. Other legal constructions of individual responsibility for massive crimes are strikingly different. In the accusation speech in the 1985 trial of the Argentine Military Juntas, the prosecutor Julio Strassera tells the court and the public that the homicide cases converge to a "blood-soaked map of the country":

> We have a chronological line between the points I have mentioned, the City of Buenos Aires, Las Palomitas, … once again Buenos Aires, Rosario, Chapadmalal, and so we get the piecemeal

[4] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*. [1963] (New York: Penguin, 1994), 289.
[5] Hannah Arendt, "Personal Responsibility under Dictatorship." [1964] In: Arendt, *Responsibility and Judgment*, ed. by Jerome Kohn (New York: Schocken, 2003), 30.

> impression of a gigantic spider web that was enveloping the body of the nation. A web woven by a gigantic spider which, like all spiders, had eight legs but only one single head.[6]

While Arendt is intent on converting cogs into human beings who did *not* act mechanically, Strassera converts the military commanders into the head of a gigantic spider. They were, in this image, the necessary and sufficient cause for all the homicides he is accusing them of. In the same image, however, Strassera converts the mid-level officers, the soldiers, the police officers, and all those without whom a massive campaign of violence could not have happened into the legs of this gigantic spider: they are converted not into human beings with agency, but into organic body parts of a beast—lacking independent agency, initiative, and judgment. Arendt's and Strassera's constructions are driven as much by their perceptions of the facts as by their notions of personhood and by their political concerns about distributing responsibility: Arendt dreads a world in which persons become viewed as (potential) robots, and Strassera fears the consequences of distributing blame more widely in the armed forces and society. Both accounts of responsibility are purposeful reconstructions and not literal depictions. They suggest how to think about the political present. But should we regard our fellow citizens as persons who have chosen to be cogs in a machine, or should we regard them as former legs of a spider? Can we, based on these ideas, trust them to be responsible citizens in a democratic polity, or do they need adequate supervision to function properly? None of these assumptions are unproblematic, and both imputations of agency are based on assessments about the needs of a democratic polity: for Strassera, the inclusion of the military into the democratic system is the primary task, while Arendt claims that for politics to be possible, we need to imagine humans as free and spontaneous moral actors.

Responsibility and Agency in the Chain of Command

[6] Julio Strassera, *La Acusación en el Juicio a los Juntas Militares, Causa 13/84*. Quoted from *El Diario del Juicio*, No. 20 (September 11, 1985), p. 9.

When Raúl Alfonsín, the elected President, took office on December 10, 1983, he was committed to prosecuting those who were responsible for the atrocities of the preceding years. But who was responsible, and for which acts? Before responsibility could be meaningfully assigned, a basic stock of commonly recognized facts about the forced disappearances since the coup in March 1976 was necessary because the crimes were committed in secret, and those who denounced them were often discredited as unpatriotic. In 1984, the *National Commission on the Disappearances of Persons* (CONADEP), issued its final report. CONDAEP identified 8960 cases of forced disappearances, 62% of which had taken place in the apartments of the victims before witnesses.[7] The CONADEP report legitimized the path of prosecutions because it clarified the magnitude of the crimes, debunked the justificatory myths by the armed forces, and provided significant documentary evidence for prosecutions.

The scale of the abuses supported the case for prosecutions insofar as the crimes were clearly systematic and widespread, so that they could not be the work of a few wayward junior officers. Yet the large numbers of perpetrators as well as their social positions posed problems for conceptualizing criminal responsibility: most of the abuses were committed by the armed forces, including the police. The institutional ethos of these tightly hierarchical institutions provided two sets of answers to the question of responsibility. First, the superior commanders have the responsibility for everything that was done or omitted by their troops, while lower-level officers are expected to obey the orders they receive and can therefore not be held responsible. And second, criminal investigations of "acts of service" would be considered attacks on the dignity of the entire institution. These two lines – responsibility located at the top, and institutional cohesion– dominated the military's responses to the demands of moral and legal accountability. The institutional cohesion had been fostered during the dictatorship by rotating the officers between assignments—so that

[7] CONADEP, *Nunca Más: Informe de la Comisión Nacional Sobre la Desaparición de Personas* (Buenos Aires: Eudeba, 1985), 16-7.

almost every active duty officer had participated in disappearances, torture, and murder. Distinguishing officers who had committed crimes from those who had not would thus be hard because of the number of crimes, because they would plead obedience to orders, and because the members armed forces would practice institutional solidarity. In addition, the military still held enormous political influence. Several small-scale military rebellions in reaction to the prosecution of officers between 1987 and 1989 attest to the military's institutional cohesion and defiance.

President Alfonsín and his advisors on the prosecutions issue—the legal philosophers Carlos Nino and Jaime Malamud Goti—conceptualized different gradations of responsibility for the disappearances, tortures, and killings as follows:

> It is necessary to develop a juridical articulation of the distinction between three degrees of responsibility of those who participated in the repression of supposed terrorists by criminal methods: (a) the responsibility of those who devised and organized the illegal repression, gave the orders and induced compliance with them; (b) the responsibility of those who went beyond the given orders and committed additional crimes, often motivated by cruelty, perversion, or personal gain; and, (c) the responsibility of those who strictly complied with the orders they received in a general context of mistakes and coercion, which led them to believe that what they did was legitimate and that they have to obey the orders that are given, or else suffer grave consequences.[8]

Three groups of actors are distinguished on the basis of conceptual inference: those who gave orders, those who exceeded orders, especially for personal motives, and those (the great majority) who followed orders. Responsibility is concentrated on those who gave orders and those who acted beyond given orders—the two numerically smallest groups:

> Impunity for those who are included in categories (a) and (b) is absolutely unacceptable, given that this would imply a severe ethical failure and an set a precedent that is extraordinarily dangerous for the future in showing the inequality in threats of punishment and in impeding the disarmament of this terrible repressive organization established in those years.[9]

The largest group of perpetrators, those who "simply" obeyed orders, is exempted from the prosecutions. Why is this the case? Does the government want to legitimize obedience as social

[8] Carlos Nino and Jaime Malamud Goti, "Memorándum: La responsabilidad jurídica en la represión del terrorismo." Reprinted in: Horacio Verbitsky, *Civiles y militares: memoria secreta de la transición* (Buenos Aires: Sudamericana, 2003), 265.
[9] *Ibid.*

virtue? Or does is the empirical normality of torture on demand recognized and converted into a moral normality that does not need to be justified?

If Everybody Does It, Is It Normal?

Carlos Nino and Jaime Malamud Goti acknowledge that the criminal codes do not stipulate that "obedience" is legally "due" to orders if the content of these orders is the commission of "extremely aberrant acts such as torture."[10] Thus, obedience is a virtue with limits. Obedience is not "due" to orders whose content deviates from the standard normative framework. But does this reasoning hold when the moral abnormality of torture is an empirical normality? During 1976-1982, torture might have been "aberrant" in a normative sense, but it was empirically normal in the clandestine detention centers. Should the distinction between legitimate and illegitimate orders be made according to *normative*—legal or moral—standards, or should it be guided by how widespread certain acts were *in practice*? Where is the line between normal conduct that does not need to be justified, on the one hand, and "aberrant" acts for which accountability is demanded, on the other hand? The construction of normality is an exercise in inclusion and exclusion: the "normal" is beyond justification, only the "deviant," "aberrant," or "abnormal" is highlighted and calls for a justification.[11] This scrutiny separates the authors of "aberrant" acts from the community of those whose actions are "normal" and who can therefore claim to speak for society at large: the boundaries of normality serve to isolate and exclude those who are placed outside. This mechanism exists for social norms as well as for legal norms: "crimes" are acts that are defined as normatively deviant, and they are assumed to be empirically deviant as well. Only the authors of acts that are reclassified as "deviant" or "aberrant" will have to account for them in court. Yet when empirical

[10] *Ibid.*
[11] For an initial exploration of the use of assertions of normality in post-authoritarian settings, see Lothar Fritze, *Die Gegenwart des Vergangenen* (Weimar: Böhlau Verlag, 1997), 50-51.

norms diverge from legal and moral standards, as they did in Argentina during the dictatorship, those who seek to define responsibility face a dilemma: they can argue for the application of norms that had social validity in order to ground the construction of a moral normality on the perception of an empirical normality. This strategy scales back on the moral demands, but it can assure wider acceptance because it is built on many people's actual ethical choices. This is the strategy that Carlos Nino advocates and that was primarily pursued by the Argentine government: if everybody did it, no one will be prosecuted for it[12] Or, those who elaborate the standards of responsibility can argue that the actual conduct of most persons is no excuse for the conduct of each individual who committed reprehensible acts. This argument demands "thinking without banisters" (Arendt) regardless of what others do. It refuses to lower the standards, but in doing so, it is open to the charge of "epistemic moral elitism"[13] precisely because thinking without banisters means not grounding judgments in the ethical decisions of other persons in the same situation. This is the ethical dimension of the dilemma, which also has a concrete political dimension: the dimension of exclusion. The more active duty officers are placed outside the realm of "normal conduct" and have to answer to civilian courts, the more would the military threaten to bring an end to the democratic rule that is the necessary precondition for *any* kind of accountability. In order to make the offer of inclusion into the new order to a large sector of the military, President Alfonsín chose to draw the line between prosecutions and impunity largely on the basis of empirical normality. The drafters of the presidential proposal therefore argue that in this "exceptional situation" of intense indoctrination, the excuses of mistake about the legitimacy of orders, due obedience, and coercion might have a wider applicability than usual.[14]

[12] See Nino, *Radical Evil on Trial*, 70-71, 132-3.
[13] Nino, *Radical Evil on Trial*, 132.
[14] Nino and Malamud, *Memorándum*, 266. Also see Nino, *Radical Evil on Trial*, 64.

The limitation of punishment to "exceptional" cases was not meant to suggest that abduction, murder, and torture were normatively acceptable as long as they were committed in strict compliance with orders. Carlos Nino states that this limitation of criminal responsibility was based on the need for inclusion, and not intended as an expression of approval: "no judgment was made concerning legality—all had engaged in illegal conduct, but prudential considerations led to the limiting of punishment to some."[15] Still, the distinction between those who exceeded orders (and were therefore culpable) and those who had complied with orders (and were therefore immune from punishment) conveyed the message that "due obedience" can trump the prohibition on torture.

The legislative proposal emanating from this executive project read: "it will be presumed, unless there is evidence to the contrary, that [the person] acted on the basis of an inevitable [*insalvable*] mistake about the legitimacy of the orders they received."[16] Thus, officers inability to "judge by themselves" (Arendt) was not offered as a possible excuse, but it was imputed to the officers and could only be rebutted by the prosecution. The proposal underwent significant changes before becoming a law: First, the force of the presumption in favor of due obedience was softened: it no longer read: "it *will* be presumed," but: "it *may* be presumed." More significantly, Senator Elías Sapag, who had a relative who disappeared, proposed to exclude "atrocious and abhorrent acts" from the scope of a possible due obedience defense. This change steers the construction of responsibility away from the President's attempt to collapse facts and norms into a broad due obedience stipulation. Given the high number of "atrocious and aberrant acts" in the universe of acts to be judged, Sapag's amendment had disabled the due obedience defense for all practical purposes. The clause in the Law 23.049 finally read:

[15] Nino, *Radical Evil on Trial*, 64.
[16] Proyecto de Ley, December 13, 1985. Reprinted in Verbitsky, *Civiles y militares*, 269.

> it may be presumed, unless there is evidence to the contrary, that [the person] acted on the basis of an inevitable [*insalvable*] mistake about the legitimacy of the orders they received, unless they consisted in the commission of atrocious or aberrant acts.[17]

Carlos Nino reportedly turned pale when the amendment was announced.[18] He knew that his formulation covered the due obedience defense for a great number of acts that are rightly called aberrant and atrocious. The new formulation defeated the executive project of limiting the trials to a carefully circumscribed group of decision makers and sadists:

> Immediately, human rights groups, left-wing groups, and the members of the military responsible for the worst deeds but desiring solidarity among all members of the military, argued that every crime could be considered atrocious and abhorrent. Could anybody deny that the kidnapping of unarmed civilians, detention of civilians in clandestine places, and the torture and murder of civilians were atrocious and abhorrent acts?[19]

In short, the demand that all those who had committed acts of a certain moral quality be prosecuted had superseded the demand to limit the trials to a small number of perpetrators.

The Trial of the Juntas

Meanwhile, the trial of the three military juntas—each of them composed of the then commanders in chiefs of the Army, the Navy, and the Air Force—provided another opportunity to re-evaluate the military's campaign against the country's citizens during the dictatorship. The prosecution of the members of the self-appointed supreme legislative and executive authority favors a reconstruction of the chain of command that distributes virtually all agency and responsibility at the top. Given the government's stated commitment to locating the responsibility for a large number of abuses in a small number of persons, it was predictable that the prosecution would propose to portray the juntas as the sole source of decisions leading to the disappearances. In this, the prosecution could rely on the institutional ethos of the Argentine armed forces. The Army's

[17] Law 23.049, Article 11, reprinted in Verbitsky, *Civiles y militares*, 273.
[18] *See* Nino, *Radical Evil on Trial*, 75.
[19] Nino, *Radical Evil on Trial*, 75.

Code of Conduct, for example, states that the commander in chief of the Army is the only one responsible for what the troops do or omit to do. Further, "Love of Responsibility has to be among the qualities of the commander."[20] The armed forces themselves understood the low-ranking officials to lack agency and independent judgment by virtue of their position within the institution.

The prosecution blamed the junta members for each disappearance and murder that took place while they were in office, the lack of a clear central order to this effect notwithstanding. This imputes responsibility on the basis of simply having been in office. A typical case makes this connection:

> Cases 479 and 480: Daniel Victor Antokoletz and his wife Liliana Andres are abducted on November 10, 1976, in his law practice in Guatemala Street No. 4860, 6th floor, City of Buenos Aires. They were brought to the Navy School of the Mechanics in one of the usual task force operations. The woman remained in this place for only one week, during which she heard the screams of her husband, which were caused by the tortures he suffered. At that time it was recognized that his extreme dangerousness lies in being an ideologue of the subversion in virtue of defending political prisoners. She was later freed and never saw her husband again, as is affirmed in the deposition No. 1386 of the CONADEP and the files of the case 12.703 of the Federal Court No. 2. The following wrong statements were produced by the government: [*list of documents*]
> For the aggravated deprivation of liberty of Liliana Andres and Daniel Antokoletz, the torture of the latter, and the eight falsifications in public documents corresponding to the dates at which they were members of the junta: the responsible are Videla, Massera, and Agosti; for the falsifications in public documents that correspond to their dates are responsible Viola, Massera and Agosti, for the crime of covering up the deprivation of liberty are responsible: Graffigna, Galtieri, Anaya, and Lami Dozo.[21]

There is no account of the elements in the chain of command that would connect Videla, Massera and Agosti to these two disappearances. The argument is made in a more general way: The juntas presided over the state like a mafia boss presides over a criminal organization. All criminal acts committed by the organization "are the inexorable consequence of a decision taken by the superior instances."[22] The control of the act (*dominio del hecho*) "is not given through the mere control

[20] Quoted from La Acusación, *El Diario del Juicio*, No. 21 (October 15, 1985), 1.
[21] Luis Moreno Ocampo, La Acusación, *El Diario del Juicio*, No. 20 (October 8, 1985), p.16.
[22] Julio Strassera, La Acusación, *El Diario del Juicio*, No. 21 (October 15, 1985), 2.

of the will of a third person, but through the operation of a power structure where the will of the third person is insignificant."[23] Further:

> The decision coming from the center of power produces the annihilation of the victim targeted by the order with the same inevitable certainty as would be the case using a mechanical apparatus. This is the case because between the decision and the annihilation of the victim there is no human will that could change the course of the decision that was taken, with the exception of the will of the person who operates the apparatus.[24]

As an ex post facto description of the presumed operation of the State under the juntas, this account could imply different conclusions about the responsibility of the lower-ranking officers. One the one hand, we could take this account as a functional description: in fact no single human will has intervened between the orders and the thousands of disappearances. In this reading, the functioning of the state like a gigantic machine does not necessarily permit an exculpation of those who allowed themselves to become cogs in this machine. On the other hand, this account could be read to mean that no single human will *could* have intervened. Thus, all the "cogs" were functionally and legally insignificant because they lacked agency, and are therefore excused from wrongdoing. The legal theory on which the prosecution was based did not necessarily preclude the independent responsibility of lower-level officers, but in light of the prior discourses of due obedience and ideological indoctrination, the description of the state as a machine (or a spider) lends credence to a model of responsibility that sees the lower-level officers as mechanical executors of criminal orders.

The Federal Appeals Court convicted five of the nine commanders for illegal deprivations of liberty, homicides, and other crimes. In addition, the court specifically ordered "to bring this sentence and relevant parts of the proceedings to the knowledge of the Supreme Council of the Armed Forces, so the high officers who during the fight against subversion occupied the commandos of the zones and sub-zones, and all those who had operative responsibility in the

[23] *Ibid.*
[24] *Ibid.*

actions, can be tried."[25] The Court did not think that responsibility at the top of the chain of command precludes responsibility and agency further down the chain of command, but it limits the suggestion for prosecutions to certain ranks within the armed forces. This mandate was frequently invoked in later trials. It is unclear how many trials of military officers were initiated with the backing of "The Decision" in the junta trial and the virtual insignificance of the due obedience excuse in the Law 23.049. Wide sectors of society thought that lower-level officers should be held accountable in order to discount the persistent references to the "heroic" acts of the armed forces, and to clarify the proper role of obedience in a democratic context. But, maybe more importantly, the families and friends of many of the disappeared persons still had no knowledge about their fate, or about whether, when, why, and where they died. Trials, they hoped, would force the armed forces to divulge some of the information they were yearning for.

Due Obedience in the ESMA

One of the most prominent cases covered the disappearances, tortures, and assassinations by personnel of the *Navy School of the Mechanics* (ESMA) in Buenos Aires. About 5000 detainees passed though this center, and only few returned home. Many detainees were dumped from helicopters into the Rio de la Plata. The navy generals who were questioned in the *Causa ESMA* mostly denied that the ESMA even was a detention center. They gladly took responsibility for the "operations" but denied the disappearances of persons. From 1983 to 1986, the *Causa ESMA* was handled mainly by military courts, which were not inclined to judge their fellow officers for "acts of service." When the *Causa ESMA* and various similar cases were transferred to civilian jurisdiction, military officers had to appear before civilian courts, and the military grew increasingly defiant and confrontational. The government, which had not abandoned its original prosecutions plan that concentrated on

[25] Cámara Federal de Apelaciones de lo Criminal y Correccional de la Capital Federal, *La Sentencia en la causa 13/84*. Vol. II. (Buenos Aires: Imprenta de Congreso, 1987), 865-6.

prosecuting those at the top and not the lower-level officers, tried to calm the situation by passing two laws. Both laws established tight deadlines for the trials in order to limit the strain of the prosecutions on the armed forces.

The second law, aptly called *Due Obedience Law*, was passed in June 1987 and once again modified the legal conceptualization of due obedience: Now officers below a certain rank "are not punishable" for the crimes committed in fighting so-called subversion, "because they have acted under due obedience." Officers who were commanders in chief, or had the commando of a zone, sub-zone, or a security force, the police, or a prison unit, are subject to a judicial proceeding in order to establish whether they possessed "decision-making capacity" or "participated in the elaboration of orders." Those who are included in the benefits of this new due obedience norm are presumed to "have acted in a state of coercion and subordination to the higher authorities" and, in implementing orders, did not have the "capacity or possibility of examining these orders for their legitimacy, or of opposing or resisting them." These presumptions do not apply to the crimes of abduction of minors, rape, and robbery of real estate by means of extortion. In comparison to murder, manslaughter, and the illegal deprivations of liberty that were covered by this backdoor amnesty, these are not "atrocious and aberrant" to a degree that would justify the presumption that they could not legitimately be committed in the line of duty—while murder, for example, could be an "act of service." On the other hand, the crimes that were excluded from the due obedience defense were not committed as frequently as, for example, abductions and deprivations of liberty. This new line between punishable and legally acceptable conduct is accordingly not based on a moral hierarchy of legal goods, but on the goal of limiting prosecutions to a small number of "aberrant" officers.[26] The *Due Obedience Law* returns to an inflexible imputation of cognitive incapacity for the great majority of those who had abducted, killed, and tortured with their own hands, as well as their supervisors who

[26] Law 23.521, quoted from Marcelo Sancinetti, *Derechos Humanos en la Argentina Postdictorial* (Buenos Aires: Lerner editores, 1988), 288.

chose the tactics and selected the victims. This re-conceptualization of due obedience and human agency in the military was driven by a particular interpretation of the needs of the new democracy. The legal presumption that the lower-level officers did not possess agency when they acted serves to include them among the community of those who had done nothing legally offensive.

The arguments for these new conceptualizations are tested by parties in the *ESMA Case*. At stake was whether the defendants who occupied lower positions in the military hierarchy would be excused on the basis of the *due obedience* imputation. Alicia Oliveira, a lawyer representing former detainees and relatives of disappeared, asks the courts to declare the *Law of Due Obedience* unconstitutional. This law, she says:

> puts the notion of "passive or blind obedience" into operation and converts officers, sub-officers, and soldiers of our armed forces and security forces into automates determined to "comply with every order, however exorbitant it may seem." This acceptance is ontologically and ethically improper in a democratic regime.
> […] It is obvious that behind the supposed state of ignorance or of irresistible physical force, [this law] penetrates irreversibly into the concept of the intelligent free will, a human will that can incur errors concerning its objects or concerning the legality of its action, or can suffer a restriction of its area of self-determination, but it still differs from the mere fact of nature and marks the difference between the subject that perceives and the reality that transcends it. *Article 1 of this law denies the human quality to certain citizens, [and] subtracts them from the realm of criminal law*.[27]

In addition, Oliveira argues, the law is inconsistent: it assumes that an officer is acting under conditions that make him responsible when he abducted a child and gave it to third persons, but at the same time and place, the officer is assumed not to possess the cognitive prerequisites for responsibility when he abducted adult persons.[28] Allowing the due obedience defense for crimes against the highest juridical goods—human life, dignity, and integrity—but not for lesser offenses implies a "distortion of the hierarchy of juridical goods."[29] Oliveira argues that this conceptualization of responsibility is not only at odds with the facts about the events known so far, but it is also a

[27] Alicia Oliveira, *Plantea Inconstitucionalidad*, June 12, 1987. *Causa 761 E.S.M.A.*, p. 4314. My emphasis.
[28] *Ibid.*, 4316.
[29] *Ibid.*, 4316.

concept of obedience that a democratic society cannot live with—neither in relationship to the past nor to the present.

The government's reply to this position came in the form of a legal brief by Jaime Malamud Goti, who was the Solicitor General in the Supreme Court at that time. His defense of the *Due Obedience Law* uses similar types of arguments as Oliveira does. While Oliveira argues that a notion of blind obedience as the one stipulated in the Law is incompatible with a democratic society, Malamud Goti replies that criminal law in a democratic society requires that only those who actually possessed agency can be blamed for wrongdoing; the formal ascription of responsibility based on someone's position in a hierarchical organization is incompatible with the same liberal and democratic principles that Alicia Oliveira invokes.[30] This does not explain, however, why a wide due obedience defense needs to be a legal presumption rather than an available defense that can be examined by judges in light of the facts before them, and why cognitive incapacity is imputed on the basis of the offenders' ranks and positions in the armed forces. In order to explain the codification of the limitation of responsibility, Malamud Goti stresses the prudential reasons on which the law was based:

> One should not ignore the fact that the crimes that have occurred are of an exceptional seriousness, and that a wide sector of our society is involved in them through action or omission, directly or indirectly. These facts oblige the law to ensure that only the most responsible persons are judged, leading to this situation that some citizens today wrongly consider an abdication of justice, but which is in reality the most efficient way of achieving the strengthening of the institutions that guarantee the conciliation and liberty of the Argentine citizens. This should be acknowledged as the highest pursuit of this ideal of justice that is so frequently invoked in the writings of the appellants.[31]

A barely veiled hint that the continued existence of the democracy in the face of military threats is the most important precondition achieving ideals of justice is mixed with the concern that starting too many trials might not only achieve little but also lead to a military backlash. The

[30] Jaime Malamud Goti, [no title], December 24, 1987. *Causa 761 E.S.M.A.*, p. 4734.
[31] Ibid., 4733-4.

arguments for and against the *Due Obedience Law* made strategic use of legal concepts and disagreed about the appropriateness of certain assumptions about human agency for democratic politics. The two sides did not disagree, however, about the need to construct responsibility for past human rights violations through the lens of contemporary political needs.

Conclusion

Between 1983 and 1987, the concepts of criminal responsibility and human agency in a chain of command were re-configured several times. The ways in which the due obedience norms were shaped, as well as the arguments made for and against them, suggest that the definition of "due obedience" was as much concerned with the role of the military and the compatibility of concepts of obedience in the new democratic regime as it was with the facts found in the cases. Especially the practice of imputing a lack of agency due to coercion or mistakes about the legitimacy of norms for an entire class of offenders—instead of leaving the appreciation to the judges in each case—demonstrates that disagreements about the definitions of responsibility and agency were based on general disagreements about human agency in society and politics, and about the past and present role of the military.

The sheer scale of the atrocities produced brought immense problems for the task of judging and evaluating: acts that were widely considered worthy of punishment were also committed so frequently that the armed forces could claim they were "normal." Paradoxically, the armed forces and the human rights organizations sometimes agreed that most acts under scrutiny were "atrocious and abhorrent": the armed forces used this to argue that no one should be held responsible, and the

human rights organizations came to the opposite conclusion that, as the popular chant said: "there were no mistakes, there were no excesses, they are all assassins, the militaries of the *Proceso*."[32]

Given the magnitude of the atrocities committed by the dictatorship, those who favored prosecutions agreed that some acts that were unjust must nevertheless be considered "normal" in the extreme context and should not be prosecuted. But different actors disagreed where to draw the line of presumed normality. The two main options were: Either being guided by moral and legal standards: which acts are so "atrocious and aberrant" that they have to be prosecuted and obedience cannot be invoked to justify them? Or, having the numbers of crimes guide the decision which crimes are rare enough and severe enough to warrant judicial punishment. Over the course of the years examined here, the need to integrate the large majority of the armed forces into the democratic system was increasingly seen as paramount. This concern led to the prosecution of only few perpetrators in high positions.

Those involved in the trials and prosecutions articulated their standards on the basis of their interpretation of the political past, seen through the lens of evaluative legal concepts, and with a view to the needs of normative inclusion and exclusion in contemporary politics. Thus, arguments about responsibility for past human rights violations are, to a considerable degree, arguments about the political present. The actors put history to use for their present purposes not in order to strain or twist it, but to apply the lessons they derive from past injustices. These lessons might vary across different groups, but they all use history, as Friedrich Nietzsche has recommended, for the purpose of contemporary life.[33] The judicial reconstructions of responsibility—whether they be converting the cogs of a machine back into humans, as Hannah Arendt proposes, or converting military officers into the legs of a spider whose head carries all the responsibility, as Julio Strassera seems to suggest

---

[32] *Proceso* is short for *Proceso de Reorganización Nacional* (*Process of National Reorganization*), the term that the juntas had given their attempt to change the country forever.

[33] Friedrich Nietzsche,"Vom Nutzen und Nachteil der Historie für das Leben." (Unzeitgemäße Betrachtungen, Nr. 2) *Kritische Gesamtausgabe*, ed. by Giorgio Colli and Mazzino Montinari (Berlin & New York: Walter de Gruyter, 1972), 241.

at one point—not merely legal judgments but also perspectives on the political past through the lens of the political present.