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**Regarding *Simón y otros*:
Accountability in Argentina
and
International Human Rights as Domestic Positive Law**

*Gaspar Forteza**

INTRODUCTION

Twenty-five years ago, a man, a woman, and their infant daughter were abducted by paramilitary forces from their home in Argentina. The man and woman were taken for interrogation to an infamous clandestine military installation known as “*El Olympos*,” where they were separated from their daughter. More than twenty years later, the man’s mother learned that her now adult granddaughter was living under an assumed identity as the daughter of a military official. The fate of the man and woman is still unknown and they are presumed murdered—as such, they are “disappeared.” Occurrences such as this were unfortunately not uncommon during the previous military dictatorship of Argentina.

Conservative estimates place the number of forced disappearances during the military regime that controlled the Argentinean government during 1976-1983 between 10,000 and 15,000 persons.¹ Shortly after the end of military rule in 1983, the Argentinean National Congress passed legislation that effectively amnestied many persons who allegedly committed human rights violations such as torture, extra-judicial killing, and forced disappearance. This legislation took the

* J.D., May 2007, Florida International University College of Law; B.A. 2003 English and History, University of Miami. I would like to thank the following, without whom writing this comment would have been little more than an exercise in futility: My adoring and patient wife Radia, who never minded the desk light on at 4 AM and was always willing to hear me ramble; Prof. Jorge Esquirol, for mentoring me, and showing me the smokes and mirrors of Latin American law; Prof. Andrew McClurg, for his encouragement, guidance, and his friendship; my family, for offering their unique and passionate perspectives on this subject; and to Argentina herself, my beautiful homeland—I still believe in you.

¹ Department of State Country Reports for 2002, Argentina, <http://www.state.gov/drl/rls/hrrpt/2002/18317.htm> (last visited Nov. 22, 2005).

form of two laws known as the Law of Due Obedience and the Full Stop Law.²

Argentina has seen few legal issues as contentiously debated as these two laws of amnesty during the last two decades. Nonetheless, these contentions are now definitively resolved. In 2001, Judge Gabriel Cavallo, sitting at the Buenos Aires Federal Court, declared the amnesty legislation unconstitutional—a declaration that allows even those that have previously benefited from the laws to be prosecuted. In 2005, the Federal Supreme Court affirmed this position by a supermajority decision, where eight of the nine justices filed separate opinions—seven passionately concurring with the lower court, and one dissenting.

This comment will examine that decision, entitled *Simón y otros*,³ and demonstrate that this dramatic shift towards accountability is the product not only of the internalization of *jus cogens* into Argentinean positive law, but also of a refocused military and political climate, which previously impeded the full enforcement of international human rights in Argentina.

In order to accomplish this task, the socio-historical context of military rule between 1976 and 1983 must be illustrated. This will be addressed in Part I of this comment. Part II will discuss the two laws that granted partial amnesty to military officials in their respective contexts. In Part III, the main arguments set forth in *Simón y otros* will be outlined, allowing for the exploration of the central point of this comment: that Argentina has shifted its human rights model from partial amnesty to accountability via the integration of international legal principles into an internal positive directive superior to national legislation.

PART I—1976-1983

A. Prelude To War

The period from 1976 – 1983 was undoubtedly one of the more violent and unstable times of modern Argentinean history. During this period, a military coup d'état overthrew all governmental institutions and a junta assumed political authority, an act later justified by

² Respectively, Law No. 23521, June 6, 1987, [XLIV-A] A.L.J.A. 260, [Obediencia Debida] [hereinafter Law of Due Obedience]; Law No. 23492, Dec. 24, 1986, [XLIV-A] A.D.L.A. 1100, [Ley de Punto Final] [hereinafter Full Stop Law].

³ Corte Suprema de Justicia [CSJN], 06/14/2005 “Simón, Julio H. y otros s/privación ilegítima de la libertad,” *Semanarios de Jurisprudencia Argentina* [SJA], (11/02/2005) (Arg.). [hereinafter *Simón y otros*].

the National Congress.⁴ This, however, was not the first time Argentina's government had been dissolved and the democratic process interrupted.

Coups had been eroding Argentina's governmental institutions for the better part of the Twentieth Century.⁵ Indeed, the repeated interruptions of democratic institutions throughout that century had fostered instability, corruption, and widespread disillusion in the governing branches.⁶ Until the late 1990s, the last president to have completed his presidency in a constitutional fashion was Juan Domingo Perón, in 1952.⁷

Leftist political movements, encouraged by the success of the Cuban revolution, spread across Latin America.⁸ Political corruption and a devastated economy encouraged fanatical Argentinean socialist movements, some of which eventually engaged in guerrilla warfare throughout the 1970s.⁹ Rallying behind the flag of Marxist-Leninist ideals, groups such as the *Montoneros* and the *Ejército Revolucionario del Pueblo* (ERP) sought to overthrow the government led by Isabel

⁴ "Acta para el Proceso de Reorganización Nacional," codified by Law No. 21256, Mar. 26, 1976, reprinted in ALBERTO DEARRIBA, *EL GOLPE—24 DE MARZO DE 1976* 286 (Editorial Sudamerica S.A. 2001).

⁵ Indeed, military regimes overthrew the legitimate democratic governments in 1930, 1943, 1955, and 1975. See LUIS ALBERTO ROMERO, *A HISTORY OF ARGENTINA IN THE TWENTIETH CENTURY* (Pennsylvania State University Press 2002) (1994).

⁶ DONALD C. HODGES, *ARGENTINA, 1943-1987: THE NATIONAL REVOLUTION AND RESISTANCE* 178 (rev. ed. 1988).

⁷ See MÓNICA DELEIS, ET AL., *EL LIBRO DE LOS PRESIDENTES ARGENTINOS DEL SIGLO XX* (2000). Indeed, Juan D. Perón's second term was interrupted by a coup d'état in 1955, and he was later forced to retreat into exile in Paraguay; President Arturo Frondizi, in office in 1958-1962, was forced to resign by the military due to political tensions; José María Guido, in office in 1962-1963, was elected by the Senate as the interim chief executive; Arturo H. Illia, in office in 1963-1966, assumed his post after elections were reconvened. He was subsequently deposed by another military coup; Juan Carlos Onganía, in office in 1966-1970, was a president under military rule; Roberto Levingston, in office in 1970-1971, was a president under military rule; Alejandro Lanusse, in office in 1971-1973, was a president under military rule; Héctor J. Cámpora held the office for some months in 1973, until he resigned to allow Juan D. Perón to reassume the position; Raúl A. Lastiri in office in 1973 as provisional president for the month of October; Juan Domingo Perón in office in 1973-1974, after his return from exile and reconvening of elections. He died while in office. María Estela Martínez de Perón, Juan D. Perón's vice-president and wife, was in office in 1974-1976. She maintained the presidency until 1976, when she was overthrown by the coup central to this Comment. It could be argued that President Raúl Alfonsín, in office in 1983-1989, was the first president in the latter half of the 20th century to have finished his term of office as the constitution contemplated, but he resigned before the end of his term due to economic and political turmoil. In 1999, President Menem was the first president in nearly fifty years to complete his term in office in a constitutional fashion, although he accomplished this only after having the constitution amended specifically to allow for his re-election.

⁸ DEBORAH L. NORDEN, *MILITARY REBELLION IN ARGENTINA* 56-57 (University of Nebraska Press 1996).

⁹ *Id.* at 57-58.

Perón and institute a more egalitarian and populist system.¹⁰ The attempted revolution was marked by more than protests—terrorist bombings and kidnappings of government officials occurred with relative frequency in Buenos Aires during 1975.¹¹ The government of Isabel Perón, unable to deal with the escalation of violence, issued an order to the military on February 2, 1975, known as “Operation Independence,” to enter into the province of Tucumán and “eradicate and/or annihilate the actions of subversive elements.”¹² The political climate was ripe for change. With overwhelming public support, military commanders deposed and arrested Isabel Perón and a junta took control of the democratic government with little difficulty in March of 1976.¹³

B. A Dirty War

On the 24th of March, 1976, the Armed Forces assumed political control of the Republic and immediately enacted the Statute for the Process of National Reorganization (Process Statute), which detailed the objectives and measures of the junta.¹⁴ The Process Statute validated the military’s assumption of the national political power, the expiration of all executive decrees, the dissolution of the national and provincial legislatures, as well as the dissolution of all political parties and labor unions, and the removal of all Judges of the Federal Supreme Court, Attorney General, and provincial Judges.¹⁵

After removing officials from their positions and leaving only the empty shells of the remaining governmental institutions, the junta staffed the legislative, executive, and judicial branches with their appointees, but under a new rule of law. The National Constitution was reduced to the rank of a supplementary document.¹⁶

¹⁰ *Id.*

¹¹ *See id.* at 58-59. Norden notes that until 1974, “deaths attributed to ‘subversion,’ or guerrilla actions, were actually higher than the number of deaths attributed to the military (‘the disappeared’).” *Id.*

¹² *Id.*

¹³ ROMERO, *supra* note 5, at 214.

¹⁴ Corte Suprema de Justicia [CSJN], 12/09/85, “Causa originariamente instruida por el Consejo Supremo de las Fuerzas Armadas en cumplimiento del decreto 158/83 del Poder Ejecutivo Nacional,” Fallos (1986-309-1692) (Arg.).

¹⁵ Estatuto para el Proceso de Reorganización Nacional, 03/26/1976, available at <http://www.nuncamas.org/document/militar/estatpro.htm> (last visited Jan. 25, 2006) (hereinafter Process Statute); *see also* Juzgado Nacional en lo Criminal y Correccional Federal [Juzg. Nac. Crim. Corr. Fed.], 06/03/2001, “Simón, Julio y otro,” Jurisprudencia Argentina [J.A.] (2001-III-240)(Arg.) [hereinafter *Simón y otros*, Lower Court decision].

¹⁶ Estatuto para el Proceso, *id.*

Many people welcomed the new regime.¹⁷ Indeed, the Process Statute promised that which most Argentines sought—a just and responsible government.¹⁸ The junta took control with the publicized purpose of ‘restoring the Republic to its greatness,’ and ‘restoring the essential values that are required for the efficient and effective function of government, and fundamental to national pride.’¹⁹ In theory, by subsuming the national constitution and all statutes, the junta ironically sought to restore the republic to its constitutional roots, a ‘republican, federal, and representative democracy.’²⁰ Although the aims of the junta always included re-establishing national security, this soon became the principal objective. During the first sixteen days of the junta’s control of the country, 152 persons died in clashes with the military efforts to carry out this edict.²¹

The military subordinate National Congress passed Ley 21.338, a legislative act that reformed the Argentinean Criminal Code.²² Under this law, the death penalty, previously not contemplated by the Criminal Code, was reinstated,²³ requiring executions to be carried out within 48 hours from the moment of judgment, and no more than 10 days in special circumstances.²⁴ Increased penalties for almost all crimes were set.²⁵ A veil of legal sanction thus attempted to justify dramatic grants of political power to the military, which no longer had any effective political check.²⁶

On March 24th, 1976, General Videla, the head of junta, announced via radio and every national television station that, “as of this moment, severe exercise of authority is necessary to eradicate the vices that affect the country. To that end, subversion shall continue to be ceaselessly combated, and corruption, venality, and transgressions

¹⁷ ROMERO, *supra* note 5, at 214.

¹⁸ *Id.* at 215.

¹⁹ Preamble to the Process Statute (author’s translation).

²⁰ *Simón y otros*, Lower Court decision, *supra* note 15 (author’s translation).

²¹ MARGUERITE FEITLOWITZ, *A LEXICON OF TERROR: ARGENTINA AND THE LEGACIES OF TORTURE* 25 (Oxford University Press 1998).

²² Law No. 21.338, June, 25, 1976, Lexis N° LNACLY21338 (LexisNexis Argentina).

²³ *Id.* art. 1.

²⁴ *Id.* bis.

²⁵ *See id.* For example, the Criminal Code, Article 145 previously punished those that recruited Argentines for foreign conflicts for a period of 2 to 6 years. Law No. 11179, Sept. 30, 1921, Lexis N° LNACLO11179_1984 (LexisNexis Argentina). The military revised the Criminal sanctions provision of Article 145 via Law No. 21.338, which increased the punishment for these crimes from 3 to 15 years, and included the prohibition against recruitment for “subversive” acts. Law No. 21.338; Others included the increment of punishment for opening another’s mail (Art. 155), and the increment of the minimum punishment for any sort of theft (Art. 164). *Id.*

²⁶ STELLA MARIS AGEITOS, *LA HISTORIA DE LA IMPUNIDAD—ARGENTINA (1976 / 1989): DESDE LAS ACTAS DEL PROCESO A LOS INDULTOS DE MENEM*, <http://www.cuestiones1.net/re- vista/n10/ago02-arg-ageitos.htm> (last visited Jan. 24, 2006).

against the law will not be tolerated under any circumstances. Nor will any opposition to the reparation efforts of the Process Statute be tolerated.”²⁷

Thus commenced the “*Guerra Sucia*,” or Dirty War,²⁸ so named for the characterization of the clash between the military and the elements they meant to eradicate. A systematic and controlled method of combating subversion was created, where clandestine military forces identified suspected individuals, kidnapped them, and subjected them to interrogations under various creative methods of torture.²⁹ If not returned to their homes, the people who were kidnapped were usually “disappeared,” i.e., killed and later disposed of, never to be found.³⁰ Families that inquired about their missing kin were kept ignorant of their condition and location. This well-settled strategy of maintaining a state of permanent terror and uncertainty was seen as an effective counter-subversive measure.³¹

Many persons “disappeared” also left behind children, some of whom were adopted by military families and their identities altered.³² Because it is believed many children of interrogated persons were raised by military families, there still remain numerous signposts in Buenos Aires saying, “If you have any doubt about your identity call the *Abuelas*.”³³ A government report entitled “*Nunca Más*,” includes over 50,000 pages detailing the disappearance, torture, and murder of 8,960 missing persons, and concludes that the majority of those were not associated in any substantial manner with “elements of subver-

²⁷ *Id.*; Statement of General Videla, March 24th, 1976.; Alicia Oliveira, María José Guembe, *La Verdad, Derecho de la Sociedad*, <http://www.derechopenal.com.ar/archivos.php?op=20&id=12> (Last visited Jan. 24, 2006).

²⁸ The term is believed to be coined by the Argentinean press in order to describe the unique manner of conflict between the military and the subversive forces—a war with no rules. Haley Cutler, *Digging Up the Dirt: Who Really Won Argentina's 'Dirty War'?*, available at <http://www.gwu.edu/~uwp/fyw/euonymous/Cutler.pdf> (last visited Jan. 25, 2006).

²⁹ ROMERO, *supra* note 5, at 217 (noting that, “In principle, torture served to extract information and reveal the names, places of residence, and planned operations of the guerrilla organizations, but more generally it served to break the resistance of the abducted persons, to annul their defenses, to destroy their dignity and personality.”).

³⁰ *Id.*; FEITLOWITZ, *supra* note 21, at 51 (recounting testimony of interrogated persons, including pregnant women and children).

³¹ ROMERO, *supra* note 5, at 216-17; FEITLOWITZ, *supra* note 21, at 51 (recounting testimony of a tortured sixteen-year old pregnant girl, being told no one would come look for her or find her).

³² ROMERO, *supra* note 5, at 218. Indeed, this is also evidenced by the facts of the case examined in this Comment.

³³ Lisa Avery, *A Return to Life: The Right to Identity and the Right to Identify Argentina's 'Living Disappeared'*, 27 HARV. WOMEN'S L.J. 235, 235 (2004).

sion.”³⁴ The report revealed that there were over 340 clandestine military installations throughout the country where interrogations took place.³⁵

Also part of the military restoration of Argentinean dignity involved the reintegration of the Malvinas Islands (Falkland Islands) into the Argentinean geographical sovereign.³⁶ A failed attempt to recapture the islands diplomatically led to war with Britain in 1982, which had claimed that territory.³⁷ After a six-week battle, the Argentinean military returned decimated to find a nation struggling to survive in a stagnant economy and dissent within military ranks.³⁸ Military officials were charged with mismanagement of the war, and internal military conflicts led the junta to voluntarily call for elections in 1983.³⁹

In April of that year, the military released its “*Documento Final*,” declaring its victory over subversion, and stating that all acts of military officers in the *Guerra Sucia* were strictly pursuant to valid military orders.⁴⁰ Only a few months prior to the commencement of elections, the junta issued its last official order through the national legislature, entitled the National Pacification Law, as a last attempt to amnesty all criminal acts committed by the military during the period of 1973 to 1982.⁴¹

Presidential candidate Raúl Alfonsín publicly declared he had no intent to recognize even a modicum of legality in the National Pacification Law and would regard it only as a poorly veiled attempt at self-exoneration.⁴² The President responded to the military’s Final Report declaration:

³⁴ NUNCA MÁS: THE REPORT OF THE ARGENTINEAN NATIONAL COMMISSION OF THE DISAPPEARED (1984), http://www.nuncamas.org/english/library/nevagain/nevagain_000.htm (last visited Nov. 22, 2005) [hereinafter NUNCA MÁS REPORT].

³⁵ *Id.*

³⁶ ROMERO, *supra* note 5, at 240–47.

³⁷ *Id.*

³⁸ *Timeline: Argentina, A Chronology of Key Events*, BBC NEWS, Jan. 13, 2007, http://news.bbc.co.uk/2/hi/americas/country_profiles/1196005.stm (last visited Nov. 25, 2005).

³⁹ See HODGES, *supra* note 6, at 276–81; ROMERO, *supra* note 5, at 247.

⁴⁰ “Documento final de la Junta Militar sobre la Guerra contra la subversión y el terrorismo,” available at <http://www.desaparecidos.org/arg/doc/secretos/final02.htm> (last visited March 15, 2006). The Document was aired over radio and read on national television on April 23rd, 1983. Military officials Cristino Nicolaides, Rubén Franco, and Augusto Hughes placed their signatures on the document, and consequently, this became the primary piece of evidence leading to their conviction for, inter alia, the kidnapping of children.

⁴¹ Law No. 22924, Sept. 27, 1983, Lexis N° LNACLY22924 (LexisNexis Argentina).

⁴² RAÚL ALFONSÍN, MEMORIA POLÍTICA—TRANSICIÓN \ Y DERECHOS HUMANOS 34 (Fondo de Cultura Económica Argentina S.A. 2004).

Those illegal actions committed by the military during the repression must be adjudicated by our judicial system and not just by history...The Judiciary shall dictate, rather than interested parties, what actions may be considered to have been carried out pursuant to valid military orders. It is against the most fundamental principles of law to hold that crimes against the life or physical wellbeing of citizens that posed no resistance were actions reasonably within the scope of military service.⁴³

The Supreme Court would echo his reasoning in 1986.⁴⁴ Along with promises of justice and truth, Alfonsín's commitment to pursuing military officials won him a great deal of public support, culminating in his election victory.⁴⁵

PART II—1983-2005

A. Focus on Human Rights

Alfonsín kept his word. After his inauguration, he quickly instituted a plan of military accountability for crimes against the Argentinean people.⁴⁶ Only five days after assuming his office, he issued an executive decree which created the *Comisión Nacional sobre la Desaparición de Personas* (CONADEP), a truth commission composed of hand-picked officials, whose main purpose was investigating complaints involving disappeared persons and children.⁴⁷ This commission issued the aforementioned final report, *Nunca Más*.⁴⁸ Also as part of his first acts, President Alfonsín signed the United Nations' International Covenant on Civil and Political Rights (ICCPR),⁴⁹ which was quickly followed by the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁵⁰ and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

⁴³ "Respuesta del candidato Alfonsín al 'Documento Final,'" available at <http://www.desaparecidos.org/arg/doc/secretos/candi.html> (last visited March 15, 2006).

⁴⁴ See Corte Suprema de Justicia [CSJN], "Causa incoada por Decreto 158/83 del Poder Ejecutivo Nacional," Fallos (1986-309-5) (Arg.).

⁴⁵ See ALFONSÍN, *supra* note 42, at 34.

⁴⁶ *Id.* at 33-52.

⁴⁷ *Id.*; Executive Decree PEN N° 187/1983, available at <http://www.desaparecidos.org/arg/co-nadep/> (last visited Jan. 25, 2006).

⁴⁸ NUNCA MÁS REPORT, *supra* note 34.

⁴⁹ International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, Doc. A/6316/49 (Dec. 16, 1966) [hereinafter ICCPR].

⁵⁰ International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICESCR].

(Torture Convention).⁵¹ More importantly, and more central to our discussion, Argentina recognized the jurisdiction of the Inter-American Court on Human Rights and signed the American Convention on Human Rights.⁵²

President Alfonsín also recognized that it was in the nation's best interests to pursue superior military officers swiftly and efficiently, lest he upset the fragile peace between the military and the civilian government.⁵³ He sought to limit prosecutions to about 100 officers, and trusted that the military tribunals to carry out the sentences expeditiously.⁵⁴

Several military officials were tried and convicted, but President Alfonsín still received international criticism for "leniency."⁵⁵ Legislation up to 1985 required the crimes to be tried first in military tribunals,⁵⁶ and of those, a clause of "due obedience" in the Military Code of Justice exculpated officers if they were merely following the orders of a superior.⁵⁷ Given that the Military Code of Justice was not enforceable in non-military tribunals, officers were understandably disquieted by the notion of civilian courts trying military officials.⁵⁸

Furthermore, facing staunch criticism for leaving this matter solely in the hands of military courts, Alfonsín opted for a compromise. He introduced a law into Congress that would allow appeals to be made as of right to civilian courts.⁵⁹ The Congress expanded upon his proposal and enacted a law that allowed the Buenos Aires Court of Appeal to assume the cases being tried in military tribunals if these were found to delay unnecessarily.⁶⁰ This law proved crucial because

⁵¹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984) [hereinafter Torture Convention].

⁵² American Convention on Human Rights, Organization of American States, OFFICIAL RECORDS, OEA/Ser.K/XVI/1.1, doc. 65, rev. 1, corr. 2 (1970). The Convention can also be found reprinted by the American Society of International Law, 9 ILM 673 (1970) [hereinafter American Convention].

⁵³ COLIN M. LEWIS AND NISSA TORRENTS (eds.), ARGENTINA IN THE CRISIS YEARS, 1983–1990: FROM ALFONSÍN TO MENEM 54–55 (Institute of Latin American Studies 1993).

⁵⁴ *Id.*

⁵⁵ Alfonsín, *supra* note 42, at 37–39.

⁵⁶ Law No. Ley 23049, March 13, 1984, Lexis N° LNAcly23049 (LexisNexis Argentina). This law modified Article 108 of the Military Code of Justice (established by Law No. 14029), granting military tribunals jurisdiction to hear controversies arising out of the Dirty War. *Id.*

⁵⁷ Military Code of Justice, Article 514. Published by the Argentinean Military Virtual Library, available at <http://www.biblioteca.ejercito.mil.ar/Doctrina/Doctrina/pe0003.htm> (last visited Jan. 26, 2006); Law No. 14029, July 16, 1951, Lexis N° LNAcly14029 (LexisNexis Argentina).

⁵⁸ ALFONSÍN, *supra* note 42, at 37–38.

⁵⁹ Executive Decree 158/83, reprinted in M. A. SANCINETTI, DERECHOS HUMANOS EN LA ARGENTINA POST-DICTATORIAL 34–6 (Buenos Aires 1988).

⁶⁰ Law 23049, *supra* note 56; LEWIS & TORRENTS, *supra* note 53, at 55.

the dockets of military tribunals were replete with prosecutions over the mismanagement of the Malvinas war and were not able to prosecute for human crimes violations in a speedy manner.⁶¹

After a year of failing to deliver a single verdict on human rights violations, the military tribunals moved the cases to the civilian courts, where the nine members of the junta were prosecuted for all their counter subversive actions.⁶² Judges were drawn from diverse backgrounds to relieve any fears of personal allegiance to Alfonsín, and federal prosecutor Dr. Julio Cesar Strassera charged the officers with over 700 separate counts of torture, rape, murder, unjust imprisonment, and theft of personal property.⁶³ Hundreds of counts of murder were brought, a charge often made impossible to prove when the victim had “disappeared.”⁶⁴ General Jorge Videla was incarcerated along with four other senior officers.⁶⁵ Many courts suspended their dockets and focused mainly on charges alleging human rights violations.⁶⁶

By 1987, around 450 military officials were being prosecuted for crimes against the Argentinean people.⁶⁷ This was the first time in the country’s history that military officials were tried by Federal courts for their acts while in service.⁶⁸ Indeed, although many Latin American nations had suffered through similar regimes, such prosecutions were an unprecedented event in the history of the continent.⁶⁹ This considerably unsettled the military.⁷⁰

Further, the military grew increasingly restless by the highly publicized announcements and reports of the CONADEP.⁷¹ Complaints against over 2,000 members of the military were brought by victims, whom civilian courts could not ignore, and consequently, Alfonsín’s plan for the swift prosecution of the most senior 100 members of the military was frustrated.⁷² The very public prosecution of the military leaders had a strong impact on the national Armed Forces.⁷³ Their disquiet grew, and rumors of another coup spread through the nation.⁷⁴

⁶¹ LEWIS & TORRENTS, *supra* note 53, at 55.

⁶² NORDEN, *supra* note 8, at 102.

⁶³ *Simón y otros*, Lower Court decision, *supra* note 15.

⁶⁴ NORDEN, *supra* note 8, at 102.

⁶⁵ *Id.*

⁶⁶ *Id.* at 103.

⁶⁷ *Id.*

⁶⁸ ALFONSÍN, *supra* note 42, at 38.

⁶⁹ LEWIS & TORRENTS, *supra* note 53, at 56.

⁷⁰ *See id.*

⁷¹ Andrew S. Brown, *Adios Amnesty: Prosecutorial Discretion and Military Trials in Argentina*, 37 TEX. INT’L L.J. 203, 211 (2002).

⁷² LEWIS & TORRENTS, *supra* note 53, at 56.

⁷³ NORDEN, *supra* note 8, at 129.

⁷⁴ *Id.*

Several small military uprisings occurred, arguably sparked by Major Ernesto Barreiro's refusal to appear in court on a summons, and culminating in a confrontation between several hundred officers and protesting civilians at the Plaza de Mayo, in Buenos Aires.⁷⁵ Small uprisings quickly coalesced into an identifiable military resistance.⁷⁶ Junior military officers took control of several military command posts and demonstrated to the President that he would be unable to quell the uprising without military support.⁷⁷

Some commentators have argued that were it not for a complete lack of prosecutorial discretion, which obligates the Argentinean prosecutor to try every case that comes before him in accordance with the Criminal Code, the government might have avoided the numerous military uprisings that threatened to overthrow the democratic government.⁷⁸ Nonetheless, as one writer put it, "Alfonsín did not have complete control over the trials he had initiated. Once the ball started rolling, stopping it became almost impossible."⁷⁹

In an effort to appease the threatened military,⁸⁰ President Alfonsín proposed an interpretive norm of Article 511 of the Military Code of Justice and of Article 36, clause 6 of the Criminal Code.⁸¹ This norm of statutory interpretation would establish a rebuttable presumption that, despite the illegality of the military orders, the subordinate officers could not be faulted for following them because of conditions of pressure, propaganda, and terror.⁸² The Senate accepted this proposal, but modified it to include an exception for 'serious and aberrant' crimes.⁸³ Without any meaningful definition of what was "serious and aberrant," the modified proposal created a loophole wide enough to nullify any effect that might have appeased the military.⁸⁴

Practically every member of the military government would later be subpoenaed.⁸⁵ These events, in the words of President Alfonsín, 'increased the climate of grave tension in the divisions of the Armed Forces Each one of its men felt threatened.'⁸⁶ The chief of the ar-

⁷⁵ *Id.* at 128-29.

⁷⁶ *Id.*

⁷⁷ *See id.* at 128-38.

⁷⁸ *See Brown, supra* note 71, at 217.

⁷⁹ NORDEN, *supra* note 8, at 128.

⁸⁰ ALFONSÍN, *supra* note 42, at 49.

⁸¹ Military Code of Justice, Article 511, *supra* note 57.

⁸² ALFONSÍN, *supra* note 42, at 49.

⁸³ *Id.* (author's translation).

⁸⁴ *See id.*

⁸⁵ Brown, *supra* note 71, at 212.

⁸⁶ ALFONSÍN, *supra* note 42, at 49 (author's translation).

my declared that if the judicial summons of military generals did not cease, the military would respond with violence.⁸⁷ The President would have to concede many of his original goals in order to prevent the very real and materialized coup looming on the horizon from engulfing the republic once more.

B. Alfonsín—Prosecution and Amnesty

In late 1986, President Alfonsín introduced the *Ley de Caducidad de la Acción Penal*, (otherwise known as the *Ley de Punto Final*, or Full Stop Law), which was quickly passed by the national legislature.⁸⁸ The law created a statute of limitations for prosecutions of crimes committed by the military regime.⁸⁹ Charges for individual crimes would have to be brought within sixty days of the promulgation of the law or be completely barred.⁹⁰

Although the purpose was to decrease the number of trials and thereby quiet the military-civilian tensions, the law instead had a “boomerang” effect.⁹¹ The Law was passed at a strategic time, in late December, knowing that the month of January was reserved as a scheduled vacation for the courts.⁹² Nonetheless, faced with the findings of CONADEP, many courts cancelled their vacations and instead subpoenaed hundreds of officials.⁹³

After the tolling of the statute, over four hundred officials were in criminal proceedings, many having been already incarcerated.⁹⁴ For lower-ranked officers who had been formally charged before the expiration of the sixty-day statute of limitations, this legislation was far from adequate.⁹⁵ Another military uprising ensued in 1987.⁹⁶ It appeared the president would require stronger measures to prevent another coup.⁹⁷

Specially tailored to assuage those at the heart of the rebellion,⁹⁸ the Law of Due Obedience was introduced by the president to the national legislature, which passed it with little resistance.⁹⁹ This statute

⁸⁷ Brown, *supra* note 71, at 212.

⁸⁸ Full Stop Law, *supra* note 2.

⁸⁹ *Id.* at art. 1.

⁹⁰ *Id.*

⁹¹ ALFONSÍN, *supra* note 42, at 50.

⁹² NORDEN, *supra* note 8, at 103.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 103-04.

⁹⁷ *See id.* at 104.

⁹⁸ *Id.*

⁹⁹ Law of Due Obedience, *supra* note 2.

integrated the due obedience clause found in Article 513 of the Military Code of Justice¹⁰⁰ into federal statutory law.¹⁰¹ The due obedience clause of the Military Code of Justice exculpated all actions of subordinate officers if their conduct was within the scope of a superior's military order,¹⁰² Alfonsín's Law of Due Obedience tailored the exculpation much more narrowly. The statute read: 'It is presumed, and not admitting proof to the contrary, that those who at the time of the commission of the acts, were subordinates, sub-officials, and personnel staff of the Armed Forces, in divisions of security, police, and prisons, are not punishable for [alleged crimes during military rule] by virtue of having been required to follow orders. The same presumption shall be held for superior officers. . . . In those cases, it shall be considered as a matter of law that these officers acted under unquestionable orders, and were incapable of opposing, resisting, or investigating the orders.'¹⁰³

This statute established an irrebuttable presumption of fact—that officers of a certain determined rank were presumed to have been following orders which they were powerless to disobey.¹⁰⁴ No evidence or proof otherwise could be admitted to rebut this presumption.¹⁰⁵ Like the Full Stop Law, the Due Obedience statute conceived of extrajudicial killings, torture, and rape, but explicitly excluded the exculpation of the theft of minors, personal and real property, and changing minors' legal identity.¹⁰⁶

This last statute was crippling to the already weakened prosecution effort.¹⁰⁷ The number of accused still in process dropped to about

¹⁰⁰ Law No. 14029, Military Code of Justice, Article 513, *supra* note 57.

¹⁰¹ NORDEN, *supra* note 8, at 104.

¹⁰² Law No. 14029, Military Code of Justice, Article 514, *supra* note 57. The text of the Article reads: "When a crime is committed while in the performance of an order of a superior officer, only the superior officer shall be responsible, unless the subordinate officer exceeded the scope of the order given." *Id.* (author's translation).

¹⁰³ Law of Due Obedience, *supra* note 2, at art. 1 (author's translation).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ The pertinent language for both Statutes are as follows: "The present law does not extinguish criminal actions in the cases of the alteration of the civil status, kidnapping, or interference with the custody of any minor." Full Stop Law, Article 5, *supra* note 2. (author's translation); "The presumption established in the previous article shall not be applicable to crimes involving the rape, kidnapping, or interference with the custody of any minor." Law of Due Obedience, Article 2, *supra* note 2 (author's translation). See also Laura Oren, *Righting Child Custody Wrongs: The Children of the "Disappeared" in Argentina* 14 HARV. HUM. RTS. J. 123 (2001). Ms. Oren details the unique situation of children adopted by military families, often following the killing of their parents, and how the laws of amnesty were not willing to go as far as ignoring those children still "disappeared," but very much living. The facts of *Simón y otros* yields a prime example of this situation, where the case was initiated against a military family for the recovery of Claudia Victoria Poblete.

¹⁰⁷ See NORDEN, *supra* note 8, at 104.

300,¹⁰⁸ and many officers previously facing prison were exonerated.¹⁰⁹ The public outrage soon became marred by the economic ruin of the Argentinean state.¹¹⁰ Some commentators have argued that the subordination of economic concerns was necessary in order to rebuild struggling democratic institutions.¹¹¹

Further aggravating military disquiet, the Alfonsín administration's mismanagement of the national purse resulted in very poor national economic health and in lower military wages.¹¹² Subsequent attacks by insurgents against military barracks escalated tensions once more.¹¹³ Alfonsín had no choice but to allow the military to have a strong hand in the national policymaking, and granted several large defense funding plans.¹¹⁴

C. Menem—Amnesty and Confession

President Alfonsín resigned from his office five months before the end of his term.¹¹⁵ In the throes of escalating military-civilian tensions and uncontrollable inflation rates,¹¹⁶ presidential candidate Carlos Menem gave an ultimatum, "Me or Chaos."¹¹⁷ Menem promised dramatic economic change by employing free-market plans and enlisting the assistance of international corporate interests.¹¹⁸ In order to carry out his economic plans, Menem needed to pacify the country and obtain the aid of the military.¹¹⁹ Menem's approach to restoring the peace involved pardoning all officials already incarcerated for crimes committed during the dictatorship along with all the rebels also imprisoned, which he did, shortly after taking office in July of 1989.¹²⁰ By 1990, only ten convictions for human rights violations were obtained, and these were ultimately overturned and the officials re-

¹⁰⁸ *Id.*

¹⁰⁹ *See id.*

¹¹⁰ ROMERO, *supra* note 5, at 267.

¹¹¹ *Id.* at 268.

¹¹² Horacio Verbitsky, El CELS Pide la Nulidad de la Ley de Obediencia Debida—La Hora del Juicio, Página 12 (Buenos Aires), <http://www.pagina12.com.ar/2001/01-02/01-02-11/pag11.htm> (Feb. 11, 2001) (Last visited Jan. 28, 2006).

¹¹³ ALFONSÍN, *supra* note 42, at 81-91.

¹¹⁴ *Id.*

¹¹⁵ DELEIS, ET AL., *supra* note 7, at 444.

¹¹⁶ Indeed, inflation rates in 1989 reached more than 4,000%. Brown, *supra* note 71, at 213.

¹¹⁷ Avery, *supra* note 33, at 246.

¹¹⁸ ROMERO, *supra* note 5, at 285-87.

¹¹⁹ *See* Brown, *supra* note 71, at 214.

¹²⁰ NORDEN, *supra* note 8, at 140.

leased.¹²¹ Public outrage was partly restrained by Menem's having been under military captivity for five years.¹²²

By the 1990s, all officials tried in the mid-1980s were free.¹²³ However, as a response to a decision by the Inter-American Commission on Human Rights concerning a number of Argentinean civilians that were unable to obtain judgment in national courts, Menem issued a number of executive decrees.¹²⁴ These provided for very limited monetary recovery of damages suffered by civilian victims of crimes against them during the regime.¹²⁵ The compensation system was specially tailored to avoid military tension: the funds awarded would be paid by the Judge of the Interior, a non-military official, and only those that had initiated claims prior to 1985 could obtain some compensation.¹²⁶ This solution did not reach the great majority of claimants.¹²⁷

Shielded by the amnesty legislation and frustrated by the Senate blocking many military promotions, many officials publicly confessed of crimes committed during the military regime.¹²⁸ When the Senate did not authorize the promotion of Navy Captain Antonio Pernías, an intelligence officer serving under the Navy Mechanical School (ESMA) in Buenos Aires, he admitted to the Navy's involvement in the kidnapping and subsequent killing of three French nuns—a major controversy for which he had been imprisoned and later exonerated by the Due Obedience law.¹²⁹ More confessions followed, including one widely publicized in an interview between Captain Adolfo Scilingo and journalist Horacio Verbitsky, where the Captain recounted how he had participated in a military system of drugging interrogated persons, stripping them of clothing, and throwing them alive from planes over the Atlantic Ocean.¹³⁰

¹²¹ SEBASTIAN BRETT, HUMAN RIGHTS WATCH, *RELUCTANT PARTNER: THE ARGENTINEAN GOVERNMENT'S FAILURE TO BACK TRIALS OF HUMAN RIGHTS VIOLATORS*, (2001), available at <http://www.hrw.org/reports/2001/argentina/> (follow hyperlink "I. Summary and Recommendations") (last visited Feb. 16, 2007).

¹²² DELEIS, ET AL., *supra* note 7, at 452 (recounting Menem's imprisonment from the day of the military coup d'état until February 1981).

¹²³ BRETT, *supra* note 121.

¹²⁴ Report No. 1/93, Inter-Am. C.H.R., OEA/ser.L/V/II.83, doc. 14corr.1(1993), <http://www.cidh.org/annualrep/92eng/Argentina10.288.htm> (last visited Nov. 27, 2005).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Daniel W. Schwartz, *Rectifying Twenty-Five Years of Material Breach: Argentina and the Legacy of the 'Dirty War' in International Law*, 18 EMORY INT'L L. REV. 317, 337-40 (2004).

¹²⁸ See BRETT, *supra* note 121.

¹²⁹ *Id.*

¹³⁰ HORACIO VERBITSKY, *EL VUELO—UNA FORMA CRISTIANA DE MUERTE—CONFESIONES DE UN OFICIAL DE LA ARMADA* (Editorial Sudamericana 2004). This confession led to the extradition of Adolfo Scilingo to Spain for trial of crimes against humanity concerning

On April 25th, 1995, newly appointed General Martín Balza declared on a television broadcast that the Armed Forces were indeed responsible for a gross violation of human rights crimes and those actions were a terrible miscalculation by the junta in attempting to eradicate subversion.¹³¹ He added that the commission of such acts could never be justified by the following of orders.¹³² An international spotlight shined on Argentina's past, prompting criticism and reviving international and domestic pressures to investigate allegations of human rights crimes.¹³³ A constitutional reform in 1994 marked the dissipation of the military *force majeure*.¹³⁴ Over a decade later, the elevation of international human rights treaties to constitutional standing demonstrated that the desire for accountability and investigation into the events of 1976-1983 did not decrease with the passage of time.¹³⁵

This renewed fervor would allow for the reconsideration of Argentina's policy for Dirty War amnesty. In 1998, the National Congress derogated the Full Stop and Due Obedience laws, making them useless in suits thereafter initiated.¹³⁶ Because such derogation only allowed for the suit of officers that had not already benefited from the laws, it could not reach the overwhelming majority of those believed to be culpable.¹³⁷ The National Congress passed a law *declaring null and void* the two amnesty laws.¹³⁸ Until *Simón y otros*, it was unknown whether Congress had the power to nullify its own laws and make the

his involvement in those "Flights of Death"; BRETT, *supra* note 121; Argentinean 'Dirty War' Suspect Convicted, http://www.washingtonpost.com/wp-dyn/articles/A681-2005Apr19_2.html (last visited Nov. 27, 2005).

¹³¹ See BRETT, *supra* note 121.

¹³² See *id.*

¹³³ The confessions by military officials marked a renewal of debate in the public forum concerning the truth of the allegations of human rights violations. The Center for Legal and Social Studies, the party that initiated the action in *Simón y otros*, stated that "It was evident from the beginning that Scilingo's words had reached many ears, and little by little the surprising conversations that could be heard in bars and shops filtered through to the various institutions which until then had remained exclusively silent." Human Rights Watch Report, Argentina: Reluctant Partner (2001), available at http://www.nuncamas.org/investig/hrw_121201_01.htm (last visited March 1, 2006).

¹³⁴ Janet Kovic Levit, *The Constitutionalization of Human Rights in Argentina: Problem or Promise?*, 37 COLUM. J. TRANSNAT'L L. 281, 309-11 (1999).

¹³⁵ CONST. ARG. art. 75, cl. 22 (1994).

¹³⁶ Law 24.952, April 15, 1998, LexisNexis Argentina, Lexis N° 04683; *Simón y otros*, *supra* note 3, at Considerando No. 2 of Judge Maqueda's vote.

¹³⁷ See *Simón y otros*, *supra* note 3, at Considerando No. 15 of Judge Maqueda's vote. Professor Luis Jiménez de Asúa stated on the floor of Congressional debates that "Crimes against humanity are as old as humanity itself. The legal concept is, however, a new one, given that these require a status of civilization capable of recognizing human rights laws, with respect to the individual and his activities, it is important that this Congress does not deny this. we have an unrenounceable ethical obligation: remove the obstacles that prohibit Argentina from persecuting those that committed crimes against humanity." *Id.* (author's translation).

¹³⁸ Law No. 25779, Sept. 3, 2003, Lexis N° LNACLY25779 (LexisNexis Argentina).

invalidation apply retroactively.¹³⁹ Consonant with a revived national consensus for accountability and repeated Congressional action hostile to the amnesty laws, the Supreme Court handed down its decision June 14th, 2005.

D. Treaties Under The Argentinean Constitution Prior To *Simón y otros*

The court in *Simón y otros* relied upon the supremacy of international treaties ratified by Argentina over domestic law to invalidate the Full Stop and Due Obedience laws. To better understand how the Court arrived at its opinion, we will first briefly focus on the status of international treaties within the Argentinean legal framework.

Prior to the 1994 constitutional reform, Argentina regarded treaties in a manner similar to that adopted by the United States. Treaties were signed by the federal government¹⁴⁰ and were the “supreme law of the land.”¹⁴¹ Constitutional principles of federalism prohibited the provinces from engaging in treaty-making with each other or with foreign powers.¹⁴² Arguably, the similarities on this point to the United States’ system ended there. The Argentinean Constitution established the structure of international treaties in relation to the powers of government, but the precise status of treaties vis-à-vis the Argentinean Constitution itself, however, remained a somewhat more obscure issue.

In *Ekmekdjian*, a 1992 Supreme Court case, it was held that international treaties ratified by the National Congress stood above national legislation.¹⁴³ More specifically, the court noted that human

¹³⁹ Notably, most Judges on the Supreme Court carefully avoided this issue in this case. Justice Petracchi wrote that this law constituted only a mere “formality” or a “declaration.” *Simón y otros*, *supra* note 3, at Considerando No. 34 of Judge Petracchi’s majority opinion. This sentiment was echoed by Judges Maqueda, Highton de Nolasco, and Lorenzetti. Judge Zaffaroni, however, spent a considerable portion of his written decision contemplating the Congressional power to declare its own laws null and void, but strangely enough, failed to reach a conclusion, stating that “if Congress didn’t have the power to [declare the laws unconstitutional], we undoubtedly would have.” *Simón y otros*, *supra* note 3, at Considerando No. 36 of Justice’s Zaffaroni’s vote (author’s translation). All Judges in the majority, except Judges Boggiano and Argibay neither of whom discussed the issue, concurred that the validity of the Law was predicated upon the co-validation of the Supreme Court. Judge Fayt, however, noted that because the laws were previously derogated for prospective use by Law No. 24.952, Congress was without the power to declare something unconstitutional, when it no longer existed in the legal landscape. *Simón y otros*, *supra* note 3, at Considerando No. 10, Judge Fayt’s dissenting vote.

¹⁴⁰ See CONST. ARG. art. 27 (1853).

¹⁴¹ See CONST. ARG. art. 31 (1853) (“The Constitution, the laws of the Nation enacted by Congress in pursuance thereof, and treaties with foreign powers are the supreme law of the Nation.”).

¹⁴² See CONST. ARG. art. 29 (1853).

¹⁴³ See Corte Suprema de Justicia [CSJN], 07/07/1992, “Ekmekdjian, Miguel Ángel v. Sofovich, Gerardo y otros,” Fallos (1992-315-1492) (Arg.) (hereinafter *Ekmekdjian*); Compare to the

rights treaties were of a special character that justified this elevation above domestic laws.¹⁴⁴ It was noted that international treaties were not only superior domestic law, but also presumptively self-executing and immediately enforceable if the treaty did not explicitly require additional domestic legislative action.¹⁴⁵

Nonetheless, the Supreme Court has progressively chipped away at this rule, making clear in its holding in *Fibraca* that superiority over domestic law did not necessarily entail parity with the National Constitution.¹⁴⁶ This position was affirmed in subsequent Supreme Court decisions.¹⁴⁷ The Court in *Hagelin* further limited the reach of *Ekmekdjian* to apply only to situations where the treaty was diametrically opposite to the domestic law and could not be reasonably held to be applicable to the factual circumstances.¹⁴⁸ That court interpreted its holding in *Fibraca* to require “the existence of a real conflict between both norms,” rather than a mere overlap of subject-matter.¹⁴⁹ The National Congress overturned these last limitations and expanded upon the Court’s holding in *Ekmekdjian* with its dramatic restructuring of the Federal Constitution.

In 1994, the National Congress held a constitutional reform convention to inject new life into the 140 year-old document, which had received only minor changes since 1860.¹⁵⁰ About half of the Constitution itself underwent revision, and the volume of text approximately doubled.¹⁵¹ One of the broader parts of the reform is part our key fo-

United States, where the “last in time rule” states that treaties and national legislation are on equal footing, and it is the one last passed or ratified that rules over the earlier norm. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1), (2) (1986).

¹⁴⁴ See *Ekmekdjian*, *supra* note 143. That Court reasoned that human rights treaties were superior to national legislation principally on three grounds: 1) the complex legislative process required to ratify a treaty is more stringent than the passing of national legislation, 2) the Vienna Convention on the Law of Treaties requires treaty obligations to find no impediment in domestic legislation, and 3) if Congress were endowed with the power of abolishing a treaty by mere subsequent legislation, it would constitute a violation of the separation of powers. *Id.*; see also *Simón y otros*, *supra* note 3, at Considerando No. 73 of Judge Fayt’s dissenting vote.

¹⁴⁵ *Ekmekdjian*, *supra* note 143.

¹⁴⁶ See Corte Suprema de Justicia [CSJN] 07/07/1993, “*Fibraca onstructora SCA. v. Comisión Técnica Mixta de Salto Grande*,” *Jurisprudencia Argentina* [JA], (1993-IV-471) (Arg.).

¹⁴⁷ Corte Suprema de Justicia [CSJN] 12/22/1993, “*Hagelin Ragnar v. Poder Ejecutivo Nacional s/ juicio de conocimiento*,” *Fallos* (1993-316-3176) (Arg.).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at Considerando No.7 of majority decisión. (author’s translation).

¹⁵⁰ Jonathan M. Miller, “Argentina—Introductory Notes: Constitutional History and Political Background,” *Preface* to CONSTITUTIONS OF THE COUNTRIES OF THE WORLD—ARGENTINA Gisbert H. Flanz, Ed. Release 99-6 (Oceana Publications, Inc., Dobbs Ferry, NY 1999) vii (hereinafter, all English translations of the Argentinean Constitution derive from this source).

¹⁵¹ *Id.* at xii.

cus—the introduction of Article 75, section 22, which elevates ten international human rights treaties to the status of constitutional obligation.¹⁵² The list of 10 treaties, however, is by no means exhaustive—the section provides for all treaty obligations present and future to enjoy a similar hierarchy.¹⁵³ The Article provides:

Congress shall have the power to...approve or reject treaties entered with other nations and with international organizations, and concordats with the Holy See. Treaties and concordats have higher standing than laws.

The following [international instruments], under the conditions under which they are in force, stand on the same level as the Constitution, [but] do not repeal any article in the First Part of this Constitution, and must be understood as complementary of the rights and guarantees recognized herein.¹⁵⁴

As is evident, the section itself recognizes possible conflicts between treaties and preexisting constitutional doctrine, and underscores the caveat that treaties may not “repeal any article in the First Part of the Constitution.”¹⁵⁵

In light of its holdings in *Fibraca* and *Hagelin*, the Supreme Court in *Simón y otros* may arguably not have been empowered to nullify the amnesty laws without this constitutional reform. In *Simón y otros*, the Court was forced to attempt the reconciliation of these laws and the American Convention on Human Rights,¹⁵⁶ the ICCPR,¹⁵⁷ the Torture Convention,¹⁵⁸ and the Geneva Convention on the Law of Treaties.¹⁵⁹ The court found no reconciliation possible, and therefore abolished the laws.

¹⁵² ARG. CONST. art. 75, cl. 22 (1994).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* This forms the basis for the primary argument in defense of the amnesty laws: abolition of the amnesty laws would be a violation of Article 18 of the Constitution (ex post facto prohibition) because the use of Article 75, clause 22 to abolish these statutes would be a retroactive application of criminal law. As will be later discussed in greater detail, the majority discards this defense as inapplicable, but in so doing, discusses the hierarchical standing of treaty obligations within the constitutional spectrum.

¹⁵⁶ American Convention, *supra* note 52.

¹⁵⁷ ICCPR, *supra* note 49.

¹⁵⁸ Torture Convention, *supra* note 51.

¹⁵⁹ The Vienna Convention on the Law of Treaties, May 23, 1969, art. 27, 1155 U.N.T.S. 331, 339, was codified by Law 19865, ratified by the Executive Branch on December 5, 1972 and became effective on January 27, 1980. Law No. 19.865, Oct. 3, 1972, [XXXII-D] A.D.L.A. 6412. [herein Law of Treaties Convention].

PART III—A LANDMARK CASE

A. Background

The case of *Simón y otros* originated from a complaint by Buscarita Imperi Roa, who stated that on November 28, 1978, the Armed Forces kidnapped her son, José Liborio Poblete Roa, her daughter in law Gertrudis Marta Hlaczik and her granddaughter Claudia Victoria Poblete.¹⁶⁰ The complaint alleged that the retired military officer Ceferrino Landa and his wife Mercedes Beatriz Moreira had in their custody Ms. Hlaczik's granddaughter under the assumed name of Mercedes Beatriz Landa.¹⁶¹ During pre-trial investigation, it was proven that the girl was indeed Ms. Hlaczik's granddaughter and that she had been kidnapped when she was eight months old.¹⁶² As a result, on February 25th, 2000, Landa and Moreira were preventively imprisoned to await trial.¹⁶³

Taking advantage of a criminal procedure provision that allows any private individual to initiate criminal proceedings,¹⁶⁴ the *Centro de Estudios Legales y Sociales* (CELS), an Argentinean human rights group, amended Mrs. Roa's complaint to seek punishment of Julio "*El Turco Julian*" for the torture and extrajudicial killing of Gertrudis Marta Hlaczik and José Liborio Poblete Roa, calling for the nullification of the amnesty laws.

The complaint alleged that the parents were taken that night to the governmental detention center "*El Olimpo*," where officers separated the parents from the girl under the pretense that she would be taken back to her grandmother.¹⁶⁵ The defendant Julio Simón was one of the various officers that had been involved in the abduction of the family and the subsequent separation of the child from her parents.¹⁶⁶ Judge Cavallo, sitting on the bench of the Federal Court of Buenos Aires ordered the detention of Simón and another officer, Juan Antonio Del Cerro, and declared the amnesty laws unconstitutional.¹⁶⁷

The Federal Court of Appeals of Buenos Aires, echoing Judge Petracchi's dissent in a 1987 case that validated the Law of Due Ob-

¹⁶⁰ *Simón y otros*, *supra* note 3, at Considerando No. 1 of Judge's Petracchi's majority opinion.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Cód. PROC. PEN. art. 146.

¹⁶⁵ *Simón y otros*, *supra* note 3, at Considerando No. 2 of Judge's Petracchi's majority opinion.

¹⁶⁶ *Id.*

¹⁶⁷ Schwartz, *supra* note 127, at 337-40.

edience, upheld the trial Judge's decision to abolish the amnesty laws.¹⁶⁸ *Simón y otros* is the resulting appeal from that decision.

B. The Court's Opinion

Eight of the nine Judges sitting on the bench deliberated over the issues, resulting in a supermajority decision of 7-1 to declare "null and with no effect" the laws of amnesty shielding military officers from prosecution.¹⁶⁹ As a result, previous Congressional action to declare the laws null is no longer symbolic in application. The majority declared that "laws 23.492 and 23.521 are with no effect, and no action premised upon them may impede the judgment against those responsible, or create any obstacle to the investigation of crimes against humanity through appropriate legal avenues."¹⁷⁰

The Court held that the Due Obedience and Full Stop Laws were contradictory to norms of international law adopted by the Constitution's Article 75, section 22.¹⁷¹ Specifically, the laws were held to amnesty human rights violations, an important declaration, the lack of which would render international human rights law inapplicable.¹⁷² Furthermore, the Court held that in light of Argentina's obligations as expressed by the American Declaration of Human Rights, the Inter-American Court on Human Rights' rulings, and the ICCPR, upholding the amnesty laws would run afoul of the duties to investigate and punish allegations of human rights violations,¹⁷³ to extend judicial protection to victims of crimes against humanity, and to prohibit statutory limitations on human rights crimes.¹⁷⁴ These duties and prohibitions were held to arise from *jus cogens* as articulated by the multilateral treaties to which Argentina is signatory. As a necessary step to apply these, the court also defined the appropriate stature of treaties within the Argentinean legal framework, a previously murky subject even after the constitutional amendment that elevated them to constitutional hierarchy.

¹⁶⁸ *Simón y otros*, *supra* note 3, at Considerando No. 5 of Judge's Petracchi's majority opinion.

¹⁶⁹ Judges that voted to nullify amnesty laws: Petracchi, Maqueda, Highton de Nolasco, Lorenzetti, Boggiano, Argibay, and Zaffaroni. Judge Fayt was the sole dissenting voice. (author's translation).

¹⁷⁰ *Simón y otros*, *supra* note 3, at Considerando No. 3 in Judge Petracchi's majority opinion, echoed by Judges Boggiano, Maqueda, Zaffaroni, Highton de Nolasco, Lorenzetti, and Argibay. (author's translation).

¹⁷¹ *Id.* at Considerando No. 34 of Judge Petracchi's majority opinion.

¹⁷² *Id.* at Considerando No. 15 of Judge Argibay's vote.

¹⁷³ *Id.* at Considerando No. 81 of Judge Maqueda's vote.

¹⁷⁴ *Id.* at Considerando No. 40 of Judge Boggiano's vote.

It is important to note that the treaties were not treated by the Court as sources of substantive law. Although the Court perhaps takes this issue for granted in the opinion, as it is nowhere discussed, it is nonetheless an important one: The constitutional demands to abolish the Due Obedience and Full Stop Laws are purely procedural. Indeed, the treaties merely prohibit statutory limitations for these crimes and impose upon the signatories a duty to investigate and punish such crimes according to domestic criminal law. The substantive law applicable to those that benefited from the amnesty laws will stem from the Argentinean Penal Code or from the Military Code of Justice.¹⁷⁵ Indeed, the amnesty laws are themselves procedural legislation.¹⁷⁶ The Court in *Simón y otros* applied *jus cogens* as articulated by multilateral treaties signed by the Republic to abolish these procedural restrictions, which resulted in the free application of domestic law to crimes committed by the military during the regime of 1976-1983.¹⁷⁷

1. *Jus Cogens* and the duties of the state

Jus cogens is a reference to the status attained by the gravity and the international prohibition of certain crimes.¹⁷⁸ An international criminal prohibition reaches the scope of *jus cogens* when its characteristics submit the action to *obligatio erga omnes*.¹⁷⁹ This obligation is a denotation of legal imperatives binding upon all nation states.¹⁸⁰ Commentators have argued that not all violations of internationally recognized rights attain the status of *obligatio erga omnes*, but rather only those that don't merely establish a right to punish human rights

¹⁷⁵ Indeed, the very text of the amnesty laws defines the legislative impediment to prosecution only as the requirement of non-application of domestic law to a particular situation. The acts themselves never ceased to be crimes, but were declared procedurally nonjusticiable. See Full Stop Law, *supra* note 2, at art. 1 (mandating a statute of limitations on prosecutions of alleged violations comprehended under Article 10 of Law 23.049, legislation that conferred military jurisdiction over cases involving violations of the Argentinean Penal Code and Article 108 of the Code of Military Justice); see Law of Due Obedience, *supra* note 2, at art. 1 (requiring the exoneration of all but military superiors that committed crimes as defined by Article 10 of Law 23.049).

¹⁷⁶ See Full Stop Law, *supra* note 2; see Law of Due Obedience, *supra* note 2.

¹⁷⁷ See *Simón y otros*, Lower Court decision, *supra* note 15 (underscoring that these amnesty laws are prohibitions on the application of the Penal Code to particular acts committed at a specific time).

¹⁷⁸ M. Cherif Bassiouni, "Accountability for International Crime and Serious Violations of Fundamental Human Rights: International Crimes: Jus Cogens and Obligation Erga Omnes," 59 LAW & CONTEMP. PROB. 63, 63 (1996). Notably, this law review article was cited by Judge Maqueda in his discussion of *jus cogens* in his vote in the case here studied. *Simón y otros*, *supra* note 3, at Considerando No. 80 of Judge Maqueda's vote.

¹⁷⁹ *Id.* at 63.

¹⁸⁰ See *id.*

violations, but affirmatively require such action.¹⁸¹ Thus, *jus cogens* denotes a body of laws that are preemptory in nature and thus non-derogable by domestic laws.¹⁸²

In 1853, when Argentina drafted its Constitution, it outlined in Article 102 that, “when the crime is committed outside the borders of the Nation, in violation of international norms, Congress shall determine by special law the place where the trial is to be held.”¹⁸³ This Constitutional provision has been held by the Supreme Court to introduce *jus cogens* into Argentina’s domestically enforceable legal framework.¹⁸⁴

The Argentinean Supreme Court has recognized the existence of the law of nations and its undeniable application to the Republic.¹⁸⁵ Unlike in the United States, where its Constitution empowers the Congress only to “define and punish offences against the law of nations,”¹⁸⁶ the Argentinean National Congress does not have the power to deviate from established norms of *jus cogens*.¹⁸⁷ Congress is merely empowered to decide “the place where the trial is to be held.”¹⁸⁸ The demands of *jus cogens* to prosecute human rights violators played a critical role in instructing the Supreme Court’s decision in this case.

Judge Maqueda declares in *Simón y otros* that Argentina is not only constitutionally bound to apply *jus cogens*, but is also bound through its mere membership in the global community.¹⁸⁹ He argues that Argentina is bound by *jus gentium*, otherwise known as the law of nations.¹⁹⁰ Thus, *jus gentium* obligations were adopted and made part of the Argentinean constitutional mandate before the constitutional reform in 1994, and even before the 1992 Supreme Court held human rights treaties were of elevated character.¹⁹¹

¹⁸¹ *Id.* at 65.

¹⁸² *Id.*

¹⁸³ ARG. CONST. art. 102 (1853). Article 102 later became Article 118 in the 1994 Constitution.

¹⁸⁴ Corte Suprema de Justicia [CSJN], 11/02/1995, “Priebke, Erich s/ solicitud de extradición,” Fallos (1996-318-2148), at 2176 (Arg.) [hereinafter *Priebke*]; *Simón y otros*, *supra* note 3, at Considerando No. 40 of Judge Maqueda’s vote.

¹⁸⁵ *Simón y otros*, *supra* note 3, at Considerando No. 43 of Judge Maqueda’s vote; Corte Suprema de Justicia [CSJN], 3/24/1988 “Sordelli, Beatriz Mabel v. Villalba, Rosina Alcira,” Jurisprudencia Argentina [J.A.], (1988-IV-251) (Arg.); Corte Suprema de Justicia [CSJN], 9/25/2001, “Ceresole, Norberto Rafael v. República de Venezuela s/ daños y perjuicios,” Fallos (2001-324-2885) (Arg.).

¹⁸⁶ U.S. CONST., art. I, § 8.

¹⁸⁷ *Priebke*, *supra* note 184, at 2176.

¹⁸⁸ See ARG. CONST., art. 102 (1853).

¹⁸⁹ See *Simón y otros*, *supra* note 3, at Part IV of Judge Maqueda’s vote.

¹⁹⁰ *Id.*

¹⁹¹ Ekmekdjian, *supra* note 144.

Citing United States Supreme Court Justice Story's "Commentaries on the Constitution of the United States," Judge Maqueda notes that the criminal law of nations that protects individuals at a fundamental level is considered valid amongst all civilized countries once there is a general consensus established by the States.¹⁹² He argues that the supremacy of the law of nations was a principal concern for the creation of Article 118 (originally Article 102 in 1853), which grants the National Congress the power to determine the forum for crimes committed against the law of nations.¹⁹³

Further, the Judge argues that the law of nations has evolved into a more concrete and discrete body of international norms, encompassed in the notion of *jus cogens*. He opines that the amnesty statutes deeply offend those *erga omnes* obligations imposed by *jus cogens*, and thus are offensive to the National Constitution via Article 118.¹⁹⁴

Some Argentinean jurists contend, however, that Article 118 is little more than a jurisdictional requirement, for although it allows the National Congress to dictate where trials for *delicta iuris gentium* should be held, it by no means elevates crimes against humanity above those domestic crimes amnestiable by national law.¹⁹⁵ Judge Boggiano notes that Article 118 is much more than just a jurisdictional requirement.¹⁹⁶ The Judge had previously noted that the Article contains a substantive provision prohibiting crimes against the law of nations, recognizing the severity of the crimes, and that because of their seriousness, they hurt all mankind.¹⁹⁷ Thus, he argued, Article 118 incorporated *jus cogens* into Argentina's internal positive law.

Even if *jus cogens* were not so incorporated through the Article, Judge Maqueda points out that the Inter-American Commission has defined those *erga omnes* obligations as "superior order of legal norms, which the laws of man or nations may not contravene" and as the "rules which have been accepted, either expressly by treaty or tacitly by custom, as being necessary to protect the public morality recognized by them."¹⁹⁸ The Judge states that although unequivocally established by Resolution 174 (II) of the United Nations General As-

¹⁹² *Simón y otros*, *supra* note 3, at Considerando No. 40 of Judge Maqueda's vote.

¹⁹³ *Id.*; ARG. CONST. art. 102 (1853).

¹⁹⁴ *See Simón y otros*, *supra* note 3, at Considerando No. 45 of Judge Maqueda's vote.

¹⁹⁵ *Id.* at Considerando No. 64 of Judge Fayt's dissenting vote.

¹⁹⁶ *Id.* at Considerando No. 28 of Judge Boggiano's vote.

¹⁹⁷ *Id.*; Corte Suprema de Justicia [CSJN], 04/06/1993, "Nadel, León y otro s/ contrabando," Fallos (1993-316-567) (Arg.) (Judge Boggiano dissenting).

¹⁹⁸ *Simón y otros*, *supra* note 3, at Considerando No. 46 of Judge Maqueda's vote; Roach and Pinkerton v. United States, Case 9.647, Inter-Am. C.H.R., Resolution No. 3/87, OAS Doc. OEA/Ser.L/V/II.71 doc. 9 rev. 1, para. 55 (1987).

sembly in 1947, *jus cogens* obligations existed well before World War II, and thus were clearly in force at the time of the enactment of the amnesty statutes.¹⁹⁹

Furthermore, the Judge notes, *jus cogens* was one of the more important considerations of the National Congress when reforming the Constitution in 1994. He quotes a Session Report from the constitutional reform assembly as referring explicitly to the necessity of *jus cogens* as an able source of enforceable law because when the State commits a crime against its own people, history has demonstrated that only international review can remedy the situation.²⁰⁰

No Judge, however, argued that the *jus cogens* principles communicated by the Constitution via Article 118 were sufficient to strike down the amnesty laws without their articulation by the treaties. Even the Court's most enthusiastic advocate of the applicability of *jus cogens*, Judge Maqueda, concludes that although the *erga omnes* principles were recognized duties transmitted by Article 118 of the Constitution, they were nonetheless unquestionably binding upon the Argentinean Republic because of treaties such as the American Convention on Human Rights and the decisions by the Inter-American Court of Human Rights.²⁰¹ It is therefore unclear whether Article 118 and *jus cogens* sans the multilateral treaties or the Constitutional amendment would have constituted sufficient substance to convince the court to annul the amnesty laws. It is just as well, perhaps, since the Court concerned itself instead with the present application duties and obligations articulated by treaties such as the ICCPR and the American Convention on Human Rights.

2. Judicial Protection and Barrios Altos

Through their interpretation of Articles 1.1 and 2 of the American Convention on Human Rights, the Court found the Due Obedience and Full Stop statutes to be facially contradictory to Articles 8 and 25 of the same Convention.²⁰² Further, the Court found that these

¹⁹⁹ *Simón y otros*, *supra* note 3, at Considerando No. 47 of Judge Maqueda's vote.

²⁰⁰ *Id.* at Considerando No. 58. The Judge states that Article 75 (22) sought to establish, "a political constitution, which aims to universalize human rights, recognize those supranational organisms such as the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights, as well as recognize those statutes and dispositions to be in harmony with their resolutions and those of the Executive National and universal history has proven that when nation states violate human rights, these can only be reverted by the coercive presence of international organisms which demand the same. The rights therein consecrated become dead words when a nation decides not to obey them." (author's translation).

²⁰¹ *Id.* at Considerando No. 34.

²⁰² *Id.* at Considerando No. 23 of the majority opinion.

laws were also violative of Article 14.1 and 2 of the ICCPR,²⁰³ as well as Articles 118 of the National Constitution.²⁰⁴ With the possible exception of this last constitutional Article, these provisions all explicitly require the same from signatory States: judicial protection and access to adequate legal remedies for victims of human rights violations.

Article 1.1 of the American Conventions on Human Rights as well as Articles 2.2 and 2.3 of the ICCPR require those who have been the victims of some infringement on their human rights to have some effective remedy at law from a competent body.²⁰⁵ The Court in this case found the Due Obedience and Full Stop laws to offend this principle, since thousands of claimants were denied an effective remedy at law.²⁰⁶ This principle, denoted in Argentinean law as the “principle of equality,” demands that those who have suffered a wrong receive an adequate judicial remedy.²⁰⁷ In that sense, the principle is not dissimilar from the maxim found in the landmark United States Supreme

²⁰³ *Id.*

²⁰⁴ *Id.* at Considerando No. 28 of Judge Boggiano’s vote.

²⁰⁵ American Convention, *supra* note 52, at art. 1.1. The pertinent text of this article reads:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

Id.

The ICCPR article 2.2 reads:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

ICCPR, *supra* note 49.

Article 2.3 reads:

Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.

Id.

²⁰⁶ See *Simón y otros*, *supra* note 3, at Considerando No. 23 of Judge Petracchi’s majority opinion.

²⁰⁷ *Id.* at Considerando No. 19 of Judge Highton de Nolasco.

Court case of *Marbury v. Madison*, which established that there must be a legal remedy for every vested legal right.²⁰⁸ This maxim is also made explicit in Articles 8 and 25 of the American Convention on Human Rights.²⁰⁹

The majority draws much guidance from the Inter-American Court on Human Rights' interpretation of the Convention as expounded in a recent case, *Barrios Altos*.²¹⁰ Argentina agreed to be subjected to the jurisdiction of this international court and recognized the competence of that tribunal to interpret the American Convention

²⁰⁸ *Marbury v. Madison*, 5 U.S. 137, 163, 2 L. Ed. 60 (1803).

²⁰⁹ American Convention, *supra* note 52. Article 8 states that:

1.) Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature. 2.) Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: a.) the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court; b.) prior notification in detail to the accused of the charges against him; c.) adequate time and means for the preparation of his defense; d.) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel; e.) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law; f.) the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts; g.) the right not to be compelled to be a witness against himself or to plead guilty; and; h.) the right to appeal the judgment to a higher court.

Id.

Article 25 of the same Convention, entitled "Right to Judicial Protection" states:

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. 2. The States Parties undertake: a.) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; b.) to develop the possibilities of judicial remedy; and c.) to ensure that the competent authorities shall enforce such remedies when granted.

Id.

²¹⁰ *Simón y otros*, *supra* note 4, at Considerando No. 23 of Judge Petracchi's majority opinion; *Barrios Altos Case* (Chumbipuma Aguirre v. Perú), Inter-Am. Ct. H.R., Series C, No. 75, March 14, 2001. English copy of the disposition is available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf (last visited Feb. 16, 2007) (hereinafter *Barrios Altos*).

when it signed the instrument.²¹¹ Thus, the interpretations of the Convention by the Inter-American Court are held to be highly influential secondary legal authority in Argentinean courts.²¹²

In *Barrios Altos*, the Inter-American Court examined the self-amnesty laws passed by the Peruvian de facto government, which entirely exonerated perpetrators of crimes committed against the Peruvian people in efforts to eradicate “subversion” between 1980 and 1995.²¹³ The Inter-American Court interpreted Articles 1 and 2 of the Convention to require an adequate remedy at law for victims of human rights violations—a requirement from which no signatory nation could be exempt.²¹⁴ That tribunal held that:

In the light of the general obligations set forth in Articles 1(1) and 2 of the American Convention, the States Parties have the duty to take measures of all kinds to ensure that no one is deprived of the judicial protection and the exercise of the right to a simple and effective remedy, in the terms of Articles 8 and 25 of the Convention. It is for this reason that the States Parties to the Convention which adopt laws that have such an effect, as do the laws of self-amnesty, incur in a violation of Articles 8 and 25 in connection with Articles 1(1) and 2, all of the Convention.

The laws of self-amnesty lead to the defenselessness of the victims and to the perpetuation of impunity, whereby they are manifestly incompatible with the letter and the spirit of the American Convention. This type of laws obstructs the identification of the individuals responsible for violations of human rights, as obstacles as created to the investigation and the access to justice, impeding the victims and their relatives to know the truth and to receive the corresponding reparation.²¹⁵

Judge Maqueda reasons that the *Barrios Altos* case takes on a special significance in light of Article 75, clause 22 of the Argentinean Constitution, which elevates treaties to constitutional hierarchy.²¹⁶ That significance underscores obligations such as those demanded by

²¹¹ Law No. 24658, June 19, 1996, Lexis N° LNACLY24658 (LexisNexis Argentina).

²¹² *Simón y otros*, *supra* note 3, at Considerando No. 17 of Judge Petracchi’s majority opinion; Corte Suprema de Justicia [CSJN], 8/21/2003, “Videla, Jorge R.,” Fallos (2003-326-2805) (Arg.); Corte Suprema de Justicia [CSJN], 4/7/1995, “Giroldi, Horacio David y otro s/ recurso de casación /causa n° 32/93,” Jurisprudencia Argentina [JA] (1995-III-571) (Arg.).

²¹³ *Barrios Altos*, *supra* note 210, at ¶¶ 2(i), 2(m).

²¹⁴ *Id.* at ¶ 39.

²¹⁵ *Id.* at ¶ 43 (author’s translation).

²¹⁶ *Simón y otros*, *supra* note 3, at Considerando No. 19 of Judge Maqueda’s vote.

Articles 26²¹⁷ and 27²¹⁸ of the Vienna Convention on the Law of Treaties, which prohibit the use of domestic laws as a validation for non-compliance of a treaty.

Furthermore, in its 1992 report on rights conditions in Argentina, the Inter-American Commission on Human Rights noted that the amnesty laws, along with the presidential pardons, constituted grave violations of Articles 1, 8 and 25 of the Convention for failing to impart judicial protection to victims.²¹⁹ Through this guidance, the Court focused upon an explicit requirement of the decision in *Barrios Altos*—that nations signatory to the Convention must take positive steps to remove legal impediments that prohibit the illumination of facts surrounding alleged human rights abuses.²²⁰ Moreover, the Inter-American Court found in *Barrios Altos* that the “right to truth” is an inextricable component of a proper interpretation of Articles 8 and 25 of the Convention.²²¹ As such, the plurality in *Simón y otros* argued, the amnesty laws cannot survive constitutional scrutiny.²²²

Consequently, the instructive rule of *Barrios Altos* used by the plurality in *Simón y otros* is that ‘Party States have the duty to take measures of all kinds to ensure that no one is deprived of the judicial protection and the exercise of the right to a simple and effective remedy.’²²³ The majority therefore adopts the *Barrios Altos* rule as analogous, since both Peruvian and Argentinean statutes established the same thing: amnesty for violators of human rights.²²⁴

²¹⁷ Law of Treaties Convention, *supra* note 159, at art. 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”).

²¹⁸ *Id.* at art. 27 (“A party may not invoke the provisions of its internal law as a justification for its failure to perform a treaty.”).

²¹⁹ Inter-American Commission on Human Rights, report no. 28/92 (Argentina), October 2, 1992, at paragraph 1 of report conclusion, available at <http://www1.umn.edu/humanrts/cases/28%5E92arg.pdf> (last visited Feb. 16, 2007).

²²⁰ *Simón y otros*, *supra* note 3, at Considerando No. 19 of Judge Maqueda’s vote.

²²¹ *Barrios Altos*, *supra* note 210, at ¶¶ 47-48.

²²² *Simón y otros*, *supra* note 3, at Considerando No. 20 of Judge Petracchi’s majority opinion.

²²³ *Barrios Altos*, *supra* note 210, at Part X (author’s translation).

²²⁴ *Simón y otros*, *supra* note 3, at Considerando No. 24 of Judge Petracchi’s majority opinion. The Judge states, “It is true that the situation that created the Full Stop and Law of Due Obediences is not “exactly” the same as that situated in Perú. Nonetheless, when determining their compatibility with the obligations demanded by international human rights law this is unimportant. What is dispositive here is that the [Argentinean amnesty laws] present the same defects which lead the Inter-American Court to renounce the Peruvian “self-amnesty” laws. They both constitute *ad hoc* laws whose purpose is to avoid remedy of grave injuries to human rights” (author’s translation).

3. Statutes of limitation and human rights crimes

More concretely, *jus cogens* prohibits all statutory limitations for human rights crimes, which is an issue of notable importance in this case. The crime of “forced disappearance” is treated under *jus cogens* as a unique crime, where even if a statute of limitations were applicable, its tolling would not commence so long as there still existed any uncertainty regarding the fate of the victim.²²⁵ Argentina integrated into its positive law the Inter-American Convention on the Forced Disappearance of Persons (Convention on Forced Disappearance),²²⁶ which defines such crimes as continuous until the fate of the victim is ascertained.²²⁷

Furthermore, the Declaration on the Protection of all Persons from Forced Disappearance (Declaration on Forced Disappearance) also defines this crime as an explicit prohibition by the law of nations.²²⁸ As Judge Boggiano notes in *Simón y otros*, even if one followed the premise that forced disappearances were susceptible to statutes of limitation, this kind of crime is unique in that the statute would not have begun to toll so long as prosecution was prohibited.²²⁹

This principle is premised upon the definition of forced disappearances as permanent crimes.²³⁰ Indeed, the Inter-American Court on Human Rights has held numerous times that the *jus cogens* crime of forced disappearance is a crime of a permanent nature, and thus not subject to statutes of limitation.²³¹ Additionally, the Argentinean Supreme Court has held that crimes of such a character cannot be susceptible to statutes of limitation because the injury occurred not only before, but continues to this day, and will continue until the facts are brought to light.²³² Moreover, that Court has recognized the prohibi-

²²⁵ *Simón y otros*, *supra* note 3, at Considerando No. 41 of Judge Boggiano’s vote.

²²⁶ Law No. 24.820, May 26, 1997, Lexis N° LNAcly24820 (LexisNexis Argentina).

²²⁷ Inter-American Convention on Forced Disappearance of Persons, art. III, June 9, 1994, OEA Doc. AG/RES. 1256 (XXIV-0/94), reprinted in 33 ILM 1529 (1994) [hereinafter Convention on Forced Disappearance]. The pertinent text of the treaty states that forced disappearances “shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined.” *Id.*

²²⁸ Declaration on the Protection of all Persons from Enforced Disappearance, GA Res. 47/133, UN GAOR, 47th Sess., Supp. No. 49, at 207, UN Doc. A/47/49 (1992).

²²⁹ See *Simón y otros*, *supra* note 3, at Considerando No. 41 of Judge Boggiano’s vote.

²³⁰ *Id.*

²³¹ See *Trujillo Oroza vs. Bolivia*, Series C No. 92, 2/27/2002, para. 72, 2/27/2002, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_92_ing.pdf (last visited Feb. 16, 2007); See *Velázquez Rodríguez*, Series C No. 4, Para. 181, 7/29/1988, available at www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf (last visited Feb. 16, 2007).

²³² Corte Suprema de Justicia [CSJN], “Arancibia Clavel, Enrique L.,” 8/24/2004, Jurisprudencia Argentina [JA] (2004-IV-426) (Arg.), at Considerando No. 13 of majority opinion. (hereinafter *Arancibia Clavel*).

tion of statutes of limitation to human rights crimes as inherent in the law of nations before the induction of the Convention into Argentinean positive law.²³³

As a statutory limitation to the prosecution “permanent crimes,” therefore, the Full Stop Law facially violates the Convention on Forced Disappearance and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (Statutory Limitations Convention),²³⁴ both of which are now constitutional mandates.²³⁵ These treaties prohibit enactment of domestic law to limit the time within which a charge for crimes against humanity may be prosecuted.²³⁶

In regards to the Convention on Forced Disappearance, Article VII states that:

Criminal prosecution for the forced disappearance of persons and the penalty judicially imposed on its perpetrator shall not be subject to statutes of limitations.

However, if there should be a norm of a fundamental character preventing application of the stipulation contained in the previous paragraph, the period of limitation shall be equal to that which applies to the gravest crime in the domestic laws of the corresponding State Party.²³⁷

In light of the second paragraph, it may not be said that international law’s prohibition on statutory limitations is clearly absolute. Pursuant to the Convention on Forced Disappearance, amnesties may

²³³ *Priebke, supra* note 184.

²³⁴ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *opened for signature* Nov. 26, 1968, 754 U.N.T.S. 73, G.A. Res. 2391, 23 U.N. GAOR Supp. (No. 18) at 40, art. 1(b), U.N. Doc. A/7218 (1968) [hereinafter Statutory Limitations Convention].

²³⁵ The Statutory Limitations Convention was elevated to constitutional hierarchy by Law No. 24.584, Nov. 1, 1995, Lexis N° LNACLY24584 (LexisNexis Argentina). The Convention on Forced Disappearance was also elevated to constitutional hierarchy two years later. *Supra* note 227.

²³⁶ Convention on Forced Disappearance, *supra* note 227; Statutory Limitations Convention, *supra* note 234. The Statutory Limitations Convention states in Article 1 that,

No statutory limitation shall apply to the following crimes, irrespective of the date of their commission: (b) Crimes against humanity whether committed in time of war or in time of peace. .eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid , and 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.

Id.

²³⁷ Convention on Forced Disappearance, *supra* note 227, at art. VII.

not contemplate a statutory limitation period less than that corresponding to the gravest crime punishable by domestic laws, provided there is a pre-existing domestic norm of “fundamental character” requiring that limitation. The Full Stop Law called for the extinction of all judicial action against persons accused of crimes during the Dirty War within sixty days of its promulgation.²³⁸ The Argentinean Penal Code defines the permissible periods of statutory limitations for crimes committed.²³⁹ The crimes amnestied by the Full Stop Law correspond to a statutory limitation measured in years, not days.²⁴⁰ Therefore, even assuming there is a domestic norm of “fundamental character” requiring the limitation, the sixty day period contemplated by the Full Stop Law violates the *jus cogens* principle against the statutory limitations for human rights crimes.

4. Ancillary arguments

In addition to arguments based upon *jus cogens* and the multilateral treaties to which Argentina is a signatory, the Court employs several ancillary arguments which further support the annulment of the amnesty laws, only three of which will be discussed in this comment. Although arguments premised upon notions of sovereignty, extradition, and the separation of governmental powers formed the bulk of the lower federal court’s decision, as well as that of the Prosecutor General in this case, they went conspicuously unaddressed by most Judges. Nonetheless, they are perhaps the soundest arguments for the annulment of the amnesty laws, and as such, deserve at least some acknowledgment.

5. Separation of powers

The Court in *Simón y otros*, invalidates the laws of impunity primarily upon grounds of irreconcilability with international law. Nonetheless, the Court notes that several arguments supporting the aboli-

²³⁸ Full Stop Law, *supra* note 2, at art. 1.

²³⁹ Cód. PEN. ARG. art. 62.

²⁴⁰ Indeed, the statutory limitations provided by Argentinean Penal Code are as follows:

Two years when the crime is punishable only by a fine; One year when the crime is punishable only by temporary incapacitation; five years when the crime is punishable only by perpetual incapacitation; the period in time corresponding to the maximum sentence possibly assessed for crimes punishable by imprisonment or reclusion, not more than fifteen years, or less than two years; fifteen years when the crime is punishable by perpetual imprisonment or reclusion.

tion of the amnesty laws are found within the constitutional requirement of a political balance of the governmental powers.²⁴¹

Judge Maqueda argues, as does the majority of Court, that the Due Obedience law improperly intrudes upon the purview of the judicial branch by establishing an irrefutable presumption of fact.²⁴² As previously stated, the statute reads: "It is presumed, and not admitting proof to the contrary, that those who at the time of the commission of the acts are not punishable for [alleged crimes during military rule] by virtue of having been required to follow orders."²⁴³ This requirement prohibits Judges to make determinations of fact, which is strictly a faculty of the judicial power.²⁴⁴ As was established early in the reported case law of the Republic, the legislative power may not decide "cases" or "controversies."²⁴⁵ This is within the exclusive purview of the judicial power. Thus, by denying courts the power to determine whether the individuals that came before them were in fact "incapable of opposing, resisting, or investigating the orders," the legislative power impermissibly intruded upon the exclusive province of the judiciary.²⁴⁶

²⁴¹ The lower court in *Simón y otros*, relied heavily upon one argument based on the separation of powers, which the Prosecutor General discusses at great length, but the majority in this case conspicuously omits. That argument is based upon Article 29 of the National Constitution, and its prohibition of state and federal legislatures from extending extraordinary powers to the Executive branch. It was one of the principal legal proscriptions that moved the lower Federal Appeals Court to declare the laws unconstitutional. Several other Federal courts subsequently echoed the lower court in *Simón y otros*, and struck the amnesty laws down based largely on this Article. In this case, the argument was presented by the Prosecutor General as requiring the invalidations of the amnesty laws because the congressional action that enacted them was itself a violation of the separation of powers required by that article.

Prior to the 1930s, the delegation of "extraordinary powers" to the executive by the legislature was often justified by imminent dangers to the nation. In these cases, it was argued that certain momentary constitutional sacrifices were warranted when the nation was faced with its own extinction. The nation created Article 29 thus in response to ensure the domestic uninterrupted of democratic institutions. The Prosecutor General argues in his brief that if the National Congress had in fact assigned the military the "whole of public authority," or the sum of political power, then those amnesty laws that sought to immunize the recipients of that power from criminality are equally offensive to Article 29. Thus, if congressional action conceding the legislative authority to the military is devoid of legitimacy, then laws that require the abandonment of prosecution of military crimes committed pursuant to that concession are similarly illegitimate.

²⁴² *Simón y otros*, *supra* note 3, at Considerando 24 of Judge Maqueda's vote.

²⁴³ Law of Due Obedience, *supra* note 2, at art. 1.

²⁴⁴ *Simón y otros*, *supra* note 3, at Considerando No. 25 of Judge Maqueda's vote. The Judge adopts Judge Bacqué's dissenting opinion in *Camps* and "makes it his." *Id.*

²⁴⁵ Corte Suprema de Justicia [CSJN], 6/22/1987, "Camps, Ramón Juan Alberto y otros," Fallos (1987-310-1162) (Arg.), at Considerando No. 28 of Judge Petracchi's dissent. Interestingly, the Chief Judge relies on the landmark U.S. case of *Marbury v. Madison*, 5 U.S. 137 (1803), in support of this proposition.

²⁴⁶ See Law of Due Obedience, *supra* note 2 (author's translation).

Another separation of powers violation inherent in the Due Obedience law is found in its purely retroactive character.²⁴⁷ In Argentina, legislative acts must be applicable to future events, and may not declare prior acts legal or illegal.²⁴⁸ This is the cornerstone of Judges Petracchi and Bacqué's dissenting opinions in *Camps*, a 1987 Supreme Court case.

In that decision, the Court found that it did not have the power to rule over the Due Obedience statute because it would implicate a violation of the fundamental balance of power evinced by the structure of the Constitution.²⁴⁹ It did so, ironically, by employing the converse reading of the same separation of powers requirement above discussed. The majority wrote in *Camps*:

The most delicate mission of dispensing justice is knowing to stay within one's jurisdiction, without intruding into the field of the other branches of power. This is especially important when the National Congress exercises its elevated function of determining the proper coordination between different interests so that society may survive...It should be then said that it is not proper for the Judiciary to Judge the opportunity, merit, or the convenience of the decisions of the other powers of the State.²⁵⁰

While it is true that the judiciary may not invalidate a congressional act because it finds fault with its merit or policy, the court in *Camps* came very close, admitting they would not declare the statute unconstitutional only because the threat of another military coup was a real and manifest danger. This danger, as will be later discussed, is no longer a looming concern either for the country or the Supreme Court.

6. Sovereignty and extradition

An underlying constitutional concern for some members of the Court is the manner in which the amnesty statutes injure the national sovereignty. There is a principle of the dignity and right of self-governance that underlies the Argentinean Constitution.²⁵¹ As Judge Zaffaroni states, "the very essence of the Constitution is the attribu-

²⁴⁷ *Simón y otros*, *supra* note 3, at Considerando No. 13 of Judge Petracchi's majority opinion.

²⁴⁸ *Id.*

²⁴⁹ *Camps*, *infra* note 259, at Part I of majority opinion.

²⁵⁰ *Camps*, *infra* note 259, at Considerando No. 11 of majority opinion (author's translation).

²⁵¹ *Simón y otros*, *supra* note 3, at Considerando No. 34 of Judge Zaffaroni's opinion.

tion or distribution of power in order to exercise the inherent authority of sovereignty.”²⁵² This principle is found within the Constitution’s Preamble, which is not merely a declarative manifestation, but a source of substantive law.²⁵³ Judge Zaffaroni argues that the Preamble’s statement, “[W]e, the representatives of the people, with the object of constituting the national union, ensuring justice, preserving domestic peace . . .” is wholly negated when Judges are forced relinquish jurisdiction over complaints that “force Argentineans to be subjected to the courts of any other country on the planet.”²⁵⁴

The amnesty laws are unique in that they forbid the prosecution of crimes which every nation in the world has jurisdiction to try. Thus, amnesty equals extradition, and extradition for crimes committed by the Argentinean government against the Argentinean people deeply injures national sovereignty.²⁵⁵ The amnesty laws therefore reduce the Constitution to a “defective document.”²⁵⁶ In exercising the national sovereignty by declaring the amnesty laws unconstitutional, the Court would effectively be placing a stop on extraditions and allowing those crimes committed by Argentineans to be tried in Argentina. Judge Lorenzetti echoes this sentiment, formulating the plurality’s concurrence on this point: “The dignity of the Republic within the international community demands that it clearly reaffirm its will to exercise its jurisdiction and sovereignty.”²⁵⁷

C. Defense and Dissent: Principles of Legality and of Equality

Judge Fayt, in his dissenting opinion in *Simón y otros*, addresses almost every argument advanced by the majority, coming to entirely different conclusions. His arguments are mainly premised upon the

²⁵² *Id.* (author’s translation).

²⁵³ *Id.* at Considerando No. 35 of Judge Zaffaroni’s opinion.

²⁵⁴ *Id.* Interestingly, the dissenting and defense arguments take the position that principles of sovereignty demand a different conclusion. The dissent notes that there is a principle of international law, validated by the United Nations Human Rights Commission as well as the Inter-American Court on Human Rights, which recognizes the existence of a “margin of national appreciation.” *Id.* at Considerando No. 48 of Judge Fayt’s dissenting vote. This principle guarantees the autonomy of the nation state by reserving to the sovereign a margin of decision-making legitimacy in the induction of international norms such as *jus cogens* into the domestic field. This is in essence an addendum to Judge Fayt’s principle of legality contention. He argues that the national sovereignty prohibits the sacrifice of the principle, as enabled by Article 18 of the National Constitution, on the altar of international law, because that decision resides within the “margin of national appreciation.” *Id.* This begs the question: What falls within this “margin of appreciation” and what does not? This question is unanswered, and consequently does not form a great part of the Judge’s dissenting opinion. *Id.*

²⁵⁵ *Simón y otros*, *supra* note 3, at Considerando No. 35 of Judge Zaffaroni’s opinion.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at Considerando No. 29 of Judge Lorenzetti’s opinion (author’s translation).

Supreme Court's earlier holding in *Camps*, i.e., the defense arguments in *Simón y otros*.²⁵⁸ Both these are centered around the apparently irreconcilable conflict between international legal obligations that demand the retroactive application of criminal law and Article 18 of the National Constitution, which explicitly prohibits *ex post facto* laws.²⁵⁹ Almost every argument advanced by the majority is passed through Article 18 by the dissent, who concludes that, in light of the inability of treaties to present conflicts with pre-existing constitutional principles, all fail constitutional muster.

This "principle of legality" is a fundamental trait of Argentinean justice, and the conflict is indeed apparent: the treaties which conflict with the amnesty laws were signed *ex post facto* the alleged crimes committed. It is mainly through *jus cogens* that the majority find their way around the principle of legality. The defense and dissenting opinion's arguments fall away, or at the very least, take on a very different form when we accept *jus cogens* as enforceable domestic law *at the time* the crimes were committed.

Although this issue is the backbone of the dissent, it is merely the majority's lengthy response to the defense's main argument. We shall first examine how the dissent regards the principle as prohibiting the application of the American Convention, International Covenant on Social and Political Rights, and other international instruments, and then determine how the majority overcomes this obstacle.

Article 18 of the Argentinean Constitution states: "No inhabitant of the Nation may be punished without prior trial based on a law in force prior to the offense."²⁶⁰ This principle of *nullum crimen, nulla poena sine lege previa* is meant to safeguard those persons whose actions are criminalized at a future time. Even if there should be some prior prohibition, the principle requires the application of the most benign law, since the prohibition applies only when the subsequent prohibition is more severe than the earlier.²⁶¹ Since the treaties demand the retroactive application of their provisions, these must be held to be inapplicable to Argentina lest they injure some established constitutional principle, such as that found within Article 18. Therefore, and taking into consideration that treaties can never injure estab-

²⁵⁸ See Corte Suprema de Justicia [CSJN], 6/22/1987, "Camps, Ramón Juan Alberto y otros," *Jurisprudencia Argentina* [JA] (1987-III-121) (Arg.).

²⁵⁹ CONST. ARG. art. 18 (1994).

²⁶⁰ *Id.*

²⁶¹ *Simón y otros*, *supra* note 3, at Considerando No. 6 of Judge Petracchi's majority opinion.

lished constitutional principles, the defense argues, the treaties cannot be retroactively applied.²⁶²

The defense contends that the majority is retroactively applying the American Convention, the ICCPR, and the American Convention on Forced Disappearance of Persons.²⁶³ He notes that this is not only clearly a violation of Article 18, but also of Article 27,²⁶⁴ which requires the Federal Government to enact only treaties that are “in conformity with the principles of public law laid down by this Constitution,” as well as Article 75(22), which includes the aforementioned caveat.²⁶⁵ We’ll address each in turn.

The ICCPR was signed shortly before the enactment of the amnesty laws, therefore constituting *lege previa*. Nonetheless, in defense of the amnesty laws, it is argued that the Argentinean United Nations delegate present at the treaty debates expressed that the Republic would only ratify the treaty if it were able to interpret the Article 15.2 of the ICCPR, which commands the retroactive application of *jus gentium* crimes, as subordinate to the principle of legality commanded by Article 18.²⁶⁶ Argentina subsequently ratified the treaty in 1986, but issued a reservation to this effect.²⁶⁷ Thus, the ICCPR, was ratified by Argentina expressly prohibiting any injury to that specific Article of the Constitution.²⁶⁸

This argument contends that in disregarding the reservation above mentioned, the majority incorrectly and retroactively applied the American Convention on Forced Disappearance of Persons, which was signed in 1994. The dissent argues that even if the ICCPR is applicable, Article VII saves the statutes.²⁶⁹ As previously discussed, the ICCPR prohibits statutory limitations, unless there is “a norm of fundamental character preventing the application of [the prohibition of

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ ARG. CONST. art. 27 (1994).

²⁶⁵ *Simón y otros*, *supra* note 3, at Considerando No. 9 of Judge Boggiano’s vote (author’s translation).

²⁶⁶ *Id.* at Considerando No. 43 of Judge Fayt’s dissenting vote.

²⁶⁷ Law No. 23313, art. 4., May 13, 1986, Lexis N° LNACLY23313 (LexisNexis Argentina). The pertinent text reads, “El Gobierno Argentino manifiesta que la aplicación del apartado segundo del art. 15 del Pacto Internacional de Derechos Civiles y Políticos, deberá estar sujeta al principio establecido en el art. 18 de nuestra Constitución Nacional.”—“The Argentinean Government states that the second section of Article 15 of the International Covenant on Civil and Political Rights shall comport to the principle established in Article 18 of our Nacional Constitution.” (author’s translation).

²⁶⁸ *Id.*

²⁶⁹ Convention on Forced Disappearance, *supra* note 227.

statutory limitations.]”²⁷⁰ In that event, the statutory limitation corresponding to the gravest crime in domestic law applies.

Thus, the statute of limitations determined by the Full Stop Law is not violative of the treaty for, as the Judge states, “what is Article 18 if not a norm of fundamental character?”²⁷¹ Interestingly, neither the dissent nor the defense argues for the application of a statute of limitations according to the “gravest crime in the domestic laws.” This is possibly because the sixty-day limitation provided by the Full Stop Law falls very short of the limitation provided for by the Penal Code for any crime punishable by imprisonment.²⁷²

The majority does not see Article 18 as a major impediment toward the annulment of the amnesty laws. The opinions regarding the applicability of the principle of legality fall within two camps.

The first is embodied in Judge Petracchi’s argument. He states (and no other Judge concurs with him on this point) that the ratification of the American Convention and submission to the jurisdiction of the Inter-American Court on Human Rights necessarily prohibits the application of the principle of legality in order to disregard human rights obligations.²⁷³ Although Judge Petracchi doesn’t explicitly state this, it follows logically that in his opinion, the Inter-American Convention on the Forced Disappearance of Persons overruled Article 18 of the Constitution in matters concerning human rights violations.

The second opinion regarding the applicability of the *ex post facto* prohibition is embodied in Judge Maqueda and Judge Highton de Nolasco’s votes, amongst others, that the principle of legality is simply not implicated in this case. The Judges note that in no way should importance be divested from the inviolable maxim *nullum crimen sine lege previa*.²⁷⁴ Judge Maqueda notes that the actions by the military amnestied by the statutes in question were very much prohibited by national positive law prior to their commission, and thus there is no retroactive application of law.²⁷⁵

Judge Highton de Nolasco notes that *jus cogens* was an entirely enforceable source of law during the time of commission of the crimes.²⁷⁶ Article 118 of the National Constitution acknowledges the submission of Argentina to supranational norms prohibiting the

²⁷⁰ *Id.*

²⁷¹ *Simón y otros, supra* note 3, at Considerando No. 38 of Judge Fayt’s dissenting vote (author’s translation).

²⁷² Cód. PEN. ARG. art. 62.

²⁷³ *Simón y otros, supra* note 3, at Considerando No. 31 of Judge Petracchi’s majority opinion.

²⁷⁴ *Id.* at Considerando No. 83 of Judge Maqueda’s vote.

²⁷⁵ *Id.* at Considerando No. 84 of Judge Maqueda’s vote.

²⁷⁶ *Id.* at Considerando No. 31 of Judge Highton de Nolasco’s vote.

commission and even the amnesty of human rights crimes.²⁷⁷ Thus, the subsequent ratification of treaties that echoed the same was nothing more than an articulation of preexisting positive domestic law.²⁷⁸ Judge Boggiano echoes this reasoning, arguing that the annulment of the laws cannot be prevented by the application of the principle of legality because *jus gentium* was an enforceable source of law prior to the commission of the acts.²⁷⁹

Further, Judge Maqueda declares, “not only were those crimes prescribed by international law, but our own Code anticipates exactly this sort of conduct and provides its sanction, which indicates that the principle of legality [is not injured].”²⁸⁰ Specifically, Penal Code Articles 141, 142 and 144 prohibited the crime of forced disappearance.²⁸¹ Because the Code provisions predate the commission of the actions the principle of legality is not violated nor implicated if these persons are tried for crimes committed during the junta.²⁸²

Another articulation of this view is advanced by Judge Boggiano, who raises a structural argument.²⁸³ Constitutional provisions may not be interpreted to contradict each other.²⁸⁴ The only way that one could reconcile Article 118's induction of *jus cogens* with the principle of legality in Article 18 is to state that those *obligation erga omnes* were applicable to the Republic before the commission of the crimes in question.²⁸⁵ The Supreme Court has firmly established in prior case law that “*jus cogens* has been enforceable law in Argentina from time immemorial.”²⁸⁶

Judge Argibay, however, phrases the same concept somewhat differently. She notes that the principle of legality is not implicated nor violated in two situations: First, the principle cannot be enforced when the law to be applied does not constitute any change in the legality or illegality of the act previously committed.²⁸⁷ Indeed, if the action is illegal when it is committed, it is not cognizable by the principle of legality. Second, the principle has no place when the legitimate expectations of the actor are not frustrated.²⁸⁸ In other words, if the actor

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.* at Considerando No. 43 of Judge Boggiano's vote.

²⁸⁰ *Id.* at Considerando No. 84 of Judge Maqueda's vote (author's translation).

²⁸¹ *Id.* at Considerando No. 85; Cód. PEN. art. 141, 142, 143.

²⁸² *See id.* at Considerando No. 85 of Judge Maqueda's vote.

²⁸³ *Id.* at Considerando No. 49 of Judge Boggiano's vote.

²⁸⁴ *See id.*

²⁸⁵ *Id.* at Considerando No. 43 of Judge Boggiano's vote.

²⁸⁶ *Id.* (citing his own opinion in the Arancibia Clavel case) (author's translation).

²⁸⁷ *Id.* at Considerando No. 16 of Judge Argibay's vote.

²⁸⁸ *Id.*

could not legitimately expect his conduct to be legal, his expectations will not be frustrated by the subsequent criminalization of his actions.²⁸⁹ Thus, because the kidnapping, torture, and subsequent disappearance of persons could not legitimately be expected to be legal acts at the time of commission, the principle is not implicated in this case.²⁹⁰

Additionally, the defense and dissent in *Simón y otros*, contend that the Statutory Limitations Convention is inapplicable for two reasons. First, the Convention does not contemplate the crime of forced disappearance as a crime against humanity. Second, the treaty was obligatory to the Republic only from 1995, and its retroactive application is a violation of the *ex post facto* prohibition.²⁹¹

It is thus clear that non-applicability of statutes of limitation to human rights crimes logically intersects with the prohibition on the *ex post facto* application of law in this case. Nonetheless, it is possible to address the above contention in two steps. First, the very nature of the crime places it among those state actions prohibited by the law of nations, and therefore not susceptible to the prohibition of *ex post facto* laws. Second, even if domestic positive law is not subordinated by the character of the crimes, *jus cogens* was recognized by the Republic prior to the commission of the acts, and the principle of legality is not violated.

Both dissent and defense rest the foundation of their arguments on a point of law upon which almost every Judge concurs—the inviolability of the principle of legality. Consequently, it is possible their arguments could have fared better if they had instead challenged the enforceability of domestic positive law in criminalizing the defendants' actions at the time they were committed. On this issue, Judge Fayt merely states that the majority “dogmatically applies” the principles of *jus cogens* without establishing what are the international practices on the subject,²⁹² and that it “dogmatically applies” the findings of the Court in *Barrios Altos* to the Argentinean case.²⁹³ It would seem that Judge Fayt of the majority's logic and not its result. Indeed, the natural continuation of the Judge's argument on this point would be to establish that at the time the acts were committed, they were not prohibited by enforceable domestic law. Perhaps for obvious reasons, this argument is not made.

The Argentinean Supreme Court could also have drawn guidance, as it has done in the past, from its North American counterpart.

²⁸⁹ *Id.*

²⁹⁰ *See id.*

²⁹¹ *Id.* at Considerando No. 39 of Judge Fayt's dissenting vote.

²⁹² *Id.* at Considerando No. 43 of Judge Fayt's dissenting vote (author's translation).

²⁹³ *Id.* at Considerando No. 78 of Judge Fayt's dissenting vote (author's translation).

In the United States, the prohibition on *ex post facto* laws is also a long-standing principle of criminal law.²⁹⁴ Both Argentina and the United States have determined that this principle prohibits the negative retroactive effect upon a person's rights. Thus the distinction could have been drawn by finding that Argentina's treaty obligations in this case are of a purely procedural rather than substantive nature. Retroactive application of purely procedural doctrine which does not alter the rights of the accused from the moment the act was committed has never been prohibited in either system.²⁹⁵ This distinction is essentially a more clear articulation of the majority opinion in *Simón y otros*, that the *nullum crimen, nulla poena sine lege previa* rule is not violated by the retroactive application of Argentina's current treaty obligations.

The dissent also addresses the majority's heavy reliance upon the Inter-American Court on Human Rights's decision in the *Barrios Altos* case. Judge Fayt argues *Barrios Altos* is a distinguishable case, and therefore not applicable to the issue at bar.²⁹⁶ As previously examined, *Barrios Altos* considered the Peruvian amnesty laws were not democratically endorsed and exonerated all persons involved in the massacre of several members of the Peruvian communist party *Sendero Luminoso*.²⁹⁷ That Court relied upon the American Convention's imposition of the "principle of equality," or the extension of judicial protection to every victim of human rights violations, to signatory states.²⁹⁸

Judge Fayt's argument is founded on Inter-American Court Judge García Ramírez's concurring opinion in *Barrios Altos*.²⁹⁹ He contends that because the Peruvian laws were not a product of a democratic process, they are more like the attempted Argentinean junta's self-amnesty in the National Pacification Law, and therefore not applicable to the instant case.³⁰⁰ It is also argued that the Argentinean laws were not absolute amnesties, and technically, one could still punish human rights crimes, given of course that charges against a senior military official were filed before the expiration of the Full Stop statute of

²⁹⁴ See *Cummings v. Missouri*, 71 U.S. 277, 323 (1867).

²⁹⁵ See *id.*; see Corte Suprema de Justicia [CSJN], 24/12/1962, "Fiscal v. Santoro, Duilio y otros / recurso extraordinario," J.A. (1963-III-481) (Arg.) (noting that a law that violates the principle of legality is one that creates a new, more prohibitive form of criminal penalty).

The U.S. Supreme Court, speaking for its country, has recognized this principle on several occasions. *Dobbett v. Florida*, 432 U.S. 282, 293 (1977); *Beazell v. Ohio*, 269 U.S. 167, 171 (1925); *Gibson v. Mississippi*, 162 U.S. 565, 590 (1896).

²⁹⁶ *Simón y otros*, *supra* note 3, at Considerando No. 78 of Judge Fayt's dissenting vote.

²⁹⁷ *Barrios Altos*, *supra* note 210.

²⁹⁸ *Id.*

²⁹⁹ *Id.* at Paragraph 10 of Judge García Ramírez's concurring opinion.

³⁰⁰ *Simón y otros*, *supra* note 3, at Considerando No. 78-79 of Judge Fayt's dissenting vote.

limitations.³⁰¹ In essence, this view distinguishes *Barrios Altos* because of its procedural origins and absolutism.

The majority does not respond to this distinction. Nonetheless, and irrespective of the factual incongruity between the Peruvian and Argentinean examples, this view does not explain how the principle of equality as it was applied in *Barrios Altos* leads to any different result here. This view seems to suggest an absurd result—that the proper interpretation of the Convention, which requires signatory states to “ensure that *no one* is deprived of judicial protection” instead, means to “ensure that *not everyone* is deprived of judicial protection.” Essentially, this reading would establish that the Convention prohibits only de jure and not de facto denial of judicial protection.

In any regard, the *Barrios Altos* majority decision was not predicated upon the non-democratic procedural origins of the Peruvian laws. Although the *Barrios Altos* court contemplates laws admittedly classified as “self-amnesties,” the Court does not condemn the laws because of their non-democratic ratification, but rather because they demonstrate that Peru “failed to comply with the obligation to adapt internal legislation that is embodied in Article 2 of the Convention.”³⁰²

Neither was the *Barrios Altos* decision predicated upon the total denial of judicial protection. On the contrary, as the Inter-American Court noted, the Peruvian amnesty laws prevented only criminal prosecution of the crimes, and allowed unbridled civil liability for the same.³⁰³ From that perspective, the laws condemned in *Barrios Altos* were less offensive to the American Convention than those at issue in *Simón y otros* in that Peruvian victims were extended judicial protection under civil liability whereas in Argentina, both criminal and civil recourses were extinguished.³⁰⁴

PART IV—A TIME RIPE FOR CHANGE

The Prosecutor General writes in *Simón y otros* that:

[T]he test for the constitutionality of a statute must [have] correspondence with the moment in history in which the analysis is made . . . It is not a controversial proposition that the Constitution should be interpreted dynamically, according to the values of society and the attention that is required

³⁰¹ See *id.* at Considerando No. 30 of Judge Fayt’s dissenting vote.

³⁰² *Barrios Altos*, *supra* note 210, at Paragraph 42 of majority opinion.

³⁰³ *Id.* at Paragraph 18 of majority opinion.

³⁰⁴ Law No. 23.984, Sept. 4, 1991, Lexis N° LNACLY23984 (LexisNexis Argentina). Indeed, under Argentinean law, issues of civil liability usually cannot be disassociated from the criminal charge, and are part of the same trial. *Id.*

by those moments in history that change the substance of both evaluative and interpretative paradigms.³⁰⁵

Indeed, it may be argued that all of the majority's arguments in *Simón y otros* premised upon the long-standing enforceability of *jus cogens* were just as much valid in 1987, when the Court upheld the Law of Due Obedience in *Camps*, as they are today.³⁰⁶ Arguments premised on the separation of powers, upon the violation of *jus cogens* as introduced into domestic law through Article 118 of the National Constitution, injury to national sovereignty, and denial of judicial protection to victims were all valid not only in 1987, but also at the time the amnesty laws were promulgated and when the crimes were committed. So, what has changed?

The Prosecutor General's statement is consonant with another principle of *jus cogens* echoed by Judge Maqueda: That historically, governments' powers to amnesty human rights violations are extinguished when imminent threats to democratic institutions no longer exist.³⁰⁷ In other words, a government may be justified in amnestying military actions because the alternative would result in the destruction of the democratic state. However, once that concern no longer exists, the government is no longer empowered to maintain that amnesty. Clearly, the decision in *Simón y otros* advances a dynamic and fluid test for constitutionality and compliance with international law. The political climate of the Republic when the amnesty laws were passed has dramatically changed, warranting this new change in the Argentinean model from one of amnesty to one of accountability.

Institutionally, Argentina is a different country from its 1980s counterpart. The threat of military uprising has tremendously diminished.³⁰⁸ The military no longer wields great political power.³⁰⁹ Defense spending has steadily declined since Menem commenced a gra-

³⁰⁵ *Simón y otros*, *supra* note 3, at Dictámen del Procurador General, VIII-A.

³⁰⁶ The shift in the legal landscape in this regard focuses on the enactment of Article 75, clause 22 of the Constitution. The 1994 constitutional reform which added this Article could be seen as a mere ratification of prior Argentinean jurisprudence, since the Supreme Court had already held international treaties to be of a higher order than national legislation. See Ekmekdjian, *supra* note 143. Furthermore, the Court had also previously recognized that the existence of *jus cogens* was a long-standing requirement of the Constitution's Article 118. See *Simón y otros*, *supra* note 3, at Considerando No. 45 of Judge Maqueda's vote.

³⁰⁷ *Simón y otros*, *supra* note 3, at Considerando No. 81 of Judge Maqueda's vote.

³⁰⁸ Centro de Estudios Legales y Sociales, DERECHOS HUMANOS EN ARGENTINA—INFORME 2005 65, (Siglo XXI Editores Argentina S.A. 2005) [hereinafter Centro de Estudios Legales y Sociales]. The Center for Legal and Social Studies notes that, "[The military's] capacity and intentions of involving themselves in this issue has diminished progressively during the last few years." (author's translation).

³⁰⁹ Brown, *supra* note 71, at 216.

dual reduction in the flow of funds to the Navy and Armed Forces.³¹⁰ In 1999, an annual report on military expenditures in Argentina was submitted to the U.S. Congress Committee on Appropriations that stated, "The Argentinean military does not play a political role. In contrast to years past during the era of the military juntas, the armed forces no longer pose a threat to the constitutional regime."³¹¹

Nine out of ten of the officers currently serving in the armed forces were not in the service during the military regime.³¹² Recently, officers were questioned by the military regarding their most pressing concerns. Their responses were predominantly regarding low wages and equipment shortages.³¹³ They did not mention the ongoing arrests for kidnapped children or the possibility of the annulment of the amnesty laws as pressing issues.³¹⁴ Many hard right political officials, such as Carlos Ruckauf, ex-Governor of Buenos Aires, which had previously maintained outspoken support for the military and the validity of the amnesty laws now support the nomination for the *Abuelas de la Plaza de Mayo* for the Nobel Peace Prize.³¹⁵ When the Federal Court of Appeals handed down its decision, giving rise to the case here examined, the military made clear it was "not going to do anything," and would specifically avoid "meddling with the courts."³¹⁶ The Federal

³¹⁰ *Id.*; Annual Report on Military Expenditures in Argentina, Submitted to the Committee on Appropriations of the U.S. Senate and the Committee on Appropriations of the U.S. House of Representatives by the Department of State on February 19, 1999, http://www.state.gov/www/global/arms/99_amiex1.html#ar (last visited 11/30/05). The report states,

The 2000 budget presented by the Menem government in late 1999 cut the MOD's budget (excluding pensions) by over 12 percent, to USD 1.8 billion. The new de la Rúa government (which took office in December 1999) accepted most of the Menem budget, including the defense portion, and also called for spending restraints across the board. For example, in February 2000, the MOD was told to cut spending by an additional USD 150 million. Given the current tight financial situation in Argentina, we expect that there will be no additional money made available to the MOD for at least the short-term.

Id.

³¹¹ Annual Report on Military Expenditures in Argentina, Submitted to the Committee on Appropriations of the U.S. Senate and the Committee on Appropriations of the U.S. House of Representatives by the Department of State on February 19, 1999, http://www.state.gov/www/global/arms/99_amiex1.html#ar (last visited 11/30/05).

³¹² Verbitsky, *supra* note 112.

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ The *Abuelas de la Plaza de Mayo* is an organization founded by the mothers and grandmothers of disappeared children, who have spearheaded campaigns against the amnesty laws and continued investigation and prosecution for theft of children during the Dirty War. See Avery, *supra* note 33.

³¹⁶ *Id.*

Court of Appeals Judge was subsequently invited to a military ceremony where Military Major General Brinzoni, an official who directly benefited from the amnesty statutes, assured the Judge that the military would obey the orders of the judiciary.³¹⁷ In 2001, when the lower court in *Simón y otros* struck down the amnesty laws, the Center for Legal and Social Studies in Argentina (CELS) filed a *habeas data* to obtain information held by military archives.³¹⁸ At that time, 663 officials reported to give testimony, including Major General Brinzoni, and several other high-ranking officials.³¹⁹

Although many political commentators believed that the Supreme Court's decision here studied would serve no purpose but to "open old wounds" and stir up military frustrations,³²⁰ the CELS reports that of the 199 officials detained after this ruling, only 6 had been in active service during the military regime.³²¹ Some retired military officials have denounced this ruling but have retaliated only by publishing newspaper articles and making impassioned public speeches.³²² Furthermore, increasingly enabled communication between the military and civilian communities has fostered an ongoing dialogue regarding the needs of national defense departments, as is evidenced by several public forum debates, such as the "Values and Principles of the Military Profession Conference," and the "Conference on National Defense and International Dimensions of Security."³²³ This has also greatly contributed toward decreased tensions within both the military and between the armed forces and the civilian government.³²⁴

The lower court's declaration in 2001 revived popular fervor for illuminating the events of Argentina's troubled past. In 2004, the government sanctioned a project to memorialize persons disappeared during the military regime, and make public the location of clandestine military installations where interrogations took place.³²⁵ International attention has been well received by the Argentinean govern-

³¹⁷ *Id.*; General Brinzoni now possibly faces prosecution as he was the Secretary General of the Chaco Province in December 1976, where seventeen political prisoners were killed. "Argentina: Supreme Court Should Resist Army Pressure," Human Rights Watch <http://hrw.org/english/docs/2003/03/12/argent5394.htm> (last visited 11/30/05); Verbitsky, *supra* note 112.

³¹⁸ Centro de Estudios Legales y Sociales, *supra* note 308, at 65.

³¹⁹ *Id.* at 65-66.

³²⁰ *Id.* at 66.

³²¹ *Id.*

³²² *Id.*

³²³ *Id.* at 67. The Conferences were: "El Seminario Internacional de La Defensa Nacional y las Dimensiones Internacional y Regional de la Seguridad," and the "Jornadas de Reflexión sobre los Valores y Principios de la Profesión Militar," (author's translation). *Id.*

³²⁴ *See id.*

³²⁵ *Id.* at 37.

ment, which held conferences on the reaffirmation of human rights in the country, inviting Kerry Kennedy from Amnesty International, the director of the Holocaust Museum in Washington, D.C., Sara Bloomfield, and the Chief Executive of Human Rights First, Michael Posner, among others.³²⁶

Although the 2001 decision was initially viewed with some skepticism, several courts have echoed Judge Cavallo's pronouncement. In September 2003, the Federal Capital's Court of Appeals opened the *ESMA* case for re-hearing, which had previously prohibited the prosecution of several military officers involved in human rights violations in the *Escuela de Mecánica de la Armada* (ESMA).³²⁷ The *Camps* case, which originally validated the Law of Due Obedience has also been ordered reopened, and the Chief of Police of the Buenos Aires province as well as his subordinates prosecuted.³²⁸ Several other federal courts in other provinces have followed suit, declaring the amnesty laws unconstitutional, and prosecuting previously immune participants of the Dirty War.³²⁹

The trend of the Argentinean political landscape seems to echo Judge Lorenzetti's words in *Simón y otros*, "[There] are certain acts that simply cannot be forgotten."³³⁰ Indeed, the demand for prosecution of crimes against the Argentinean people during its last military regime seems to have only risen. In 2003, two months after being sworn into office, President Kirchner signed a decree authorizing the extradition of forty-three officials to Spain, who were alleged to have taken part in crimes against humanity during the Dirty War.³³¹ Spain subsequently declined to seek extradition in anticipation of the Supreme Court's *Simón y otros* decision.³³² President Kirchner stated that he wished all those accused to be tried in Argentinean courts.³³³

³²⁶ *Id.* at 39.

³²⁷ Cámara Federal de Buenos Aires [C.C.C.Fed.], "Causa n° 761 - E.S.M.A., Hechos denunciados como ocurridos en la Escuela de Mecánica de la Armada," Sept. 1, 2003, available at <http://www.geocities.com/apdhlaplata/juridica/juridicac13.htm> (last visited Feb. 5, 2006); Luis Marquez Urtubey, *Non-Applicability of Statutes of Limitation for Crimes Committed in Argentina: Barrios Altos*, 11 SW.J.L. & TRADE AM. 109, 119 (2005).

³²⁸ Cámara Federal de Buenos Aires, Sala II [C.C.C.Fed.], "Causa incoada en virtud del decreto 280/84 del Poder Ejecutivo Nacional," Mar. 16, 2004, available at <http://www.geocities.com/apdhlaplata/juridica/juridicac17.htm> (last visited Feb. 5, 2006); Urtubey, *supra* note 327.

³²⁹ See Urtubey, *supra* note 327.

³³⁰ *Simón y otros*, *supra* note 3, at Considerando No. 23 of Judge Lorenzetti's vote (author's translation).

³³¹ Avery, *supra* note 33, at 266-67.

³³² *Id.*

³³³ *Id.*

Clearly, the political climate has changed so dramatically, that those fears transparent in *Camps* are no longer manifest today.

CONCLUSION

The Argentinean Supreme Court has handed down a landmark decision in *Simón y otros*, declaring amnesty laws of Due Obedience and Full Stop repugnant to the Constitution. With the aid of the 1994 constitutional reform, which elevated treaties to which Argentina was a signatory to constitutional hierarchy, the Court was unable to deny the blatant contradiction between the amnesty laws and Argentina's obligations to international law.

The implications of this judgment are broad. The Court has opened the door to the immediate prosecution of over 1,200 officers thought to be currently immune from prosecution.³³⁴ After more than 11 years of legislative efforts to bring Argentina within compliance of international human rights obligations, the judiciary's efforts have met with resounding approval. Argentina currently recognizes the duty to prevent, investigate, and punish human rights abuses as commanded by the American Convention on Human Rights, and more specifically, the applicability of these obligations to the events of 1976 to 1983.³³⁵ Annulment of the laws may constitute a positive step toward restoring the Argentinean people's confidence in the democratic process, an effect that is in itself, a remarkable achievement.

³³⁴ *Argentinean Judge Revokes Amnesty*, BBC NEWS, Mar. 6, 2001, <http://news.bbc.co.uk/1/hi/world/americas/1205836.stm> (last visited Nov. 30, 2005).

³³⁵ Centro de Estudios Legales y Sociales, *supra* note 308, at 50.