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International Law-Argentine Law-Criminal Law-Judgement of Former Military Rulers for Human Rights Violations (Jorge R. Videla et alia)

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COMMENTS

INTERNATIONAL LAW—ARGENTINE LAW—CRIMINAL LAW—*Judgment of Former Military Rulers for Human Rights Violations: Jorge R. Videla et alia*[1]—In early December, 1985, an Argentine federal court of appeals handed down five convictions in a criminal action against former ruling junta members. The charges arose out of the military's proclaimed *dirty war* against subversion when thousands of ordinary citizens suspected of "subversion" suffered abduction, torture, and ultimately, summary execution.[2] The civilian government which followed the military's *de facto* era targeted the high command of the armed forces for prosecution. Rather than standing trial for high treason or subverting the Constitution, however, the nine officers charged were called to answer for the common crimes of abduction, torture and murder. The *Videla* court's resulting decision has been hailed as a critical and unprecedented ruling in the history of

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1. Dec. 9, 1985, Cámera Nacional de Apelaciones en lo Criminal y Correcional Federal de la Capital Federal [Federal Chamber of Appeals], Buenos Aires 198_ L.L. _____. An officially edited version of the court's 1,000 plus page opinion, still unreported, was published in an Argentine periodical and is the source of all references to the opinion in this article. El Diario del Juicio, Jan. 28, 1986 [hereinafter Juicio] 7-26. *See also* EL LIBRO DE EL DIARIO DEL JUICIO 459-542 (1986). For a comprehensive account of the allegations against the military, see NUNCA MÁS: INFORME DE LA COMISIÓN NACIONAL DE DESAPARICIÓN DE PERSONAS, (1984) [hereinafter NUNCA MÁS]. *See also* J. SIMPSON & J. BENNET, THE DISAPPEARED AND THE MOTHERS OF THE PLAZA: THE STORY OF THE 11,000 ARGENTINIANS WHO VANISHED (1985).

2. The nine defendants in chronological order dating from the 1976 *coup* were: Army General Jorge Videla, convicted; Navy Admiral Emilio Massera, convicted; Air Force Brigadier General Orlando Agosti, convicted; Army General Roberto Eduardo Viola, convicted; Navy Admiral Armando Lambruschini, convicted; Air Force Brigadier General Omar Graffigna, acquitted; Army General Leopoldo Galtieri, acquitted; Navy Admiral Jorge Anaya, acquitted; Air Force Brigadier General Basilio Lami Dozo, acquitted. *Argentine Court Finds Five Guilty for Junta Roles*, N.Y. Times, Dec. 10, 1985, at A1, col. 6. For a detailed account of the various charges proven and corresponding sentencing, see E. Gray, *Human Rights: Conviction of Former Argentine Military Commanders for Human Rights Abuses Committed by Subordinates*, 27 HARV. INT'L L.J. 688, 691-692, 691-692 nn. 20-22 (1986) [hereinafter Gray].

Three of the four acquitted on these charges, General Galtieri, Admiral Anaya, and Brigadier General Lami Dozo, were convicted in a separate proceeding for criminal negligence in their conduct of the Falklands/Malvinas War. N.Y. Times, Nov. 12, 1985, at A6, cols. 1-3.

Latin American jurisprudence.[3]

The court held that no justification existed for adopting illegal means to defeat subversion, despite the court's recognition that the acts of the defendants were in response to a wave of terror which swept the country in the early 1970s leaving hundreds dead at the hands of extremists of the left.[4] Of the five defendants convicted, General Jorge Videla and Admiral Emilio Massera were given life sentences and the remaining three received sentences varying from four-and-one-half to seventeen years.[5] The Supreme Court affirmed the appellate court's rulings with only slight modifications in sentencing.[6]

The implicit legacy of this uncommon juridical event lies in its value as a model for coming to terms with official terrorism. The aftershocks of the trial continue to be felt in Argentina,[7] particularly with respect to the ongoing prosecutions of junior officers in decision-making capacities, and of military personnel who exceeded lawful orders.[8] Beyond Argentina's borders, demands are being made in other Latin American countries that *Argentine-style* trials be imposed on members of their own armed forces,[9] despite the countervailing risk of greater re-

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3. *Argentina: National Appeals Court (Criminal Division) Judgment on Human Rights Violations by Former Military Leaders*, 26 INT'L. LEGAL MAT. 12 (E. Dahl & A. Garro eds. Mar. 1987) (citing to pagination of the prepublication manuscript) [hereinafter INT'L. LEGAL MAT.].

4. Juicio, *supra* note 1, at 25, col. 4 and at 26, cols. 1-4.

5. *Id.* at 9, col. 1.

6. INT'L LEGAL MAT., *supra* note 3, at ll. (The judgment was handed down on December 30, 1986.)

7. On the changing cultural and political climate in Argentina soon after the resumption of constitutional rule and the trial of the juntas, see, e.g., *Educators in Argentina Add Democracy to the Curriculum*, N.Y. Times, Oct. 16, 1985 at 2E, col. 3; *Argentina Reports Arresting Ex-Nazi for Extradition*, N.Y. Times, Nov. 16, 1985 at 3, col. 3.

8. For articles in the U.S. press on the continuing prosecutions, see *The Dirty War's Dirty Laundry: Should Argentina End its Human Rights Trials?* Newsweek, Feb. 23, 1987 at 40; *More Argentine Officers Face Trials*, N.Y. Times, Feb. 24, 1987 at 3, col. 1; *Justice Diluted in Argentina*, N.Y. Times, Feb. 25, 1987 at 26, col. 1; *Closing the Book*, The Nation, Feb. 28, 1987 at 239.

On the criminal responsibility of those who obeyed orders, see INT'L. LEGAL MAT, *supra* note 3, at 5-6, and on the law of "Full Stop" cutting off the prosecutions as of February 22, 1987 *id.* at 11-12. *See also*, Call for Amnesty in Argentina, N.Y. Times, May 17, 1987 at E2, col.1 (legislation proposed by President Alfonsín to virtually absolve all middle and lower ranking military officers for their role in the "dirty war").

9. *See An '82 Slaying Stirs Politics in Brazil*, N.Y. Times, Oct. 6, 1985 at 3, col. 1; *Latin Military Put on Notice by Junta Trial*, N.Y. Times Dec. 15, 1985 at 15 A, col. 1; *Democracy Isn't Curing All that Ails Uruguay*, N.Y. Times, Jan. 5, 1987 at 12A, col. 3.

trenchment by current military dictators in the face of such prospects.

At its most confounding, the conflict posed at trial was whether war, here an internal "war on subversion," can or should be governed by law.[10] If, contrary to the defendants' position, conduct in such a war was found to be amenable to judgment, then the triers of fact and law would need to examine if and when the commission of crimes by subordinates may be imputed to their military commanders.

The prosecution demanded that the defendants be found guilty for having given illegal orders which were ultimately carried out by others.[11] In the alternative, the prosecution maintained that the commanders were under a duty to stop the illegal acts from occurring. The prosecution also argued that the army, navy and air force commanders who presided over the three successive juntas from 1976 to 1983 should be judged collectively and serially by term in office. Criminal liability would then lie without regard to which branch actually carried out the alleged orders.

The litigation strategy of the defense was to plead general denials of all wrongdoing and in tandem to reject out-of-hand the premise that rules even exist by which the accused might be judged.[12] A number of the defendants, each represented by separate counsel, argued against the prosecution's theory of liability based on collective responsibility. They insisted that orders from any one member of the junta was authoritative only as to that member's branch of the armed forces. Another defense argument denying liability pertained to *actual* commission of specific crimes. The defense maintained that only the individual who physically carried out the act could be held responsible. They argued that any crime which may have been committed (without conceding that any were) was the result of excesses on the part of subordinates.

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10. Juicio, *supra* note 1, at 15-16.

11. *La Acusación del Fiscal Strassera*, La Semana, Suplemento Especial xi-xii (Fall 1985) [hereinafter *Strassera*].

12. *Defensa individual frente a la acusación por juntas*, Juicio, Sept. 24, 1985 at col. 1-6.

Background

A weak civilian government beset by rising anarchy and violence following the death of President Juan Perón in 1974 provided the Argentine military with both the impetus and tacit popular approval to overthrow Perón's constitutional successor, his vice-president and widow, Isabel Perón.[13] The extremists responsible for the general instability were made up largely of members of both the far right and the far left wings of the splintering Peronist Party. The military take-over came as no great surprise to observers of the Argentine political scene, given the almost constant interruptions in civilian rule during the past half century. The military intervened in 1930, 1943, 1955, 1962, 1966,[14] and again in 1976 when the first junta's defendants, General Jorge Videla, Admiral Emilio Massera, and Brigadier General Orlando Agosti, seized control of the country.[15]

The method by which the junta chose to deal with the extremism of the left (the rightist fringe elements having joined forces with the government)[16] was to erect and maintain an elaborate network of secret security forces, torture centers and con-

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13. WITH FRIENDS LIKE THESE: THE AMERICAS WATCH REPORT ON HUMAN RIGHTS AND U.S. POLICY IN LATIN AMERICA 96 (C. Brown, ed. 1985). For a capsule history of events leading up to the 1976 military takeover, see R. Dworkin, *Report from Hell*, The N.Y. Review of Books, Jul. 17, 1986, 11-16 (reviewing NUNCA MÁS) [hereinafter *Report from Hell*].

14. The military overthrew President Yrigoyen in 1930. In 1943, President Castillo was overthrown by a military uprising that included Colonel Juan D. Perón. Perón subsequently became President and was removed by *coup* in 1955. In 1962, the military deposed elected President Frondizi. President Ilia was overthrown in 1966. *See* J. OCON, HISTORIA ARGENTINA 553-66 (1974).

For an Argentine sociologist's perspective on the military's pervasive involvement in politics over the course of Argentine history, see Corradi, *Argentina*, in LATIN AMERICA: THE STRUGGLE WITH DEPENDENCY AND BEYOND 340-400 (R. Chilcote & J. Edelstein eds. 1974) [hereinafter Corradi].

> [T]he Argentine army had always been "political": compulsory military service, established in 1901, was designed with political socialization in mind. The army was charged with overseeing elections. In Argentina the draft card and the voter registration card are the same documents for males over eighteen years of age. In brief, the Argentine armed forces have always been oriented to "civic action" programs.

Id. at 343.

15. In 1976, General Jorge Videla led the *coup* in the first of a series of three juntas.

16. *See Strassera*, *supra* note 11, at iv (The *Alianza Anticomunista Argentina* disappeared from the scene after the '76 *coup*, and impliedly, was integrated into the state's apparatus of terror).

centration camps.[17] The official panel which investigated the disappearances was able to identify 365 separate clandestine concentration camps and torture centers operating in Argentina, principally between 1976 and 1979. The process of "disappearing" involved conspicuous similarities in the vast majority of cases. Typically, victims were seized in the middle of the night by unidentified, armed men. The victims were forcibly or by threat of force, removed from their homes and bundled into the trunks of waiting automobiles. These vehicles were invariably the ubiquitous Ford Falcons without license plates which came to be identified with the abduction squads.

The targets were often young people, but anyone was a potential abductee. Very few of the victims maintained card-carrying alliegance or even particular sympathy for any radical group. They, rather, bore some relationship, however tenuous, to what their abductors considered to be subversive activities. These included such ties as university affiliation, a profession in the social sciences, union membership, participation in literacy programs, or all the more tangentially, the appearance of one's name in the address book of someone seized for one of the reasons just mentioned.

In the aftermath of an abduction, the home of the victim was looted and property stolen. Most of those who became known as *los desaparecidos* (the disappeared ones) lived what remained of their lives in the detention centers, hooded or blind-

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17. For detail on the juntas' antisubversive methodology from which the information for this section was derived, see NUNCA MÁS, *supra* note 1, at 810; *Report from Hell*, *supra* note 13, at 12; Osiel, *The Making of Human Rights Policy in Argentina: The Impact of Ideas and Interests on a Legal Conflict*, 18 J. LAT. AMER. STUD. 139-142 [hereinafter Osiel].

According to Mark Osiel, who spent ten weeks in Argentina during the height of the trial studying the issues and conducting interviews, the "national security" doctrine provided the military with a rationale for deciding whom to target for abduction. It was generally believed by the operative factions of the military that "Christian civilization had to be preserved against those who, under the banner of tolerance had tolerated the questioning of authority, sacred and secular." The permissiveness of the universities was thought to be the "natural breeding ground of terrorists." According to Osiel's explication of the mind set of the military, the terrorists had carried the cultural subversiveness of the liberal universities to its logical conclusion. The military was able to justify killing those who displayed sympathies for social change since their realization of full subversiveness was only a matter of time. "It would have been useless to kill only the insects that had already hatched while still more germinated freely in the nest." *Id.* (citations omitted).

folded, and deprived of even the basic necessities of life. The prisoners were isolated from one another and methodically tortured with beatings, electric shocks and near-drownings. No less severe treatment ensued for reasons of youth,[18] gender, or religious vocation. Release of an abductee was occasionally effected as in the celebrated case of Jacobo Timerman, largely as a result of international pressure,[19] but more often the captors, as a law unto themselves, appeared to make life and death decisions out of sheer caprice. Under the massive, but silent testamentary weight of the thousands who failed to reappear, it has been since presumed that all of these suffered the fate of summary execution.[20] Incineration, mass burial in unmarked graves, and ejection from aircraft into the sea were means by which the corpses of persons never officially detained, charged or tried, were rendered unidentifiable. When the junta seized power, it dismissed the provincial governors and dissolved the Congress. The new rulers replaced the Supreme Court with their own appointees despite the Argentine Constitution's guarantee of life tenure.[21] The new panel of justices was composed of military supporters and retired officers, but even they were subject to dismissal at will.[22] The junta issued a series of decrees aimed at legitimizing its war against subversion,[23] and it continued to validate the *state of siege* imposed by the government of Isabel Perón.[24]

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18. A shocking total of 130 cases of infant disappearances were reported. NUNCA MÁS, *supra* note 1 at 299, 322. *The Official Story*, a film by María Louisa Bemberg about the horror of children who vanished during the military rule from 1976 to 1983 won an academy award in 1986 for best foreign film. *Freedom Nourishes Argentine Movies*, N.Y. Times, Mar. 29, 1987 at Sec. 2-1, col. 1.

19. *See* J. TIMERMAN, PRESO SIN NOMBRE, CELDA SIN NÚMERO (1982).

20. Even the head of the transitional military government, General Bignone, declared the "missing" presumed dead prior to the elections of 1983. *Human Rights in the World: Argentina*, 31 INTL COMM'N JURISTS REV. 2, n. 2 (1983) [hereinafter INTL COMM'N JURISTS].

21. CONSTITUCIÓN NACIONAL, art. 96 (Argent.) For an English translation, see 1 A.BLAUSTEIN & G. FLANZ, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, CONSTITUTION OF ARGENTINA 1853 (as amended) at 20 (1986)[hereinafter CONSTI. ARGENT.].

22. Mignone, Estlund & Issacharoff, *Dictatorship on Trial: Prosecution of Human Rights Violations in Argentina*, 10 YALE J. INT'L L. 118 (1984) [hereinafter *Dictatorship on Trial*].

23. *Boletín Oficial* of the Republic of Argentina, Military Junta, Process of National Reorganization, Statute for the Process of National Reorganization (Nov. 21, 1978), *reprinted in* A. BLAUSTEIN & G. FLANZ, *supra* note 21, at 26-30.

24. For the wording of Article 23 of the Argentine Constitution granting authority to declare a *state of siege*, see note 98 *infra*.

When it became clear that the military's power was in eclipse after the disastrous Falklands/Malvinas War, and the economy in more than just disarray, the junta felt obliged to call for elections.[25] Although the junta attempted to barter its agreement to return control to a civilian government for blanket immunity for the armed forces, such an agreement was flatly rejected by Raúl Alfonsín, candidate of the Unión Civica Radical Party, who later carried the popular vote to the presidency.[26] Nevertheless, as the junta's rule drew to a close, the commanders-in-chief issued a decree absolving military personnel of all offenses committed in the war against subversion.[27]

Within days of taking office, President Alfonsín issued a decree calling for the criminal prosecution of the nine former junta members who had ruled the country from 1976 to 1983.[28] He asked Congress to repeal the newly minted amnesty law[29] and to amend the Code of Military Justice.[30] The amendments called for military jurisdiction at the trial level for all cases brought against military personnel who held decision-making positions, as well as against subordinates who committed atrocities. Decisions of the military tribunal were then subject to federal review. The President also ordered a special commission to investigate the disappearances with instructions to report its findings within 180 days.[31]

The Argentine Legislature expeditiously enacted into law

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25. *Dictatorship on Trial*, *supra* note 22, at 124. *See* N.Y. Times, Dec. 15, 1985 at E3, col. 1 (attributes the military's downfall to the failing economy and the 1982 Falklands/Malvinas War rather than societal disaffection with the military over the so-called dirty war).

26. Osiel, *supra* note 17, at 135, 143-144 (In contrast, the Peronist Party candidate, widely expected to win, publicly announced that he would honor the amnesty.); INTL COMM'N JURISTS REV. at 1 (1983) (Alfonsín won with 52% of the votes cast; the Peronist candidate brought in 40%.).

27. Law of National Pacification, No. 22.924, Sept. 22, 1983, 1983-B A.L.J.A. 1681.

28. Decree No. 158, Dec. 13, 1983, 1983B A.L.J.A. 1943.

29. *See* C. Nino, *Comment—The Human Rights Policy of the Argentine Constitutional Government: A Reply*, 11 YALE J. INT'L L. 217, 223 (1985) (argued as to the invalidity of the Amnesty Law under the Constitution).

30. Law No. 23.040, Dec. 27, 1983, 1983-B A.L.J.A. 1813.

31. Decree No. 157, Dec. 13, 1983, 1983-B A.L.J.A. 1944 (This decree also ordered the capture and trial of suspected leaders of the Montoneros guerilla movement.) *See* Osiel, *supra* note 17 at 138, 143-159 (examining the president's policy as an expression of his strategy to reduce both the power of the armed forces and the attractiveness of guerrilla movements).

the President's proposals.[32] The amended Code of Military Justice specifically provided that the Supreme Council of the Armed Forces, the military's highest court, report on the status of its proceedings against the junta members. This was to issue within six months of the commencement of the action. Any unjustified delay or negligence in the prosecution of the trial could trigger a motion for removal to the federal court.

The statute also created a defense of mistake, or what amounted to lack of *mens rea* for subordinates who acted without decision-making capacity. Subordinates who carried out a superior's orders were presumed to have believed that the orders were lawful in the absence of evidence to the contrary.[33] The presumption explicitly did not operate in favor of subordinates found to have committed atrocities.[34]

These provisions to the Code of Military Justice were bitterly contested by both human rights groups in Argentina and by the armed forces.[35] The human rights groups contended that routing the trials through the military tribunals would result in a denial of due process and equal protection of the law. They argued that when military procedural law is applied, as would be the case in these proceedings, fewer safeguards are available to either the victim or the accused than under federal law.[36] Argentine military courts, like their counterparts in the United States, are created pursuant to the Legislative Powers of the Constitution. Military procedural law obeys the institutional imperatives of the military, a hierarchical body dedicated to discipline and

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32. Law No. 23.049, Feb. 14, 1984, 1984A A.L.J.A. 6.

33. *Id.* at art. 11. For legislative history, see *Diario de Cámara de Senadores de la Nación*, Special Session, Jan. 31 - Feb. 1, 1984; *Diario de Sesiones de la Cámara de Diputados de la Nación*, Special Session, Feb. 9, 1984.

34. Law 23.049 at art. 11.

35. *See* Gray, *supra* note 2, at n. 10 and accompanying text at 689-690.

36. *Dictatorship on Trial, supra* note 22, at 129-130. The survivors argued lack of access to the federal courts since under federal rules of criminal procedure, victims of crimes, or their representatives are entitled to initiate *querellas* (criminal complaints) involving serious felonies, or to join the public prosecutor as a party to the criminal proceeding. Cód. Proc. Pen arts. 170-176. But for an explication of Law 23.049 more favorable to the victims, see Int'l. Legal Mat. *supra* note 3, at 5 (The new law added a provision to Article 100 of the Code of Military Justice whereby the victim of the crime or his relatives may intervene in the military procedure to request the production of any evidence and to appeal to the pertinent Federal Appeals Court.).

immediate response to superior orders.[37] This rationale is very distinct from the policies of federalism and respect for individual liberties which underlie the federal system. Created under the Judicial Powers of the Constitution, the federal courts are endowed with far greater mechanisms for insuring independence and impartiality. Federal judges, for example, are constitutionally endowed with life tenure,[38] while judgeships in the courts of the armed forces are filled by military officers on a rotating basis.[39] Under the Argentine civil law tradition, federal judges conduct trials by the inquisitorial method.[40] This authorizes such courts to confront one witness with another offering contradictory testimony,[41] unlike the military courts which prohibit such confrontation if the party contradicting another witness is subordinate in rank to the latter.[42]

The military, for its part, contested the applicability of the amended Code of Military Justice to offenses committed before the enactment of such provisions on *ex post facto* grounds. The military also contended that the right of appeal to the federal court violated the constitutional right of an accused to be judged by his *juez natural* (natural judge), thus demanding that *all* proceedings be conducted under military jurisdiction.[43]

In *Bignone, Reynaldo R.*, the Argentine Supreme Court addressed the survivors' petition holding in favor of the constitutionality of the contested provisions.[44] The Argentine Court cited in support a decision of the U.S. Supreme Court, *Fletcher v. Peck*.[45] The Court followed the *Fletcher* principle of deference to the presumed validity of a legislative enactment despite the Court's reasonable doubt as to its constitutionality. The Court held that the time limitations placed on military tribunals and

37. Similarly, U.S. military courts are not part of the Article III judiciary. M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 39 (1980).

38. CONST. ARGENT. art. 96, *supra* note 21, at 39.

39. Osiel, *supra* note 17, at 174. (The judges of the Supreme Council came from the upper ranks of the officer corps.)

40. MERRYMAN & CLARK, COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS 734 (1978).

41. CÓD. PROC. PEN. arts. 309-315 (CÓDIGOS A-Z 1983).

42. CÓD. JUS. MIL. art. 288.

43. In Videla, Jorge R., Dec. 27, 1984, 1985-A L.L. 360, the Supreme Court upheld the constitutionality of the objections on both *ex post facto* and *juez natural* grounds.

44. Bignone, Reynaldo B., June 21, 1984, 1984-C L.L. 258.

45. 10 U.S. (6 Cranch) 87 (1810).

the possibility of appellate review sufficed to save the amendments from a facial attack.

Military Proceedings

The Supreme Council instituted proceedings against the nine former commanders, but failed to complete its work by the end of the prescribed six-month statutory period.[46] The Federal Chamber of Appeals granted the Council a ninety-day extension with a progress report due in thirty days.[47]

On September 25, 1984, the Council issued a report declaring its inability and unwillingness to complete proceedings against the junta members.[48] The Council declared unobjectionable any of the orders or decrees issued during the antisubversive campaign. The Council stated that criminal liability would lie against the defendants, if at all, only for failure to properly supervise subordinates to prevent possible excesses. But the Council further maintained that it was dubious whether such excesses were provable. It stated that those who engaged in subversive activities could not be considered to have been illegally detained, thus suggesting that "subversive" ties, such as membership in a leftist political group, stripped the individual of the right to formal arrest, notification of charges, or a fair trial. The Council concluded that most of the alleged victims had engaged in subversive activities.[49]

The Council found the credibility suspect of all those who were themselves victims as well as the family members of victims. In the Council's view, the subversive status of the victims was enough to taint the believability of their testimony and testimony by relatives of victims was presumptively biased.[50] The repetition of patterns in testimony led the Council to discount the veracity of the prosecution's witnesses on the assumption that this consistency was the product of deliberate and calculated falsification. The Council concluded its report by emphasizing the importance in a military context of discipline, hierar-

46. *Dictatorship on Trial, supra* note 22, at 138.
47. *Id.* at 139.
48. *Id.* at 140 (citing La Prensa, Sept. 26, 1984 at 1, col. 1).
49. La Prensa, *Id.* at 1, col. 5.
50. *Id.* at 4, col. 3.

chy, and obedience to superior orders.[51]

Federal Appellate Review

In accordance with the revised Code of Military Justice, the case was removed to the Federal Appellate Chamber of Buenos Aires before judges normally accustomed to hearing limited issues on appeal in private proceedings.[52] The revised Code provided for an open trial and oral trial proceedings.[53] This departed radically from conventional practice in federal court. Unlike the due process safeguards of the United States criminal justice system, criminal proceedings under Argentine federal rules of criminal procedure, even at the trial level, are neither oral nor open to the public.[54] At the time of removal from military to federal forum, the embrionic state to which the action had progressed made a mere review of findings impossible. Neither could the federal court simply continue where the Council had left off. As a result, the appellate court found itself in the unprecedented position of conducting a full-fledged criminal trial.[55]

The finders of fact and law consisted of six appellate court judges from a wide variety of backgrounds and political parties.[56] The panel members spent from October 9, 1984 until the opening of the trial on April 25, 1985 reviewing thousands of pages of testimony compiled by the President's commission as well as relevant case law and legislation. At trial, the judges heard 496 hours of testimony broken down as follows: Thirty to forty percent of the witnesses were surviving victims of abduction and torture; another thirty to forty percent were relatives and neighbors of less fortunate victims who failed to reappear; and the final twenty percent included foreign witnesses, military

51. *Id.*

52. Address by Judge Andrés J. D'Alessio at the Association of the Bar of the City of New York, (Mar. 3, 1986) [hereinafter D'Alessio] (Judge D'Alessio was one of the six sitting judges in the trial of the juntas.)

53. *Id.*

54. *Id.*

55. *Id.*

56. Besides Judge D'Alessio, Guillermo A. C. Ledesma, Ricardo R. Gil Lavedra, Jorge A. Valerga Araoz, Jorge Edwin Torlasco, and León Carlos Arslanian comprised the panel of judges and took turns presiding over the trial. INT'L. LEGAL MAT., *supra* note 3, at 9.

personnel and experts.[57]

Issues at Trial

The most crucial issues presented at trial revolved around the responsibility of commanders-in-chief for ordering subordinates to carry out abductions, torture, executions and other enumerated crimes.[58] In the alternative, if the commanders could not be found guilty as principals, the issue was whether they had a duty to prevent the carnage. Finally, were the defendants responsible as individuals or collectively as members of a governing junta.

Dispositions at Trial

The court flatly rejected the prosecution's argument of collective responsibility.[59] It found that the several branches of the armed forces were in fact very independent. The Falklands/Malvinas War had provided a recent and graphic illustration of the lack of coordination between the services. In further support of their separateness, the court cited the historical and constitutional function of the army as a land force versus the traditional roles of the navy and air force. Statistics bore out this distinction confirming the Army's primary role in the antisubversive campaign. The aggregate of offenses charged against the Army was much higher than those brought against the other two branches.

The court reviewed the legal basis for eight distinct charges and examined the underlying proof for 709 representative cases brought against the defendants. They included: (1) illegitimate deprivation of liberty,[60] (2) torture,[61] (3) homicide,[62] (4) aggravated homicide,[63] (5) theft,[64] (6) coverup,[65] (7) reduction to in-

57. *See* D'Alessio, *supra* note 52.
58. Juicio, *supra* note 1, at 17.
59. *Id.*.
60. Juicio, *supra* note 1, at 7, col. 4 (citing CONST. ARGENT. art. 18).
61. Juicio, *supra* note 1, at 8, col. 1 (citing CÓD. PEN. art. 144 (Argen.)). For the most current English translation, see THE ARGENTINE PENAL CODE, AMER. SERIES OF FOREIGN PENAL CODES (E. Gonzalez Lopez trans. 1963).
62. Juicio, *supra* note 1, at 8, col. 1-2.
63. *Id.* at 8, col. 2.
64. *Id.* at 8, col. 2 (citing CÓD. PEN. art. 164).
65. Juicio, *supra* note 1, at 8, col. 2-3 (citing CÓD. PEN. art. 277 §6).

voluntary servitude,[66] and (8) ideological forgery (the making of false statements in public documents).[67] The court found that only the first five charges could be sustained on the law and the facts and only against certain of the defendants.[68]The court found, as a matter of fact, that certain defendants issued orders to seize prisoners and to maintain a secret system of detention centers.[69] This represented a clear violation of individual liberties guaranteed under Article 18 of the Constitution.[70] Favoring the defendants on a different matter, the court discounted liability for refusals to call a halt to illegal detentions imposed by a predecessor. The court, however, squarely rejected the defense argument that the detentions imposed during their tenure in control had been legally obtained by decree of a previous constitutional government granting the armed forces license to "annihilate terrorism."[71]

On the homicide charges, the defense urged the court to restrict the prosecution based on the lack of existence of identifiable evidence. The defense interpreted the *corpus delicti* rule to require that the dead bodies of the allegedly deceased actually be found.[72] The court disagreed, holding that in order to prove homicide, the *corpus delicti* need not be the corpse itself, but

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66. Juicio, *supra* note 1, at 8, col. 3 (citing COD. PEN. ART. 140).

67. Juicio, *supra* note 1, at 8, col. 4.

68. *Id.* at 7-8.

69. *Id.* at 16, col. 3-4.

70. Article 18 of the ARGENTINE CONSTITUTION provides:

> No inhabitant of the Nation may be punished without previous trial, based on an earlier law than the date of the offense, nor tried by special commissions, nor removed from the judges designated by law before the date of the offense. No one can be compelled to testify against himself, nor be arrested, except by virtue of a written order from a competent authority. The defense, by trial, of the person and of rights is inviolable. The residence is inviolable, as are letters, correspondence and private papers; and a law shall determine in what cases and for what reasons their search and seizure shall be allowed. The penalty of death for political offenses, all kinds of torture, and flogging, are forever abolished. The prisons of the Nation shall be healthy and clean, for the security and not for the punishment of the prisoners confined therein; and any measure that under pretext or precaution inflicts on them punishment beyond the demands of security, shall render liable the judge who authorizes it.

CONST. ARGENT. art. 18, *supra* note 21, at 5-6.

71. Laws 21.264 and 21.460

72. *But see, e.g.*, R. PERKINS & R. BOYCE, CRIMINAL LAW 140-145 (1982) (In the absence of some unusual enactment, North American jurisdictions do not follow the interpretation advanced by the defense either.).

rather may be the series of elements by which a judge is induced to believe in the commission of a crime.[73]

The court held that the technical requirements of the crimes of cover-up and reduction to servitude punishable under the Argentine Penal Code were not satisfied.[74] As to the charge of ideological forgery, the prosecution sought criminal liability for the practice of either supplying false information, or no information, in response to investigations conducted preliminary to the issuance of a writ of *habeas corpus*. In almost every instance, these investigations failed to uncover acknowledgment by the military that specified individuals were being held.[75] The court found that facts were unavailable to prove specifically which personnel were responsible for furnishing or failing to furnish information given the anonymous manner in which the military processed these requests.[76]

Pertinent Law

The court predicated its analysis of the conduct of the defendants on a central theme of Montesquieu, that all states have the same purpose, to preserve themselves without endangering their objectives.[77] In pursuing this analysis, the court looked to the Preamble to the Argentine Constitution[78] as an indisputable expression and affirmation of the nation's collective objectives. In language identical to its North American counterpart, the Argentine Preamble provides for "a national union [to] establish

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73. Juicio, *supra* note 1, at 8, col. 1 (citing CÓD. JUS. MIL., art. 219 and C. DIAZ, EL CUERPO DEL DELITO EN LA LEGISLACIÓN PROCESAL ARGENTINA 35 (1965). *Cf.* W. LAFAVE & A. SCOTT, JR., CRIMINAL LAW 18 (1986). The almost universal American rule is that the concept of *corpus delicti* involves two component parts: first the occurrence of the specific kind of injury or loss (as in homicide, a person deceased); secondly, somebody's criminality as the source of the loss. Proof of the loss in homicide need not entail production of the body. *Id.*

74. Juicio, *supra* note 1, at 8, col. 3.

75. *Id.* at 8, col. 4. *Cf. Report from Hell, supra* note 13, at 11. The courts had no power to question the military's flat denials and the lawyers who brought *habeas corpus* actions began to disappear themselves. *See, e.g.*, Perez de Smith, 297 Fallos 338 (1977); 300 Fallos 832, 1282 (1978) (judicial inquiry into the disappearances on a consolidated action of some 400 petitions for *habeas corpus*).

76. Juicio, *supra* note 1, at 8, col. 4.

77. The court cited to MONTESQUIEU, EL ESPÍRITU DE LAS LEYES 201 (N. Estevanez & M. Huici trans. 1951). For an English translation, see MONTESQUIEU, SPIRIT OF LAWS (T. Nugent trans. 1899).

78. CONST. ARGENT., *supra*, note 21.

justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity."[79]

When the first set of junta members, General Jorge Videla, Admiral Emilio Massera, and Brigadier General Orlando Agosti, seized power on March 24, 1976, they proclaimed their basic purpose to be the restoration of essential values fundamental to the state. The court keyed off this asserted goal by examining what laws existed during the course of this so-called restoration of essential values in order to judge the legality of the means chosen.

The Code of Military Justice provides that in time of war, military jurisdiction shall extend to civilians or persons outside the services who are in the operational or war zone and commit an act sanctioned by the Code or by a commanding officer.[80] The Code further states that wartime commanders can issue orders they believe are necessary for the security and discipline of their troops.[81] Under another provision of the Code, military commanders are licensed to assume control over an area when civilian authorities are powerless to stop looting and violence.[82] Orders issued under military authority in such circumstances oblige compliance by all those who find themselves in these zones. Such decrees, however, cannot impose any penalties beyond those prescribed by the Code of Military Justice or the Penal Code.[83] In the case of looting, for example, shoot-to-kill orders may be issued, but the guilty party must be surprised in the act, refuse to surrender immediately, or use arms against the authorities.[84] The procedure for adjudicating violations of orders is verbal and summary, but commanders are cautioned not to deprive the accused of a reasonable defense.[85]

With respect to rights to property, the National Defense Law, promulgated in 1966, restricted certain rights to property

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79. CONST. ARGENT., *supra*, note 21.

80. Juicio, *supra* note 1, at 9, col. 2.

81. *Id.*

82. COD. JUS. MIL. art. 133.

83. *Id.* at art. 135.

84. *Id.* at art. 137. For a ruling on the police use of deadly force under U.S. case law, *see* Tennesee v. Garner, 471 U.S. 1 (1985). *See also* MODEL PENAL CODE §3.07

85. COD. JUS. MIL. art. 138.

for the survival of the nation.[86] Under this statute, however, any governmental procurement of private property was subject to formal requisition, indemnification and judicial review.[87] On the local level, the Civil Defense Law of Buenos Aires, enacted in 1981, empowered the presiding municipal official to declare a state of emergency in part or in all of the city.[88]

Even though the defendants claimed to rely on the foregoing legal instruments to obtain the goal of preserving essential state values after their *de facto* rise to power on March 24, 1976, the court made clear that before and after this date constitutional guarantees remained in effect.[89] These included all of the following: the right to petition the authorities; the right to enter, remain in, cross, or leave the country; the right to publish ideas without prior censorship; the right to associate oneself with useful ends; the right to teach and learn;[90] the right to equality before the law;[91] the right to the inviolability of property;[92] the right not to be judged without trial under law enacted prior to the date of the offense; the right to be tried before one's natural judge; the right to due process; the right to freedom from arrest without a written order from a competent authority; the right to the inviolability of the home and correspondence; the right to freedom from torture and execution for political crimes;[93] the right to freedom from the Presidential exercise of Judicial powers;[94] and the right to all implied rights derived from a republican form of government.[95] The court found that the defendants could neither satisfy compliance with the statutory law they cited as relevant to emergency conditions, nor could they, in the first instance, satisfy compliance with the more fundamental rights guaranteed by the Constitution. In effect, the court found that the defendants had engaged in wholesale abrogation of the

86. Juicio, *supra* note 1, at 9, col. 3 (citing Law 16.970 (B.O. Oct. 10, 1966), regulated by Decree 739 (B.O. Feb. 14, 1967)).

87. Juicio, *supra* note 1, at 9, col. 4.

88. *Id.* (citing Law 22.413).

89. Juicio, *supra* note 1, at 9, col. 4.

90. CONST. ARGENT. art. 14, *supra* note 21, at 4-5.

91. CONST. ARGENT. art. 16, *supra* note 21, at 5.

92. CONST. ARGENT. art. 17, *supra* note 21, at 5.

93. CONST. ARGENT. art. 18, *supra* note 21, at 5-6.

94. CONST. ARGENT. art. 95, *supra* note 21, at 20.

95. CONST. ARGENT. art. 33, *supra* note 21, at 7.

Constitution.

The Necessity Defense

After concluding that the means chosen by the defendants were patently illegal both under the Constitution and statutory law, the court examined the defendants' claim that their acts were shielded from criminality under the defense of necessity.[96]

The basis of the necessity defense is that the defendants may, in some circumstances, choose the "lesser of two evils," even if that evil is a crime.[97] The defendants must show that the harm sought to be avoided must be greater than the harm that is committed. In addition, there may be no third alternative that would also avoid the harm, but would be non-criminal or a less serious crime. And finally, the harm must be imminent, not merely future.

The court began its analysis by stating that it was evident that the criminal acts imputed to the defendants—illegal deprivation of liberty, torture, robbery and murder—were evils caused by those with responsibility for the use of state force. The court also stated that the evils were causally linked one to another. The criminal evils committed by the defendants were avowedly carried out in the interest of preventing acts of terror from being committed by subversives. The defendants believed that the evil of the imagined disintegration of the state would be avoided if the terrorists could be prevented from taking power.

The court held the necessity defense inapplicable to the defendants. It reasoned that, although it is true that the defense can be prompted by the actions of a third party, the acts of one who may successfully invoke the defense must have been of a defensive rather than offensive nature. As to the requirement that the evil employed be "the lesser," the defense failed because the defendants abducted and killed in order to prevent the abductions and killings by the terrorists. This was not a "lesser" evil but an equivalent one.

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96. On the court's exposition of the necessity defense, see Juicio, *supra* note 1, at 10, col. 1-3 (The information for this section can be found therein.).

97. Cód. Jus. Mil. art. 510. *See* R. Nuñez, Derecho Penal Argentina 310 (1964). *Cf.* Model Penal Code §3.02 (The evil sought to be avoided must be greater than that sought to be prevented. The actor's belief in the necessity of his conduct to avoid the contemplated harm is sufficient unless the actor was reckless or negligent).

Regarding the immediacy of harm requirement, the court reasoned that, if, as the defense contended, criminal acts were committed to prevent the insurgents from seizing political power and installing a tyrannical regime, then such an evil lacked imminence, even though it arguably may have been a greater evil than the acts of the defendants. The record revealed not a single portion of the country under the control of the subversives, nor official recognition from anyone of either the subversives or the armed forces as belligerents. Support from foreign powers or the Argentine populace for the subversives was virtually nonexistent.

Moreover, the defendants failed to satisfy the requirement of choosing the least damaging evil in combating the supposed greater evil of subversion. The court enumerated various other alternatives the defendants could have pursued. They could, for example, have arrested all presumed terrorists whose cases presented insufficient proof for trial and held them at the disposition of the Executive Branch under the provisions of Article 23 of the Constitution.[98] The defendants could have provided the constitutionally prescribed option of exile or imprisonment under conditions of *state of siege*.[99] But according to the court, the best course of action would have been based on respect for the basic legal obligations expressed in the United Nations Charter and the Geneva Convention of 1949 on the treatment of victims of war.[100] The court concluded in a resounding condemnation that, all to the contrary, the defendants' response to ter-

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98. Article 23 of the ARGENTINE CONSTITUTION provides:

> In the event of internal disorder or foreign attack endangering the operation of this Constitution and of the authorities created thereby, the Province or territory in which the disturbance of order exists shall be declared in a state of siege and the constitutional guarantees shall be suspended therein. But during such suspension the President of the Republic shall not convict or apply punishment upon his own authority. His power shall be limited, in such a case, with respect to persons, to arresting them or transferring them from one point of the Nation, to another, if they do not prefer to leave Argentine territory.

See supra note 21, at 6.

99. *See* Snyder, *State of Siege and Rule of Law in Argentina: The Politics and Rhetoric of Vindication* 15 LAW. AMER. 503 (1984); Portelli, *Human Rights Problems For A New Democracy: The Disappeared And Argentina's Current Constitutive Process of Authoritative Decision*, (Dec. 1984) (unpublished manuscript available at the office of the HUMAN RIGHTS ANNUAL, N.Y. Law School).

100. Juicio, *supra* note 1, at 10, col. 4.

rorism was to commit the armed forces to an antisubversive struggle external to all of society, law, and ethical, cultural and religious norms.[101]

The Nature of War as a Defense

Considering the defendants' basic contention that their acts were extralegal because of the exigencies of war, the court undertook an extensive analysis of the issue in the light of national and international doctrine.[102] The court was careful to note the general blurring of the lines concerning the implications of an armed conflict arising in the midst of a society versus one arising between or among separate states. The court listed the sometimes overlapping classifications of insurrection, civil war, international civil war, revolutionary war and guerilla war. The court divided revolutionary war into five phases: infiltration, intimidation, control of the population, domination of a geographic area, development of civil war and takeover of the country.[103] The court determined that the conflict occurring in Argentina was best characterized as a revolutionary war.[104] According to an army chief of staff, the "war" had progressed to the fourth phase. He testified that in the impending future the terrorists could be expected to install a revolutionary government and make overtures for international recognition.[105] The court, however, found in contradiction that the enemy only numbered between 300 and 500 according to an internal directive issued by the army itself. The army circular went on to describe "attempts to open a rural front,"[106] and other purely preparatory

101. *Id.*

102. *Id.* at 13-16. *See* McDougal, *A Theory About Law*, 44 S. CAL. L. REV. 362, 364 (1971) (argues in favor of a comprehensive view of law comprised of varying degrees of authority and control in both national and international arenas):

> [There are no] neat distinctions. . . between the characteristics of national and international law. [When] national law is regarded as isolated from the larger world about it, it becomes impossible either to account for many important factors which affect decision or rationally to clarify policies for the various interpenetrating communities which in fact embrace the activities of man.

Id. at 377.

103. Juicio, *supra* note 1, at 13, col. 1 (citing treatises on war (citations omitted)).

104. *Id.* at 13, col. 2.

105. *Id.*

106. *Id.* (citing Directive 333/75 (Operaciones en contra de la subversión en Tucumán)).

activities.[107]

The defendants not only maintained that war should not be governed by law, but in addition, they distinguished the victors from the vanquished, finding it particularly galling that their conduct as the "saviors of the nation" be held up to judicial scrutiny. The court rejected as Machiavellian and unacceptable the underlying assumption that the "princes" of this world need only be judged by their results.[108] The court, instead, counterposed the belief that legal order depends upon the ability of courts to render judgments over all forms of human conduct.[109] The court opined that perhaps the choice of means taken by the armed forces impelled the triumph of arms with greater speed than would otherwise have obtained, but what in fact triumphed was neither right nor law nor civilization, but only force.[110] The defendants faced judgment not for having won the war, but rather for the methods they employed toward this end.[111] The court stated that the defendants, allegedly fighting to preserve the values most essential to Argentine culture, tradition and way of life, faced judgment for paradoxically depriving the nation of the very same.[112] In the last analysis, the defendants failed the test of Montesquieu, to preserve the state without endangering its objectives.

As the court continued to explore the range of all possible sources of applicable law, it found that both municipal and international law were proper authorities for evaluating the conduct of the defendants during their antisubversive campaign.

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107. Juicio, *supra* note 1, at 13, col. 2.

108. *Id.* at 13, col. 3 (citing N. MACHIAVELLI, EL PRÍNCIPE 66 (L. Navarro trans. 1895)). For an English translation, see N. MACHIAVELLI, THE PRINCE ch. XIII (W. Marriott trans. 1952).

> Intentions of men, and even more of princes, since they cannot be subjected to the appreciation of a court should be judged by their results. All a prince does to retain his power and the integrity of his domains will be considered honorable and will be praised by everybody, since the populace allows itself to be led by appearances and only judges the events.

Id.

109. Juicio, *supra* note 1, at 13, col. 3.

110. *Id.*

111. *Id.*

112. *Id.*

Argentine Law

In the case of internal disturbance, the Argentine Constitution permits the executive branch of the government to call a *state of siege*.[113] The court pointed out that a *state of siege* had been in effect since November 6, 1974 under decree issued by the constitutional government which preceeded the defendants' rule.[114] The defendants did not seek to lift the *state of siege* during any part of their tenure in office. The invocation of a *state of siege* by no means precludes the powers of the state from functioning, while at the same time, the execution of state powers cannot be realized outside of the Constitution.[115] Therefore, the conduct under scrutiny in this criminal action could not be justified by the mere existence of a *state of siege*.[116] A *state of siege* authorizes arrests at the disposition of the executive branch, not at the will of the armed forces, security forces or the police. It does not authorize detention without trial, indiscriminate damage or theft of private property, and very clearly, a *state of siege* does not sanction torture, inhumane treatment or murder.[117]

The history of the enactment of laws guaranteeing human rights in Argentina dates back to the early nineteenth century. In post-colonial Buenos Aires, a decree was issued granting "all citizens the sacred right to the protection of their lives, honor, liberty and property."[118] It provided that only under the most remote and extraordinary circumstances could the government suspend the decree because of a threat to public tranquility and security.[119] The decree imposed responsibility on the government for actions taken during the period of extreme measures. A suspension of the decree was permissible only as long as necessity demanded. The General Assembly was to be granted notice

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113. *See* Snyder, *supra* note 99 and accompanying text.

114. Decree 1368, Nov. 6, 1974 (B.O. Nov. 7, 1974).

115. Juicio, *supra* note 1, at 14, col. 1.

116. *Id.*

117. *Id.* (citing J. GONZALEZ, MANUAL DE LA CONSTITUCIÓN ARGENTINA 267-268 (1897) and L. QUINTANA, V TRATADO DE LA CIENCIA DEL DERECHO CONSTITUCIONAL 459 *et seq.* (1956)).

118. Juicio, *supra* note 1, at 14, col. 1 (citing Decreto de Seguridad Individual, Nov. 23, 1811).

119. *Id.*

of such a suspension and the justification thereto.[120]

In more recent times, again in contemplation of an emergency context, a decree issued by a civilian government declared that all military personnel who rise up against the constituted authorities or who participate in movements tending to defeat them are to be shot on sight.[121] This decree was challenged in court during a period of threatened military uprisings. The Supreme Court held itself to be without authority to review the law.[122]

In the present case, the court could also have chosen the route of lack of authority to decide, or the more common abstention for prudential considerations. Instead, the court took responsibility head-on, reasoning that because the defendants possessed a wide array of law-making power at their disposal, their choice of combating terrorism through secrecy and the imposition of a reign of terror equivalent to that of their enemy was clearly unjustified[123] Reiterating that "necessity" did not dictate recourse to the means chosen by the defendants, the court cited a provision of the Code of Military Justice[124] applicable to both civilians and military personnel who violate the law.[125]

In their defense, the accused offered the Law of National Defense.[126] This provides that, in case of internal disturbance, the armed forces may be called upon to restore order or lend necessary assistance.[127] The defendants had also attempted to foreclose the application of international law governing the treatment of prisoners, yet invoke national law for the adjudication of crimes allegedly committed by those detained. This inherent contradiction appeared in army regulations issued at the height of the antisubversive campaign. Army Chief of Staff Roberto Viola[128] approved a regulation which provided that the in-

120. *Id.*

121. Juicio, *supra* note 1, at 14, col. 1 (citing Decree 19.376, Sept. 28, 1951, later affirmed by law 14.072 (declared a state of internal war)).

122. Juicio, *supra* note 1, at 14, col. 2 (citing Judgment of Amparo de Alberto Allias, Fallos 223:206).

123. Juicio, *supra* note 1, at 14, col. 3.

124. *Id.* at 14, col. 3 (citing COD. DE JUS. MIL. art. 133).

125. *Id.* at art. 134.

126. Juicio, *supra* note 1, at 14, col. 3 (citing Law 16.970, art. 43).

127. Juicio, *supra* note 1, at 14, col. 3.

128. Viola was later to become a defendant in the instant criminal action and face charges for his role as commander-in-chief of the army from 1978-79.

dividuals who participate in subversion shall not have standing under international public law.[129] They were not to enjoy the right to be treated as prisoners of war, but to be considered *criminals*, judged and condemned as such in accordance with national legislation.[130] This policy contradicted the defendants' legal argument at trial on two counts. It repudiated the idea that there was a war in effect and it endorsed the proposition that the prisoners were to be accorded due process of law.

Beyond these contradictory and self-restrictive positions adopted by the armed forces, still other legal instruments in effect militated against the defendants' attempts to exonerate themselves. A regulation issued by the Army, albeit laid down prior to the installation of the defendants' regime, recommended moderation in the procedures used to combat terrorism.[131] Another regulation set forth rules for the treatment of prisoners which expressly prohibited any physical or psychological torture.[132]

International Law

For the court's purposes, much of international law on the conduct of war was applicable despite defendants' views on the status of the insurgents as mere political delinquents.[133] The court cited, for example, the Geneva Convention of 1949 on the wounded, sick and prisoners of war.[134] According to its provisions, the Geneva Convention extends to armed conflicts lacking an international character that occur within the territory of a subscribing country.[135] In particular, the court found the substantive prohibitions of the Geneva Convention applicable. Contracting parties were expressly forbidden any attempts on the life or bodily integrity of the wounded, sick, or prisoners of war. Also forbidden were murder in all its forms, mutilation, cruel

129. Juicio, *supra* note 1, at 14, col. 4 (citing RC9-1 of the Argentine army (1977)).
130. *Id.* at 173.
131. Juicio, *supra* note 1, at 14, col. 4 (citing RC8-2, Operaciones contra fuerzas irregulares (1969)).
132. Juicio, *supra* note 1, at 173 (citing RC16-101, Chapter IV (4.003.2)).
133. Juicio, *supra* note 1, at 14-16.
134. *Id.* at 14, col. 4 (citing J. BIDART CAMPOS, I DERECHO CONSTITUCIONAL 582 (1978)).
135. 6 U.S.T. 3, T.I.A.S. No. 3316.

treatment, and torture; the taking of hostages; affronts to personal dignity, especially humiliating and degrading treatment; sentences dictated and executions effected without prior judgment by a regularly constituted court and under judicial guarantees recognized as indispensable to civilized people.[136] The provisions applied to those who do not participate directly in the hostilities, members of the armed forces who lay down their arms, and the sick and wounded.[137]

The court recounted that Argentina has also ratified many other international treaties which have attempted to regulate war in its more dehumanizing aspects. Argentina approved the signing of the Pact of the Society of Nations in Versailles in 1919[138] and the United Nations Charter in 1946 among others.[139] The United Nations Charter addresses the right to self-defense by requiring that any means necessary to repulse an attack be immediately communicated to the Security Council.[140]

The court noted that Argentina was also a subscribing member of the Organization of American States[141] whose charter endorses much the same content of respect for human rights as does the Charter of the United Nations.[142] The court concluded that international treaties should be honored so that their principles may be framed within judicial institutions.[143]

Furthermore, the court found authority in organized religion by citing one of the messages of Vatican Council II exhorting the peoples of the world to comply with international treaties on the treatment of prisoners and the wounded.[144]

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136. Juicio, *supra* note 1, at 15, col. 2.

137. *Id.*

138. Juicio, *supra* note 1, at 15, col. 1 (citing June 28, 1919, Versailles (approved by Argentine law 11.722)).

139. Juicio, *supra* note 1, at 15, col. 1 (citing June 26, 1945 (approved by Argentine law 12.838, 1946)).

140. U.N.CHARTER art. 51.

141. Juicio, *supra* note 1, at 15, col. 1 (citing April 31, 1948, Bogotá (approved by Argentine Decree 328/56)).

142. Juicio, *supra* note 1, at 15, col. 1.

143. Juicio, *supra* note 1, at 15, col. 3 (citing J. DEL VECCHIO, EL FENÓMENO DE LA PAZ 10, 115 (M. Castano trans. 1912)).

144. Juicio, *supra* note 1, at 15, col. 4 (citing Concilio Vaticano II Constituciones, Decreto, Declaraciones, Documentos pontíficos complementarios, 79 (Madrid 1966)).

Liability for Acts Ordered

Although the court found that the facts established that the defendants had given orders to abduct, detain, and torture those suspected of having ties to subversion, and the defendants had accorded wide latitude to subordinates in determining the fate of their prisoners,[145] the court still retained the legal task of explaining the theory of liability for the criminal acts themselves. The court held that the defendants had dominion over these acts through an organized apparatus of power.[146] The defendants were not required to have personal knowledge of exactly what act would be carried out, precisely by whom or to whom, since causation was determined by the fungibility of the executioners. If one subordinate had refused to carry out an order, another would readily step in and take his place. The commission of the acts did not depend on exact knowledge. The role of the defendants was analogized to that of a Mafia boss. The orders the boss gives are well understood by his lieutenants and will be carried out inexorably. This fact assured the consummation of the crime.[147]

Given choice of law problems, the military code is the operative law in determining the proper body of law to apply.[148] It dictates, for example, that participation in a criminal act is governed by the laws of the Penal Code.[149] But under military law, when a crime is committed under the orders of a superior officer, the superior will be the only one responsible.[150] The inferior will only be considered an accomplice when he has exceeded compliance with the order.[151] The court held that, in furtherance of the policies of discipline and obedience, the commanders stood liable for issuing illegal orders, independently of their subordinates who actually carried out the acts.[152] This policy has many adher-

145. Juicio, *supra* note 1, at 16, col. 3.

146. *Id.* at 18, col. 4.

147. *Id.*

148. *Id.* at 17, col. 3 (citing art. 108 del ordenamiento castrense and Law 23.049, art. 10).

149. Juicio, *supra* note 1, at 17, col. 3 (citing Cód. Jus. Mil., art. 513).

150. *Id.* at art. 514. *Cf.* Model Penal Code §2.10 (Obedience to superior orders is an affirmative defense to the charge of criminal conduct. To successfully invoke the defense, the actor must not know the order to be unlawful.).

151. *Id.*

152. Juicio, *supra* note 1, at 17, col. 3. *But see*, note 8 *supra*, and accompanying text.

ents among the nations of the world. The court cited equivalent provisions in the military codes of Germany, Bolivia, Peru, Brazil, Venezuela, Switzerland, Chile, Colombia, Turkey, and Italy, where the practice dates back to Roman law.[153]

Conclusion

The acquittals and less-than-life sentences meted out to three of the former rulers found guilty of human rights violations were vitriolicly attacked by the victims' advocacy groups who had so actively demanded the prosecutions. Conversely, the fact of the trial itself and, *a fortiori*, the convictions continued to be the focus of passionate indignation on the part of the military.[154] The opposing sides each grounded their objections on ideological conviction, and by so doing, lessened the chances of success for President Alfonsín's goals of depolarization of the political climate and greater societal respect for the rule of law. The resistence of the military and the human rights groups to the give-and-take process of political discourse and negotiated settlement does not enhance the prognosis.[155] Rancor over the outcome will undoubtedly continue to divide Argentina psychologically and politically for years to come. The great bloodbath of the *dirty war* followed by the correspondingly lesser bloodletting of the public trial and sentencing have left all major contenders, the military, the human rights groups, and the government, with unfinished agendas and the animus to pursue them. But in view of the complexity and volatility of the political arena and the limited scope of this article, suffice it to say that a

153. Juicio, *supra* note 1, at 17, col. 4-18, col. 1.

154. *Argentina's Anguish—The Gone Will Not Soon Be Forgotten*, N.Y. Times, Dec. 15, 1985 at E3, col. 1.

155. On President Alfonsín's long-term goals, see Osiel *supra* note 17, at 158 (attributes the rise of the guerilla movements and the abuses of the counterinsurgency campaign to a common origin in a lack of respect for law and lawful means of political contest). *See also*, Address by Professor Juan Corradi, *Cultural Dilemmas of Democratic Consolidation in Argentina*, NYU Center for Latin American and Caribbean Studies (Feb. 12, 1987)("The military stews in its own resentment waiting for society to come to appeal to them.").

The military's unwillingness to engage in political dialogue was made manifest to Professor Corradi by the stony silence with which the *Comando Conjunto* (Chiefs of Staff) greeted his lecture on the principles of democracy (part of a re-education seminar sponsored by the Alfonsín administration). According to Professor Corradi, his military audience generally understood his talk to be part of their "punishment." *Id.*

strengthened Argentine judiciary and a diminished role for authoritarianism seem undeniable and would constitute no mean accomplishment for Argentina. And finally, the long-term deterrent effect both at home and abroad of Argentina's response to state terrorism may ultimately prove to be its greatest value. In the usual Latin American course of governmental succession, victors denounce their predecessors for the abuses of the past, but invariably stop short of demanding an accounting from them in a court of law.[156] Barring assassination, house arrest, or less coercive means designed to remove ex-leaders permanently from the political arena, deposed politicians tend to take up interim residence in Miami or Madrid biding their time for a return to power and a renewal of the cycle.[157] Constitutionalism may be invoked in these comings and goings of power, but in the end, supremacy of the law is a hollow phrase when those who wield power are habitually beyond its pale.

In a calculated risk to its survival as a constitutional government,[158] the Alfonsín administration empowered the nation's ju-

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156. *Id.* at 138. "Transitions from military to civilian rule in Latin America have almost always involved bargains protecting departing heads of state from prosecution by their successors." *Id.*

157. *See, e.g.*, POTASH, THE ARMY AND POLITICS IN ARGENTINA 121 (1980) (describes Juan Perón's direction of Peronism from exile in Madrid).

158. For an indication of the risk assumed by President Alfonsín in instigating the prosecutions, see FBIS-LAM-85, *Publisher on Camps' Threat Against Alfonsín*, April 30, 1985 (Police Chief of Buenos Aires Herald is quoted as saying he would "sign the execution order for Raúl Alfonsín."). *See also, Argentina May Reduce and Reorganize its Armed Forces—Alfonsín Has Yet to Conquer the Army*, N.Y. Times, Nov. 3, 1985 at 3E, col. 2.

For signs of a diminishing threat to constitutional government, see *Visit by Alfonsín Peacefully Ends Argentine Mutiny*, N.Y. Times, Apr. 20, 1987 at A1, col. 6 (attributed the overwhelming popular denunciation of the rebellious officers as indicative of the country's "definitive decision to live in democracy." The revolt had been triggered by refusals to respond to court orders stemming from prosecutions for crimes committed in the antisubversive campaign.); *Army Commander in Argentina Quits In Wake of Revolt*, N.Y. Times, Apr. 21, 1987, at A1, col.2 (Many Argentines, including political opponents of the President, described his handling of the military uprising as a "watershed in Argentina's long struggle for democracy.").

But on a less sanguine note, the patterns of alternating military and civilian rule are deeply rooted in Argentina. For an historical perspective, see Corradi, *supra* note 14, at 399-400 (Of a total of 35 military uprisings in Argentina between 1900 and 1974, 23 were unsuccessful and 12 were successful).

With a final impression of *deja vu* on the eve of publication, this author learned that the variously termed "mutiny" or "rebellion" which began on April 16, 1987, described above, may rekindle the same jurisdictional dispute ignited by the *Videla* controversy

diciary to rule on the criminal culpability of its predecessors in an attempt to thwart this predictable scenario. The concertedly impartial trial and the court's thickly documented opinion exposed a system of licensed sadism based on unchecked power and absolute caprice. This time those responsible did not get off unscathed. If the Videlas and Masseras yet to come should pause and reflect on this court's judgment, choosing not to let loose the dogs of unbridled warfare, then the *ad terrorem* value of this decision shall have been sustained.

Nora Drew Renzulli

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over military versus civilian forum. Depending on whether the rebel leader, Lieutenant Colonel Aldo Rico, is charged with the crime of rebellion, punishable under the civil law, or mutiny, a crime against discipline subject to military law, the respective federal or military jurisdiction will follow with all of the legal and political repercussions which each imply. *See supra*, notes 35-42 (for an analysis of the two forums), and 46-51 and accompanying text (demonstrating the unwillingness of the officer corps to engage in any internal criticism or self-purging within the military's own tribunal for what had been done by the armed forces in the antisubversive campaign).