¿PAZ SIN JUSTICIA? ARGENTINA'S "DIRTY WAR" AND GROSS VIOLATIONS OF HUMAN RIGHTS: DOES IMPUNITY CONFORM TO INTERNATIONAL HUMAN RIGHTS NORMS?

by

NANCY-LOUISE E. HUSTINS

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Department of LAW
The University of British Columbia
Vancouver, BC Canada
ABSTRACT

Inadequate laws and the impunity of those who are the perpetrators of gross violations of human rights in past authoritarian regimes fuel the struggle between accountability and social reconciliation in South America.

Various incoming governments in Latin America have granted amnesty or impunity to the authors, under one or more previous governments, of gross violations of human rights, ostensibly in order to ensure a smooth transition of power from dictatorships to new democracies.

The question of how to deal with past violators of human rights in a transitional justice context is important to international human rights law as it raises complex questions of international legal theory and practice.

During the 1970s, Argentina witnessed state-sponsored terrorism on an unprecedented scale. Violations of human rights, such as abductions, torture and disappearance were rampant in everyday society. The military carried out these crimes in a culture of impunity.

In this thesis, the author argues that the reign of impunity that existed and continues to exist after Argentina's "dirty war" is in violation of the state's domestic and international obligations.

Successor regimes have an obligation in international law to investigate, prosecute, and punish the authors of gross violations of human rights. This duty is reflected in current trends in international law toward furthering accountability by a variety of mechanisms. The author argues that this duty has not been fulfilled by the Argentine government.

The author provides a historical analysis of the 'dirty war' and gross violations of human rights that occurred in Argentina. The author presents a doctrinal argument supporting the emerging norm in international law that requires states to investigate, prosecute and provide redress for gross violations of human rights, drawing upon conventional treaty law and customary international law. Finally, the author considers recent events in Argentina reflective of diminishing impunity for crimes against humanity.
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And to the desaparecidos of the 'dirty war' and the thousands of families who never learned the fate of their loved ones, I hope this thesis provides readers with some knowledge of the terrible atrocities Argentines suffered under the military dictatorship from 1976-1983.
CHAPTER ONE: INTRODUCTION

Our recent history has been characterized by frequent and lengthy periods of military intervention in the nation's politics. Apart from the negative effects these interventions have had on our institutions, they have also provoked an exceptionally profound and serious crisis... What both the military and civilians forget here, to the detriment of both the country and the Armed Forces, is that golden rule which applies in all civilized nations whatever their political system or ideology, which is that the Armed Forces should always be subordinate to the civilian authority established through democratic institutions [emphasis added].

- Dr. Raúl Alfonsín, Presidential Speech December 10, 1983

1.1 Brief Overview of Concepts and History

1.1.1 State-Sponsored Terrorism

Since the attacks on the World Trade Center on September 11, 2001, the term "terrorist" has taken on new meaning. We have entered an era of the declared "War on Terror" in which governments have taken unilateral measures to protect their citizens in the interests of national and international security. Every day, the press headlines document a suspected terrorist or a new terrorist threat.

In fact, we have become so preoccupied with the so-called "War on Terror" that we are "in danger of overlooking a much more lethal and widespread form of terror" that

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1 **Nunca Más: A Report by Argentina's National Commission on Disappeared People** (Faber and Faber Limited: London, 1986) at 445; originally published as **Nunca Más: Informe de la Comisión Nacional sobre la Desaparición de Personas** (Buenos Aires: Editorial Universitaria de Buenos Aires, 1984) ["Nunca Más Report" or "CONADEP Report"].

2 In fact, the Canadian government has established an international commission to this effect. In 2000, Former Prime Minister Jean Chrétien, and Lloyd Axworthy, former Minister of Foreign Affairs, launched the "International Commission on Intervention and State Sovereignty (ICISS)" in order to address the problem of state sovereignty and international responsibility. The ICISS was tasked with the question: when is it appropriate for states to take action against other states who are committing gross violations of human rights against their own citizens? The ICISS has devised a report entitled "The Responsibility to Protect" whereby they canvas the central theme of a "responsibility to protect" – the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe (online: <http://www.dfait-maeci.gc.ca/iciss-ciise/report-en.asp>).

3 For example, just a couple of weeks ago, the Royal Canadian Mounted Police arrested an Ottawa man who worked as a software developer at the Department of Foreign Affairs in Ottawa in relation to participating in or contributing to activities of a terrorist group or facilitating terrorist activity – see "Foreign Affairs Worker Tied to Terror: Foreign Appears in Court in First Case since 2001 Anti-Terrorism Law" **Toronto Star** (31 March 2004), online: The Toronto Star <www.thestar.com>.
continues to exist in many countries - state-sponsored terror. This thesis is a doctrinal and historical inquiry into the reigning impunity over state-sponsored terrorism that occurred in Argentina during the 1970s.

1.1.2 Impunity in Transitional Justice Situations

Inadequate laws and impunity for those who are perpetrators of gross violations of human rights in past authoritarian regimes continues to fuel the struggle between accountability and social reconciliation in South America. The continuous struggle for human rights became "a unifying element in the struggle for democracy" during the years of military rule. Various incoming governments in Latin America have granted amnesty or impunity to the authors, under one or more previous governments, of gross violations of human rights, ostensibly in order to ensure a smooth transition of power from

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4 Patricia Marchak, Reigns of Terror (Montreal: McGill-Queen's University Press, 2003) [Marchak, "Reigns"] in the Preface at vii. Marchak states: "Both today and historically, the vast majority of crimes against humanity, and by far the largest number of deaths and disappearances, have been caused not by small groups of revolutionaries, but by organized states against their own citizens and the citizens of other countries"


6 Panizza, ibid, at 169

7 Kai Ambos, "Impunity and International Criminal Law: A Case Study on Colombia, Peru, Bolivia, Chile and Argentina" (1997) 18:1-4 Hum. Rts. L.J. 1 at 2; Christopher C. Joyner, "Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability" (1998) 26:4 Denv. J. Int'l L. & Pol'y 591 at 596 and 611. Ambos and Joyner note that human rights violations have taken place in many countries in both "formal democracies or less stable democratic institutions". These gross violations of human rights have included: violations of the right to life (extralegal executions, forced "disappearances", and massacres), violations of personal integrity (torture and other physical injuries), and unlawful restrictions on personal liberty (arbitrary detentions often preceding the forced disappearance, illicit search and seizure, unwarranted arrest, and house arrest). The perpetrators of these human rights
dictatorships to new democracies.\textsuperscript{8}

In this particular transitional justice context, impunity is a backward looking issue involving how to come to terms with the past, and evaluate gross violations of human rights under previous military regimes.\textsuperscript{9} The main source of impunity that exists in this delicate context is "militarization".\textsuperscript{10} Members of the military and security forces continue to intimidate and control the government; they are, in fact, often the very individuals occupying cabinet positions in the new "democratic" government.\textsuperscript{11}

Given the fragility of this transitional justice context, a political compromise between truth and justice is often required. However, how does a new president balance these conflicting concepts? Can one exist without the other?

\[T\]here has been a tremendous focus on the search for truth about the human rights violations committed by the previous regime, partly because many of the atrocities committed by these authoritarian regimes were conducted in secret. At times, this emphasis on obtaining the truth has led to the misperception that the search for truth and justice are mutually exclusive, especially if reconciliation between different segments of the human rights violations has included: state security forces (i.e., military, police, secret service agents), and insurgent movements (paramilitary death squads, unattached militias, and clandestine groups).

\textsuperscript{8} Garro, supra note 5 at 9 states "One of the most difficult dilemmas confronted by the first transitional government of Argentina was whether to bring to trial military and police officers suspected of perpetrating human rights violations during the dictatorship, or to declare a blanket amnesty for the purpose of achieving what many perceived as a necessary and prompt reconciliation between civilians and the military". See also Mark Osiel, "The Making of Human Rights Policy in Argentina: The Impact of Ideas and Interests on a Legal Conflict" (1986) 18 J. Lat. Amer. Stud. 135 [Osiel, "Making Of"] at 138 where he states "Transitions from military to civilian rule in Latin America have almost always involved bargains protecting departing heads of state from prosecution by their successors".

\textsuperscript{9} Garro, \textit{ibid}. at 4; Ambos, \textit{supra} note 7 at 2; Joyner, \textit{supra} note 7 at 611.

\textsuperscript{10} Ronalth Ochaeta, "Eradicating Impunity: The New Challenge to Democracy and Peace in Guatemala", Campaign against Impunity: Portrait and Plan of Action 1997, 17-32. Also see Garro, \textit{ibid}. at 9 where he states: "A major obstacle to the unfolding democratization process of many Latin American countries has been the demands of the armed forces, in anticipation of transitions to civilian rule, for guarantees against accountability".

\textsuperscript{11} Joyner, \textit{supra} note 7 at 611: "Perhaps even more disheartening for victim survivors is watching as former perpetrators are subsequently elevated to positions of authority in the government – a situation that not only permits them to escape prosecution and punishment, but also enables them to exert even more power and control over their former victims".
society is one of the objectives of the new regime\textsuperscript{12} [emphasis added].

**1.1.3 Culture of Impunity Reigns in Argentina\textsuperscript{13}**

Argentina's state-sponsored terrorism remains a salient example in the international law of impunity in a transitional justice context.\textsuperscript{14} Between 1976 and 1983, an estimated 30,000 people were "disappeared"\textsuperscript{15} during Argentina's 'dirty war'.\textsuperscript{16} Amidst rapid economic decline, political violence, and corruption, Lt. General Jorge Rafael Videla led the military *junta* in the 1976 coup that ousted Isabel Perón's government.\textsuperscript{17} The "Doctrine of National Security" was used to control the state and justify numerous decrees that gave the armed forces broad and sweeping powers. What started out as a state campaign to wipe out left-wing terrorism became a systematic and widespread practice that affected daily life of Argentineans. In the end, the violence employed by the state exceeded any terrorist tactics they had initially intended to combat.\textsuperscript{18}


\textsuperscript{13} See section 1.2.2 entitled "Impunity" for a review of existing literature on the terminology of 'impunity'.

\textsuperscript{14} Mary Margaret Penrose, "Impunity – Inertia, Inaction, and Invalidity: A Literature Review" (1999) 17:2 B.U. Int'l L.J. 269 at 288. See also, Cohen, "State Crimes", supra note 5 at 29 where he describes Argentina as an example of a "gradually unfolding process of impunity" which occurred in different stages, and will be further discussed in Chapter Three.

\textsuperscript{15} Patricia Marchak, *God's Assassins: State Terrorism in Argentina in the 1970s* (Montreal: McGill-Queen's University Press, 1999) [Marchak, "God's Assassins"]. Marchak makes the comment at 16 that, in fact, the practice of forced disappearances was so frequent in Argentina that the Spanish noun *los desaparecidos* (meaning "the disappeared") has become an international word used by the press, and has become both an intransitive and transitive verb within the Latin-American context (taking on meanings such as "she disappeared" or "the army disappeared her" or simply put, "the disappeared").

\textsuperscript{16} Nunca Más Report, supra note 1 provides detailed accounts of 8,960 cases of disappearance the Commission heard evidence of, but estimates the actual figure to have been considerably higher since many individuals were still afraid to come forward and provide testimony. In the Foreword to the Report at xiv, Nick Caistor remarks that in 1976-1977 alone, an estimated 8,000 - 20,000 people disappeared and were never heard from again. For a detailed discussion on the difficulty of determining an accurate number due to contested information regarding the disappeared in Argentina, see generally Alison Brysk, "The Politics of Measurement: The Contested Count of the Disappeared in Argentina" (1994) 16:4 Hum. Rts. Q. 676.


\textsuperscript{18} Marguerite Feitlowitz, *A Lexicon of Terror: Argentina and the Legacies of Torture* (New York: Oxford University Press, 1998). Feitlowitz notes at 6 that leftist groups initially targeted as "subversives" totalled no more than 2000 individuals, 400 of whom had access to arms.
Immediately following the coup, military and police powers increased. All Republican institutions were dissolved including the Congress, the provincial legislatures, municipal councils, political parties, trade unions, and professional as well as student associations. The stated objective of the armed forces was to rid the Argentine state of those deemed "subversive". The military junta understood this task as "not merely the elimination of all those who were actively engaged in armed actions against the state or its representatives, but also the eradication of those who could be considered as offering ideological support to the guerrillas". The term "subversive" was therefore inclusive of anyone who was seen as a terrorist or as opposition to the military government. Military junta leader and President Lt. General Jorge Videla was quoted as stating: "A terrorist is not just someone with a gun or bomb, but also someone who spreads ideas that are contrary to Western and Christian civilization".

Thousands of individuals perceived as "subversives to the state" were imprisoned illegally, abducted, and forced into detention centres where they were subjected to torture sessions on a daily basis (these centres were originally only intended to temporarily house the prisoners before being sent off to a concentration camp). Once they were under the control of the members of the state's military junta, they were beaten, tortured, murdered, raped, or forced into exile. Pregnant women were kept alive long enough for

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19 Ibid. at 22. For a detailed discussion on curtailed liberties, see Chapter Two, section 2.2.2 entitled "El Proceso".
20 Nunca Más Report, supra note 1 in the Foreword at xiii.
21 For a further discussion on those individuals and professions deemed "subversive", see Chapter Two, section 2.2.2 entitled "El Proceso".
23 Nunca Más Report, ibid.
24 Ibid.
their babies to be born in torture chambers, only for those babies to be later given away to military personnel and their families.\textsuperscript{25} Many Argentinean families will never know the fate of their loved ones as they became one of the many \textit{desaparecidos}\textsuperscript{26} or one of the thousands of individuals who were drugged and dumped, dead or alive, from aeroplanes into the Atlantic Ocean.\textsuperscript{27}

In 1983, newly democratically elected President Raúl Ricardo Alfonsín, of the Radical Party, took an aggressive approach in an attempt to facilitate transitional justice immediately upon taking office. Through presidential decree, he set up the truth commission entitled the \textit{Comisión Nacional sobre la Desaparición de Personas} (the "National Commission on Disappeared People", also known as "CONADEP") in order to investigate human rights abuses that occurred during the 'dirty war'. CONADEP was chaired by the widely respected author, Ernesto Sábato, who led the publication of a detailed report entitled \textit{Nunca Más} ("Never Again"), the first of its kind, documenting the accounts of survivors and witnesses, and chronicling the Argentine government's massive and systematic campaign of terror, torture and murder.\textsuperscript{28}

In 1985, the Federal Appeals Court of Argentina prosecuted nine former Commanders-in-Chief, including two former Presidents who had headed the first three \textit{juntas}.\textsuperscript{29} However, during these trials, tensions mounted and there were continued threats

\textsuperscript{25} \textit{Ibid.}

\textsuperscript{26} Marchak, \textit{God's Assassins}, \textit{supra} note 15, and see discussion in Chapter Two, section 2.2.3 entitled "Unprecedented Violence".

\textsuperscript{27} \textit{Nunca Más Report}, \textit{supra} note 1.

\textsuperscript{28} \textit{Ibid.}

\textsuperscript{29} Marchak, \textit{God's Assassins}, \textit{supra} note 15 at 334 lists those convicted: Five were given variable sentences: General Jorge Videla and Roberto Viola, Admirals Emilio Massera and Armando Lambruschini, and Air Force Brigadier Orlando Agostí. Ramón Camps, military commander of the Buenos Aires police,
to national security. Threats were issued against members of the judiciary and witnesses, and many courthouses were bombed. Within a few months, the military regained its strength in the public eye and challenged the application of the law to atrocities committed by the members of the military junta.\(^{30}\)

Facing continued tensions and wanting to "pacify"\(^{31}\) the military, Alfonsín reinterpreted the Penal and Military Codes and granted the defences of "due obedience" and "following orders" to members of the military junta (these defences were codified in two pieces of legislation known as the 1986 "Full Stop", and 1987 "Due Obedience" laws and will be further discussed in Chapter Three).\(^{32}\) These laws effectively granted many of the military junta new amnesty from criminal prosecution. However, as will be explored later, these laws did not apply to crimes of abduction and concealment of children.\(^{33}\)

In 1989, Alfonsín's government lost to President Carlos Saúl Menem of the Justicialist Party. Menem subsequently pardoned five senior junta leaders already convicted and a further 280 members of the armed forces that were on trial, once again was found guilty of six hundred homicides and sentenced to twenty-five years. See also Mark J. Osiel, *Mass Atrocity, Ordinary Evil and Hannah Arendt: Criminal Consciousness in Argentina's Dirty War* (Yale University Press, New Haven, 2001) [Osiel, "Mass Atrocity"] at 16: Videla was convicted on 66 charges of murder, 306 charges of kidnappings, 97 cases of torture, and 26 cases of theft; Massera and Videla were given life sentences and all those convicted were stripped of various rights and privileges, including military rank and pensions. Also see generally, Federal/Criminal and Correctional Court of Appeals for the Federal District of Buenos Aires Judgment in the Case No. 13, rendered on 15 December 1985. The Supreme Court of Argentina confirmed the convictions of junta commanders in December 1986 (see *Revista de Jurisprudencia Argentina*, No. 5513, 29 April 1987).

\(^{30}\) Garro, supra note 5 at 15.
\(^{31}\) Latore, supra note 17 at 428.
\(^{32}\) Ley de Punto Final (Full Stop Law), No. 23,492 (December 24, 1986) and Ley de Obeniencia Debida (Due Obedience Law), No. 23,521 (June 4, 1987). These laws will be discussed in detail in Chapter Three, section 3.3.4 entitled "Prosecution of the Former Junta and the Resulting Amnesties".
\(^{33}\) See Chapter Three, section 3.3.4(c)(i) entitled "The Full Stop Law".
granting a blanket amnesty to those responsible for committing human rights abuses during the 'dirty war'.

34 Through Menem's pardons, impunity again reigned in Argentina.

1.1.4 Recent Developments Provide Culture of Accountability

(a) International Law

Recent international events indicate there is an emerging trend in international criminal law and international human rights law toward universal jurisdiction, providing a culture of accountability for gross violations of human rights. Violators of human rights are no longer afforded refuge under amnesty laws and cannot live out their days in peace and luxury; the international community will no longer tolerate such inaction.

One need only consider the establishments of international tribunals such as the International Criminal Court ("ICC"), the International Criminal Tribunal for Former Yugoslavia ("ICTY"), the International Criminal Tribunal for Rwanda ("ICTR"), the Sierra Leone Special Court, the East Timor hybrid tribunal, and the Cambodian mixed international and domestic war crimes tribunal to appreciate how far we have come in the past decade toward furthering international accountability.

35 Other new legal instruments have surfaced that reflect the current view that the international community will no longer tolerate widespread impunity for gross violations.

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of human rights, including truth and reconciliation commissions\textsuperscript{36}, and prosecutions under the concept of universal jurisdiction. Landmark cases, such as that of the former Chilean dictator General Augusto Pinochet, have served as an impetus in Latin America and aid in setting a new international precedent in the struggle against impunity.\textsuperscript{37} The

\textsuperscript{36}To date, there have been truth commissions in Argentina, Bolivia, Burundi, Chad, Chile, Cyprus, East Timor, Ecuador, El Salvador, Germany, Guatemala, Haiti, Honduras, Malawi, Nepal, Nigeria, Panama, the Philippines, Serbia, Sierra Leone, South Africa, South Korea, Sri Lanka, Uganda, Uruguay, and Zimbabwe. Recent developments indicate that truth commission will likely be set up in Bosnia, Burma, Cambodia, Colombia, the Congo, Indonesia, Kosovo, and Peru. See United States Institute of Peace, Truth Commissions Digital Collection, online: <http://www.usip.org/library/truth.html#toc>.


In September of 1973, General Augusto Pinochet staged a \textit{coup d'état} to overthrow President Salvador Allende's socialist government in Chile. At the time, Chile was believed to be the centre of "Operation Condor" and widespread violations of human rights were occurring in Chile and elsewhere across Latin America. During Pinochet's reign from 1973 to 1990, there was systematic use of torture and summary executions of victims from all walks of life.

In 1988, Pinochet lost office finally relinquishing power in 1990 to the democratically elected President Patricio Aylwin in exchange for a secret amnesty. As Commander-in-Chief of the army, Pinochet benefited from immunity until he retired from this position in 1998, at which time he was sworn in as a senator for life and received life immunity.

In October 1998, while in London as a guest of the British Ministry of Defence, Pinochet was arrested on a warrant issued by the Spanish Judge Baltasar Garzón alleging that he had murdered Spanish citizens in Chile during his dictatorship and later that he had engaged in crimes of torture, hostage taking, murder, and was involved in the disappearances of 3,178 people. Judge Garzón demanded that Pinochet be extradited to Spain to stand trial for the alleged crimes.

In 1999, the case for extradition went before the House of Lords where the main issue to be decided was the scope of the immunity Pinochet enjoyed as a former Head of State for criminal acts allegedly committed while he was still Head of State. The House of Lords ultimately decided that a former Head of State has narrower immunity than a current Head of State and that immunity can never cover torture or hostage taking, as these are regarded as crimes against humanity. The House of Lords ruled that the majority of crimes, for which Judge Garzón sought Pinochet's extradition from Spain, were not crimes under English law at the time of the alleged offences (the United Kingdom did not ratify the \textit{Convention Against Torture} until 1988) but that Pinochet could be extradited on all accounts of torture after 1988. Even though this time restriction significantly narrowed the number of allegations against Pinochet, it was the first time a former Head of State has been held accountable for such atrocities (see full judgment in "Re: Pinochet", online: United Kingdom Parliament <http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990115/pino01.htm>.

In 2000, Pinochet was allowed to return to Chile after the United Kingdom Home Secretary decided he was unfit to stand trial for health reasons. Back in Chile, the Supreme Court stripped him of all immunity and gave credit to the House of Lords decision. However, in July of 2002, the Chilean Appeals Court ruled that Pinochet suffered from dementia and was unfit to stand trial ("Chilean Court Rules Pinochet Unfit for Trial" CNN (9 July 2001), online: CNN.com World <http://www.cnn.com/2001/WORLD/americas/07/09/pinochet/>).
Pinochet precedent has created a snowball effect that is gaining momentum in the international arena.\(^{38}\)

Other recent cases include that of Hissène Habré, former Head of State of Chad. Habré has been living in exile in Senegal since 1990. The Dakar Regional Court in Senegal indicted Habré and charged him with murder and torture of his own subjects during his rule from 1982 to 1990.\(^{39}\) This marks the first time a former African head of state has been charged with human rights violations by a court of another state, and were it not for the Pinochet precedent, it is unlikely Senegal would have chosen to indict him.

In sum, former heads of state are no longer immune to prosecution and the culture of impunity surrounding them has been significantly diminished. These "precedents of accountability" have a significant impact in the fight against international impunity.\(^{40}\)

\((b)\) Effect on Domestic Law

Recent national and international developments concerning Argentina provide hope that former members of the military junta will finally be held accountable for their

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Regardless of the practical shortcomings of Pinochet's frail health, this landmark decision reflects the trend toward universal criminal jurisdiction over crimes under international law. Pinochet, a Chilean national, was held by the United Kingdom to be extraditable to Spain to stand trial, for alleged crimes that took place outside the United Kingdom, and where the victims were Spanish citizens.


The new impetus that has driven the courts once more into action has come in part from the new tide in favour of international justice affecting countries in four continents. The watershed for Latin America was the arrest of Pinochet in London in October 1998 at the request of Spanish Judge Baltasar Garzón. Almost overnight, this landmark event transformed issues of state sovereignty and extraterritorial justice from largely academic issues into matters of global debate. In terms of justice and the accountability of former dictators and their cohorts, the world has grown smaller and frontiers more permeable since Pinochet's arrest. It is now increasingly recognized that those who commit crimes against humanity may in principle be judged anywhere.

\(^{39}\) Kittichaisaree, \textit{supra} note 37 at 60.

actions during the country's 'dirty war'. During the decade that followed Menem's pardons, Argentina experienced a further period of economic decline and a recession set in. However, at the same time, the country witnessed the emergence of many human rights movements and international awareness toward holding those individuals accused of gross violations of human rights accountable. These developments will be discussed in detail in Chapters Four and Five.

In 1990, France held its first trial in absentia against an Argentine national, ex-Navy Officer Alfredo Astiz, who ran the notorious School of Naval Mechanics that served as a secret torture centre.41 Over the next few years, France, Germany, Italy, Spain, and Sweden initiated similar proceedings.42

In 1996, ordinary citizens initiated the Más que Memoria ("More than Memory") campaign. Its purpose was to enable young people to come forward and speak about their experiences during the 'dirty war'.43

In 1999, a famous human rights group, the Abuelas de Plaza de Mayo ("Grandmothers of Plaza de Mayo") succeeded in having charges laid against Lt. General Videla, General Bignone, and Admiral Massera for kidnapping infants (the only crime

41 Astiz was involved in the abductions of two French nuns, Léonie Renée Duquet and Alice Domon. See “The Dirty War's Dirtiest Soldier” The Globe and Mail (10 June 2002); and “Dirty Warrior Wanted in Germany” Buenos Aires Herald (4 December 2003).
43 Marchak, God's Assassins, supra note 15 at 335.
\footnote{45}{See Chapter Four, section 4.3 entitled "Argentina's 'Full Stop' and 'Due Obedience Laws' and Resulting Pardons" for further discussion of this case.
\footnote{47}{President Kirchner was a member of the leftwing nationalist Peronist Youth Movement when he was a student. Note: Former President Carlos Menem sought re-election in 2003, but later withdrew his campaign in the face of corruption charges. In August, Menem was arrested for embezzlement charges as part of an anti-graft campaign (see "Carlos Menem is a Political Has-Been: Former Premier Quits Race" The Guardian Unlimited Special Reports (16 May 2003), online: Guardian Unlimited <http://www.guardian.co.uk/argentina/story/0,11439,957088,00.html>.

In 2001, the Federal Court of Buenos Aires unanimously affirmed a decision by a lower court judge that found the 1986 and 1987 amnesty laws to be unconstitutional and contrary to Argentina's international human rights obligations.\footnote{45}

In June 2003, Mexico extradited ex-Navy Officer Ricardo Miguel Cavallo to Spain where he is now awaiting trial.\footnote{46} Human rights activist and Spanish examining magistrate Judge Baltazar Garzón issued 45 extradition requests to Argentina. In August 2003, faced with numerous extradition requests from several countries, President Nestor Kirchner, who himself was held by the military as a student during the 'dirty war', repealed a decree that prevented the extradition of Argentines from standing trial abroad for human rights violations.\footnote{47}

Weeks later, Argentina made a historic move in order to combat reigning impunity when both houses of the Congress annulled the amnesty laws that shielded hundreds of the military junta from prosecution for human rights abuses during the 'dirty war'.\footnote{48} However, the impact of the congressional resolution remains to be seen, as the
Supreme Court of Argentina must now rule over the issue of the constitutionality of the amnesty laws.

International pressure and political tensions are high in Argentina at this time. Political scientists and human rights activists fear that the Supreme Court, itself currently "undergoing a shake-up after accusations of corruption and political bias", may not be up to the task. In the meantime, Spain has dropped its extradition requests, leaving the ultimate fate of the military junta in the hands of Argentina's judicial system.

1.2 Literature Review

It is well beyond the scope of this thesis to provide an exhaustive analysis of the literature Argentina's 'dirty war'. Given the degree and severity of gross violations of human rights that occurred, there is a plethora of literature on the subject. Much of the existing academic literature focuses on achieving an accurate historical record for understanding the origins and causes of reigning impunity and the 'dirty war'.

Justice Louise Arbour points out that, as North Americans, "[W]e have had the privilege of being nurtured in an environment that is respectful of intellectual pursuits, that deals with ideas on their merit and that accepts contradictory debate as a gift of democracy". Such has not always been the case in many other areas of the world, particularly in Argentina's recent past. It is to be noted, however, that Argentina does

49 Ibid. Members of the court are facing impeachment for corruption and the court is still seen as politically influenced.
enjoy a much greater freedom of speech nowadays since the 1970's. This thesis considers
the historical past of Argentina when such freedoms did not exist.

1.2.1 State-Sponsored Terrorism

"Inequality is a normal feature of societies".\(^{52}\) In her book entitled \textit{Reigns of Terror}, Professor Patricia Marchak argues that state-sponsored crimes against humanity occur when those in control of state institutions are unable to sustain the existing system.\(^{53}\) Professor Marchak notes that these societies typically lack independent institutions, but have very strong military forces, as was the case in Argentina.

Why then do states inflict terror and genocide on their own citizens?\(^{54}\) In \textit{Reigns of Terror}, Professor Marchak notes that current theories about state crimes against their own citizens tend to revolve around the concept of racism.\(^{55}\) However, she argues that many state crimes are aimed at populations that are not ethnically different from the majority. Perpetrators choose victims based on their territorial location, their occupation, their lifestyle, their class situation, their political belief, and even their age.\(^{56}\) These crimes are commonly known as "politicide".\(^{57}\)

\(^{52}\) Marchak, \textit{Reigns}, supra note 4 in the Epilogue at 267.
\(^{53}\) \textit{Ibid.} at 274
\(^{54}\) \textit{Ibid.} in the Preface at viii.
\(^{55}\) \textit{Ibid.} Marchak notes that the concept of racism "has variations ranging from xenophobia to tribalism, but
the basic theme is that people, defining themselves and others by their ethnic roots, turn on minorities when
they feel threatened in one way or another". The \textit{Convention on the Prevention and Punishment of the
January 1951) ("Genocide Convention"), defines genocide in Article 2 as an act "committed with intent to
destroy, in whole or in part, a national, ethnic, racial or religious group".
\(^{56}\) \textit{Ibid.}
\(^{57}\) \textit{Ibid.} At 30, Marchak states:
Politicide occurs when governments, or others holding a high degree of independent power, authorize the
kidnapping, torture, murder, or other grave human rights abuses against people who hold, or whom they
believe might hold, dissident ideas, or whose economic and social class situation is deemed to be
anathema, or whose lifestyle is deemed to be impure or objectionable for whatever reason, when such
identification is not subject to proof, evidence, or open trial.

Panizza, supra note 5 at 178 calls this "social cleansing".
In Argentina, the victims of politicide were not only the armed subversives, but also innocent people who lived in a particular area, went to university, practiced in certain professions, and were in any way associated with those deemed subversive.\(^{58}\) Marchak suggests that politicide is usually designed to remove power from a class of people or to prevent them from acting in a certain way, or thinking a certain way. Many politicides involve killing an idea by killing the ideological leader and destroying the books linked to that social movement.\(^{59}\) This is exactly what occurred during Argentina's 'dirty war' where "Marxism" was the enemy of the state.\(^{60}\)

Marchak argues, contrary to much of the current literature on genocide, that state crimes against its own citizens "are always instrumental, the ultimate objective being the retention or creation of unequal citizens and the appropriation of territory, other property, or services belonging to the victims".\(^{61}\) In her opinion, the ethnic dimension in existing theories provides "the excuse and ideological rationale for the action", but it does not explain the events.\(^{62}\)

In Marchak's opinion, state-sponsored terrorism is an attempt at eliminating ideas and thereby preventing social change. She argues that the definition of genocide has become an obstacle to our understanding of state crimes, unless we recognize genocide as a subset of crimes against humanity. Marchak states that genocide and politicide need to

\(^{58}\) Osiel, "Making Of", supra note 8 at 139 states: "Certain professions, such as psychiatry, were regarded as subversive by their very nature".

\(^{59}\) Marchak, Reigns, supra note 4 in the Preface at viii.

\(^{60}\) Ibid. at 103.

\(^{61}\) Ibid. in the Preface at viii.

\(^{62}\) Ibid.
be located within political contexts, rather than in simple terms of ethnic origins.\(^6^3\)

She argues that racism and authoritarian cultures are insufficient as explanations for the events that occurred under those repressive regimes. Instead, she suggests that we need to understand the "structural constraints" of states when changes are imposed on them.\(^6^4\)

In her book, Marchak makes the following comments regarding the characteristics of states that serve as 'preconditions' to the commission of state crimes against civilians:\(^6^5\)

The state is an organization with a monopoly of the legitimate use of armed force in a given territory. When either civilian governments or armies choose to conduct themselves as agents of crimes against humanity, they must have sufficient capacity – in terms of numbers and internal organization – to fully control the society with or without continued coercion. Armed force is an essential, though insufficient, condition for the conduct of these crimes. Moreover, a government has control of armed force only as long as the institutions of the armed forces consider that government legitimate.

States have a mandate to sustain and reproduce systems of inequality among citizens; when they cannot reproduce the system, they have a high probability of committing crimes against humanity.

Fundamental social change that results in, or has the potential to result in substantial alteration in the systemic inequalities of power constitutes a potential condition for the commission of state crimes against civilians.

Democracies are less likely to spawn reigns of terror on their own citizens than dictatorships or other autocratic systems.

States in societies with an authoritarian culture, societies where civil rights are not established, and societies where repression is widespread and of long duration may be especially prone to use forces against their own citizens for the solving of societal problems.

Societies with numerous institutional sectors separate from government have a greater capacity to withstand political paralysis than societies where the state is in control of major institutions, or where major institutions are closely allied with the state.

\(^6^3\) Ibid. In her book, Marchak argues that the same kind of conditions led Young Turks, Hitler, Stalin, Pol Pot, Hutu extremists, Serbian armies, and the Argentine junta to kill perceived opponents.

\(^6^4\) Ibid., at 3. Marchak states that structural changes may be social, political, demographic, economic, or environmental and affect the structure of the state in that the state is no longer capable of proceeding with traditional governance without resorting to violence.

\(^6^5\) Ibid., at 3-35.
Ideology is a bridge between the perception of a group as potential enemies and the determination to eradicate them.

Political paralysis brought on by confrontation with fundamental social change that results in destabilization of the unequal powers of citizens, when combined with armed force capable of sustaining crimes against humanity and a paucity of institutions independent of the state, is the precondition for state crimes against citizens. The reasons may be expressed in many ideological frameworks that act as the bridge between motivation and action; the ultimate objectives may be instrumental and material. Autocratic forms of governance, an authoritarian culture, or cultures that have not hitherto included protection of civil rights may add to the probability of the commission of state crimes.

[emphasis added].

State-sponsored terrorism will be the subject of further consideration in Chapter Two, section 2.3 "Theories Behind the 'Dirty War'".

1.2.2 Impunity

In order to understand why impunity reigns in countries such as Argentina, one must first consider the terminology. In this thesis, the 1986 and 1987 amnesty laws passed by the Argentinean government are referred to as either the amnesty or impunity laws.66 However, impunity, as a concept, refers to the entire socio-political context in which Argentina currently finds itself. Amnesty laws are usually one of several indicia of a culture of impunity.

Academics and legal scholars find impunity difficult to define; it is a both a "political tool and legal concept".67 In general, impunity refers to the "inability to prosecute and/or punish due to limited financial resources and a minimally-effective judicial system, or simply a lack of political will manifested by the exchange of

66 See supra note 32.
67 Penrose, supra note 14 at 271; and Cohen, supra note 5 at 28 states the concept of impunity can refer to "a gradual historical indifference or be the result of a conscious policy".
amnesties or pardons borne out of complacency of *realpolitik*.  

Louis Joinet, Special Rapporteur to the United Nations, defined impunity as: "the impossibility, *de jure* or *de facto*, of bringing the perpetrators of human rights violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims".  

Kai Ambos, of the Max Planck Institute for Foreign and International Criminal Law, notes that impunity has both factual and normative dimensions. The factual dimensions of impunity refer to the particular circumstances and internal political-social conditions that permit gross human rights violators to evade prosecution, whereas normative dimensions of impunity are often tied to the presence of a military justice system and various national impunity or amnesty laws.  

Ambos further notes that impunity exists in both practice and law. Impunity in practice is a result of strong military justice systems and weak civil governments, as was the case in Argentina with the "Full-Stop" and "Due Obedience" laws. In this context,

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68 Penrose, *ibid*. at 275-276. Penrose later refers to the following statement made by Amnesty International at 273:

"The term [impunity] conveys a sense of wrongdoers escaping justice or any serious form of accountability for their deeds. Impunity can arise at any stage before, during or after the judicial process: in not investigating the crimes; in not bringing the suspected culprits to trial; in not reaching a verdict or convicting them, despite the existence of convincing evidence which would establish their guilt beyond a reasonable doubt; in not sentencing those convicted, or sentencing them to derisory punishments out of all proportion to the gravity of their crimes; and in not enforcing their sentences."


70 Ambos, *supra* note 7; Joyner, *supra* note 7 at 611.


72 Ambos, *ibid*. at 2. See *supra* note 32.
the military justice system facilitated impunity sanctioned by the Argentine state for fellow officers of the military junta who had committed gross violations of human rights.

There appears to be a logical link between impunity and military justice, which renders the latter even more of an oxymoron [...] Military legislation is often crucial for granting impunity to perpetrators, since in many national circumstances, military tribunals hold extensive jurisdiction over human rights conditions in the country. 

Ambos suggests three common occurrences of impunity in law: (1) impunity laws (constitutional and general criminal law, amnesties and pardons, and special provisions exempting certain individuals), (2) military justice (offences, jurisdiction, organizational structure, fair trial principles, substantive and procedural obstacles), and (3) states of emergency. National impunity laws, such as amnesties, pardons, and exemptions are "direct, immediate forms of impunity" and are the primary focus of this thesis.

Professor Françoise Hampson, also a member of the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities, makes a distinction between "contemporaneous impunity" and "impunity for past actions". The former refers to the "breakdown of domestic mechanisms for securing accountability", whereas the latter refers to the specific issue of how to deal with past violations of human rights when there is a political transition from an authoritarian to a democratic regime. Both occurred in Argentina, however, it is the latter that is the focal point of this thesis.

Many legal scholars have suggested the term accountability as the "antithesis of

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73 Joyner, supra note 7 at 611-612.
74 Ambos, supra note 7 at 2-5.
75 Joyner, supra note 7 at 612.
76 Françoise Hampson, "Impunity and Accountability" in Sieder, supra note 37 at 8.
77 Ibid.
impunity", or the "effort aimed at curtailing impunity". Academics have described the three main types of legal accountability as: (1) the use of prosecutions, (2) the use of non-criminal sanctions, and (3) the use of truth commissions as either a substitute for, or in addition to, other accountability mechanisms. In the context of transitional justice, the notion of accountability raises complex questions of international theory and practice, and it must be considered in light of the fragile situation and specific circumstances of each transitional government.

1.2.3 Transitional Justice

The question of whether and how "fledgling democratic governments" should hold accountable those accused of having committed gross violations of human rights in the pre-democratic period has sparked a "vigorous debate" among international human rights scholars. There exists a plethora of literature on the subject of transitional or retroactive justice.

The major challenge simply stated is: during the transition from authoritarian to democratic rule, in the interest of national reconciliation, how does the new government fairly balance the notions of truth and justice? If impunity continues in the new government, the democratic institutional structure as a whole is compromised: "the

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79 Mark Freeman, "Transitional Justice: Fundamental Goals and Unavoidable Complications" (2000) 28 Man. L.J. 113. At para. 5, Freeman describes "non-criminal sanctions" as including: "lustrations, removal from office, forced apologies, civil liability, community service, economic penalties, or public disclosure of wrongdoing".
80 Penrose, supra note 14 at 272-273.
human decision no longer resides in a tyrannical but in a democratic power, in which all branches of state participate at different levels and with different degrees of involvement, approving and permitting it."  

Scholars have argued varying approaches to accountability, resulting in the emergence of three schools of thought. Some argue that new democracies should take an aggressive approach by adopting policies aimed at emphasizing punishment and condemning the perpetrators. Others argue a more lenient approach that would emphasize forgiveness and social reconciliation. Yet others support a middle-ground approach favouring policies aimed at balancing numerous goals, including punishment, reconciliation, and the establishment of an accurate historical record. Mark Freeman, Senior Associate for the International Centre for Transitional Justice in New York City, argues that strict adherence to any of these approaches is dangerous given the fragility of a transitional justice context.

Transitional justice often requires trade-offs and contradictory considerations that will vary from one context to another. This will depend largely on the specific circumstances of the transitory period. Professor Carlos Nino, also Advisor on constitutional issues to former President of Argentina Raúl Alfonsín, made the following

82 Penrose, supra note 14 at 275.
83 Freeman, supra note 79 at para. 1.
84 Ibid. at para. 2.
85 Ibid.; and Panizza, supra note 5 at 171.
86 Freeman, ibid.
87 Ibid.; and Cohen, "State Crimes", supra note 5 at 28 states: "What complicates the story is not so much the timing or form of the policy but the ongoing debate between those who insist on strict accountability and those who see 'impunity' as not necessarily a pejorative alternative or failure, but part of a desirable strategy to achieve reconciliation and to advance the prospects of a genuine reconstruction".
statement about the varied and difficult realities successor governments face in situations of transitional justice in the wake of Argentina's 'dirty war':

Though it is true that many people approach the issue of human rights violations with a strong retributive impulse, almost all who think momentarily about the issue are not prepared to defend a policy of punishing those abuses once it becomes clear that such a policy would probably provoke, by a causal chain, similar or even worse abuses. One might be a retributivist of the permissive variety, holding that a past wrong makes the criminal lose his immunity from punishment, but whether the state is morally obligated to punish him depends on the consequences of that punishment. Or, alternatively, one might think that those consequences are relevant to the very permissibility of punishment.  

Freeman remarks that the new democratic government faces the difficult choice between justice and the continuation of peace, or justice and the continuation of democracy. Nino adds that prosecutions may have to be limited and counterbalanced with the aim of preserving the democratic system. However, new governments must meet their international obligations and strive to remain in conformity with international law, which will be discussed below in section 1.2.4. This is the situation in which Argentina found itself, and will be further explored in Chapter Three of this thesis.

Freeman goes on to list six fundamental goals of transitional justice: (1) accountability, (2) truth, (3) social reconciliation, (4) victim recognition, (5) compensation for victims, and (6) institutional reform. Each of these goals raises moral, political and legal considerations that will inevitably vary in any given context.

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89 Freeman, supra note 79 at para. 2.
90 Nino, "Duty to Punish", supra note 88 at 2620. Nino states:
This last caveat is all the more sensible once we realize that the preservation of the democratic system is a prerequisite of those very prosecutions and the loss of it is a necessary antecedent to massive violation of human rights. Mandatory retribution, which values punishment above all else, raises the issue of whether equality before the law is infringed when the need to protect valuable institutions, like democracy, leads to a selection of the agents who will be prosecuted for human rights abuses.
91 Freeman, supra note 79 at para. 4.
92 Ibid. at paras. 4-10.
In sum, new democratic governments face the difficult task of evaluating the situation and making certain compromises in order to further the goals of transitional justice. Doing so will inevitably involve complications and contradictions in applying such goals.

Freeman lists the six principal constraints related to the implementation of the goals of transitional justice (with accompanying examples):

(1) Capacity complications and the threat of a return to widespread violence (as was the case in Chile even after General Augusto Pinochet ceded power, and in Argentina when newly elected President Raúl Alfonsín attempted to take an aggressive approach toward retroactive justice immediately after taking power);

(2) Costs of retroactive justice programs (for example, in Rwanda, there were over 90,000 people being held in detention awaiting trials);

(3) Program trade-offs and priority of transitional programs (for example, in South Africa, the government adopted a controversial approach involving granting amnesty to perpetrators of human rights violations in exchange for truthful disclosure of their participation);

(4) Complications of interdependence and interconnecting goals (for example, in El Salvador, the truth and reconciliation commission was made up of foreigners from other Latin American countries as the government thought the presence of nationals on the commission might undermine the process);

(5) Complications of timing (for example, in the Philippines, newly elected President Corazon Aquino attempted to take an aggressive approach to justice at the beginning of the transitory period and this resulted in seven attempted coups during her first term in office); and

(6) Dilemmas of legality and fairness (for example, in 1992 in Hungary, President Goncz asked the court to decide on the constitutionality of a proposed law that attempted to restart the statute of limitations for selected crimes committed between 1944 and 1990, but the court decided the law was unconstitutional on the basis that it placed political convenience ahead of basic legal standards of fairness).  

In conclusion, new democratic governments have the difficult task of balancing the goals of transitional justice with political, economic, social and legal realities. Fostering peaceful relations and bolstering democratic institutions is of primordial

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93 Ibid. at paras. 11-21.
concern and must be taken into account when prioritizing retroactive justice programs. However, meeting international obligations under international treaty and customary law should also be priority. In this respect, various forms of accountability have emerged on the international scene in an effort to combat impunity, namely truth commissions, repealing amnesty laws, and the current trend toward universal jurisdiction.

1.2.4 International Law

A review of the existing literature indicates that the question of how emerging democracies should address the atrocities of their recent past when the perpetrators still wield considerable political or military power is a significant problem in the human rights field.\footnote{Jose Zalaquett, "Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations" (1992) 43 Hastings L.J. 1425 [Zalaquett, "Balancing"] at 1426.} The decisions of new democratic states are no longer domestic considerations; they affect the international community as a whole.\footnote{Naomi Roht-Arriaza, & Lauren Gibson, "The Developing Jurisprudence on Amnesty" (1998) 20(4) Hum. Rts. Q. 843 at 843-844.} International law and international jurists therefore play an important role in defining the terms of transitional justice.

Professor Naomi Roht-Arriaza, also author of numerous publications on impunity, notes that in the aftermath of the atrocities committed during the Second World War, nations finally began to accept the limits of their sovereignty regarding the human rights of those individuals residing under their jurisdiction.\footnote{Naomi Roht-Arriaza, "Sources in International Treaties of an Obligation to Investigate, Prosecute, and Provide Redress" in Naomi Roht-Arriaza, ed., Impunity and Human Rights in International Law and Practice (Oxford: Oxford University Press, 1995) [Roht-Arriaza, "Impunity"] at 24.} It was in the wake of the Second World War that a state's treatment of its own citizens became a concern for the entire
international community. A further recognition that the failure to come to terms with past violations could lead to future violations came with the end of the Cold War and the rise of "nascent democracies".

Nowadays, there are numerous emerging international organizations, non-governmental organizations ("NGOs"), and human rights groups that lobby governments and the international community to hold those responsible for gross violations of human rights accountable. International human rights bodies also regularly call upon states and the international community to investigate, prosecute, and provide redress for victims of gross violations of human rights.

International human right scholars and activists agree that impunity laws, such as self-amnesties and pardons, are violations of the existing duty under international law to prosecute gross violations of human rights. These laws therefore lack legitimacy in international law if they apply to crimes against humanity, crimes of aggression, crimes of war, genocide, and torture. In this respect, it is important that relevant principles of international law be identified in transitional justice contexts.

The international legal system is "peculiar"; international law is not "law" in the strict legal sense, but a combination of governing treaties, customary practices and

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97 Ibid. at 24.
98 Penrose, supra note 14 at 270; Roht-Arriaza & Gibson, supra note 95 at 844.
99 Roht-Arriaza & Gibson, ibid.
100 This will be the subject of further discussion in Chapter Four.
101 Ambos, supra note 7 at 11.
102 Orentlicher, supra note 81 at 2539-40. Orentlicher considers the following questions pertaining to international law: "Are amnesty laws permissible? Does international law impose any affirmative duties to punish human rights violations? If so, are there any principles of law that "mitigate" the general duties in light of the peculiar constraints prevailing in transitional societies? To the extent that current law is not dispositive, is new law desirable?"
103 Penrose, supra note 14 at 277.
general principles taken together as international obligations to not engage in certain types of behaviour.\textsuperscript{104} State sovereignty remains the major obstacle to the development of international law, and its drawback has been particularly evident in combating impunity for gross violations of human rights.\textsuperscript{105} One author suggests this reluctance stems from the fact that criminal jurisdiction is still regarded as one of the most "sacred areas of state sovereignty".\textsuperscript{106}

When states and members of the international community are faced with the task of deciding whether to prosecute those suspected of committing gross violations of human rights in a former regime, many questions arise. Not only do these decisions involve questions of morality and law, but political stability, public support for democracy, and military presence in governmental affairs are also important factors in the decision-making process.\textsuperscript{107}

Professor Madeline Morris notes three fundamental reasons why governments fail to achieve full accountability: (1) political constraints borne out of the continued need to live and work together in a particular society, (2) limited resources (i.e. financial, human and judicial resources), and (3) a lack of political will at the national and/or international level.\textsuperscript{108} In Argentina, the gross violation of human rights that occurred were in the form of state-sponsored terrorism so all three of the listed reasons would have factored in the

\textsuperscript{104} \textit{Ibid.}
\textsuperscript{105} \textit{Ibid.}
\textsuperscript{106} \textit{Ibid.} at 278. Penrose cites Antonio Cassese, former President of the ICTY: "The reluctance of states regarding international penal enforcement is hardly surprising, given that international criminal tribunals intrude on one of the most sacred areas of state sovereignty: criminal jurisdiction".
\textsuperscript{107} \textit{Ibid.} This will be the subject of further discussion in Chapter Three.
\textsuperscript{108} \textit{Ibid.} citing Professor Madeline Morris.
decision-making of the successor governments.

In her book entitled *Impunity and Human Rights in International Law and Practice*, Professor Roht-Arriaza states that in "formulating policies for dealing with past violations of fundamental rights, international law can be an important source of support for transitional regimes".\(^{109}\) Roht-Arriaza notes that reference to international law is mandated by the very nature of the gross violation of human rights in the transitional justice context.\(^{110}\) With regard to Argentina, massive systematic patterns of arbitrary killings, state torture, and forced disappearances are clearly in violation of international law.

In her book, Roht-Arriaza studies the legal setting and illustrates how international law treats the concepts of punishment and redress as necessary parts of a legal regime based on respect for human rights. She goes on to consider the legal framework in support of accountability for gross violations of human rights by interpreting sources in international treaties and non-treaties of an obligation to investigate, prosecute, and provide redress.

Professor Christopher Joyner states that a "corpus of international law has evolved that imposes positive obligations on states to investigate and prosecute suspected violators of human rights crimes (including genocide, torture, and crimes against humanity)".\(^{111}\) Various international treaties, such as the *1949 Geneva War Crimes*
Conventions (the "Geneva Conventions")\textsuperscript{112} and Additional Protocols I and II\textsuperscript{113}, the Convention on the Suppression and Punishment of the Crime of Apartheid\textsuperscript{114}, the Convention on the Prevention and Suppression of the Crime of Genocide (the "Genocide Convention")\textsuperscript{115} and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention")\textsuperscript{116} serve to establish a "legal framework designed to combat impunity" by setting minimum standards of acceptable behaviour under international law.\textsuperscript{117} These treaties "prohibit certain offences that violate human rights norms and obligate states or the international community to prosecute these offenders".\textsuperscript{118}

However, Roht-Arriaza notes that the applicability of international treaties is limited because not all states have signed or ratified the relevant treaty at the time the gross violations of human rights occur.\textsuperscript{119} It is at this point that one must consider


\textsuperscript{115} Supra note 55.


\textsuperscript{117} Joyner, supra note 7 at 597.

\textsuperscript{118} Ibid.

\textsuperscript{119} Roht-Arriaza, Impunity, supra note 96 at 28.
broader human rights instruments, such as the *Universal Declaration of Human Rights* (the "*Universal Declaration*")\textsuperscript{120} or the *International Covenant on Civil and Political Rights* (the "*International Covenant*")\textsuperscript{121}, which provide additional treaty-based sources of an international obligation to investigate, prosecute, and compensate" by including "ensuring and protecting" provisions.\textsuperscript{122}

Furthermore, independent of international criminal law treaty provisions and human rights instruments, states must also respect the obligation to investigate, prosecute, and provide redress that emerges from customary international law.

Roht-Arriaza states that four sources indicate an emerging obligation under customary international law to investigate, prosecute, and provide redress to victims: (1) treaty provisions as the basis of a customary norm, (2) diplomatic practice, (3) customary law surrounding crimes against humanity, and (4) the practice of arbitral tribunals under the rules of state responsibility for the protection of aliens.\textsuperscript{123} Finally, Roht-Arriaza suggests that general principles of law, such as *jus cogens* and *obligatio ergo omnes*, also support the notion of an existing obligation under international law to investigate, prosecute, and provide redress.\textsuperscript{124}

Professor Diane Orentlicher suggests that relevant principles of international law must be identified in a transitional justice context.\textsuperscript{125} Orentlicher argues that the central


\textsuperscript{122} Roht-Arriaza, *Impunity*, supra note 96 at 28.

\textsuperscript{123} Roht-Arriaza, "Non-Treaty Sources of the Obligation to Investigate and Prosecute", in *Impunity*, ibid. at 40 [Roht-Arriaza, "Non-Treaty Sources"].

\textsuperscript{124} *Ibid.* at 46.

\textsuperscript{125} Orentlicher, *supra* note 81 and 102 at 2539-40.
importance of the rule of law in civilized societies requires (albeit within defined but principled limits) the prosecution of atrocious crimes. In fact, she argues that international law helps assure the survival of these fragile democracies "when its clear pronouncement removes certain atrocious crimes from the provincial realm of a country's internal politics and thereby places those crimes squarely within the scope of universal concern and the conscience of all civilized people." To this effect, Orentlicher also suggests that recently developed principles of international law, both customary and conventional, already impose obligations on states to prosecute those responsible for human rights violations.

In conclusion, as an ensemble, international criminal law treaties, international human rights instruments, customary international law and general principles of law strongly support the notion that states have an affirmative obligation to protect their citizens, prosecute and investigate gross violations of human rights, and compensate those who are victims of such violations. Argentina's impunity laws and its state practice of impunity are therefore in conflict with this established proposition of international law.

1.3 Overview of Chapters

The author has chronologically arranged the Chapters in this thesis in order to recount the story of Argentina and its people in an effective and concise manner. The author hopes to provide the reader with an inquiry into the state-sponsored terrorism that occurred during the country's 'dirty war' and highlight recent developments in

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126 Ibid. at 2540.
127 Ibid.
international law indicative of a trend toward accountability of perpetrators of human rights violations. The author acknowledges the biggest challenge is to attempt to set the historical scene in Argentina and provide the reader with an understanding of the events and conditions leading up to the 'dirty war' in a succinct and concise manner.

Chapter Two begins with a historical analysis of Argentina's socio-political context and the notion of 'Peronism' that led up to the military coup of 1976. The author will provide the reader with a brief, but detailed account of Argentina's human rights abuses during the 'dirty war' and theories about its causes.

Chapter Three considers the concept of impunity in a transitional justice context. The author will discuss at length Argentina's return to democracy and crucial political decisions that were made in the wake of the 'dirty war', including the truth and reconciliation commission, the proclaiming of the 1986 and 1987 amnesty laws, the prosecution of members of the military junta, and their subsequent pardons given in 1989 and 1990.

Chapter Four will examine amnesty legislation with regard to international law. The duty to investigate, prosecute, and provide redress existing under international law will be analyzed in the context of granting impunity laws. This Chapter concludes with a consideration of recent events in Argentina demonstrative of a current trend toward holding accountable those responsible for gross violations of human rights.

Chapter Five concludes this thesis with a description of current day developments, including the emergence of human rights movements and the international trend toward
universal jurisdiction in an effort to combat impunity.

1.4 Methodology and Theoretical Framework

In this thesis, it is the author's intention to examine the underlying socio-political, historical, and legal factors leading up to this dark chapter in Argentina's history. Structurally, various institutions at the time, such as the judiciary and parliamentarians, were intrinsically susceptible to manipulation by the military, which, in turn, led to the breakdown of society and reigning impunity in Argentina. However, recent events indicate that Argentina is experiencing yet a new period of transition - this time the national and international community are demanding the veil of impunity be lifted.

The author adopts both a historical and doctrinal approach to law. An in-depth analysis is conducted into how successor democratic governments come to terms with their past while building up and nurturing the rule of law in the wake of human rights abuses. Further consideration is given to external international pressures that have helped shape the Argentina of today, and how international human rights law and the notion of accountability have progressed since the country's 'dirty war'.

In conducting research, the author relies on a variety of sources, namely journal articles, texts, newspaper clippings, and witness accounts. Most of the existing literature provides a historical overview of what occurred during Argentina's 'dirty war'. Many of the texts are inter-disciplinary in nature, drawing upon socio-political critiques, political science, history, and international law.

The methodological approach includes an examination into Roht-Arriaza's book
that entertains the notion that states have an affirmative obligation in international law to investigate allegations of human rights abuses and charge those responsible for committing such atrocities. The obligation of states to prosecute and punish those persons suspected of serious human rights violations through their domestic jurisdictions arises out of treaty law. This thesis considers states' jurisdiction to prosecute these perpetrators under their respective treaty obligations in conventional international law.

Nowadays, it is also argued that customary international law requires successor regimes to prosecute and punish the authors of gross human rights violations. Although human rights treaties do not explicitly require states to prosecute violations, they impose a general duty on states to investigate allegations of torture, extra-legal killings, and forced disappearances. This thesis examines this duty in light of growing international norms such as states' prescriptive jurisdiction to prosecute human rights violators in the absence of treaty law.

The methodology will also involve adopting the liberal international law theory to an analysis of Argentina's impunity laws. William Burke-White, then a Ph.D. student at Cambridge, won the prestigious 2002 Deak Award, for his article "Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation," published in the *Harvard International Law Journal*.129

In his article, Burke-White acknowledges the renewed importance of studying amnesty legislation given the fact that extra-territorial prosecutions under the principle of

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128 ibid.
universal jurisdiction have increased. Burke-White suggests that "as the international community has become more involved in the process of post-conflict reconciliation, amnesty has re-emerged as an important political and legal tool".

Burke-White constructs a new deontological framework for the analysis of impunity laws. His framework consists of simultaneously accepting the potential value of amnesty legislation for social reconciliation, while at the same time respecting international law obligations. His analysis involves applying liberal international law theory to the study of amnesty legislation which includes taking into consideration the "inextricable links between the domestic and international contexts". In applying this theory, Burke-White's model has two key axes in order to construct a framework analyzing the extraterritorial validity of the amnesty legislation: legitimacy and scope.

This analysis will be applied in Argentina's context in Chapter Four in order to conclude that granting the 1986 and 1987 impunity laws effectively denied the judiciary the opportunity to prosecute and hold accountable those responsible for gross violations of human rights. Argentina's impunity laws were broad in scope and had little, if any, domestic legitimacy and no international legitimacy. As such, it is the author's intention to demonstrate Argentina remains in violation of international law.

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130 Ibid.
131 Ibid. at 468.
132 Ibid.
133 Ibid. at 468 and 475.
134 Ibid. at 469. "Legitimacy addresses domestic and international sources and results of amnesty laws; scope refers to the crimes and individuals covered by these laws".
135 Ibid. at 530.
136 Ibid. at 490.
CHAPTER TWO: ARGENTINA'S 'DIRTY WAR'

First we kill all the subversives; then we kill their collaborators; then their sympathizers; then... those who remain indifferent; and finally we will kill the timid.

- General Ibérico Saint-Jean

2.1 Argentina's Historical and Political Context

It is beyond the scope of this thesis to consider at length Argentina's turbulent economic and political history that has been marked by "recurring cycles of bloody rule". However, it is pertinent at this point to briefly consider the historical background that fuelled political ideologies in the country leading up to the escalating violence in the 1970s, and the breakdown of societal structures that ensued. In her book, Reigns of Terror, Marchak states that "the violent history of Argentina is a part of any explanation of what occurred there." A further consideration of theories behind the causes of the 'dirty war' will be discussed in section 2.3.

Following independence from Spain in 1816, Argentina experienced numerous periods of internal political conflict between the civilian and military factions eventually leading up to the coup of 1976. Sadly, Argentina has been no stranger to violence as political turmoil and civil unrest marked the country's history for over a century.

Violence in the name of imposing order in Argentina had been a longstanding policy of governments. Elites of the country had often initiated - or had readily accepted - repressive forms of social control over workers and dissidents. The church hierarchy likewise could be expected to consent to, if not actively collaborate in, the suppression of dissidents. Argentina had become, over its history, an undemocratic, intolerant, rigidly polarized society. One might have predicted that it was on a collision course. Yet there were many surprises in the way the case unfolded.

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138 Feitlowitz, *supra* note 18 at 5.
139 Marchak, *Reigns*, *supra* note 4 at 79.
140 Garro, *supra* note 5 at 6.
141 Marchak, *God's Assassins*, *supra* note 15 at 43.
In his book entitled *Radical Evil on Trial*, Professor Nino divides Argentina's history into three periods: (1) 1816 - 1860, (2) 1860 - 1930, and (3) 1930 - 1983. In his opinion, the first period was marked by frequent civil wars between Buenos Aires and the interior provinces, "notorious for the pre-eminence of popular caudillos, Juan Manuel de Rosas". The second period began with the constitutionalization of the country and was characterized by "political tranquility amid restrained democracy". During this period, Nino notes that although Argentina experienced considerable social and economic progress, some authoritarian tendencies were already evident. The third period began in 1930 with a coup by a "nationalistic civic-military movement" which held power until the democratization of the country in 1983.

In her book entitled *God's Assassins: State Terrorism in Argentina in the 1970s*, Professor Marchak notes two distinct periods in Argentina's history prior to the violence of the 1970s. She describes the first period as the colonial and immediate postcolonial history, from which the original institutions and culture of Argentina were established. The second period begins around 1930 when the military forces first took over "the reins of government".

Marchak notes that Argentina's economic and social development after colonial

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143 Ibid. See also Alberto Ciria, "Review Essay: Argentina at the Crossroads" (1978) 20:2 J. Inter-Am. Stud. & World Affairs 211 at 212; and Garro, supra note 5 at 6.
144 Nino, ibid.
145 Ibid. Also see infra note 151 re: la semana trágica.
146 Ibid. at 42.
147 Marchak, *God's Assassins*, supra note 15 at 43.
148 Ibid.
and postcolonial history is not unlike that of other European settler colonies, which also witnessed trade union evolution and the emergence of socialist and anarchist movements.\textsuperscript{150} With these movements came bloody uprisings and violence. However, in Marchak's opinion, what distinguishes Argentina from other countries is that the uprisings that took place, resulting in the murder of numerous workers, occurred on a larger scale than elsewhere, thereby setting the stage for later atrocities.\textsuperscript{151}

After World War I, Argentina was ruled by various elected governments. As stated above, this period is marked by the country's social and economic progress. Buenos Aires was deemed the 'Paris' of Latin America and the economy flourished.\textsuperscript{152} Immigration led to unprecedented population growth, and the export-based economy (grain and beef) made Argentina the seventh-largest economic power in the world at the time.\textsuperscript{153} Social reform included increased literacy rates and improved academic quality.\textsuperscript{154} However, during this period, authoritarian tendencies, such as the emergence of right-wing movements, primarily nationalist, fundamentalist Catholic movements like the \textit{Liga Patriótica Argentina} ("Argentine Patriotic League"), surfaced.\textsuperscript{155}

\textsuperscript{150} Marchak, \textit{ibid.} at 44. Marchak also notes that landholding patterns were the exception given that the oligarchy in Argentina monopolized the land.
\textsuperscript{151} \textit{Ibid.} To this effect, Marchak notes two events in particular. The second week of January 1919 became known as the \textit{semana trágica} ("tragic week"), where the government suppressed anarchist and social labour agitation in Buenos Aires. The mass uprising was met by military troops who machine-gunned the workers (As Marchak mentions, it is interesting to note that, ironically, the young lieutenant in charge of the troops who machine-gunned the workers was Juan Domingo Perón). The second event was the Patagonian Rebellion of 1921-22 where soldiers killed 1,500 workers who had rebelled against British and Argentine sheep ranchers.
\textsuperscript{152} Feitlowitz, \textit{supra} note 18 at 4.
\textsuperscript{153} Nino, \textit{Radical Evil}, \textit{supra} note 142 at 42. Feitlowitz, \textit{ibid.} notes that after WWII, Argentina was ranked as the eighth wealthiest nation in the world. Garro, \textit{supra} note 5 at 7 states that Argentina was one of the world's richest nations in 1930, and tumbled to 70\textsuperscript{th} place by 1990.
\textsuperscript{154} Nino, \textit{ibid.} at 42.
\textsuperscript{155} \textit{Ibid.} at 42; Marchak, \textit{God's Assassins}, \textit{supra} note 15 at 48, Feitlowitz, \textit{supra} note 18 at 4.
The first military coup of the century occurred in 1930 due to a depression and a weakened civilian government which caused social, economic and political unrest.\textsuperscript{156} Nino states that "the establishment's fear of social revolt, combined with nationalist sentiments, heightened the attractiveness of xenophobia and fascist ideology".\textsuperscript{157} Prior to World War II, from 1930-45, Argentina was continually ruled by a series of military dictatorships and rigged governments during which time there was a period of political anarchy and economic decline.\textsuperscript{158}

2.1.1 Peronism

In 1946, Juan Domingo Perón became president with 52.4 percent of the vote.\textsuperscript{159} It is important to understand the policies behind the Peronist movement, known as Peronism, as this period marks escalating violence between left-wing guerrilla movements and the military, thereby fuelling the "subversive" campaign ideology that was to come.\textsuperscript{160}

Perón's political policies concentrated on redistributing income, dismantling the judicial system, intimidating and controlling the press and opposing political parties, and supporting and reforming organized labour.\textsuperscript{161} Perón is famous for improving the living

\textsuperscript{156} Nino, \textit{ibid.} at 42; and Garro, \textit{supra} note 5 at 6.
\textsuperscript{157} \textit{Ibid.}
\textsuperscript{158} Marchak, \textit{God's Assassins, supra} note 15 at 51: In 1930, the Supreme Court ruled that the armed forces could legally oust an elected government. The rationale was that they alone would be in a position to protect life, liberty, and property if the established order broke down. The following year, a Catholic nationalist, General José F. Uriburu took over power via a military coup. Mainwaring, \textit{supra} note 149 at 415 states that every coup was supported by members of the civilian population.
\textsuperscript{159} Marchak, \textit{ibid.} at 57.
\textsuperscript{161} Marchak, \textit{God's Assassins, supra} note 15 at 57-75; and see also Ciria, \textit{supra} note 143 for a general discussion on the notion of Peronism.
standards for poor Argentines, institutionalizing a welfare state and creating labour unions with strong political powers. However, under Perón's dictatorship, there was widespread persecution of political opponents. Under his government, members of opposition parties were detained, forced into exile, tortured and killed. Marchak sums up the "continuing legacy of the Peronist period" as including "a demoralized and politicized judiciary, the absence of due process and the rule of law in daily life, and widespread disrespect for the law and democracy".

After numerous clashes between organized labour groups and the military, Perón was deposed by the coup of 1955. A series of military dictatorships followed from 1955-1973 and Perón's Justicialist party was banned. During this time, Perón was in exile in Spain, maintaining significant influence over Argentine politics and planning his return. Perón managed to infiltrate the trade union movement and the left-wing guerrilla opposition from Madrid and the military finally allowed Peronists to compete in the 1973 elections. However, even the military governments couldn't stop Argentina's decline as increasing unemployment, inflation, socio-political divisions, and institutional decay set in.

In 1973, Perón had his "second-coming" via stand-in, Héctor Cámpora, who won

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162 Nino, Radical Evil, supra note 142 at 43.
163 Marchak, God's Assassins, supra note 15 at 63.
164 Feitlowitz, supra note 18 notes that from exile, "Perón continued for sixteen years to exert an almost magical political power from behind the scenes. By virtue of his absence he became a mythic presence".
165 Nino, Radical Evil, supra note 142 at 43.
166 Rita Arditti, Searching for Life: The Grandmothers of the Plaza de Mayo and the Disappeared Children of Argentina (Berkley: University of California Press, 1999) at 9. See also Garro, supra note 5 at 7 where he states that the 1970s were marked by political chaos and economic decline.
the election defeating the military forces.\textsuperscript{167} Perón later withdrew his endorsement, forcing Cámpora's immediate resignation.\textsuperscript{168} Marchak makes the following comment about the competition for power that was in progress after the elections: "[T]he military forces were fractured, despised, and in retreat; there was every reason for union members and guerrillas to lay down their arms and plan a peaceful transition to democracy. But the antagonists were unable to take that road, for already there was a power struggle for the succession".\textsuperscript{169}

On July 12, 1973, Perón pushed out Cámpora and once again became president. Upon reassuming the presidency, Perón abandoned Cámpora's social pact that had been introduced in order to hold prices and wages constant for two years.\textsuperscript{170} However, Perón was not aware of significant political changes that had occurred during his exile. Loyal Peronist followers had split into two groups, both claiming they represented the true meaning of "Peronism". Left-wing revolutionary military groups, such as the Montoneros, clashed with extreme right-wing labour movements, and tensions mounted within the labour movement. Violence escalated and there were a number of politically motivated killings. This is considered by some as the start of the 'dirty war'.\textsuperscript{171}

\textsuperscript{167} Marchak, \textit{God's Assassins}, supra note 15 at 102.
\textsuperscript{168} Nino, \textit{Radical Evil}, supra note 142 at 43.
\textsuperscript{169} Marchak, \textit{God's Assassins}, supra note 15 at 102. Marchak notes that many sub-struggles that were in progress at the time, thereby complicating our understanding of this period. Sub-struggles included: competition for power within the union bureaucracy and between Peronist and dissident unions; competition between young guerrillas or their supporters and union leaders; and numerous other rivalries between leaders of various factions within the Peronist movement. See also Osiel, "Making Of", supra note 8 at 175 where he states the struggle was one of ideas more than one between interests.
\textsuperscript{170} Marchak, \textit{ibid}. at 105.
\textsuperscript{171} \textit{Ibid}. at 109.
2.1.2 Isabelita

After Perón's death in 1974, his third wife, María Estela Isabel Martínez de Perón ("Isabelita"), assumed presidential duties and declared a "state of siege" in order to combat left-wing guerrilla activity. Isabel gave the military a "carte blanche" to exert any means necessary to squelch guerrilla activity. She had José López Rega, then Minister of Welfare, oversee the right-wing terrorist clandestine organization, known as the Alianza Anticomunista Argentina ("AAA" or "Argentine Anticommunist Alliance"), whose function was to rid the country of "subversives". The economy was experiencing a rapid decline and violence continued to escalate.

2.1.3 Coup of 1976

On March 24, 1976, Isabel Perón was ousted by a military coup led by Lieutenant-General Jorge Rafael Videla. Many Argentineans supported the coup under the impression that a state controlled by military junta would finally end the

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172 Under Argentinean law, once a "state of siege" is declared, the government is able to override existing legal procedures as per the Poder Ejecutivo Nacional, PEN ("National Executive Power") vested to the government by Section 23 of the Constitution. Section 23 of the Argentine Constitution states: In the event of domestic disorder or foreign attack endangering the full enforcement of this Constitution and of the authorities hereby established, the province or territory which is in a turmoil shall be declared in state of siege and the constitutional guarantees shall be suspended therein. But during such a suspension the President of the Republic shall not pronounce judgment or apply penalties on his own. In such case, his power shall be limited, with respect to persons, to their arrest or transfer from one place of the Nation to another, should they not prefer to leave the Argentine territory [emphasis added].

173 Arditti, supra note 166 at 10.

174 Marchak, God's Assassins, supra note 15 at 112; Nino, Radical Evil, supra note 142 at 43; and Nunca Más Report, supra note 1 in Foreword. Marchak describes the trademarks of the Triple A hit-squads: they travelled in Ford Falcons without licence plates and typically shot individuals at close range leaving the corpses in ditches and roadways or burnt-out cars. Marchak interviewed witnesses who described how the Triple A would put their "black list" in the local newspapers; any individual on such a list would have 24 hours to leave the country in forced exile or would face certain death or torture (at 114 interviewing Osvaldo Bayer). This is all part of what Marchak describes as "state terrorism" with an underlying purpose of instilling terror in the Argentine population.

violence and chaos the country had experienced since Perón's return.\textsuperscript{176} Ironically, the coup was given the name "The Gentleman's coup" as it was seen as a positive change in government by those who would restore peace and order in the country.\textsuperscript{177} The media portrayed General Videla and the other leaders as reasonable and honest gentlemen willing to accept the heavy burden of saving Argentina from "subversives".\textsuperscript{178}

At this point, one must consider the historical importance and significance of the military in Argentina. The military held enormous power over the Argentinean people.\textsuperscript{179} Though the military had developed considerable autonomy, "they also operated at the behest, or even in support, of a class of domestic capitalists".\textsuperscript{180} One author notes that political parties, unions, businesses and interest groups had all made alliances with the military - Argentineans had long struggled with the concept of democracy and did not put much faith in the idea of self-government.\textsuperscript{181}

The 1976 coup was seen as a welcomed relief to the previous two and a half years of violence and political chaos under Isabel Perón.\textsuperscript{182} However, Argentineans could not be more wrong as the coup "ushered" in a systematic campaign of state-terrorism with unprecedented violence in the country.\textsuperscript{183}

\begin{footnotesize}
\begin{enumerate}
\item Osiel, "Making Of", supra note 8 at 171.
\item Feitlowitz, supra note 18 at 6.
\item Arditti, supra note 166 at 8.
\item Potash, "Changing Role", supra note 160 at 571.
\item Marchak, Reigns, supra note 4 at 238.
\item Feitlowitz, supra note 18 at 5. See also Mainwaring, supra note 149 at 415: "Parties, unions, business associations, the large rural bourgeoisie, and the military have consistently worked for short-term interests, even at the expense of institutional stability". And at 416: "Before the 1976 coup, the prevalent intellectual attitude was that democracy was a formal institutional arrangement that would not resolve the country's problems".
\item Feitlowitz, ibid. at 20.
\item Marchak, God's Assassins, supra note 15 at 148; and Garro, supra note 5 at 7 calls this the "darkest period of its history".
\end{enumerate}
\end{footnotesize}
2.2 The 'Dirty War'

2.2.1 Terminology

At this point, it is useful to consider the term 'dirty war'. Marchak explains that the term was coined by the army for the battle against guerrillas. However, in the author's discussions with her, Professor Marchak stated that the Spanish translation guerra sucia should be avoided as it is still a principled objection by many in Argentina on the grounds that no war was ever declared.

Feitlowitz states that la guerra sucia is a direct translation of Charles DeGaulle's la sale de guerre (the Dirty War in Algeria): "Like the Argentines, the French military insisted in Algiers that 'we're defending the West here...a certain notion of what man is'".

Nino states that "this was a 'dirty war' against an enemy without uniform or flag. Because this enemy did not follow the rules or war, the government claimed it was justified in resorting to extraordinary measure to repel aggression".

The English term 'dirty war' and the Spanish term El Proceso ("the Process for National Reorganization"), the official name given by the state, will be employed

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184 Marchak, ibid. at 109.
185 Ibid. and in the author's discussions with Dr. Marchak.
186 Feitlowitz, supra note 18 at 11.
187 Nino, Radical Evil, supra note 142 at 56. See also Osiel, Mass Atrocity, supra note 29 at 13 where he states "To fight an enemy of decentralized 'cells', it was thought necessary to adopt a similar mode of organization"; David Pion-Berlin, "To Prosecute or to Pardon? Human Rights Decisions in Latin American Southern Cone (Chile, Argentina, Uruguay)" (1994) 16:1 Hum. Rts. Q. 105 [Pion-Berlin, "Prosecute or Pardon"] at 108 states: "The military juntas that presided over the Proceso easily and frequently lost sight of the distinction between armed and unarmed foes, thus earning their operations and the name 'Dirty War'".
interchangeably throughout this thesis.\textsuperscript{188}

2.2.2 \textit{El Proceso}

With the 1976 coup came a period of even more violence where systematic disappearances, torture and killings became daily life for Argentineans. This was the beginning of \textit{El Proceso} where the stated military objective was to rid the population of all "elements incompatible with its social vision"\textsuperscript{189} and rid the country of any "subversives, communists, atheists, and dissidents, who, in their view constituted a serious threat to the well-being of 'Western civilization and Christianity'".\textsuperscript{190}

During \textit{El Proceso} (1976-1983), the military regime was headed by a succession of four \textit{juntas}, composed of three senior officers from each of the armed forces (army, navy and air force). The first \textit{junta} was led by Lieutenant General Videla, Admiral Emilio Eduardo Massera, and Brigadier General Orlando Ramón Agosti. In 1982, President Videla was succeeded by General Roberto Viola, Army Chief of Staff. Later that year, Viola was unseated by General Leopoldo Galtieri. Finally, in 1982, General Reynaldo Benito Bignone presided over the free election period. Even though the regime was meant to project a unified military to the public, power struggles were so intense

\textsuperscript{188} Pion-Berlin, "The Fall", supra note 175 at 57: \textit{The Act of National Reorganization} was proclaimed on March 24, 1976 and became known as the \textit{Proceso}. Pion-Berlin states this Act set clearly set out the political, social, and economic objectives and strategies to be pursued by the military regime. See also infra note 196.

\textsuperscript{189} Osiel, \textit{Mass Atrocity}, supra note 29 at 11; this included "traditional Catholicism, fierce nationalism, and intense xenophobia merged into the ideal of an organic society free of political dissent, cultural experimentation, class conflict, religious diversity, or secular doubt".

\textsuperscript{190} Marchak, \textit{God's Assassins}, supra note 15 at 1. See also Pion-Berlin, "The Fall", supra note 175 at 57 and Richard Lewis Siegel, "Transitional Justice: A Decade of Debate and Experience" (1998) 20:2 Hum. Rts. Q. 431 at 433-434 where he states that in the minds of the military and perpetrators of gross violations of human rights, they actually thought a state of war existed in their own country at the time.
during this period that each junta experienced internal rivalry with one another.\textsuperscript{191}

The campaign against "subversives" initially targeted guerrilla organizations and paramilitary groups such as the Montoneros, the Ejército Revolucionario del Pueblo ("ERP" or "People's Revolutionary Army"), the Fuerzas Armadas Revolucionarias ("FAR" or "Revolutionary Armed Forces") and the Fuerzas Armadas Peronistas ("FAP" or "Peronist Armed Forces").\textsuperscript{192}

During El Proceso, the military objective to rid the country of "subversives" extended to destroying the very institutions and ideologies that were not compatible with the "Western Christian civilization" way of thinking.\textsuperscript{193} The term became inclusive of anyone in one of the following "categories of guilt"\textsuperscript{194} considered opponents to the military government: trade unionists, left-leaning intellectuals and academics, artists, journalists, lawyers, priests, social workers, psychiatrists, psychoanalysts, and foreign and domestic business people. Lt. General Videla made the following statement indicating the extent to which any criticism of the junta's rule was a sign of anti-Argentine, "subversive" behaviour that the regime needed to crush in order to protect the nation: "I want to clarify that Argentine citizens are not victims of the repression. The repression is against a minority that we do not consider Argentine".\textsuperscript{195}

\textsuperscript{191} Feitlowitz, \textit{supra} note 18 at 8.
\textsuperscript{192} \textit{Ibid.} at 6; Marchak, \textit{God's Assassins, supra} note 15 at 341 in the Appendix. However, see also Osiel, \textit{Mass Atrocity, supra} note 29 at 12: "It would be wrong to minimize the disruptive effects of left-wing terrorism on Argentine society in the late 1960s and early 1970s, as many scholars were long inclined to do".
\textsuperscript{193} Marchak, \textit{ibid.} at 150-1.
\textsuperscript{194} Feitlowitz, \textit{supra} note 18 at 7.
\textsuperscript{195} Marchak, \textit{God's Assassins, supra} note 15 at 151 quoting President Videla in \textit{La Prensa}, 18 December 1977, as reported in Frontalini and Caiati, \textit{El mito de la guerra sucia}, 22.
Immediately upon assuming office, a breakdown in legal structures and institutions occurred; the *junta* issued an "Act Fixing the Purpose and Basic Objectives for the Process of National Reconstruction" stating the objectives of the *junta* as furthering the primacy of the state and ensuring national security, promoting morality, eradicating subversion, and furthering economic development.\(^{196}\) This Statute effectively granted the military the authority to exercise all judicial, legislative, and executive powers.\(^{197}\) The *junta* promulgated regulations delimiting its functions and appointing itself as the supreme organ of the state the same day.\(^{198}\) All facets of civil society came under the control of the military: *habeas corpus* remedies were undermined, censorship was extended to all spheres of life, and trade unions, political parties and universities fell under the control of the *junta*.\(^{199}\) The military extended the state of siege that had been imposed by Isabel's government indefinitely. The *junta* curtailed civil liberties under the "Doctrine of National Security" in order to provide an appearance of legality for what they were about to do.\(^{200}\)

All constitutional authority was suspended.\(^{201}\) Curtailed liberties involved the

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\(^{196}\) Nino, *Radical Evil*, supra note 142 at 54.

\(^{197}\) Arditti, *supra* note 166 at 8. See also Kathryn Lee Crawford, "Due Obedience and the Rights of Victims: Argentina's Transition to Democracy" (1990) 12:1 Hum. Rts. Q. 17 at 19.

\(^{198}\) Nino, * Radical Evil, supra* note 142 at 54.

\(^{199}\) Arditti, *supra* note 166 at 8; and Osiel, *Mass Atrocity, supra* note 29 at 13.

\(^{200}\) Nino, *Radical Evil, supra* note 142 at 54; Latore, *supra* note 17 at 427. Arditti, *ibid.* at 11 notes that the Doctrine of National Security, the political cornerstone of the *junta*, was not a new idea. Other countries in Latin America were fighting an "internal enemy" or "subversive" forces under the same doctrine. Lt. Gen. Videla was quoted as stating: "We should be thankful for saving the Nation from chaos and the menace of subversion" (see Feitlowitz, *supra* note 18 at 200).

\(^{201}\) Carlos H. Acuña & Catalina Smulovitz, "Guarding the Guardians in Argentina: Some Lessons about the Risks and Benefits of Empowering the Courts" in McAdams, *Transitional Justice, supra* note 5 at 97: Upon seizing power, the *junta* "modified the rules of political competition and the functions of governmental power, and it established comprehensive regulations for the operation of state institutions".
suspension of Article 23 of the Constitution, the "Right of Option" that guaranteed individuals arrested under the "state of siege" the right to choose between jail and exile. The armed forces shut down the provincial and municipal legislatures and dissolved Congress. Universities were purged. Political parties, meetings, and trade union activities were banned. The Supreme Court justices and the Attorney General were replaced with appointees of the *junta*. Provincial legislators and governors were dismissed. The press, radio, and television stations were under strict censorship and gagged. Furthermore, the death penalty was introduced and the age of criminal responsibility was lowered to sixteen. The military extended its judicial jurisdiction to include civilian "subversive acts", which were now punishable by death. A further discussion of curtailed liberties affecting the judicial system and civil society follows in section 2.2.9.

2.2.3 Unprecedented Violence

The violence that followed under the regime was unprecedented. Between 1976 and 1983, it is estimated that 30,000 people were "disappeared". What started out as a war against "subversives" became a systematic state-campaign of terror.

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202 Nino, *Radical Evil*, supra note 142 at 54; Arditti, *supra* note 166 at 8; and see *supra* note 172.
203 Acuña & Smulovitz, *supra* note 201 at 97.
204 Pion-Berlin, "The Fall", *supra* note 175 at 55-56. The Peronist party was banned from all political activity.
205 The Supreme Court Justices had to swear alliance to the *junta*. See Crawford, *supra* note 197 at 19; and Osiel, *Mass Atrocity*, *supra* note 29 at 13.
206 Acuña & Smulovitz, *supra* note 201 at 98.
207 Nino, *Radical Evil*, *supra* note 142 at 54.
208 Pion-Berlin, "Prosecute or Pardon", *supra* note 187 at 108: "This not only represented the single worst episode of terror in Argentina's history, but perhaps in the South American region as a whole".
209 See *supra* note 16 stating that 8,960 cases were documented by the *Nunca Más Report*. 


involving the transgression of the most fundamental human rights.\textsuperscript{210}

In the end, the whole leftist movement proved to be an insignificant threat to an armed forces of 130,000 members. The military even admitted... the numbers of victims of leftist terrorist activity was only one-eighth of the official number of disappearances. Leftist terrorist activity became a useful pretext for "disposing of" numerous individuals considered threatening to the consolidation of the military's political, social, and economic power.\textsuperscript{211}

In 1976, when Lt. General Videla took over, the guerrilla movement had been all but wiped out by Isabel's regime. General Videla himself stated that the guerrilla groups were no longer a threat to the state.\textsuperscript{212} In fact, it is estimated the total insurgent forces did not amount to more than 2,000 people, of whom only 20 percent were armed, whereas the armed forces numbered close to 200,000.\textsuperscript{213} It is therefore evident that the system of repression under the military \textit{junta} was deliberately planned and the violation of human rights that occurred was both common and widespread.\textsuperscript{214} One author notes that "the threat of left-wing terrorism was an excuse to take complete control and impose the \textit{junta}'s own brand of state terrorism".\textsuperscript{215}

Evidence presented to the National Commission on Disappeared People (CONADEP) indicates that "murder, rape, torture, execution, looting and other serious crimes went unpunished as long as they were carried out within the framework of the political and ideological persecution unleashed" during the 'dirty war'.\textsuperscript{216}

The regime formed task forces that would systematically carry out abductions,
torture and assassinations in order to put in practice this new methodology of repression under the Doctrine of National Security.\textsuperscript{217} Their methods were particularly brutal and sadistic in nature. The typical chronological sequence under the system of repression was: \textit{abduction - disappearance - torture}.\textsuperscript{218} In fact, the practice of enforced disappearance was so widespread that the term \textit{desaparecidos} became synonymous with Argentina because of its pervasive use by the military \textit{junta}.\textsuperscript{219} Individuals that were "disappeared" typically ended up in secret detention centres, many of which functioned as torture chambers, and these individuals were never seen or heard from again.

\subsection*{2.2.4 Abduction}

Abductions were typically carried out by masked and armed assailants of the armed forces at night or at dawn. Individuals were primarily abducted in their private homes, but also in the streets or at their workplace toward the end of the week.\textsuperscript{220}

Evidence presented to CONADEP indicates that the brutal and humiliating manner in which abductions were conducted was to instil terror and intimidation in the population.\textsuperscript{221} During the abduction, the victim was blindfolded so as not to reveal the

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\textsuperscript{217} Arditti, \textit{supra} note 166 at 13.
\footnotesize
\textsuperscript{218} \textit{Nunca Más Report, supra} note 1 at 10. Arditti, \textit{ibid}. at 14 states that the term \textit{detenidos-desaparecidos} (detained-disappeared) more accurately describes the methodology of repression than does \textit{desaparecidos} alone. See generally Ruti G. Teitel, \textit{Transitional Justice} (Oxford: Oxford University Press, 2000) at 77-81 for a discussion on disappearance.
\footnotesize
\textsuperscript{219} Latore, \textit{supra} note 17 at 422; and see \textit{supra} note 15. Emilio Fermin Mignone, Cynthia L. Estlund, & Samuel Issacharoff, "Dictatorship on Trial: Prosecution of Human Rights Violations in Argentina" (1984) 10 Yale J. Int'l Law 118 at 120: "...the Argentine experience had the unfortunate distinction of introducing the term \textit{desaparecido} into the international lexicon". See also Naomi Roht-Arriaza, "State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law" (1990) 78 Cal. L. Rev. 449 [Roht-Arriaza, "State Responsibility"] at 454 stating there are two main elements of forced disappearance: (1) abduction or detention, and (2) official refusal to acknowledge the abduction or disclose any information revealing the detainee's fate.
\footnotesize
\textsuperscript{220} Arditti, \textit{supra} note 166 at 16. Arditti states that the timing helped delay whatever action the victim's relatives might wish to initiate.
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\textsuperscript{221} \textit{Nunca Más Report, supra} note 1 at 12.
\end{flushright}
identity of the captor.\textsuperscript{222} By halting traffic, using helicopters, loudspeakers, searchlights, bombs and grenades, the armed forces made such a grand spectacle that they ensured victims, their families and witnesses in the neighbourhood would be too terrified to react.\textsuperscript{223} Further creating terror, the number of assailants and manner with which they armed themselves was grossly disproportionate to the supposed "threat".\textsuperscript{224}

In order to effect these abductions, the police would clear and secure the targeted area for the military in preparation for an impending abduction (these areas were known as "green lights" or "free zones").\textsuperscript{225} Assailants drove Ford Falcons without license plates or trucks and vans from the military. The victim was thrown on to the floor of the car blindfolded and handcuffed and taken to a secret detention centre.

The regime was so brutal that abductions often occurred in the presence of children. These children were sent to the neighbours, left abandoned, or taken to the secret detentions centres where they would witness torture being inflicted on their parents.\textsuperscript{226} Nunca Más documents one case of a twelve-year old child who died of a heart attack after witnessing the abduction of his parents; he waited hours at the window waiting for his parents' return.\textsuperscript{227} During or after these kidnappings, gangs that were involved in the operation would loot the victims' homes.\textsuperscript{228}

\textsuperscript{222} The expression "walling up" was used for blindfolding see Nunca Más Report, supra note 1 at 19.

\textsuperscript{223} Ibid. at 12; and Arditti, supra note 166 at 16-17.

\textsuperscript{224} Nunca Más Report, ibid. at 11.

\textsuperscript{225} Ibid. at 13; and Feitlowitz, supra note 18 at 60.

\textsuperscript{226} Nunca Más Report, ibid. at 14.

\textsuperscript{227} Ibid. at 307.

\textsuperscript{228} Ibid. at 16; Feitlowitz, supra note 18 at 53; and Arditti, supra note 166 at 17. This was considered "war booty" and included cars, deeds to houses and land. See also Osiel, Mass Atrocity, supra note 29 at 14 – military personnel forced captives to transfer ownership of their automobiles and real estate.
CONADEP documented and compiled percentages of people detained in front of witnesses, who had not reappeared. 62% were detained in their own homes; 24.6% were detained in the street; 7% were detained at work; 6% were detained in their place of study; and 0.4% of people who disappeared while legally detained in military, penal or police establishments.229

2.2.5 Disappearance at Secret Detention Centres

Once abducted, the victim was placed in one of the 340 clandestine detention centres throughout the country and almost certainly became one of the many 'disappeared':230 "to be admitted to one of these centres meant to cease to exist".231 Many of these detention centres were already functioning centres such as civilian buildings, police offices and detention centres adapted as full-scale concentration camps and torture centres where prisoners were held against their will.232 For example, among the most

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229 Nunca Más Report, ibid. note 1 at 11.
230 Osiel, Mass Atrocity, supra note 29 at 13; and Osiel, "Making Of", supra note 8 at 139.
231 Nunca Más Report, supra note 1 at 51-52. CONADEP documents the disappeared by age group at 285:

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<thead>
<tr>
<th>AGE</th>
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<tr>
<td>0-5</td>
<td>0.82</td>
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<td>6-10</td>
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<td>11-15</td>
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<td>16-20</td>
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<td>21-25</td>
<td>32.62</td>
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<td>26-30</td>
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<td>12.26</td>
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<td>6.73</td>
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<td>46-50</td>
<td>2.41</td>
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<td>1.84</td>
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<td>56-60</td>
<td>1.17</td>
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<td>61-65</td>
<td>0.75</td>
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<td>66-70</td>
<td>0.41</td>
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<td>70+</td>
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Arditti, supra note 166 at 14 states that for every two murdered bodies found, there were nine disappearances.
232 Nunca Más Report, ibid. at 55; Marchak, God's Assassins, supra note 15 at 149; and Brysk, supra note 16 at 679.
famous detention centres that existed were the Navy Mechanics School (EMSA), Olimpo, Club Atlético, and La Perla, to name but a few.\(^{233}\) These centres were financed by the state and were the foundation of the regime's operation.\(^{234}\)

Survivor accounts and testimonies of daily life in these detention centres are shocking and gruesome.\(^{235}\) Prisoners lost their identity and became a registered number. They were constantly blindfolded or forced to wear a hood. They were fed once or twice a day, usually flour and water. Sometimes they would go days without food. One survivor's account demonstrates the perversity of the regime: on one occasion, prisoners were served soup on a plate and forced to eat it with a fork; on another, prisoners were served stew made with corn cobs from which the guards had already eaten the kernels.\(^{236}\)

Prisoners were forced to live in cells that were extremely small where they could not sit upright or stretch out fully. Health and hygiene conditions were atrocious. Prisoners were forced to sleep in on mattresses soiled with urine, blood, excrement, sweat and vomit. Lice and conjunctivitis were common among prisoners. The secret detention centres also had specialized rooms that functioned as 'operating theatres' or torture chambers and were equipped with various instruments employed in torture techniques.\(^{237}\) Life in a detention centre almost certainly meant torture for a prisoner.

The following survivor's account describes how prisoners were forced to sit upright, while hooded, for lengthy periods of time:

\(^{233}\) Nunca Más Report, ibid. at 76-209.
\(^{234}\) Arditti, supra note 166 at 17.
\(^{235}\) What follows is fully documented in the Nunca Más Report, supra note 1 at 51-76.
\(^{236}\) Ibid. at 64.
\(^{237}\) Ibid. at 60.
In Campo de Mayo, where I was taken on 28 April 1977, the treatment consisted of keeping the prisoner hooded throughout his stay, sitting, without talking or moving, in large rooms which had previously been used as stables. Perhaps this phrase does not express clearly enough what that actually meant, because you might think that when I say, 'sitting, hooded all the time', it is just a figure of speech. But that is not the case: we prisoners were made to sit on the floor with nothing to lean against from the moment we got up at six in the morning until eight in the evening when we went to bed. We spent fourteen hours a day in that position. And when I say 'without talking or moving', I mean exactly that. We couldn't utter a word, or even turn our heads. On one occasion, a companion ceased to be included on the interrogators' list and was forgotten. Six months went by, and they only realized what had happened because one of the guards thought it strange that the prisoner was never wanted for anything and was always in the same condition, without being 'transferred'. He told the interrogators, who decided to 'transfer' him that week, as he was no longer of any interest to them. This man had been sitting there, hooded, without speaking or moving, for six months, awaiting death. We would sit like this, padlocked to a chain which could be either individual or collective. The individual type was a kind of shackle put on the feet; the collective type consisted of one chain about 30 metres long, long enough to be attached at either end to opposite walls in the block. Prisoners were chained to it every metre and a half, as circumstances required, so that there were all linked together. This system was permanent.238

The Argentinean truth and reconciliation commission concluded that "the characteristic of these centres and the daily life led there, reveal that they had been specifically conceived for the subjection of victims to a meticulous and deliberate stripping of all human attributes, rather than for their simple physical elimination".239

Prisoners lived under the constant fear of being 'transferred' which was the euphemism for certain death.240 In fact, the military government's scheme was so covert and deliberate that prisoners were given better food and 'cleaned up' days before being transferred so that the eventual corpse would not look so ragged and the 'extremist killed in a shoot-out' explanation could be feasibly given to the public.241

At first, the military government denied the existence of these centres and authorities systematically refused to give any information on the fate of people to the

238 Ibid. at 59 (file No. 2819).
239 Ibid. at 52.
240 Arditti, supra note 166 at 19.
241 Nunca Más Report, supra note 1 at 67.
victims' families.\textsuperscript{242} The following two statements demonstrate the extent to which the regime manifestly and with clear intent misinformed the public on the fate of the 'disappeared':

I categorically deny that there exist in Argentina any concentration camps or prisoners being held in military establishments beyond the time absolutely necessary for the investigation of a person captured in an operation before they are transferred to a penal establishment.

There are no political prisoners in Argentina, except for a few persons who may have been detained under government emergency legislation and who are really being detained because of their political activity. There are no prisoners being held merely for being political, or because they do not share the ideas held by the Government.
- General Viola, September 7, 1978.\textsuperscript{243}

However, as the number of reported abductions and accounts of released prisoners became public knowledge, the regime eventually had to admit the existence of secret detention centres, although they still gave false explanations attempting to present the international community with "a situation of maximum legality".\textsuperscript{244} The military government maintained these centres were necessary legal limits to thwart "subversives".

The regime's categorical denial of human rights abuses\textsuperscript{245} is best evidenced by the visit of the Inter-American Commission on Human Rights in mid-1979.\textsuperscript{246} The ESMA tried to dupe the Commission by transferring the bulk of prisoners to a small island in the Tigre river, many of whom never reappeared afterwards. The few prisoners who remained on the premises were dressed in the uniform of enlisted men: "In this way a

\textsuperscript{242} Teitel, \textit{supra} note 218 at 77: every step of the military's scheme was done under extreme secrecy.
\textsuperscript{243} \textit{Nunca Más Report}, \textit{ibid.} at 53.
\textsuperscript{244} \textit{Ibid.}
\textsuperscript{245} Stanley Cohen, "Government Responses to Human Rights Reports: Claims, Denials and Counterclaims" (1996) 18:3 Hum. Rts. Q. 517 at 524-525 states "For a disappearance to be a disappearance it has to be denied".
\textsuperscript{246} Acuña & Smulovitz, \textit{supra} note 201 at 100: This was the junta's "first attempt to whitewash the governments' repressive methods".
shameful hoax was perpetrated on an international organization, made worse by the fact that the people who authorized the Commission's visit to the country and personally welcomed its members, went on to 'offer the fullest possible cooperation'..."\textsuperscript{247}

\textit{Nunca Más} documents another appalling case which demonstrates the extent to which the \textit{junta} went to lie about disappearances. Thelma Jara de Cabezas (file no. 6505), then secretary of the Commission of Families of those Disappeared and Imprisoned for Political Reasons, who had been kidnapped on April 30, 1979, was brought to the island with other prisoners from the ESMA. Thelma was used by the regime to produce a series of new items for the national and foreign press in order to counteract the campaign which was calling on the government to produce her alive.\textsuperscript{248} The military forced her to write letters to Pope Paul VI, General Videla, Cardinals Primattesta and Aramburu, and to her family wherein she denied her disappearance and explained she had fled to a neighbouring country in fear of an armed guerrilla organization (these letters were posted from Uruguay). In fact, while on the island, the regime brought her to Uruguay three times to meet with journalists and the foreign media in order to keep up the false explanation and cast doubt on the Commission's accusations concerning her disappearance.\textsuperscript{249}

Other methods employed to dupe the public include Admiral Massera's 'Pilot Centre in Paris', set up with the aim of improving Argentina's human rights image abroad. At the Pilot Centre, military \textit{junta} would pay for published advertisements and forge

\textsuperscript{247} \textit{Nunca Más Report}, supra note 1 at 130.
\textsuperscript{248} \textit{Ibid.} at 131.
\textsuperscript{249} \textit{Ibid.}
letters supposedly from mothers of the disappeared in Argentina. Officer Astiz managed to infiltrate the human rights organization, *Madres de Plaza de Mayo* ("Mothers of Plaza de Mayo"), posing as one 'Gustavo Niño', the apparent brother of one of the disappeared, and aided in abducting two French nuns.

### 2.2.6 Torture and Death

Evidence presented to the truth and reconciliation commission indicates that torture "was an important element in the methodology of repression". Torture was a widespread and systematic practice in secret detention centres and formed part of a prisoner's daily routine: "[W]hat else were these tortures but an immense display of the most degrading and indescribable acts of degradation, which the military governments, lacking all legitimacy in power, used to secure power over a whole nation?"

While at detention centres, individuals were subjected to physical and psychological torture including beatings, rape, humiliation, and sexual abuse, designed to humiliate and degrade the victim. Torture sessions were normally carried out in the 'operating theatre', a room consisting of no furniture except a metal slab upon which the victim would be blindfolded and strapped down with chains. The 'operating theatre' was lined with egg cartons to blunt out the victim's cries and scream of pain.

Any device that could emit electricity was the regime's weapon of choice for...
torture sessions. Torture instruments included an electric scalpel\textsuperscript{257}, electrodes for producing electric shock\textsuperscript{258}, electrified retrosopes\textsuperscript{259}, electric 'underpants'\textsuperscript{260}, and an electric cattle prod.\textsuperscript{261} The electric prod was used at such a high voltage that it caused the victim's tongue to contract making it impossible to scream.\textsuperscript{262} Electrodes were placed on the victim's teeth, gums, nipples, and genitals causing indescribable pain.\textsuperscript{263} The soles of the victim's feet were burned with electric shock and then the skin was peeled off causing excruciating pain.\textsuperscript{264} Electric wire was inserted into women's vagina and applied to their breasts, and was inserted into men's penis, anus and testicles.\textsuperscript{265}

Victims' heads were immersed in cold water tanks filled with urine and feces until the victim was at the point of suffocation, only to be raised and dunked again.\textsuperscript{266} Victims' heads were also covered with plastic bags until they could no longer breathe, then they were released and subjected to it again. Prisoners were constantly blindfolded, causing eye infections, temporary and long-term blindness and infestations of maggots.\textsuperscript{267} Victims were handcuffed to a wall with their arms so far apart that they were forced to stand on their tiptoe for hours.\textsuperscript{268} Prisoners were burnt with cigarettes and punched so hard in the ears they went temporarily deaf.\textsuperscript{269}

\textsuperscript{257} Nunca M\'{a}s Report, supra note 1 at 32.
\textsuperscript{258} Ibid. at 30.
\textsuperscript{259} Feitlowitz, supra note 18 at 58. A retroscope was used as an anal torture device.
\textsuperscript{260} Nunca M\'{a}s Report, supra note 1 at 36.
\textsuperscript{261} Ibid.
\textsuperscript{262} Ibid.
\textsuperscript{263} See infra note 278.
\textsuperscript{264} Nunca M\'{a}s Report, supra note 1 at 36.
\textsuperscript{265} Ibid. at 37.
\textsuperscript{266} Feitlowitz, supra note 18 at 59.
\textsuperscript{267} Ibid.
\textsuperscript{268} Nunca M\'{a}s Report, supra note 1 at 36.
\textsuperscript{269} Ibid. at 51.
The regime forced children to witness the torture of their parents. Many of these children suffered horrible psychological consequences. *Nunca Más* documents one case where five-year old Josefina Sánchez de Vargas was forced to witness the torture of her father so that he would talk. When she was returned to her grandparents' home, she took a gun from her grandfather's drawer and committed suicide.\textsuperscript{270}

There are also appalling accounts of torture through the use of animals. Some prisoners were placed in pens with violent dogs.\textsuperscript{271} Cats were placed inside the clothes of other prisoners and electric shock was applied to the animal.\textsuperscript{272}

Victims were brutally and repeatedly raped in front of their relatives.\textsuperscript{273} Other particularly cruel methods included burying naked victims up to their neck and leaving them in that position for four days or more; when they were dug up, they were infested with sores from insect and ant bites.\textsuperscript{274} Prisoners were hung from a tree or a beam, or dragged from a boat and submersed under water for long periods of time.\textsuperscript{275} Once tortured, prisoners were typically left without any medical attention and some women haemorrhaged from the rapes they sustained. Pregnant women were treated no differently and many were forced to give birth under these appalling conditions (see section 2.2.7). Simulated assassinations were the main method of psychological torture whereby a loaded pistol was put to the prisoner's head.\textsuperscript{276} Prisoners were paraded naked

\textsuperscript{270} *Ibid.* at 308; and Arditti, *supra* note 166 at 19.
\textsuperscript{271} Nino, *Radical Evil*, *supra* note 142 at 55.
\textsuperscript{272} *Nunca Más Report*, *supra* note 1 at 36.
\textsuperscript{273} Nino, *Radical Evil*, *supra* note 142 at 55.
\textsuperscript{274} *Nunca Más Report*, *supra* note 1 at 28.
\textsuperscript{275} *Ibid.* at 42-43.
\textsuperscript{276} *Ibid.* at 41.
along a gallery of soldiers causing further humiliation.\footnote{\textit{Ibid.} at 48-49.}

It is well beyond the scope of this thesis to reprint all survivors' accounts of their mistreatment and torture during the 'dirty war'. However, it would be an injustice to the memory of those tortured by the regime to not consider at least some of those stories. Therefore, one survivor's account, Dr. Noberto Liwsky (file No. 7397) and his gruesome account of how he was abducted on April 5, 1978 and later tortured, has been arbitrarily chosen to convey the extent to which gross violations of human rights occurred under the regime.

As I was inserting the key in the lock I realized what was happening, because the door was pulled inwards violently and I stumbled forward.

I jumped back, trying to escape. Two shots (one in each leg) stopped me. However, I still put up a struggle, and for several minutes resisted, being handcuffed and hooded, as best I could. At the same time, I was shouting at the top of my lungs that I was being kidnapped, begging my neighbours to tell my family, and to try to stop them taking me away.

Finally, exhausted and blindfolded, I was told by the person who apparently was in command that my wife and two daughters had already been captured and 'disappeared'.

They had to drag me out, since I couldn't walk because of the wounds in my legs. As we were leaving the building, I saw a car with a flashing red light in the street. By the sound of the voices and commands, and the slamming of car doors, interspersed with shouts from my neighbours, I presumed that this was a police car.

After several minutes of heated argument, the police car left. The others then took me out of the building and threw me on to the floor of a car, possibly a Ford Falcon, and set off.

They hauled me out of the car in the same way, carrying me between four of them. We crossed four or five metres of what by the sound of it was a gravelled yard, then they threw me on to a table. They tied me by my hands and feet to its four corners.

The first voice I heard after being tied up was of someone who said he was a doctor. He told me the wounds on my legs were bleeding badly, so I should not try to resist in any way.

Then I heard another voice. This one said he was the 'Colonel'. He told me they knew I was not involved with terrorism or the guerrillas, but that they were going to torture me because I opposed the regime, because: 'I hadn't understood that in Argentina there was no room for any opposition to the Process of National Reorganization.' He then added: 'You're going to pay dearly for it... the poor won't have any goody-goodies to look after them anymore!'

Everything happened very quickly. From the moment they took me out of the car to the beginning of the first electric shock session took less time than I am taking to tell it. For days they applied electric shocks to my gums, nipples, genitals, abdomen and
ears. Unintentionally, I managed to annoy them, because, I don't know why, although the
shocks made me scream, jerk and shudder, they could not make me pass out.

They then began to beat me systematically and rhythmically with wooden sticks
on my back, the backs of my thighs, my calves and the soles of my feet. At first the pain
was dreadful. Then it became unbearable. Eventually, I lost all feeling in the part of my
body being beaten. The agonizing pain returned a short while after they finished hitting
me. It was made still worse when they tore off my shirt, which had stuck to the wounds,
in order to take me off for a fresh electric shock session. This continued for several days,
alternating the two tortures. Sometimes they did both at the same time.

Such a combination of tortures can be fatal because, whereas electric shock
produces muscular contractions, beating causes the muscle to relax (as a form of
protection). Sometimes this can bring on heart failure.

In between torture sessions they left me hanging by my arms from hooks fixed
in the wall of the cell where they had thrown me.

Sometimes they put me on to the torture table and stretched me out, tying my
hands and feet to a machine which I can't describe since I never saw it, but which gave
me the feeling that they were going to tear part of my body off.

At one point when I was face-down on the torture table, they lifted my head then
removed my blindfold to show me a bloodstained rag. They asked me if I recognized it
and, without waiting for a reply - impossible anyway because it was unrecognizable, and
my eyesight was very badly affected - they told me it was a pair of my wife's knickers.
No other explanation was given, so that I would suffer all the more... then they
blindfolded me again and carried on with their beating.

Ten days after I entered this 'pit', they brought my wife, Hilda Nora Erefía, to my
cell. I could scarcely see her, but she seemed in a pitiful state. They only left us together
for two or three minutes, with one of the torturers present. When they took her away
again, I thought (I later learned that both of us had thought the same) that this would be
the last time we saw each other. That it was the end for both of us. Despite the fact that I
was told she had been set free with some other people, the next news I had of her was
after I had been put into official custody at the Gregario de Laferrère police station, and
she came at the first visiting with my daughters.

On two or three occasions they also burnt me with a metal instrument. I didn't
see this either, but I had the impression that they were pressing something hard into me.
Not like a cigarette, which gets squashed, but something more like a red-hot nail.

One day they put me face-down on the torture table, tied me up (as always) and
calmly began to strip the skin from the soles of my feet. I imagine, though I didn't see it
because I was blindfolded, that they were doing it with a razor blade or a scalpel. I could
feel them pulling as if they were trying to separate the skin at the edge of the wound with
a pair of pincers. I passed out. From then on, strangely enough, I was able to faint very
easily. As for example on the occasion when, showing me more bloodstained rags, they
said these were my daughters' knickers, and asked me whether I wanted them to be
tortured with me or separately.

I began to feel that I was living alongside death. When I wasn't being tortured I
had hallucinations about death - sometimes when I was awake, at other times while
sleeping.

When they came to fetch me for a torture session, they would kick the door open
and shout at me, flailing out at everything in their way. That is how I knew what was
going to happen even before they reached me. I lived in a state of suspense waiting for
the moment when they would come to fetch me.

The most vivid and terrifying memory I have of all that time was of always
living with death. I felt it was impossible to think. I desperately tried to summon up a
thought in order to convince myself I wasn't dead. That I wasn't mad. At the same time,
I wished with all my heart that they would kill me as soon as possible.

There was a constant struggle in my mind. On the one hand: 'I must remain
lucid and get my ideas straight again': on the other: 'Let them finish me off once and for all'. I had the sensation of sliding towards nothingness down a huge slippery tube where I could get no grip. I felt that just one clear thought would be something solid for me to hold on to and prevent my fall into the void. My memory of that time is at once so concrete and so personal and private that the image I have of it is of an intestine existing both inside and outside my own body.

In the midst of all this terror, I'm not sure when, they took me off to the 'operating theatre'. There they tied me up and began to torture my testicles. I don't know if they did this by hand or with a machine. I'd never experienced such pain. It was as though they were pulling out all my insides from my throat and brain downwards. As though my throat, brain, stomach and testicles were linked by a nylon thread which they were pulling on, while at the same time crushing everything. My only wish was for them to succeed in pulling all my insides out so that I would be completely empty. Then I passed out.

Without knowing how or when, I regained consciousness and they were tugging at me again. I fainted a second time.

At that moment, fifteen or eighteen days after my abduction, I began to have kidney problems, difficulties with passing water. Three-and-a-half months later, when I was a prisoner in Villa Devoto prison, the doctors from the International Red Cross diagnosed acute renal failure of a traumatic origin, which could be traced to the beatings I had undergone.

After being held for twenty-five days in complete isolation, I was thrown into a cell with another person. This was a friend of mine, a colleague from the dispensary, Dr. Francisco García Fernández.

I was in very bad shape. It was Fernández who gave me the first minimal medical attention, because in all that time I had been unable to think of cleaning or looking after myself.

It was only several days later that, by moving the blindfold slightly, I could see all they had done to me. Before that it had been impossible, not because I didn't try to remove the blindfold, but because my eyesight had been so poor.

It was then for the first time I saw the state of my testicles... I remembered that as a medical student I saw, in the famous Houssay textbook, a photograph of a man who, because of the enormous size of his testicles, wheeled them along in a wheelbarrow! Mine were of similar dimensions, and were coloured a deep black and blue.

Another day they took me out of my cell and, despite my swollen testicles, placed me face-down again. They tied me up and raped me slowly and deliberately by introducing a metal object into my anus. They then passed an electric current through the object. I cannot describe how everything inside me felt as though it were on fire.

After that, the torture ceased. They only gave me beatings two or three times a week. Now they used their hands and feet rather than metal or wooden instruments.

Thanks to this new, relatively mild policy, I began to recover physically, I had lost more than 25 kilos and was suffering from the kidney complaint I've already mentioned.

Two months prior to my abduction, in February 1978, I had suffered a recurrence of typhoid fever. Somewhere between 20 and 25 May, in other words forty-five or fifty days after my capture, I fell ill again with typhoid owing to my physical exhaustion.\(^{278}\)

Many who were tortured never lived to tell their story. *Nunca Más* documents how 'death' was used by the regime as a political weapon to exterminate anyone deemed

'subversive' or opposed to the regime. The military government brought back the death penalty once it took over in 1976 arguing it was necessary to prevent the worst subversive crimes. Ironically, the regime never actually used the death penalty *per se* during the 'dirty war' - that is to say, there were never any investigations or trials that led to a death sentence. Cláddestine killings and assassinations took place without the use of the judiciary.

Physical extermination of prisoners took a variety of forms. Many prisoners did not survive the repeated torture sessions; others committed suicide. *Nunca Más* documents several cases of mass executions by firing squads. Hundreds of others were killed in so-called 'armed confrontations' or 'escape attempts' that were staged by the regime. As prisoners were moved from one detention centre to another, military guards would claim individuals were shot whilst they tried to escape. Horrifying evidence has also come to light regarding the so-called 'death flights' where prisoners were drugged with pentothal or already dead and were thrown from planes into the Río de la Plata with their stomachs slit open. Hundreds of other bodies were either burned or buried in unmarked mass graves.

The absence of physical evidence made it extremely difficult to locate

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279 *Ibid.* at 209-234. Pion-Berlin, "Prosecute or Pardon", *supra* note 187 at 108 states that death due to disappearance was the central instrument of terror.

280 *Nunca Más Report*, *ibid.* at 209.

281 *Arditti*, *supra* note 166 at 19.


283 *Nunca Más Report*, *supra* note 1 at 212-214.


285 *Ibid.* at 222; and Osiel, *Mass Atrocity*, *supra* note 29 at 20. See also Feitlowitz, *supra* note 18 at 193 where she states prisoners called this *comida de pescado* ("fish food"). In 1995, Retired Navy Captain Adolfo Scilingo publicly confessed to participating in these 'death flights'.
disappeared family members and loved ones. When the regime finally gave way to democracy in 1983, some mass graves were excavated only to discover that the *junta* went to great lengths to ensure the identity of the disappeared would never be known—the mass graves contained only pieces of bodies, dismembered and decapitated before the burial.  

2.2.7 *Children Born in Captivity*  

"The treatment and torture of pregnant women reveals an almost unimaginable level of hatred and cruelty".  

30 % of the disappeared were women, 10 % who were pregnant at the time.  

Torturers inserted a spoon into the pregnant woman's vagina until it touched the fetus; then they applied electric shock to it often causing miscarriage.  

Some women were kept alive long enough to give birth, and then the mother was murdered and the child was given away to military personnel and their families.  

Other women were forced to give birth under appalling circumstances while in captivity.  

Sometimes doctors performed caesarean sections to speed up the births, or the women were injected with serums forcing them into early labour.  

The following harrowing account was given to CONADEP by Adriana Calvo de Laborde (file No. 2531):  

On 12 March Inés Ortega de Fossati, another prisoner, began to have labour pains. We shouted to the 'corporal of the guard' (that was how we had to address him).

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286 Arditti, *supra* note 166 at 20.  
287 Ibid. at 21.  
288 *Nunca Más Report, supra* note 1 at 285: Overall, pregnant women made up 3 % of the total number of disappeared. See also Feitlowitz, *supra* note 18 at 238: the Grandmothers of Plaza de Mayo estimate over 500 babies disappeared during the 'dirty war'.  
289 Arditti, *supra* note 166 at 22.  
290 Brysk, *supra* note 16 at 679.  

Hours passed without any reply. As I was the only woman present with any experience, I helped her as best I could. It was her first-born, and she was seventeen or eighteen years old. Finally, after twelve hours, she was taken to the prison kitchen and put on a dirty table, blindfolded, and in front of all the guards, she had her child, assisted by a so-called doctor who did nothing except shout at her while the others laughed. She had a son called Leonardo. She was left with him for four or five days in a cell, and after that they took her baby away, saying that the Colonel wished to look at him. Apparently someone filled up a form with details of the child...

On 15 April I began to go into labour. After three or four hours of being on the floor with contractions that were coming faster and faster, and thanks to the shouts of other women, I was taken away in an army patrol car with two men in front and one woman behind (the woman was called 'Lucrecia' and she used to take part in the torture sessions).

We drove in the direction of Buenos Aires, but my child wouldn't wait and at the crossroads of Alpargatas, opposite the Abbott Laboratory, the woman shrieked that they should stop the car on the verge, and there Theresa was born. Thanks to the forces of nature, the birth was normal. The only assistance I received was when 'Lucrecia' tied the umbilical cord which was still linking me with the child as there was nothing to cut it with. No more than five minutes later we drove on, supposedly in the direction of a hospital. I was still blindfolded and my child was on the seat. After many twists and turns we arrived at what I later learnt was the building of the Detective Squad of Banfield (the Pozo de Banfield). There I saw the same doctor who had assisted Ines Ortega de Fossatti. He cut the umbilical cord in the car and took me up two or three floors to a place where they removed the placenta. He made me undress in front of an officer on duty. I had to wash the bed, the floor and my dress, and clear away the placenta. Then, finally, they left me to wash my baby, while they continued their insults and threats. On entering the building they took off my blindfold saying, 'It's not necessary now', so that for the rest of the time I could see their faces.

Laborde was considered one of the "lucky" few who survived her ordeal and kept her child. Her torturers dropped her and her baby off in front of her parents' house in the middle of the night ten days after giving birth, in her nightgown and slippers, covered in fleas.

The military believed that those children born from "subversives" should not be allowed to grow up with the families that had produced their parents. Many of those children born in captivity were given away to military personnel and their families in order to ensure they would grow up in "decent" and "patriotic" families "who would save

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292 Nunca Más Report, supra note 1 at 291-2.
293 Arditti, supra note 166 at 26.
294 Ibid. at 1.
them from the next generation of subversives". These children grew up never knowing their true identity and are the subject of ongoing investigations to this day. The human rights group, Grandmothers of the Plaza de Mayo, initiated an international campaign attempting to locate their disappeared grandchildren: "In the blackest moments of the dictatorship, [the Grandmothers] became the civic conscience of the nation".

2.2.8 Economic Crimes

During the 'dirty war' repression, there was also a "systematic and simultaneous transgression of other legal rights" that took place alongside the gross violations of human rights. The profits of the regime's repression included property and public documents that were used to facilitate the transfer of goods or to set up non-existent transactions: "false deeds, false documents, false car registrations and certificates of ownership were made out to expedite looting and theft".

2.2.9 Weakness in Judicial System and Civil Society

During the 'dirty war', the justice system was rendered powerless to contain the abuses that occurred. Judicial acquiescence was necessary for the repression to fully take hold of the population. CONADEP asked the following questions in their Nunca Más Report: How could so many crimes with the same modus operandi and often with numerous witnesses be carried out with such impunity? How was it that judges failed to

\[\text{\cite{Ibid.}}\]
\[\text{\cite{Nunca Más Report, supra note 1 at 422; and Brysk, supra note 16 at 680.}}\]
\[\text{\cite{Ibid. at 272; see also supra note 228.}}\]
\[\text{\cite{Nino, Radical Evil, supra note 142 at 58.}}\]
\[\text{\cite{Arditti, supra note 166 at 15; and Mignone et al., supra note 219 at 122.}}\]
\[\text{\cite{Nunca Más Report, supra note 1 at 386.}}\]
locate a single kidnap victim, even after the experiences of those fortunate enough to have been released had been public knowledge for several years? What prevented them from investigating a single one of those detention centres? This topic will be further developed in Chapter Three, section 3.3.4(b) entitled "Trials of Junta Leaders and the Supreme Council's Contempt".

The traditional *habeas corpus* remedy, considered the "cornerstone of liberties"\(^{301}\) and the sole method by which individuals could challenge the legality of detentions carried out by the *junta*, was also curtailed.\(^{302}\) This remedy was thought of in Argentina as an implicit guarantee in the Constitution – it was an accused's basic right to ask a judge to order, through a rapid, summary procedure, the cessation of any action by an official which restricts the right of personal freedom.\(^{303}\) During the 'dirty war', writs of *habeas corpus* were presented by families of the disappeared who were pleading for their release.

Though the *habeas corpus* remedy was not officially suspended *per se*, it was rendered ineffective by the complicity of most judges and writs were categorically denied.\(^{304}\) Judges, who were supposed to make inquiries of the authorities as to a person's whereabouts, refused to challenge the military's silence.\(^{305}\) During the 'dirty war', the judiciary ultimately rejected most of the 80,000 *habeas corpus* petitions that

\(^{301}\) Ibid. at 400.
\(^{302}\) These curtailed civil liberties are analyzed in Latore, supra note 17 at 425-426 and Nino, *Radical Evil*, supra note 142 at 54.
\(^{303}\) *Nunca Más Report*, supra note 1 at 396.
\(^{304}\) Arditti, *ibid* note 166 at 15; Osiel, *Mass Atrocity*, supra note 29 at 13; Malamud-Goti, "Why Punish", supra note 34 at 2; and Mignone et al., *supra* note 219 at 123: "Not only were the judges unable to serve justice, most were simply unwilling to intervene".
\(^{305}\) Arditti, *ibid*. 
were filed and ordered costs on the petitioners.\textsuperscript{306}

Normally, when a writ of \textit{habeas corpus} is filed, if the lower court's decision was to secure an individual's freedom, the individual would be released while an appeal was dealt with by the higher court (Article 639 of Penal Code).\textsuperscript{307} However, in February of 1976, the military altered this article so that if the beneficiary of the writ was arrested at the disposition of the National Executive, a decision in his or her favour to be released would not take immediate effect if the public prosecutor appealed against it.\textsuperscript{308} Such was normally the case, and in practice this meant a protected person remained in custody while the appeal was dealt with. The appeal process could take years and this inevitably had "the gravest consequences for the person urgently in need in protection".\textsuperscript{309} When the decision ultimately reached the Supreme Court, the decision almost invariably went against the individual's release.\textsuperscript{310}

In 1981, the military adopted an even more restrictive law by altering Article 618 of the Penal Code to designate the Federal Criminal Court as the only body authorized to deal with writs of \textit{habeas corpus}.\textsuperscript{311} It was therefore impossible to appeal to ordinary magistrates at a time when 'detention-disappearance' and arrests without warrants were becoming more frequent thereby leaving the accused in a "general state of

\textsuperscript{306} Nino, \textit{Radical Evil}, supra note 142 at 54; and Latore, \textit{supra} note 17 at 427.
\textsuperscript{307} \textit{Nunca M\'as Report}, supra note 1 at 396.
\textsuperscript{308} \textit{Ibid.} at 397. On February 9, 1984, Congress passed Law No. 23,050 which revoked the modification to the original text of Article 639 of the Penal Code, recognizing that appeal against a favourable decision by a \textit{habeas corpus} judge should not postpone the execution of the release.
\textsuperscript{309} \textit{Ibid.}
\textsuperscript{310} \textit{Ibid.}
\textsuperscript{311} \textit{Ibid.} at 398.
While we recognize that the main responsibility for what occurred lay with the bodies which exercised a monopoly of state power, we feel it is only fair to point out that the judiciary did not urge firmly enough the exceptional measures needed in the circumstances to compensate for the loss of authority they faced. Not once did a judge go to any of the places controlled by the bodies issuing the false reports. If they had, they would have seen the grossly untrue version of events which had become public knowledge. They used no special methods of investigation, despite the fact that there was a general awareness of the extraordinary magnitude of the cases involved. And except for the timid steps taken by some of them in the final moments of the tragedy, they did not bring to trial a single person who due to his position in the repressive apparatus must have been directly involved in the disappearances under investigation.\footnote{Ibid, at 398-99.}

The CONADEP report notes that after the 1976 coup, Argentina's institutions were "drastically subverted" and a kind of "executive-legislative-constituent power" was created that assumed extraordinary powers and supreme public authority.\footnote{Ibid, at 399.} As stated above, the junta became the supreme organ of the state and everything else was subordinate to the military's power.

From the first day following the coup, members of the judiciary and government were replaced. The new judges appointed had to swear to uphold the Articles and objectives of the "Process for National Reorganization" instigated at the hands of the junta.\footnote{Ibid. at 386.} From this point forward, the CONADEP report notes that the activities of the judiciary assumed very distinctive features condoning the usurpation of power and allowing a host of judicial aberrations to take on the appearance of legality.\footnote{See supra note 205.} CONADEP concludes that during the 'dirty war', the judicial process "became almost inoperative as a means of appeal".\footnote{Ibid, at 386-7.}
With a few exceptions, it recognized the discretionary application of the powers of arrest under the state of siege, and accepted the validity of secret reports from the security services as justification for the detention of citizens for an indefinite period. At the same time, it turned the writ of habeas corpus into a mere formality, rendering it totally inefficient as a means of combating the policy of forcible abduction.

Instead of acting as a brake on the prevailing absolutism as it should have done, the judiciary became a sham jurisdictional structure, a cover to protect its image. Free expression of ideas in the press was denied through control of the mass media and through self-censorship practised as a result of the state terrorism unleashed on dissident journalists. Legal representation in court was seriously affected by the imprisonment, exile or death of defence lawyers. The reluctance and even complacency with regard to human rights shown by many judges complete the picture of a total absence of protection for Argentine citizens.³¹⁸

Civil society was also weakened by the regime's stronghold. Those individuals detained or abducted were never afforded a proper opportunity for adequate legal defence.³¹⁹ The very lawyers that presented writs of habeas corpus on behalf of the victims' families were themselves at risk of disappearing.³²⁰ In fact, even though the Constitution guarantees every individual a defence lawyer, it was becoming increasingly difficult to find one during the 'dirty war': 109 lawyers disappeared, 24 were killed, and 100 were detained without charge or trial.³²¹ Lawyers who defended those deemed "subversive" were considered a member of the same illicit organization and became targeted.³²²

Local police failed to investigate disappearances or take complaints from families.³²³ Human rights groups and journalists were muzzled during the 'dirty war' and had to work in a climate of terror and fear. The very individuals searching for the

³¹⁸ Ibid.
³²⁰ Arditti, supra note 166 at 15. Mignone et al., supra note 219 at 121: "For lawyers to sign a habeas corpus petition was, at the height of the dictatorship, virtually to sign their own death warrants".
³²¹ Latore, supra note 17 at 427.
³²² Nunca Más Report, supra note 1 at 412.
³²³ Crawford, supra note 197 at 19.
disappeared, such as the Grandmothers of the Plaza de Mayo, became targeted and suffered threats, aggression and even abduction of some of their members.324 Journalists were not particularly outspoken defenders of human rights since they had suffered from the disappearance of many colleagues.325 Nino notes that with few exceptions, the independent press remained silent in the face of abuses, and the official press actively justified the repression.326 Many priests, religious leaders, ethnic leaders, scientists, writers, and professional associations also remained indifferent to human rights abuses during the 'dirty war'.327 One author states "the dirty war happened because, in some measure, every part of Argentine society allowed it to".328 A proper civil society never emerged in Argentina, none of its institutions were autonomous; the state exercised total control over the population.329

However, it would be erroneous to conclude that civil society did nothing to protest and oppose the military regime during the 'dirty war'.330 For instance, during the 'dirty war', Argentina witnessed the emergence of human rights and advocacy groups, such as the Abuelas de Plaza de Mayo (Grandmothers of the Plaza de Mayo), the Liga Argentina por los Derechos del Hombre (the Argentine League for the Rights of Man), the Asamblea Permanente por los Derechos Humanos (Permanent Assembly on Human Rights), the Servicio de Paz y Justicia (Service for Peace and Justice), the Centro de

324 Nunca Más Report, supra note 1 at 422.
325 Nino, Radical Evil, supra note 142 at 59.
326 Ibid.
327 Ibid; and Osiel, Mass Atrocity, supra note 29 at 13.
328 Feitlowitz, supra note 18 at 15; and see also Osiel, "Making Of", supra note 8 at 153.
329 Marchak, Reigns, supra note 4 at 79.
330 Panizza, supra note 5 at 168-169: human rights became the “unifying element in the struggle for democracy”.

Estudios Legales y Sociales (Center for Legal and Social Studies), the Madres de Plaza de Mayo (Mothers of the Plaza de Mayo), the Commission of Relatives of the Disappeared, and the Ecumenical Movement for Human Rights.\textsuperscript{331} These groups continually worked to locate the disappeared in the face of harsh military retaliation and harassment. The Mothers of the Plaza de Mayo, in particular, have been omnipresent and continue to stage weekly marches in the Plaza in an effort to keep the human rights issue a "political centre stage".\textsuperscript{332} Mounting international pressure and opposition to the human rights abuses was also effective in bringing an end to dictatorship.\textsuperscript{333}

\subsection*{2.3 Theories Behind the 'Dirty War'}

There is no doubt that the gross violation of human rights that occurred during the 'dirty war' was deliberate and planned: "Their was not a haphazard attack against enemies, nor was it the work of madmen: it was carefully planned, very well organized, even bureaucratic, response to a perceived threat".\textsuperscript{334} This was Argentina's war against terrorism, against "subversives". This was indeed a 'dirty war' against an enemy that was not considered human.\textsuperscript{335} Fundamental to any explanation of why Argentina experienced

\textsuperscript{331} Brysk, \textit{supra} note 16 at 680; and Mignone et al., \textit{supra} note 219 at 124.
\textsuperscript{332} Pion-Berlin, "Prosecute or Pardon", \textit{supra} note 187 at 122.
\textsuperscript{333} \textit{Nunca Más Report}, \textit{supra} note 1, also emphasizes the efforts of the Inter-American Commission for Human Rights of the OAS visit, as well as the activities of the UN Working Group on the Enforced or Involuntary Disappearance of Persons. CONADEP also notes the work of the UN High Commission for Refugees (UNHCR), the International Red Cross, Amnesty International, the International Commission of Jurists, the World Council of Churches, the International Federation of Human Rights, the International Movement of Catholic Jurists (Pax Romana), Pax Christi International, the International Association against Torture, the Association of Democratic Jurists, the International League for the Defence of Rights and the Liberation of Peoples, the Criminal Law Association, the Minority Rights Group, the Latin American Federation of Families of the Disappeared (FEDEFAM) in Caracas, CLAMOR in São Paulo, and the Vicaría de la Solidaridad in Chile.
\textsuperscript{334} Marchak, \textit{God's Assassins}, \textit{supra} note 15 at 319.
\textsuperscript{335} See \textit{supra} note 195.
state terrorism is that the military was "engaged in an ideological battle, and the objective was not simply to control guerrillas but to eradicate ideas". Yet this campaign of state terror involved the element of personal ambition – the junta members were dealing with their own conflicting ambitions of three armed services. To state any one cause causing the 'dirty war' would be naïve at best. There are many contributing factors that led up to the escalation of violence and the doctrine of repression.

Argentina's historical record was marked by cycles of violence and military dictatorships. The military forces had long played a central role as the enforcer of sometimes arbitrary laws. Civil society was weak. Institutional anomie, political anarchy and economic decline became all too common. Labour unions, universities, churches, political parties, the judiciary, and the media had affiliations with the junta and never fully developed as autonomous institutions. Taken together, these can be seen as the preconditions of the 1976 coup.

In his book, Radical Evil on Trial, Nino discusses four recurring dynamics that emerged in Argentine history providing an impetus for the gross violation of human

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337 Marchak, ibid. at 320.
338 See supra note 138.
339 Marchak, God's Assassins, supra note 15 at 321.
340 Malamud-Goti, "Why Punish", supra note 34 at 15-16 discusses the continued need to "democratize" Argentina's military.
341 Marchak, God's Assassins, supra note 15 at 321.
rights that occurred during the 'dirty war'.

The first trend, ideological dualism, involves a clash between two world views: the liberal tradition founded on universalist principles and the conservative tradition founded on defending traditional social institutions. In Argentina, the liberal concept of society was contradictory as liberals were typically elitists and not democrats thereby giving credence to the conservative viewpoint. Traditionalism was seen as being more democratic and committed to social justice. Nino states that the confrontation between traditionalism and liberalism was so intense it "toppled the democratic framework designed to contain and promote such debate". This led to military dictatorships on both sides. Fear of communist revolution generated authoritarian measures designed to control subversive movements and fear of social revolt magnified by the Cold War gave rise to the "Doctrine of National Security" ideology.

The second trend, corporatism, is "a means of controlling sectors of society through the state apparatus". The military, the Catholic church, and trade unions all enjoyed privileged status in Argentine society. Each has shaped Argentine society and national values and beliefs.

The third trend, anomie, "consists of a disregard for social norms, including the law...anomie was evidenced by the prevalence of coups d'etat as a means of obtaining

342 Nino, Radical Evil, supra note 142 at 44-50.
343 Ibid. at 45.
344 Ibid. at 45; and Latore, supra note 17 at 420. Other South American countries, including Brazil, Uruguay and Chile also were under military regimes who took control of the country under the guise of national security. Latore states at 419 that South American countries cooperated under Operation Condor to eradicate all political opposition during the 1960s and 1970s.
345 Nino, Radical Evil, ibid. at 45.
political power and the use of unconstitutional mechanisms to enhance the president's power".\textsuperscript{346} Nino describes institutional anomie whereby the coups d'état were judicially recognized and legitimized. Nino mentions that anomie is widespread in Argentina where the black market continues to flourish, tax evasion is rampant and traffic regulations are seldom followed. However, recent developments aimed at combating impunity indicate institutional anomie is becoming a thing of the past.

The fourth and final trend is concentration of power. Nino states that within the federal government, "power has been concentrated in the presidency at the expense of the legislative and judicial branches" resulting in a "hyperpresidential" system of government.\textsuperscript{347} During the junta's regime, Nino states that power rested wholly within the federal executive and the junta exercised control over day-to-day governmental functions.

Taken together, Nino suggests that these four "phenomena" set the stage for the state sanctioned gross violation of human rights perpetrated by the military government during the 'dirty war'.

Another author, Feitlowitz, suggests the "deep structures of Argentine society are feudal".\textsuperscript{348} In her view, the "anachronistic underpinnings" between the oligarchy, the Catholic Church, and the military evidenced a "long history of entrenched conservatism": "The Dirty War...did not erupt from a vacuum. Rather, it drew on a reservoir of beliefs, phobias, obsessions, and rhetoric that have filtered down through a variety of

\textsuperscript{346} Ibid. at 47.
\textsuperscript{347} Ibid. at 49.
\textsuperscript{348} Feitlowitz, supra note 18 at 5.
ultraconservative movements, tendencies, and regimes. ...these elements had long coexisted in Argentine politics...".349

Suggested theories about the causes of this conflict given to Marchak by Argentine interviewees for her book entitled *God's Assassins* were Peronism, militarism, an authoritarian church, an international conspiracy to test neoliberal economic policies, and the strategic defence policy initiated by the United States.350

Our interviewees provided four possible explanations beyond attributing the events to a general historical predisposition towards violence:

1. This was a holy war: from the military perspective it was necessitated by the militancy of revolutionary groups who threatened the welfare of the entire society.

2. The objective was to impose economic restructuring. Restructuring required defeat of the union movement, downsizing of the labour force and its wage claims, and elimination of opponents. One variant of this theory is that neoliberalism was imposed on the society by the dominant national class together with external powers.

3. This was a displaced war between the Cold War powers, with Argentina being used as a testing ground for the Third World War.

4. This was a struggle for power between fractions of the middle class, with the state at the centre.351

Marchak examines three Argentine ideologies: conservative church and military, bureaucratic unions, guerrilla fighters and dissident unions, each of which had its own "uncompromising version of perfection in its projected society, and each was prepared to struggle for the opportunity to impose its version on the whole society".352 Marchak goes on to consider the objective of state terrorism. Why would a military government engage in such activity? In her opinion, the paradox is that state terrorism is a process, not a

349 Ibid. at 12 and 20.
351 Ibid. at 322.
352 Ibid. at 7.
single event with a stated objective "to eliminate some subpopulation that is defined as an enemy or as being composed of inferior beings who are somehow 'impure' and unacceptable".\footnote{ibid.} \footnote{Ibid., at 6.}

The process begins when a majority of the population is eager to see the end of violence and shares some ideas about which groups are responsible. A repressive regime appears as the way to end it, to bring order to the society, and to rid the society of the troublemakers. Exhausted by years of public atrocities, the population is prepared to believe a government that promises peace.\footnote{Marchak, Reigns, supra note 4 at 81.}

Marchak concludes that "the politicide in Argentina was a response of a military force against an organized movement of middle-class students and militant unions, where the wealthiest class was fractured and real wealth was leaving the country, following the breakdown of the state and in the context of a crisis of capital accumulation".\footnote{Marchak, God's Assassins, supra note 15 at 336.}

Such was the case in Argentina. After the period of political anarchy and political assassinations that took place under Isabel Perón's regime, Argentine citizens wanted the \textit{junta} to take over and restore order in civil society. Marchak asks the important question, in the end, who won the ideological battle?\footnote{Marchak, God's Assassins, supra note 15 at 336.} Chapter Three examines the obstacles Argentina faced during its transition to democracy in the wake of gross violation of human rights.
CHAPTER THREE: IMPUNITY AND TRANSITIONAL JUSTICE

History indicates that confronting massive human rights violations is a much more difficult task than confronting ordinary crimes, even when the political agents who committed the crimes have ceased to possess power and influence. Silence and impunity have been the norm rather than the exception, and the few investigations that have been undertaken often targeted the wrong actions and the wrong people\textsuperscript{357} [emphasis added].

3.1 Accountability in the Wake of Gross Violations of Human Rights

3.1.1 Challenges of a Successor Government

For successor governments, transitions from authoritarian to democratic rule represent both "an opportunity and a hazard".\textsuperscript{358} A nascent democracy's primary concern is to establish the rule of law and build human rights safeguards into the new government that will prevent future violations.\textsuperscript{359} However, in this context, how should an emerging democracy address the human rights atrocities of their recent past when the very perpetrators still wield considerable political or military power over the new government?\textsuperscript{360}

The goal of political transition has come into conflict with the goal of providing accountability for past crimes. On the one hand, former dictators are understandably loath to leave office if they fear prosecution for their actions. On the other hand, national and international interest groups have good reason to demand the accountability and resignation of former dictators.\textsuperscript{361}

Often, the previous regime's legacy includes a weak economy and depleted

\textsuperscript{357} Nino, \textit{Radical Evil}, \textit{supra} note 142 at 3.
\textsuperscript{359} Rachel Sieder, "Introduction", in Sieder, \textit{supra} note 37 at 1.
\textsuperscript{360} Tina Rosenberg, "Overcoming the Legacies of Dictatorship" (1995) 74:3 Foreign Affairs 134 at 141; and Zalaquett, "Balancing", \textit{supra} note 94 at 1426. Perhaps the question should be: \textit{Can} constitutional rulers punish former human rights violators who are still the armed "guardians" of the country (see Acuña & Smulovitz, \textit{supra} note 201 at 96.
\textsuperscript{361} Burke-White, \textit{supra} note 129.
government funds due to mismanagement or corruption. A successor government must use limited resources, not only to turn the economy around, but also to restructure the weakened state institutions, government bureaucracy and restore public trust in the government to ensure the security of democracy.

The issue of whether to hold accountable those accused of human rights violations under a previous regime therefore has legal, ethical, political, and practical dimensions. The successor government faces two vital considerations: ethical principles that ought to be pursued, and actual political opportunities and constraints that ought to be taken into account. The choices the new government makes and the method it chooses to carry them out will make a clear statement about its commitment to protecting human rights. The question of how to adequately deal with justice in a transitional situation therefore presents the first test in the establishment of democracy and the rule of law.

In all cases of transition from an authoritarian regime to civil rule, the country's history has been controversial. Typically, members of the old regime will deny allegations of human rights abuses or attempt to justify them by "exigent"

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362 Kritz, Transitional Justice, supra note 336 at xxxvii.
363 Ibid.
364 Juan E. Méndez, "Accountability for Past Abuses" (1997) 19 Hum. Rts. Q. 255 at 256; Bassiouni, "Searching for Peace", supra note 78 at 23; Zalaquett, "Confronting", supra note 336 at 3; Panizza, supra note 5 at 170; Malamud-Goti, "Why Punish", supra note 34 at 13; Freeman, supra note 79 at paras. 4-10; and Méndez in McAdams, Transitional Justice, supra note 5 at 1.
365 Zalaquett, "Balancing", supra note 94 at 1430; Panizza, ibid. at 176; and Luc Huyse, "Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past" (1995) 20:1 Law & Soc. Inquiry 51 at 54-55. At 65 Huyse states: "The crucial challenge is to strike a balance between the demands of justice and political prudence or, in other words, to reconcile ethical imperatives and political constraints".
366 Méndez in McAdams, Transitional Justice, supra note 5 at 1: "The hardest question of all is how to pursue the objectives of justice and of reconciliation without falling into tokenism and a false morality that only thinly disguises the perpetuation of impunity".
367 Kritz, Transitional Justice, supra note 336 at xxxi.
368 Ibid. at xxxvi.
circumstances". Therefore, establishing an accurate, official record of the past is seen as an important element to a successful democratic transition. Most scholars agree that the failure to prosecute those responsible for committing gross violations of human rights could seriously "undermine the legitimacy" of the newly elected government and "generate widespread feelings of cynicism toward the new regime." A nascent democracy should strive to make a clean break with the previous regime and demonstrate its commitment to the protection of human rights through the implementation of new policies to this effect. However, the international community must take a realistic and objective view acknowledging political constraints that each successor government faces when proposing accountability measures before passing judgment on a government's choices.

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369 Ibid. Kritz warns that if these claims remain uncontested, they could undermine the new government and give the old regime more power.

370 Ibid. This can be done by using a variety of methods: namely, criminal prosecutions, the establishment of a truth and reconciliation commission, and the creation of national remembrance days and commemorative monuments. See also Rosenberg, supra note 360 at 148: "The most sweeping mechanism for dealing with past repression is trial in a court of law".


Human Rights Watch recognizes the difficulty that some governments may face in holding members of their own armed forces accountable for their gross abuses of human rights. Also, we recognize that military regimes may insist, explicitly, or implicitly, on immunity from accountability as a condition for relinquishing their offices and permitting the establishment of elected civilian governments. We do not believe that these difficulties justify disregard for the principle of accountability. We consider that accountability for gross abuses should remain a goal of a government that seeks to promote respect for human rights.

372 A primary concern of a successor government should also be to prevent future occurrences of violence, see supra note 359.

373 Méndez, "Accountability", supra note 364 at 256 at 282; Pion-Berlin, "Prosecute or Pardon", supra note 187 at 106. Also see Zalaquett, "Confronting", supra note 336 at 26-65 lists political constraints and other factors that determine the scope of the governmental action in the implementation of a legitimate human
3.1.2 The Debate Concerning Accountability and Prosecutions

Scholars have long debated the concept of accountability in a transitional justice context as it raises complex questions of international legal theory and practice, and it often has contradictory and conflicting goals. 374

One author puts forward three misconceptions surrounding the accountability dilemma: (1) there are no rules for states, (2) truth is always preferable to justice, and (3) prosecutions are inherently inimical to peace and reconciliation. 375 With regard to the first misconception, Chapter Four will demonstrate that states have an affirmative obligation in response to gross violations of human rights. With regard to the second misconception, each transitional justice context is different and the concepts of truth and justice can take on variable meanings depending on the circumstances. Given states' obligations, some form of justice must be sought. With regard to the third misconception, it is often impossible to prosecute every accused perpetrator, and political constraints may dictate an alternate route, such as choosing a select few, or prosecuting the higher ranking officers of a military junta over the junior ones (as in Argentina).

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374 See Freeman, supra notes 79 and 93 for a detailed example of complications and contradictions in a transitional justice context. Siegel, supra note 190 at 433 states: "[N]ew regimes and polities confront conflicting perceptions, demands, hopes, and fears concerning justice, truth, national reconciliation, and the building of more stable democracies". Also see Cohen, "State Crimes", supra note 5 at 31-36 where he lists the following nuanced problems that can arise in any given transitional justice context: (1) time lag, (2) authority and obedience, (3) degrees of involvement, (4) regime stability and preserving democracy, and (5) reconciliation and reconstruction.

375 Méndez, "Accountability", supra note 364 at 256 at 266-273.
Another author suggests that accountability measures fall into three categories: (1) truth, (2) justice, and (3) redress. In this sense, seven options to accountability are: (1) international prosecution, (2) international and national criminal investigatory commissions, (3) acknowledgement of responsibility through national mechanisms, such as investigative and truth commissions, and reconciliation hearings and findings, both national and international, (4) national prosecution, (5) national lustration mechanisms, (6) national civil remedies, and (7) international mechanisms for the compensation of victims.

The basic question confronting transitional governments is whether to undertake measures to prosecute the perpetrators of the ousted regime that committed human rights violations, and to what extent. Inevitably, some will argue for trial and punishment in order to draw a line between the old and new regime and to publicly condemn the crimes committed. Others will claim that show trials are "unbefitting a democracy" and that they are simply a manifestation of victor's justice.

Four arguments given by scholars in favour of accountability for past actions in

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376 Bassiouni, "Searching for Peace", supra note 78 at 18: "Accountability must be recognized as an "indispensable component of peace and eventual reconciliation" (at 18-19).

377 Ibid. at 19-23. With regard to compensation, Kritz, Transitional Justice, supra note 336 at xxxvii states that it serves three functions in the process of national reconciliation: (1) it aids the victims to manage the material aspect of their loss, (2) it constitutes an official acknowledgement of their pain by the nation, and (3) it may deter the state from future abuses, by imposing a financial cost to such misdeeds.

378 Kritz, ibid. at xxxi. See also Huyse, supra note 365 at 52: "By far the most radical interpretation of acknowledgement and accountability is to be found in the outright criminal prosecution of the perpetrators ...The granting of unconditional amnesty to those who committed politically based crimes is at the other end of the spectrum".

379 Kritz, ibid.

380 Ibid.
the specific Latin American context include:381 (1) deterrence — in the event there is a return to instability, the military and police forces will know they will or may be held accountable for human rights atrocities, (2) the need to individualize responsibility so that newly constituted military and police forces will not be all deemed responsible, and because victims need to know who was responsible, and that that specific individual has been punished, (3) to demonstrate a qualitative change in the political system that is committed to respecting the rule of law, and (4) the need to subject certain conduct, due to its intrinsic nature, to universal condemnation, irrespective of surrounding political circumstances.

Advocates in favour of criminal prosecutions rely on a moral justification for prosecutions, claiming prosecutions have a deterrent, retributive, and rehabilitative effect on the accused.382 Some scholars argue that prosecutions will advance long-term democratic consolidation.383

On the other hand, advocates of a more conciliatory policy offer six counter-arguments to legal accountability for past abuses:384 (1) the need for a fresh start after a period of upheaval, (2) trials create martyrs and villains, when everyone should bear a measure of responsibility for what occurred, (3) at a time of new beginnings, consensus

381 Hampson, supra note 76 at 9. For a further detailed discussion on why perpetrators of egregious violations of human rights should be prosecuted and punished, see Panizza, supra note 5 at 170-171; Malamud-Goti, “Why Punish”, supra note 34 at 11-12; Huyse, supra note 365 at 55-57; Siegel, supra note 190 at 439; Samuel P. Huntington, The Third Wave: Democratization in the Late Twentieth Century (Norman: University of Oklahoma Press, 1991) at 213-214; and Teitel, supra note 218 at 28-30.
382 Méndez, “Accountability”, supra note 364 at 276. Méndez argues that a moral justification of punishment, such as that offered in Argentina, is probably a variation of a “just deserts” theory, which holds that societies must punish acts of torture, murder, and disappearance out of respect for the norm that prohibits such conduct (at 277).
383 Huyse, supra note 365 at 57.
384 Hampson, supra note 76 at 10.
has to be built up and nurtured and institutions created (it is seen as a time to look forward and not backward)\textsuperscript{385}, (4) sometimes the general population prefers a 'clean break', (5) the military and police forces need to be educated achieving greater changes in attitude than the punishment of a few, and (6) trials cannot be fair because not all perpetrators will be tried and there is no fair basis for selection.

Advocates against prosecutions stress that "tactical and prudential considerations" must be taken into account since most nascent democracies are still very fragile and "may not survive attempts to convict and punish senior officers who still command support within the army".\textsuperscript{386} This school of thought considers that adopting a policy of national reconciliation and amnesties for past abuses are the best methods for preserving democracy and human rights.\textsuperscript{387}

In sum, two criteria emerge from these conflicting arguments surrounding the concept of accountability: effectiveness and fairness.\textsuperscript{388} States must also respect their obligations existing under international law, which will be further explored in Chapter Four. New governments therefore face the difficult task of evaluating the situation and making certain compromises in order to further the goals of transitional justice.\textsuperscript{389} A

\begin{footnotesize}
\begin{enumerate}
\item Garro, supra note 5 at 4: "The most troubling issues posed by the transition or consolidation of democracy in Latin America are therefore centered not so much on the creation of new legal institutions, but rather on the need to develop the necessary degree of consensus in support of those institutions".
\item Benomar, supra note 5 at 4.
\item Ibid. Benomar states this was the case in Argentina, where the prosecution of violators of human rights led to three army rebellions that jeopardized the entire democratization process. For a further detailed discussion on why perpetrators of egregious violations of human rights should not be prosecuted and punished, see Huyse, supra note 365 at 57-64; Siegel, supra note 190 at 438; Huntington, supra note 381 at 214.
\item Hampson, supra note 76 at 10.
\item Huntington, supra note 381 at 231 provides the following "Guidelines for Democratizers …Dealing With Authoritarian Crimes":
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successor government must attempt to strengthen the nascent democracy while balancing the goals of transitional justice with the political and economic realities of the country. Given the fragility of a transitional justice context, a political compromise between truth and justice is often required. Truth commissions have emerged as one such compromise and will be discussed in the next section.

3.2 Truth Commissions Serving Transitional Justice

Problems related to the administration of justice in societies in transition from authoritarian to more democratic rule have moved to the forefront of discourse among human rights activists and scholars in the last decade or so... In particular, the promise and dilemmas of truth commissions and the prominent role truth commissions have played in the administration of justice in transitional societies have received intense study and debate, generating a massive and rapidly expanding bibliography.\textsuperscript{390}

Truth and reconciliation commissions are emerging as the current trend toward accountability, and present an alternative to strict prosecution in international human rights law. In particular, truth commissions became the primary method in the inquiries of the fate of the disappeared after the fall of dictatorships.\textsuperscript{391}

Truth commissions are a "modern instrument capable of strengthening civil society and providing restorative justice. Because they are simultaneously investigative, judicial, political, educational, and therapeutic bodies, they can pursue morally ambitious

\textsuperscript{1} If transformation or transplacement occurred, do not attempt to prosecute authoritarian officials for human rights violations. The political costs of such an effort will outweigh any moral gains.

\textsuperscript{2} If replacement occurred and you feel it is morally and politically desirable, prosecute the leaders of the authoritarian regime promptly (within one year of your coming into power) while making clear that you will not prosecute middle- and lower-ranking officials.

\textsuperscript{3} Devise a means to achieve a full and dispassionate public accounting of how and why the crimes were committed.

\textsuperscript{4} Recognize that on the issue of "prosecute and punish vs. forgive and forget," each alternative presents grave problems, and that the least unsatisfactory course may well be: do not prosecute, do not punish, do not forgive, and, above all, do not forget.


\textsuperscript{391} Panizza, supra note 5 at 173.
ends of profound value to a transitional society". Truth commissions around the globe are setting a new precedent in the struggle against impunity, providing a culture of accountability in the international arena.

It is partly due to the limited reach of the courts, and partly out of a recognition that even successful prosecutions do not resolve the conflict and pain associated with past abuses, that transitional authorities have increasingly turned to official truth-seeking as a central component in their strategy to respond to past atrocities. These broad inquiries into widespread abuses by state forces, sometimes also looking into abuses by the armed opposition, have acquired the generic name of "truth commissions", a term that implies a specific kind of inquiry, even while allowing for considerable variation between the different commissions.

3.2.1 Purpose and Underlying Rationale

As the name suggests, truth and reconciliation commissions have as a fundamental goal to serve the ends of truth, peace and reconciliation. They emerged as "impunity's antidote" and "amnesty's analogue" originating in Latin America, and spreading to Africa, Europe and Asia.

Truth commissions are official, non-adversarial bodies set up on an ad hoc basis. Their mandate is to investigate, document, and record historic patterns of alleged violations of human rights during a specific time period, in a particular country. Truth commissions are also charged with obtaining facts, overcoming ignorance or denial of past events, devising recommendations for victim reparation, expressing government acknowledgement of the past, enhancing the legitimacy of the current regime, and

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393 Priscilla B. Hayner, Unspeakable Truths: Facing the Challenge of Truth Commissions (New York: Routledge, 2002) at 14 [Hayner, "Unspeakable Truths"].
394 Teitel, supra note 218 at 79.
promoting human rights and democracy.  

Usually these commissions are set up after there has been a transition from an authoritarian regime to a democratic government in order "to respond to the legacy of a horrific past". Truth commissions operate under the assumption that in order to come to terms with the past and prevent future violations of human rights, societies must seek to uncover the truth in order to understand what happened and why, and under whose command or orders. Their aim is not to prosecute and punish, but to investigate the fate of individuals under a previous regime.

Truth commissions can be established at the national, regional, or international level with either a strict mandate to discover the truth in its entirety, or only a portion of the truth. Sometimes, the United Nations sponsors truth commissions; sometimes they are created by presidential decree or legislation, or agreed to in a negotiated peace settlement.

Truth commissions can run in conjunction with prosecutions, or independently thereof, but "should not be deemed a substitute for prosecution for the four jus cogens crimes of genocide, crimes against humanity, war crimes, and torture". Truth commissions have restorative and preventative dimensions, combining the notion of

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397 Rotberg, supra note 392 at 6.
398 Huyse, supra note 365 at 53 and see supra note 365.
399 Bassiouni, "Searching for Peace", supra note 78 at 20.
400 Hayner, "International Guidelines", supra note 396 at 178.
401 Bassiouni, "Searching for Peace", supra note 78 at 20.
restorative justice with the search for truth.  

One author lists the fundamental ambitions of truth commissions as: acknowledging crimes, giving victims a voice, providing a historical account of the major institutional factors that contributed to the breakdown of law and humanity, and teaching an illuminating lesson that may offer hope for the future.

Truth commissions have multiple missions. By illuminating a country's scarred past, they give momentum and focus to efforts to rehabilitate and reconcile victims, perpetrators, state institutions, and elements of civil society that may have tolerated or collaborated in the violence. This mission of reconciliation is more immediate, and perhaps more important, than any other. Beyond that, however, truth commissions tell current and future citizens a story, hopefully accurate, that advances understanding of the mechanisms and dynamics that led their country down a path to madness... No truth commission can guarantee that the past will not repeat itself. But the hope is that knowledge is empowering and that, if enough people know, there will be vigilance and resistance if a domestic or foreign government ever again attempts to use or foment abuses as an element of state policy.

Truth commissions aid in bringing public accountability to those who have committed gross violations of human rights: "Although it may not be justice, it is at least a breach in the wall of impunity that currently surrounds the officials of states that have sponsored terror and abuse elsewhere." This brings into debate the conflicting concepts of truth and justice which were briefly touched upon in section 3.1.2, and will be further examined below.

3.2.2 Truth vs. Justice

How does one balance the seemingly conflicting concepts of truth and justice? Can one exist without the other? Legal scholars stress the importance that establishing

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402 Minow, supra note 395 at 56; Rotberg, supra note 392 at 3.
403 Smith, supra note 390 at 264-265.
404 Ibid. at 266.
405 Ibid. at 273.
406 See Kamali, supra note 12. Also see Teitel, supra note 218 at 89; "Truth is not synonymous with justice; neither is it independent of justice. Instead, it is better understood as a virtue of justice". 
the truth has for ending impunity: "Official denial of responsibility for human rights violations has long constituted a denial of the principle of accountability".\textsuperscript{407} Truth, in a transitional justice context, is "a means by which to cleanse, at least in part, the misdeeds of the past".\textsuperscript{408} Pursuing justice in a transitional context is often difficult, if not impossible, as noted above in section 3.1.

Mr. Justice Richard J. Goldstone, of the South African Constitutional Court, suggests that countries moving out of oppression to some form of democracy face three broad choices: (1) to forget about the past and enter into a period of national amnesia, (2) to systematically prosecute perpetrators of criminality, and (3) to establish a truth commission process, which is effectively a compromise between the two.\textsuperscript{409} Justice Goldstone states: "the truth commission route has really emerged as a political necessity more than the ideal solution."\textsuperscript{410}

At this point, it is essential to reconsider the purpose behind a truth commission; it is meant to provide a historic record of what occurred in that specific country's past. It is hoped that through achieving the truth, there will be meaningful reconciliation and the prevention of future conflict.\textsuperscript{411} Truth commissions are also meant to provide for some form of accountability for those individuals who have committed gross violations of human rights. Such accountability measures were discussed in section 3.1.2 above, and

\textsuperscript{407} Sieder, supra note 359 at 2.
\textsuperscript{408} Bassiouni, "Searching for Peace", supra note 78 at 23.
\textsuperscript{410} Ibid. at 166.
\textsuperscript{411} Bassiouni, "Searching for Peace", supra note 78 at 24.
range from the eventual prosecution of all potential violators to the establishment of the truth.\textsuperscript{412} One author concludes that after a historical period of mass atrocities and gross violations of human rights, truth commissions can be a better option toward the goal of healing than prosecution for some societies.\textsuperscript{413}

Truth commissions offer various advantages over trials. For example, truth commissions have a broader focus and mandate than trials and involve a concentration of effort in a limited time and capacity in order to assemble information from varied sources.\textsuperscript{414} Another advantage is the fact that victims and their families get to recount their stories which helps the healing process.\textsuperscript{415} These individuals are often left out of trials. Lastly, through public disclosure, truth commissions avert collective guilt and help prevent denial of the atrocities that occurred.\textsuperscript{416}

Some scholars argue that prosecuting those individuals accused of committing human rights abuses substantially enhances the chances for establishing the rule of law by sending a clear message that no one is outside the reach of legal accountability.\textsuperscript{417} Prosecutions are also seen as a means to punish those who have committed gross violations of human rights and may be essential to the healing of social wounds.\textsuperscript{418} Yet others argue that prosecutions entail a significant financial burden, and an emotional burden on those victims and survivors who must testify and be subjected to cross-

\textsuperscript{412} Ibid. at 19.
\textsuperscript{413} Minow, \textit{supra} note 395 at 57.
\textsuperscript{414} Méndez, "Accountability", \textit{supra} note 364 at 278; Goldstone, \textit{supra} note 409 at 172.
\textsuperscript{415} Méndez, \textit{ibid.}
\textsuperscript{416} Goldstone, \textit{supra} note 409 at 172.
\textsuperscript{417} Minow, \textit{supra} note 395 at 57 quoting Professor Stephen Landsman.
\textsuperscript{418} \textit{Ibid.} at 58.
The next section will further consider arguments that have been presented for and against the use of truth commissions.

3.2.3 Strengths and Weaknesses

Arguments in support of truth commissions tend to be centred on a victim healing-catharsis theory. Through truth commissions, victims and their families are afforded the opportunity to relate their story and be heard in public. The victims are empowered by relating their testimony with the end result emphasizing reconciliation and healing.

Other strengths of truth commissions include: aiding in re-establishing, implementing, and strengthening the rule of law in a transitional justice context, serving as means to discover the truth, serving as a public platform for victims (with regard to accountability and punishment), contributing to compensation, restitution, or reparation programs for victims, aiding in institutional reform and long-term development and democratization, and aiding in reconciliation ranging from healing, restoration, and mutual forgiveness.

However, the very nature of a transitory justice context makes truth commissions vulnerable and somewhat limited. Some scholars argue that it is not enough to discern the truth – truth commissions must go further and the truth should be accessible to the public. The issue of 'naming names' has come up many times and some truth commissions have decided not to publicly name those perpetrators of human rights

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419 Ibid.
420 Ibid.
421 David A. Crocker, "Truth Commissions, Transitional Justice, and Civil Society" in Rotberg & Thompson, supra note 392 at 105-108.
422 Ibid. at 101.
abuses. Others argue that truth commissions have insufficient material resources, inadequate numbers of trained and qualified staff, lack of power or courage to proceed against members of the police and military, and are often under tight time limitations.

Some consider the limited power of truth commissions to compel testimony and document production as a major obstacle to effective investigation of alleged violations of human rights. Truth commissions lack the ability to call witnesses, lack power to subpoena and cross-examine testimonies, cannot perform search and seizures, and cannot independently corroborate witness testimony. Truth commissions are also limited with respect to revealing the complete truth since the truth commission must narrow the number of cases to investigate down from possible thousands to a few hundred.

Given these obstacles, some scholars are quick to conclude that truth commissions make no contribution to pursuing accountability measures and sanctions. However, David Crocker, Senior Research Scholar in the Institute for Philosophy and Public Policy and the School of Public Affairs at the University of Maryland, gives three reasons why this type of conclusion is erroneous: (1) by naming individuals that have committed gross violations of human rights, the truth commission is actively contributing to ending the existing culture of impunity (for example, in Argentina, military junta were shunned publicly and subject to social stigmatization), (2) truth commissions can be compatible

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423 See infra note 504. In Argentina, the names of perpetrators who committed gross violations of human rights during the 'dirty war' were leaked to the press when the government refused to publish them.
424 Minow, supra note 395 at 57-61.
426 Crocker, supra note 421 at 101.
427 Ibid.
428 Ibid. at 103.
with prosecutions (for example, in Argentina, criminal proceedings followed publication of the truth commission's report), and (3) truth commissions often contribute directly to judicial processes by which those individuals accused of gross violations of human rights are held legally accountable and sanctioned by fines, imprisonment, compensation to victims, community service, or are prohibited from having a public career.429

Societies have often chosen truth commissions when amnesty or other laws enacted by the prior authoritarian government to protect itself and its functionaries have (largely) blocked the legal route. Alternatively, some have defended the claim that truth commissions ... are not morally second best but have advanced beyond penal and retributive justice to something called "restorative justice", defined as rehabilitating perpetrators and victims and (re)establishing relationships based on equal concern and respect.430

Regardless of the obstacles and flaws of these ad hoc commissions, the overwhelming success of various national truth and reconciliation commissions in certain countries, like Argentina, has prompted the international community to use this model in similar transitional justice contexts.431

3.2.4 Movement toward an Alternative Form of Accountability

The movement toward a system of accountability has been gaining momentum in the international arena. Argentina is but one example of how truth commissions are emerging as the alternative trend to prosecution, and will be further discussed in section 3.3.3 below. These commissions reflect the current view that the international community will no longer tolerate widespread impunity for gross violations of human rights and have been used in dozens of countries.432

429 Ibid, at 104.
430 Ibid, at 103.
431 Méndez, "Accountability", supra note 364 at 269.
432 See supra note 36.
The circumstances of each transitional justice context will inevitably vary from one country to another, and there is no set model upon which to construct a truth commission. However, one author suggests seven preliminary international guidelines for setting up a truth commission: (1) public participation in crafting the commission, (2) time and resources for preparation and set-up, (3) flexible but strong mandate for investigation, (4) political backing and operational independence, (5) appropriate funding and staffing, (6) implementation of recommendations, and (7) the role of the international community.433

Each commission's mandate and goals will differ. However, allowing for variation should not diminish the importance of minimal or international standards, so that "any official truth-seeking process is done in good faith, and results in an honest and unrestricted investigation."434 Past truth commissions serve as an example upon which to build future ones, but each commission must be established in light of the particular circumstances in which the transitional government finds itself.

Former heads of state, members of the military, government and police forces are no longer immune, and the culture of impunity surrounding them has been significantly diminished by the use of truth commissions: "Precedents of accountability, however selective and limited, contribute to the transformation of a culture of impunity that has hitherto implied the political acceptability of massive human rights abuses."435

434 Ibid. at 180.
435 Akhavan, supra note 40 at 8.
3.3 Argentina's Return to Democracy

In our society, the building of democracy could not be viewed simply as a process of restoration; it was essentially a process of creating new institutions and implementing new routines, new habits, and new ways for people to live together. It was a matter not of reconstructing a system that was functioning well until it was interrupted by authoritarianism, but of establishing new foundations for an authentic democratic system, something that we had never fully achieved\textsuperscript{436} [emphasis added].

3.3.1 The Fall of the Military Junta

In 1980, the economic policies of Argentina's military regime began to falter and after much international pressure, repression and censorship were relaxed\textsuperscript{437}. Public opinion swayed and many citizens started questioning the issue of disappearances. The humiliating defeat to the British in the Malvinas-Falklands Islands War in 1982 discredited Argentina's military government and precipitated its collapse\textsuperscript{438}. This defeat is considered by most scholars as the major influence that led to the restoration of democracy that ensued shortly thereafter\textsuperscript{439}.

\textsuperscript{436} Raul Alfonsin, "'Never Again' in Argentina" (1993) 4:1 Journal of Democracy 15.
\textsuperscript{437} Nino, Radical Evil, supra note 142 at 60.
\textsuperscript{438} Geoffrey P. Miller, "Constitutional Moments, Precommitment, and Fundamental Reform: The Case for Argentina" (1993) 71 Wash. U.L.Q. 1061 at 1076 calls this war a "comic-opera" that Argentina engaged in, in an effort to "restore national prestige". Robert A. Potash, "Alfonsín's Argentina in Historical Perspective", Presented in the Distinguished Faculty Lecture Series, Bowker Auditorium, University of Massachusetts at Amherst, November 19, 1987 (Program in Latin American Studies Occasional Papers Series No. 21) [Potash, "Alfonsin's Argentina"] at 8-9 offers three "self-evident observations" on the Falklands/Malvinas War:

1. The vast majority of Argentines, then and now, firmly believe that the islands belong to their country;
2. The military leaders who made the decision to hold on to the islands after the initial occupation vastly miscalculated the consequences of that decision; and
3. The military defeat at the hands of the British undermined the junta's authority and paved the way for the restoration of democracy. The entire episode may be seen as a modern reaffirmation of the old adage that "whom the gods would destroy they first make mad".

Human rights movements, which had until then been isolated in their efforts to locate the disappeared, "gained strength as [their] concerns became national issues central to the transition to democratic rule". After the defeat, General Galtieri resigned under pressure and the junta was dismantled because of dissension among the armed forces.

On June 22, 1982, General Bignone was brought in as president in order to supervise the return to an elected civilian government. His main concern was to ensure that the transition to democracy did not affect the military's privileged role in society. The military hoped to negotiate the terms of democratization with the campaigning political parties since human rights leaders and the general population were increasingly demanding the prosecution of the military commanders. However, no party wanted to negotiate with a military that was crumbling, and a general election was set for October 30, 1983.

In an effort to avoid accountability for the gross violations of human rights committed during the 'dirty war', the outgoing military government took three significant

"Partial Justice"] at 7. Feitlowitz, supra note 18 at 12 states that the regime was eventually brought down because "it crumbled under the weight of its own corruption, economic mismanagement, and military incompetence". However, Pion-Berlin, "The Fall", supra note 175 at 56 notes that the military's decline was not as precipitous as Argentina's surrender to the British would suggest. In his opinion, the decline began two years earlier as the "unintended result of a pattern of self-defeating behaviour". He attributes this to "a loss of faith in program objectives" (primarily economic, due to banks collapse) and "the emergence of personal and ideological cleavages within the ranks" (at 56). Finally, he notes that "victory... would have bought some time for the regime; defeat simply hastened a degenerative process already underway" (at 71).

440 HRW, Partial Justice, ibid. at 7.
441 Linz & Stepan, supra note 34 at 192.
442 Nino, Radical Evil, supra note 142 at 61.
443 HRW, Partial Justice, supra note 439 at 9.
445 Nino, Radical Evil, supra note 142 at 61.
steps to ensure military officers would not be prosecuted.\textsuperscript{446}

First, on April 28, 1983, in preparing its exit, the four and final transitional junta issued the "Final Document of the Military Junta on the War against Subversion and Terrorism" (the "Final Document").\textsuperscript{447} In the Final Document, the military attempted to put the issue of disappearances to rest; it assumed historical responsibility for the 'dirty war', but claimed that the military's actions were a direct consequence of Isabel Perón's 1975 decrees allowing the military to crackdown on suspected guerrilla activity.\textsuperscript{448} The government then stated there would be no further disclosures regarding the consequences of the "war against subversion".\textsuperscript{449} The military pardoned itself for any "excesses" and argued that they were justified in unprecedented violence they used given that the nature of the conflict demanded such a violent response.\textsuperscript{450}

Second, shortly before the 1983 election, President Bignone proclaimed a self-amnesty law.\textsuperscript{451} This law (effectively a blanket amnesty) granted immunity from prosecution to suspected terrorists and every member of the armed forces for crimes

\begin{flushright}
\textsuperscript{446} Garro & Dahl, \textit{supra} note 444 at 301.
\textsuperscript{448} Nino, \textit{Radical Evil}, \textit{supra} note 142 at 62; Latore, \textit{supra} note 17 at 427; and HRW, \textit{ibid}. Garro & Dahl, \textit{ibid.} state the following at 301:
\begin{quote}
The [Final] document conceded that human rights abuses occurred ("errors were committed as in all wars"), but stated that "the actions of the members of the armed forces in the conduct of the war were in the line of duty". It declared that those "disappeared" who were not in exile or in hiding must be considered dead 'for all legal and administrative purposes' but claimed that they met their death in open combat rather than in custody.
\end{quote}
\textsuperscript{449} Zalaquett, "Confronting", \textit{supra} note 336 at 22.
\textsuperscript{450} Feitlowitz, \textit{supra} note 18 at 12; Nino, \textit{Radical Evil}, \textit{supra} note 142 at 62. Nino states that the Final Document stipulated that all actions conformed to plans approved by superior officers, thereby preserving military jurisdiction and laying a foundation for the defence of obeying orders upon which the military members relied during their trials for human rights abuses.

On the same day that the Final Document was released, the junta ratified an institutional act which declared that "all the operations against subversion and terrorism carried out by the security forces, the police and the prison guards, under operational control, in compliance with Decrees 261/75, 2770/75, 2771/75 and 2772/75, were executed in conformity with plans approved and supervised by the superior organic commands of the armed forces and by the military junta since its constitution (at 62).

\textsuperscript{451} \textit{Ley de Pacificación Nacional} (Law of National Pacification), No. 22.924 (September 22, 1983).
committed between May 25, 1973 (the day of the coup, and the date of the last amnesty for political crimes) and June 17, 1982 (the day the third junta resigned), whether they were common or military crimes, thereby creating a legal obstacle for future prosecutions of gross violations of human rights.\(^{452}\)

Third, the outgoing military government issued a decree which ordered the destruction of all documents relating to the military repression.\(^{453}\)

On October 29, 1983, the state of siege was suspended and free elections took place giving way to a civilian government for the first time since 1930.\(^{454}\)

3.3.2 President Alfonsín and the Making of a Human Rights Policy

There was a tradition in Argentina that after each dictatorship, the crimes and abuses committed by the authoritarian government would go unpunished. My administration, moved by an urgent ethical imperative, for the first time opened the judicial channels so that the extreme violations of human rights perpetrated by both revolutionary terrorism and state terrorism could be investigated and judged by an independent judicial body. Thus the impunity of the powerful would come to an end.\(^{455}\)

On October 30, 1983, Dr. Raúl Alfonsín, of the Radical Party, obtained 52 percent of the votes cast and became president.\(^{456}\) Thus began a new chapter in Argentina's history as President Alfonsín's government "faced the virtually unprecedented task of investigating and prosecuting its own armed forces for human rights abuses".\(^{457}\) One


\(^{453}\) Decree No. 2726/83. Garro & Dahl, *supra* note 444 at 301.

\(^{454}\) Garro & Dahl, *ibid.* Also see Marchak, *God's Assassins*, *supra* note 15 at 49 where she states that during the period from 1930-1973, there were various military governments, rigged elections, restricted elections, and military designations.

\(^{455}\) Alfonsín, *supra* note 436. Zalaquett, "Confronting", *supra* note 336 at 20: "Whatever the opinion about the accomplishments of the Alfonsín government's policies dealing with the human rights violations... the Argentinean case highlights, more than any other in recent times, the moral issues, political constraints and technical questions involved in this type of situation".

\(^{456}\) HRW, *Partial Justice*, *supra* note 439 at 11: President Alfonsín was inaugurated as democratically-elected president on December 10, 1983, known as Human Rights Day throughout the world because it is the anniversary of the signing of the Universal Declaration of Human Rights.

\(^{457}\) Mignone et al., *supra* note 219 at 118-119. However, the assumption of power by democratic civilian authorities did not terminate the military's impact on society; the military's method of repression had
author states: "The Argentine experience, over time, was one of varying degrees of accountability, beginning with the military's self proclaimed amnesty, leading up through to large-scale plans for *junta* trials, and ending up with the Full Stop and Due Obedience laws".\(^{458}\)

\[(a)\] **Legislative Measure Taken to Enhance Human Rights and Prevent Future Violations**

Immediately upon assuming the presidency, Alfonsín announced a series of actions in order to restore Argentina's adherence to the rule of law and respect for the most elementary of human rights.\(^{459}\) While public support for accountability was still strong in the aftermath of the 'dirty war', Alfonsín took legislative measures to set clear parameters for forward-looking goals, in the hopes of institutionalizing legal change designed to prevent future violations of human rights.\(^{460}\)

These forward-looking measures included:\(^{461}\)

- Repealing all draconian laws against subversion enacted by the previous Peronist and military governments. In their place, laws supporting democracy would be enacted; they would criminalize acts, especially by the army or security forces, that jeopardized the constitutional system [eventually became Law 23.077, promulgated August 22, 1984].

- Enacting a law punishing torture in the same way that murder was punished. This law would hold prison directors, police chiefs, and members of military garrisons responsible for acts of torture committed within their jurisdiction [eventually became Law 23.097].

\(^{458}\) Ratner, *supra* note 358.

\(^{459}\) HRW, Partial Justice, *supra* note 439 at 13. Nino, Radical Evil, *supra* note 142 at 63: At an address to the Argentine Federation of Bar Associations, Alfonsín set out the five basic philosophical tenets concerning human rights:

1. Every human being enjoys human rights, regardless of race, nationality, or gender.
2. Human rights assure that people are not used as mere instruments for the sake of collective objectives.
3. Human rights can be violated by omission as well as action.
4. Governments' legitimacy is intimately linked to the preservation and promotion of human rights.
5. As a concern of the international community, the defence of human rights transcends national frontiers.

\(^{460}\) Nino, *ibid.* at 67.

\(^{461}\) *Ibid.* at 69.
promulgated October 24, 1984].

- Abolishing military jurisdiction for civilians over common crimes.\(^{462}\)

- Reforming the federal criminal procedure code, limiting the duration of trials and making parole easier to obtain.

- Enacting a law that would prohibit public and private discrimination.

- Ratifying several human rights treaties, including the American Convention on Human Rights (which entailed accepting the obligatory jurisdiction of the Inter-American Court of Human Rights) [eventually became Law 23.054, promulgated March 19, 1984], the United Nations Covenant on Civil and Political Rights, and the United Nations Covenant on Economic and Social Rights.\(^{463}\)

- Reforming the Military Code to abolish, in effect, military jurisdiction over common crimes committed in connection with acts of service.

[additions].

(b) Prosecuting Past Violations of Human Rights

Despite all the preventative measures described above, Alfonsín's government realized they had to actively investigate the human rights abuses. The government opted against an "absolutist" approach to transitional justice; instead it attempted to address the need for punishment "at the minimization of future social cost resulting from destabilizing effects of widespread retribution".\(^{464}\)

Our search for truth and justice with respect to the crimes of the past was based upon the following premises:

1. The violence that stained Argentina with blood during the 1970s was initiated by the terrorism of the left. Animated by an elitist view of social transformation, these leftists did not hesitate to commit terrible crimes in pursuit of an insane agenda.

2. Armed combat against this terrorism of the left, employing a degree of force proportional to the threat, was morally and juridically justified; kidnapping, torture, and clandestine assassination clearly were not. In no case is there justification for resorting to terrorist methods to combat terrorism, for that

\(^{462}\) Crawford, supra note 197 at 21: The strategy of transferring jurisdiction from military courts to civilian courts was in order to ensure the trials would be free from bias in favour of military defendants.

\(^{463}\) Argentina also became a party to the U.N. Torture Convention, supra note 116, which was in draft form at the time.

\(^{464}\) Carlos Santiago Nino, "The Human Rights Policy of the Argentine Constitutional Government: A Reply to Mignone, Estlund and Issacharoff" (1985) 11 Yale J. Int'l Law 217 [Nino, "A Reply"] at 221. Nino adds: "Leaving the most terrible abuses unpunished could encourage future abuses. However, punishment must be applied with prudence if the objective of minimizing social harms is to be achieved" (at 221).
ultimately defeats the principles that are supposedly being defended.

3. The most atrocious acts committed by both types of terrorism had to be judged by an independent judicial body, and those found guilty had to be punished. This would help ensure that never again would groups with access to firearms think that they were above the law and able to decide with impunity whether their fellow citizens would live or die.

4. Given that the pursuit of justice relied only on the strength of society's moral convictions, our objective had to be carried out without risking the stability of Argentina's democratic institutions, which are the best guarantee against the recurrence of similar episodes. This required limiting both the time period of the trials and the number of those held responsible.465

With regard to punishment of those responsible for committing gross violations of human rights, the government's intention was "not so much to punish as to prevent".466

As such, Alfonsin set out three guiding principles:

(1) Both the state and subversive terrorism should be punished.

(2) There must be limits on those held responsible, for it would be impossible effectively to pursue all those who had committed crimes.

(3) The trials should be limited to a finite period during which public enthusiasm for such a program remained high.467

The government's backward-looking program attempting to deal with the gross violations of human rights that occurred under the previous regime included:468

- Establishing a habeas corpus remedy through which civilians sentenced by military courts could have their convictions reviewed by civil courts [eventually became Law 23.042, promulgated January 19, 1984].

- Enacting a law that shortened prison terms for those detained for exaggerated security concerns [eventually became Law 23.050, promulgated in June, 1984].

- Nullifying the amnesty law [the "Law of National Pacification"]. The president concluded that the amnesty law violated equal protection principles of article 16 of the Constitution; granted the executive extraordinary powers, in contravention of article 29 of the Constitution; and, as a morally unacceptable de facto law, lacked the presumption of binding validity [eventually became Law 23.040, promulgated on December 27, 1983].

- Modifying the Military Code so as to acknowledge military jurisdiction, but also to

465 Alfonsín, supra note 436 at 15-19.
466 Ibid. at 15.
467 Nino, Radical Evil, supra note 142 at 67.
468 Ibid. at 69.
provide federal appeals courts with broad powers of review.\(^{469}\)

- Modifying the Military Code provisions that granted impunity to officers obeying orders. A rebuttable presumption was to be created for those who followed orders that ultimately violated human rights and erred about the legitimacy of the orders. This presumption was not to be available to those who had decision-making capacity.

- Issuing the decrees necessary to bring the prosecution of the leaders of the subversive guerrilla movements, and also the members of the three military junta\(^{470}\) [Decree 157/83 called for the prosecution of the following suspected leaders of guerrilla movements: Firmenich, Vaca Narvaja, Obregon Cano, Galimberti, Perdia, Pardo and Gorriaran Merlo. Decree 158/83 called for the prosecution of the following junta members: Videla, Viola, and Galtieri of the army; Massera, Lambruschini, and Anaya, of the navy; and Agosti, Graffigna, and Lami Dozo of the air force].

[additions].

The Alfonsín government's primary objective was to reinstate a proper standard of legal protection of human rights; it attempted to do this by reforming the existing criminal law as well as formulating measures aimed at improving the social and economic status of Argentine citizens.\(^{471}\)

[Our principal objective was not to obtain retribution for every wrong but to help prevent the recurrence of similar wrongs in the future by internalizing in the collective conscience the idea that no group, however powerful it might be, is beyond the law. This objective required that we take into account the necessity of assuring the loyalty of the armed forces to the democratic system, since the preservation of democracy is the main shield for the protection of human rights. Therefore, a careful distinction needed to be made between the legitimate and open struggle against terrorism and such practices as the torture and clandestine murder of human beings, which are universally recognized as illegitimate.]\(^{472}\)

This also meant Alfonsín had to reform his own existing government. As such, he

\(^{469}\) HRW, *Partial Justice*, supra note 439 at 13. Legislation mandated that all cases of human rights violations be tried before the Supreme Council of the Armed Forces, a permanent military court, as contemplated in the Code of Military Justice.

\(^{470}\) Decrees No. 157/83 & 158/83, promulgated December 13, 1983. Amnesty International, *Argentina: The Military Juntas and Human Rights: Report of the Trial of the Former Military Junta Members* (London: Amnesty International Publications, 1987) [AI, "Military Juntas"] at 11 states that Decree 158 included a section stipulating that any judgment reached by the military courts could be appealed against in civilian courts, under new legislation that the President intended to submit to Congress (this impending legislation materialized in Law 23.049 and will be discussed in section 3.3.4(a) below. HRW, *ibid.* at 13 states: "The strategy was to condemn equally state terror and anti-state political violence, an approach that has been frequently labelled in Argentina as 'the theory of the two devils'."

\(^{471}\) Nino, "A Reply", supra note 464 at 219-220.

\(^{472}\) Alfonsín, *supra* note 436 at 15-16.
replaced many members of the federal judiciary who had been sworn in by the statute of the military, as well as many high ranking governmental positions such as the Undersecretary of the Interior and the Minister of Defence, and he made severe cuts to the military budget.473

In formulating a program for redressing human rights violations, Alfonsín was cognisant of the armed forces' vulnerability after its string of devastating political, economic, and military defeats, but he still imposed organizational, budgetary and judicial changes on the military.474 He was well aware of the danger of alienating the armed forces from his administration, and decided to make a distinction between the superior officers who gave the orders that resulted in human rights abuses and those subordinates who simply carried out orders.475 He was sceptical about trying too many lower-ranking officers, fearing a dangerous reaction among the armed forces, and therefore his political strategy involved concentrating the guilt on a small group of people who had either promoted and conducted state terrorism or executed the most brutal acts.476

Alfonsín identified three levels of individual responsibility: (1) officers with

473 Nino, Radical Evil, supra note 142 at 67 and 73: In 1984, Alfonsín took further steps to counteract the traditional autonomy of the military by making each corps of the armed forces directly accountable to him. He ultimately reduced the military budget by more than half. See also Osiel, "Making Of", supra note 8 at 149 where he states that during the first few months in office, Alfonsín sought and received the resignation of 59 generals and admirals; he also introduced changes in personnel and pedagogy within the military academies in an effort to eliminate indoctrination of the "National Security Doctrine".
474 Pion-Berlin, "Prosecute or Pardon", supra note 187 at 119.
475 Potash, "Alfonsín's Argentina", supra note 438 at 18. Potash states that, by making these distinctions, Alfonsín attempted to create a middle-ground approach that fostered a process of national reconciliation between the military and civilian populations: "[H]e tried to reassure the members of the military that it was individual officers and not the armed forces as institutions that were on trial" [emphasis added].
476 Nino, Radical Evil, supra note 142 at 63 and 71.
decision-making capacity who planned the repression and gave the accompanying orders; (2) subordinates who acted beyond the scope of those orders; and (3) subordinates who strictly complied with orders. In his view, military personnel in the first two categories would be severely punished, whereas members of the third group would be given "the opportunity to reincorporate themselves in the democratic process".

With regard to determining the scope of responsibility, Alfonsín sought a two-tiered approach: first, he believed he could rely on the military courts to prosecute a small number of people who had committed the most brutal acts as a means of having the military purify itself and regain social credibility; second, he reinterpreted the norm of due obedience to include only those in the first two categories of perpetrators.

He submitted legislation to Congress to amend the Military Code to provide for appeals against rulings of the Supreme Council to the Federal Courts of Appeal, which were civilian courts; and he included a controversial exculpatory clause, stating that defendants would be presumed to have acted "in error about the legitimacy of their actions" for having obeyed orders, unless they had exceeded them. This clause effectively created an irrefutable presumption that all but most senior officers had committed abuses under orders from their superiors and virtually exonerated all military

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477 Nino, ibid. at 63 and 71. Malamud-Goti, "Why Punish", supra note 34 at 3 states that the thought of trying all military personnel responsible for committing human rights abuses was untenable so the government had to decide who was considered "principally responsible" and distinguish different levels of responsibility: those who gave orders, those who executed orders, and those who exceeded orders (NB: Malamud-Goti was the Solicitor General in Alfonsín's government).

478 Nino, ibid. at 63.

479 Ibid. at 71.

480 HRW, Partial Justice, supra note 439 at 14.
Finally, Alfonsín issued a presidential decree that created the National Commission on Disappearance of People ("CONADEP") in an effort to search for the whereabouts of those who disappeared, and he ordered the arrest and prosecution in military courts of the nine generals who had headed the first three juntas. Both these measures immediately exposed Alfonsín's government to criticism by the human rights community.

3.3.3 The National Commission on Disappeared People (CONADEP)

Immediately upon taking office, Alfonsín set up the truth commission entitled CONADEP, through presidential decree, in an effort to determine the fate of the disappeared, and to investigate violations of human rights that occurred under the military regime. Such a commission was unprecedented in Latin America, and not without risk. Alfonsín appointed ten prominent citizens and three government representatives to preside as members of the executive commission. With the popular

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481 Kritz, Transitional Justice, supra note 336 at 324 (Volume II).
483 HRW, Partial Justice, supra note 439 at 13. For a description on CONADEP, see description in Chapter One, section 1.1.3 entitled "Culture of Impunity Reigns in Argentina".
484 Mignone et al., supra note 219 at 125.
485 See supra notes 28 and 482. Factual findings and excerpts from CONADEP's Report, Nunca Más (supra note 1) have been referred to in detail in Chapter Two in the description of the military regime's methods of repression.
486 Pion-Berlin, "Prosecute or Pardon", supra note 187 at 119.
487 Nino, Radical Evil, supra note 142 at 73: Members of CONADEP included: Ernesto Sábato (writer), Magdalena Ruiz Guiñazú (Catholic radio journalist), Ricardo Colombres (justice of the Supreme Court during Frondizi’s government), René Favaloro (famous surgeon who subsequently resigned), Hilario Fernández Long (former director of the University of Buenos Aires during Illia’s presidency), Carlos T. Gattinoni (Protestant pastor), Gregorio Klimovsky (philosopher and mathematician), Marshall Meyer (rabbi of American origin), Jaime de Nevares (Catholic bishop), Eduardo Rabossi (philosopher, lawyer and president of the Argentine Society of Analytical Philosophy). The government also invited both Chambers in Congress to send three representatives to join the Commission, however, only the Chamber of Deputies complied by electing Santiago Marcelino López, Hugo Diógenes Piucill, and Horacio Hugo Huarte (all
Latin American novelist, Ernesto Sábato, as chair, CONADEP heard evidence from survivors and witnesses documenting the state-sponsored terrorism and published its findings in a detailed report entitled *Nunca Más* ('Never Again').

From the beginning, nongovernmental organizations were sceptical and publicly objected to Alfonsín's presidential-appointed committee. They lobbied, without success, for a congressional or parliamentary inquiry, since a bicameral legislative commission would have allowed a greater role for Congress (i.e., it would have had extraordinary powers to compel testimony and to obtain access to material evidence and information). Most Argentine human rights organizations eventually gave in and contributed to CONADEP's inquiry, turning over hundreds of their files on the disappeared. However, these groups' concerns over a presidential commission were later confirmed when members of the armed forces and security forces refused to cooperate with the commission's requests for information, and refused to permit

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three from the Radical Party (*Nunca Más Report*, supra note 1 at 429). Initially, the government wanted representation from the human rights organizations, but at the time, the organizations were still sceptical about the commission and refused to participate (Nino at 73). Alfonsín also created five government departments in order to deal with the different aspects of the Commission's work: Depositions Department, Documentation and Data Processing Department, Procedures Department, Legal Affairs Department, and Administrative Department (*Nunca Más Report at 429*).

488 *Nunca Más Report, ibid.* Hayner, *Unspeakable Truths, supra* note 393 at 34 states that *Nunca Más* immediately became a best-seller in Argentina; over 40,000 copies were sold on the first day of its release, 150,000 in the first eight weeks. The Report has now been reprinted over twenty times, and has sold almost 300,000 copies worldwide. It has been also translated in several languages. In fact, *Nunca Más* is now a required reading in Argentine high schools (Feitlowitz, *supra* note 18 at 247).

489 Nino, *Radical Evil, supra* note 142 at 72: Nino states that Alfonsín rejected proposals to create a bicameral congressional commission, since he believed that a commission linked to Congress would "give legislators an unhealthy opportunity to compete in lambasting the military, and a result create an extremely tense situation".

490 Osiel, "Making Of", *supra* note 8 at 150. In fact, Nobel Peace Laureate Adolfo Pérez Esquivel declined his appointment to CONADEP since it was not a congressional inquiry (HRW, *Partial Justice, supra* note 439 at 14).

491 Hayner, *Unspeakable Truths, supra* note 393 at 34.
inspections of military establishments.\(^{492}\)

CONADEP's mandate was to clarify the events related to the disappearance of persons and investigate their fate or whereabouts.\(^{493}\) It did not have the power of subpoena, nor was its task to determine the exact roles or legal responsibility of those implicated with causing disappearances.\(^{494}\)

CONADEP's mandate was extended to a year because the magnitude of work to be done would have been impossible to complete in the original time frame of six months.\(^{495}\) It held no public hearings, but it maintained a public profile, taking statements from Argentineans around the world and inspecting detention centres, clandestine cemeteries, police facilities, and torture chambers.\(^{496}\)

Members of the commission faced constant threats and resentment from some members in society. Various obstacles impeded the objective of determining the fate of the disappeared, including the fact that many clues and documents had been destroyed, the perpetrators of the crimes were masked, perpetrators used either false names or nicknames and forged credentials, buildings which had served as operational bases were

\(^{492}\) Al, Military Juntas, supra note 470 at 9.

\(^{493}\) Teitel, supra note 218 at 78. However, one author notes that the following significant violations or acts that were not investigated by the commission, or not included in the Report: killings by armed forces in real or staged "armed confrontation", temporary disappearances when the person was released or the body was found and identified, forced exile, detention and torture (survivors who were interviewed by CONADEP had their stories included as witness accounts and were not included in the list of victims), acts of violence by armed opposition, and disappearances by government forces before the installation of military government in 1976 (Hayner, Unspeakable Truths, supra note 393 in Appendix 1, Chart 4 at 316).

\(^{494}\) Osiel, "Making Of", supra note 8 at 145.

\(^{495}\) Feitlowitz, supra note 18 at 13.

\(^{496}\) Hayner, Unspeakable Truths, supra note 393 at 34. HRW, Partial Justice, supra note 439 at 17: CONADEP established branches in several major provincial cities in order to receive testimony. Argentine consulates abroad were also instructed to request exiles to come forward and provide information. Testimony was taken in consulates and embassies in Mexico City, Caracas, Los Angeles, New York, Washington, Paris, Madrid, Barcelona, Geneva, and other cities.
altered, land used for clandestine cemeteries was dug over, and that victims couldn't identify their captors since they were either blindfolded or hooded.\textsuperscript{497}

On the other hand, hundreds of victims came forward to recount their experiences, and human rights organizations, the United Nations, and the Organization of American States aided in compiling files and documents. In total, CONADEP took over 7,000 statements in a nine-month period, documenting 8,960 persons who had disappeared and compiling over 50,000 pages of documentation.\textsuperscript{498} CONADEP delivered its final report, \textit{Nunca Más}, to the government on September 20, 1984.\textsuperscript{499}

Although this report is referred to in detail in Chapter Two, it is useful to provide a brief overview at this point.\textsuperscript{500} The first section of the report describes in detail the methodology of abduction, torture and disappearance as the main methods of repression in a campaign of state-sponsored terror. It documents daily life in the secret detention centres and explains how extermination was used as a political weapon and considers the economic profits of the repression. The second section describes the categories of victims and includes many survivors' accounts of what occurred in the detention centres, including children and pregnant women. The third section discussed the judiciary's inability to deal with the phenomenon of disappearances, and the ineffectiveness of the

\begin{itemize}
\item \textsuperscript{497} \textit{Nunca Más Report}, supra note 1 at 435. Osiel, \textit{Mass Atrocity}, supra note 29 at 15 states that a high-ranking military witness testified to CONADEP that officers were ordered to destroy all records that could establish the junta members ordered criminal acts in execution of the anti-terrorist campaign before the transition to democracy.
\item \textsuperscript{498} Nino, \textit{Radical Evil}, supra note 142 at 79. See Chapter Two for detailed accounts of survivor's testimony regarding disappearances, torture, abduction and murder.
\item \textsuperscript{499} HRW, \textit{Partial Justice}, supra note 439 at 18.
\item \textsuperscript{500} This brief overview is a summary of the Chapters in \textit{Nunca Más}, supra note 1; parts of it are taken from an overview provided by HRW, \textit{Partial Justice}, ibid. at 18-19.
\end{itemize}
writ of *habeas corpus*, the targeting of lawyers for disappearances, and the harassment of human rights leaders. Finally, the report considers the doctrine behind the repression and provides recommendations to state authorities in order to prevent this type of situation from recurring in Argentina.

CONADEP recommended that the Argentinean government improve the justice system, make reparations to the families of the victims, and develop norms that would eliminate disappearances in the future. Other notable recommendations include:

1. **Instilling human rights into the national culture**: for example, the commission recommended that "laws should be passed that make the teaching and diffusion of human rights obligatory in state educational establishments, including civilian, military, and police academies";

2. **Prosecuting perpetrators or removing them from positions of authority**: for example, the commission recommended that "the body that replaces us should speed up the procedures involved in bringing before the courts the documents collected during our investigation";

3. **Undertaking further investigations**: for example, the commission recommended that "the courts should press for investigation and verification of the depositions received by the commission"; and

4. **Financial and other reparations to victims**: the commission recommended that "appropriate laws should be passed to provide children and/or relatives of disappeared with economic assistance, study grants, social security and employment and to authorize measures necessary to alleviate the many varied family and social problems caused by disappearances".

There was considerable debate within the CONADEP regarding publishing the names of those presumed responsible for gross violations of human rights. Instead, CONADEP turned over the names of over one thousand alleged offenders to President Alfonsín secretly, and when the government decided not to publish these names, they were subsequently leaked to the press and published in the weekly *El Periodista*.

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502 Hayner, *Unspeakable Truths*, supra note 393 in Appendix 1, Chart 5 at 320-327.

503 Nino, *Radical Evil*, supra note 142 at 80.

Before its dissolution, CONADEP sponsored a television program in an effort to publicize its findings and make the general public aware of the extent to which gross violations of human rights occurred under the previous government.  

3.3.4 Prosecution of the Former Junta and the Resulting Amnesties

(a) Law 23.049

During the months that followed Nunca Más Report, the government attempted to hold criminal trials for members of the military junta while public support for accountability was still strong. Alfonsín was faced with the issue of how to limit the duration and scope of the junta trials given the copious numbers of officers involved in allegations of human rights abuses.

The Law to Amend the Code of Military Justice (Law 23.049) was passed on February 14, 1984 and sharply limited the scope of military justice and provided the legal framework for the trials that would follow. This law was later challenged on its constitutionality, and upheld by the Argentine Supreme Court. Two relevant provisions are Articles 10 and 11.

505 Nino, Radical Evil, supra note 142 at 80.
506 See supra note 470 for a list of those accused and supra note 29 for those convicted.
507 Nino, Radical Evil, supra note 142 at 71.
508 Al, Military Junta, supra note 470 at 11 and 13. See also Nino, "A Reply", supra note 464 at 223-224 where he states: "The law serves as the cornerstone for the implementation of the government's policy towards human rights violations by military personnel".
509 Crawford, supra note 197 at 22: In 1985, the Supreme Court of Argentina upheld the constitutionality of this law over challenges by the junta members who argued that the provisions allowed appeal to civilian courts violated their right to be heard before military courts.
510 Article 10 of Law 23.049 reads:

The Supreme Council of the Armed Forces shall take jurisdiction, using the summary proceedings in peacetime established by Articles 502 and 504 and related sections of the Code of Military Justice, of the crimes committed prior to the effective date of this law as to which:

1) The accused are military personnel of the Armed Forces and personnel of the security, police and penal forces under operational control of the Armed Forces who acted from March 24, 1976, to September 26, 1983, in the operations undertaken with the alleged motive of curbing terrorism, and

2) The acts would have been comprehended within the Code of Military Justice, Article 108, sections 2, 3, 4, or 5, under its previous text.
Article 10 provides that all crimes committed by members of the security forces in the context of anti-subversive operations since 1973 should be tried originally by the Supreme Council of the Armed Forces ("Supreme Council" or "Council"). However, under this Article, there is also a mandatory appeal to the civilian Federal Courts. Article 10 also gives the Supreme Council of a term of 180 days (six months) to complete each trial (this later became the "Full Stop"\textsuperscript{511} clause).

Article 11 creates a defence for those acts committed by military personnel who were acting under the order of their superiors; so long as those acts were not "atrocious or aberrant" (this later became the "Due Obedience"\textsuperscript{512} defence).

By amending the legislation to open the avenue for appeal to civilian courts, Alfonsín still left the military courts with the initial prosecution, thereby giving the military a chance to cleanse itself.\textsuperscript{513} One author states that his legal strategy reflected

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\textsuperscript{511} See supra note 32.

\textsuperscript{512} Ibid.

\textsuperscript{513} Mignone et al., supra note 219 at 127:

By vesting original jurisdiction in military tribunals, the government sought to avoid the military solidarity that might ensue if all military personnel faced trials in civilian courts. Trials in the military tribunals would, according to the government, allow a section of the armed forces to condemn its own, and, in the process of purging itself of the taint of the 'dirty war', to repudiate the most culpable officials.

And at 142:

The decision to place in the hands of the military itself the prosecution of human rights abuses was a gamble. The Alfonsín government hoped that the Supreme Council – and the vast majority of the armed
the "estimation of the strength of democratic and potentially democratic factions within
the officer corps".\textsuperscript{514}

However, granting the original jurisdiction in the military tribunals created the
first serious constitutional conflict for the restored civilian government.\textsuperscript{515} This flawed
strategy rested on a political calculation whereby Alfonsín wanted to avoid a military
revolt, and give the military forces the opportunity to make things right and demonstrate
to the public that they were committed in pursuing accountability for violations of human
rights.\textsuperscript{516}

Law 23.049 has the paradoxical effect of expanding military jurisdiction at a time when
the civilian government is attempting to consolidate its power over the military as an
institution. By placing the final legal responsibility for the crimes of the dictatorship
outside the constitutionally prescribed judicial power, the Alfonsín government sacrificed
an important opportunity in the campaign to re-establish the rule of law, relying instead
upon a political calculation to avoid a direct confrontation between the armed forces and
the civilian judiciary.\textsuperscript{517} [emphasis added].

From the beginning, Alfonsín's governmental policy was at odds with human
rights groups who demanded civilian justice, and the military who insisted that no crimes
had been committed and no trials should be held.\textsuperscript{518} The "due-obedience" clause became

\textsuperscript{514} Osiel, "Making Of", supra note 8 at 150.
\textsuperscript{515} Mignone et al., supra note 219 at 132.
\textsuperscript{516} Ibid. at 126 states the legal framework provided for in Law 23.049 was "inextricably linked to the
political decision to avoid confronting as an institution the armed forces..." Also Osiel, "Making Of",
supra note 8 at 154 states that the overriding objective of Alfonsín's human rights policy was to create a
sufficient incentive for the military to follow a course of internal criticism and institutional cleansing; he
had hoped the armed forces would dissociate itself from the past regime and re-establish confidence in the
public eye. In this sense, Osiel states that Alfonsín attempted to foment a purging of the officer corps
through internal self-criticism (at 156). However, with the passage of time, this error in political analysis
became evident and the military was not willing to 'clean house'.
\textsuperscript{517} Mignone et al., ibid. at 136.
\textsuperscript{518} Ibid. at 124: "The fate of this policy in the constitutional courts, while still unresolved, exemplifies both
the promise of civilian justice and its frustration by the Alfonsín government's decision to place these cases
in the tribunals of the military".
the "focal point of opposition and distrust" for many human rights organizations and leftist political groups who believed Alfonsín's human rights policy was too broad sweeping and exempted too many from responsibility.\(^{519}\)

Human rights groups also criticized the decision to prosecute the nine former junta members in a military tribunal as opposed to a civilian court as "a hidden amnesty and a sacrifice of the rule of law".\(^{520}\) Human rights groups insisted that justice required that every perpetrator be tried, whereas families of the victims of left-wing terrorism and right-wing groups insisted that the trials were part of a communist conspiracy to destroy the armed forces as an institution.\(^{521}\) They thought that the only way to diminish the role of the armed forces was to challenge all military conduct that violated the principle of civilian supremacy.\(^{522}\) Some groups thought the junta should be indicted for genocide.\(^{523}\)

The military, on the other hand, was upset as Alfonsín's categories of perpetrators would subject hundreds of members of the junta to criminal prosecutions, thereby threatening the "integrity of the military".\(^{524}\) They continually argued their actions were justified by military "necessity" according to the "Doctrine of National Security"; they considered the efforts to hold officers accountable as a moral attack on their institution.\(^{525}\)

These clashes exemplify Argentina's delicate transitional justice situation and explain

\(^{519}\) Nino, *Radical Evil*, supra note 142 at 71.
\(^{520}\) Mignone et al., *supra* note 219 at 125.
\(^{521}\) Potash, "Alfonsín's Argentina", *supra* note 438 at 18.
\(^{522}\) Osiel, "Making Of", *supra* note 8 at 161.
\(^{523}\) *Ibid.* at 163-4: "An indictment...for genocide would have attended to the nature of their victims as political opponents of the dictatorship, and would in this way have more accurately reflected the nature of the crime than even the indictments for murder".
\(^{524}\) Nino, *Radical Evil*, supra note 142 at 71. One author states that the military saw the human rights trials as an attack on its "corporate identity" (Pion-Berlin, "Prosecute or Pardon", *supra* note 187 at 119).
\(^{525}\) See *supra* note 450. Also see Linz & Stepan, *supra* note 34 at 193; and Osiel, *Mass Atrocity*, *supra* note 29 at 16.
why holding trials for former *junta* leaders was so controversial.

(b) *Trials of Junta leaders and the Supreme Council's Contempt*

The *junta* leaders were charged with over 700 separate crimes. The Supreme Council had 180 days to complete its proceedings for human rights abuses or explain reasons for its delay, as per limit set out in Article 10 of Law 23.049. However, the Council procrastinated in judging the military leaders.

After the time period elapsed in July 1984, the Council submitted a report to the Buenos Aires Federal Court of Criminal Appeals. The Court granted the Supreme Council a ninety-day extension (October 11, 1984 was set as the completion date for the trials), but required the Council to submit a progress report on the human rights cases within thirty days.

On September 25, 1984, the Council submitted its second report in which it declared its inability and unwillingness to complete the proceedings against *junta* members. This decision to not prosecute the *junta* leaders was widely criticized by political leaders, lawyers, human rights activist and the press. After tough scrutiny, the Council created an embarrassing problem for the President by resigning *en masse* in protest of what they considered disrespectful treatment by the press, the public, and the

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527 Zalaquett, "Confronting", *supra* note 336 at 24. Human Rights Watch emphasizes the Council's consistent display of contempt for the idea of prosecuting human rights abuses in its 1991 report: "In addition to delaying inordinately on all cases, it prejudged the outcome of the trial against the commanders-in-chief well before the investigation was completed..." (HRW, *Partial Justice*, supra note 439 at 53).
529 Gray, *supra* note 439 at 690: The Chamber then granted an additional 45-day extension the next month after it received the report.
531 Mignone et al., *ibid.* at 141.
The case then went to Federal Appeals Court. The trials began in April 1985 and lasted eight months. On December 9, 1985, the Argentine National Chamber of Federal Criminal and Correctional Appeals unanimously convicted five members of the junta for human rights abuses committed during the 'dirty war', while acquitting four others. The Chamber held the methods employed in the anti-subversive campaign were manifestly illegal. The Chamber also recommended prosecuting every officer and soldier suspected of bearing responsibility for human rights violations.

Below are two notable quotes from Admiral Massera regarding the trial which serve to demonstrate the military's insistence that they were fighting a "war against subversives".

I did not come to defend myself. No one must defend himself for having won a just war. And the war against terrorism was a just war. Nonetheless, I am being prosecuted due to our victory in that just war. [Imagine] if we had lost that war, we wouldn't be here – neither you nor we – since the Supreme judges would have been replaced long ago by the turbulent popular tribunals, and a menacing and irrecognizable Argentina would have replaced the old Fatherland.

This society is like a chameleon. When things are working out in the right direction, many walk along with you. But when they turn bad, everyone retreats. It is a hypocritical society. The people who protest today and are horrified by the things that happened are the very same that in those years used to tell me: Admiral, please go on and kill them all. Follow them to their den and destroy them. And what did they believe that it was all about? It was a war. And in the war – the little Jesus should forgive me – you must kill to remain alive. So, why must we nine men alone express remorse? They persecute us as if we alone were responsible for what happened, and the other 30 millions

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532 Ibid. quoting La Nación, November 15, 1984, at 1, col. 1.
533 Gray, supra note 439 at 691.
534 See supra note 29. See also Gray, ibid. at 694 where he summarizes the Chamber's factual findings: it considered and rejected the important justifications advanced by or potentially available to the various defendants (i.e., state of necessity, fulfillment of duty or in the legitimate exercise of authority or legal right, legitimate self-defence of the nation, and injusticability of acts of war).
535 Osiel, Mass Atrocity, supra note 29 at 16.
536 Roniger & Sznajder, supra note 439 at 67.
537 Ibid. at 60 quoting a statement by Admiral Emilio E. Massera given during the trial.
are not involved at all and can sleep with their consciences at peace? What an injustice!\footnote{Ibid. quoting a 1995 interview with Massera published in Gente entitled 'Yo llevo a Dios sobre mi hombro', Página/12 (27 July, 1995), 7.}

Once the junta trials were complete, the Argentine courts turned to the charges of human rights violations against numerous other military personnel.\footnote{Kritz, Transitional Justice, supra note 336 at 324 (Volume II).} On April 24, 1986, the Minister of Defence issued a set of directives for the General Prosecutor before the Supreme Council aimed at radically reducing the number of prosecutions.\footnote{Garro & Dahl, supra note 444 at 333: Some of these directives were aimed at speeding up the trials; others were designed to bar the military prosecutor from bringing charges against those who had committed atrocities.} As a result of these directives, one judge of the Federal Appeals Court, resigned. Two other judges tendered their resignation, but agreed to stay only after President Alfonsín "assured them there had been no intention to undermine the judgment of the Appeals Court".\footnote{Ibid. at 334: Judge Jorge E. Torlasco resigned; Judges León C. Arslanián and Jorge A. Valerga Aráoz tendered their resignation.}

\textbf{(c) Prosecution of Other Military Personnel}

\textit{(i) The Full Stop Law}

The armed forces exerted increased pressure on the government to limit the number of prosecutions as time went by.\footnote{Kritz, Transitional Justice, supra note 336 at 324 (Volume II); Crawford, supra note 197 at 25. For Alfonsín, time became a crucial factor in prosecuting the military officers for three reasons. First, as time passed, officers were more and more inclined to "close ranks" in an effort to protect their comrades. Second, once the "euphoria" of democracy wore off, economic and social problems would weaken the new administration. Third, as time went on, judges would feel less pressure from human rights organizations and fear of a military coup would further dissuade them from passing judgment (Malamud-Goti, "Why Punish", supra note 34 at 4).} Law 23.492 was therefore enacted on December 24, 1986, which established a 60 day deadline for the initiation of new prosecutions against members of armed forces, police and prison services accused of...
gross violations of human rights committed during the 'dirty war'. However, criminal prosecutions for the crimes of kidnapping and concealment of minors were excluded from the law.

Once the law was passed, the Supreme Council was given 48 hours to pass on all the information about pending cases to the Federal Appeals Court. The Appeals Court could then decide whether to press charges by summoning the defendants within the 60 day time frame. This law was highly criticized by human rights organizations and members of Alfonsín's Radical Party; in fact, another judge of the Federal Appeals Court resigned in protest.

The result of the "full stop" law was that courts, prosecutors, human rights groups, and relatives of victims raced against the deadline in order to file cases and issue summons. Ironically, the 60 day time frame coincided with the summer holidays and one-month annual leave for all the courts; however, instead of taking vacation, the Federal Court decided to forego their holiday and worked "feverishly" to initiate as many legal proceedings as possible in the given time frame. When the midnight deadline passed on February 22, 1987, more than 300 summonses had been issued by eight

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543 See *supra* note 32. Garro & Dahl, *supra* note 444 at 334: However, President Alfonsín denied that his legislative actions were prompted by military pressure.
544 Law 23.492, Article 5.
545 Garro & Dahl, *supra* note 444 at 335.
546 *Ibid.*: Judge Guillermo Ledesma, the presiding judge of the Federal Appeals Court which handed down the judgment against the former commanders, resigned.
548 Potash, "Alfonsín's Argentina", *supra* note 438 at 19-20. At 19, Potash states: "[I]f the President and his advisors thought that this law would ease tensions within the military, they were mistaken; in fact, its implementation contributed to deepening the discontent and to bringing on the most serious Army crisis to confront Argentina since the restoration of democracy".
Federal Appeals Courts throughout the country.  

However, Argentina annulled the "full stop" law in August 2003 and a decision from the Supreme Court on its constitutionality is expected soon.  

This will be the subject of further discussion in Chapters Four and Five.

(ii) The Due Obedience Law

By March 1987, 51 military and police officers had been arrested in connection with gross violations of human rights during the 'dirty war'; twelve had been sentenced, while only five convictions were upheld by the Supreme Court.  

There were still hundreds of cases pending and this angered the armed forces.

The "Full Stop" deadline had not been effective in pacifying the military and the armed forces revolted during the Semana Santa (Easter Holy Week) in 1987.  

A group of heavily armed young officers seized control of a military school and defied their superiors to dislodge them in protest to the continued arrests of subordinate officers for crimes committed during the 'dirty war'.  

This became known as the "Easter Rebellion" or the "Easter Uprising", in effect, it was a mutiny staged by junior officers directed against superiors for not opposing prosecutions more strongly.

In an effort to "mitigate national frustration with the delay" in prosecuting

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549 Garro & Dahl, supra note 444 at 336; Crawford, supra note 197 at 25.
550 See supra note 48.
551 Garro & Dahl, supra note 444 at 337.
552 Ibid.
553 Crawford, supra note 197 at 26.
554 Osiel, Mass Atrocity, supra note 29 at 18.
members of the armed forces, Alfonsín enacted Law 23.521 on June 4, 1987. This "due obedience" law creates a presumption that low-and middle-ranking officers acted under their superiors' orders and duress, and therefore they should not be prosecuted for human rights abuses. It was subsequently challenged, but its constitutionality was upheld in the Argentina Supreme Court.

The decision to not prosecute junior officers who had followed orders not manifestly illegal involved both moral and practical considerations. If Alfonsín attempted to prosecute a large number of officers, he risked the officer corps seeing itself as the "true target" of the government's prosecutions, which could had led to another bloody uprising.

Human rights groups and lawyers disapproved of the "due obedience" law because, in their opinion, it violated the precedents laid down at the Nuremberg trials. They criticized Alfonsín for his "pusillanimity in not defending continued prosecution of indicted officers". They also claimed it violated the constitution's guarantee to equality under the law, and compromised the judiciary's credibility and respectability by

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556 See supra note 32; and Crawford, supra note 197 at 18.
557 Crawford, ibid. at 27: The law is based on the justificatory doctrine of due obedience, known as the "following orders" defence found in Article 514 of the Code of Military Justice and in Article 34 of the Argentine Criminal Code (Codigo Penal).
558 Potash, "Alfonsín's Argentina", supra note 438 at 19. Also see Crawford, ibid. at 17 and 31: On June 22, 1987, in a four-to-one decision, the Supreme Court declared the law constitutional (Supreme Court of Argentina, 22 June 1987, "Causa No. 547 incoada en virtud del Decreto No. 280/84 del Poder Ejecutivo Nacional", 1987-D Revista La Ley 194-266).
559 Osiel, "Making Of", supra note 8 at 154.
560 Ibid.
561 Feitlowitz, supra note 18 at 144.
562 Osiel, Mass Atrocity, supra note 29 at 19.
benefiting those who had committed gross violations of human rights.\textsuperscript{563}

Human rights groups thought that the low-ranking officers who would benefit from the law could conceivably be promoted to positions of greater power (if they hadn't been promoted already), thereby threatening the future of democracy.\textsuperscript{564}

\textquote{The enactment of the due obedience law and the cutback of the prosecutions signal a failure of the Argentine judiciary to fulfill its proper role in the transition to democracy. The Supreme Court yielded to pressure to aid the legislative and executive branches. In doing so, the court upheld the codification of military power and actually undermined the peaceful coexistence without which any democracy faces an uncertain future.\textsuperscript{565}}

The military, on the other hand, argued that those junior officers who followed orders should not be prosecuted. In their opinion, "an army is by nature an organization in which authority cannot be questioned by subordinates at crucial moments without weakening its capacity to defend the country".\textsuperscript{566}

However, Argentina annulled the "due obedience" law in August 2003 and a decision from the Supreme Court on its constitutionality is expected soon.\textsuperscript{567} This will be the subject of further discussion in Chapters Four and Five.

3.3.5 \textit{Alfonsín's Legacy}

The conviction of the former \textit{junta} leaders marks the only case in the history of Latin America where the leaders of a military government responsible for committing

\begin{itemize}
\item \textsuperscript{563} Crawford, \textit{supra} note 197 at 34. Crawford quotes the Mothers of the Plaza de Mayo, who won the 1984 Nobel Peace Prize, and called the law a "judicial parody".
\item \textsuperscript{564} Osiel, "Making Of", \textit{supra} note 8 at 166-7: "If one wished to deter a future coup, it was therefore necessary to remove the most vicious officers from positions of control, irrespective of the subordinate positions they may have occupied during the prior regime".
\item \textsuperscript{565} Crawford, \textit{supra} note 197 at 52.
\item \textsuperscript{566} Osiel, "Making Of", \textit{supra} note 8 at 174.
\item \textsuperscript{567} See \textit{supra} note 48.
\end{itemize}
gross violations of human rights were prosecuted.\textsuperscript{568} Argentina did not have a political
culture, nor any past democratic institution upon which to build itself; the critical
question it faced was the sustainability of the process of dealing with the past.\textsuperscript{569} At the
time, the only existing precedent of how to deal with a legacy of human rights abuses was
that of the Nuremberg and Tokyo trials.\textsuperscript{570} In fact, one author states: "Not since the
Nuremberg trials of the Nazi criminals of World War II had a trial of this nature
anywhere in the world captured so much public attention".\textsuperscript{571}

However, other scholars argue that the "full stop" and "due obedience" laws
violate domestic and international law in that they provide amnesty for crimes against
humanity.\textsuperscript{572} Some argue that the trials did not go far enough. One author contends that
Alfonsín's flawed policies were the cause of the failed effort in holding prosecutions,
arguing that the extended delay in trials lessened public support and outrage at what had
occurred under the military regime.\textsuperscript{573} Alfonsín's vital mistake was providing legislation

\textsuperscript{568} Crawford, \textit{supra} note 197 at 20. In fact, Argentina was the first Latin American country to break the
long history of impunity that surrounded transitions from military to civilian rule (Osiel, "Making Of", \textit{supra} note 8 at 138).
\textsuperscript{569} José Zalaquett, "Truth, Justice, and Reconciliation: Lessons for the International Community" in
Cynthia J. Arnhson, ed., Comparative Peace Processes in Latin America (Washington: Woodrow Wilson
Center Press, 1999) at 351 and 355.
\textsuperscript{570} Roniger & Sznajder, \textit{supra} note 439 at 57.
\textsuperscript{571} Pion-Berlin, "Prosecute or Pardon", \textit{supra} note 187 at 105:
\textsuperscript{572} This will be the subject of further discussion in Chapters Four.
\textsuperscript{573} Huntington, \textit{supra} note 381 at 222. Not all scholars agree on this point. For a detailed analysis on the
dynamics of the political struggle over human rights and civilian-military tensions post dictatorship, see
Acuña & Smulovitz, \textit{supra} note 201 at Chapter Four. Acuña & Smulovitz contend that the politics of
criminal prosecutions were not the simple consequence of Alfonsín's policies, but were the result of a
number of different strategies implemented by all the intervening actors in the course of moving away from
the military dictatorship. They also contend the direction followed in the process did not correspond to the
ideal choice of any of the actors involved, but was marked by a series of unanticipated developments which
strengthened the hand of numerous societal forces – including the judiciary. Acuña & Smulovitz argue the
resolution of the struggle over human rights has led \textit{in the long run} to subordination of the military to
constitutional rule. Finally, they contend that in spite of concessions granted by the Alfonsín and Menem
governments, the high costs and high risks suffered by the armed forces as a result of the investigation and
that gave the military courts primary jurisdiction to try officers, thereby giving the military the incentive and means to later obstruct the prosecutions.\textsuperscript{574}

...Alfonsín championed the human rights issue as no other South American leader had. […] Estimating the probability of a military retaliation against his human rights program to be low, given the armed forces' debilitated condition in the aftermath of the Malvinas defeat, the President enforced a series of reform-minded measures with few countervailing rewards. His assessments proved to be accurate during the first half of his administration, since the armed forces remained compliant. But in the end, he may also have underestimated the military's capacity to resuscitate itself, as witnessed by the three rebellions launched during the second half of his term that forced the termination of judicial proceedings.\textsuperscript{575}

3.4 President Menem's Pardons

I regret nothing. We had to pacify the country in order to transform it. We have definitely closed the wound (President Menem).\textsuperscript{576}

This is the saddest day in Argentine history (Dr. Raúl Alfonsín).\textsuperscript{577}

In June 1989, amidst a state of "hyperinflation" and with his government in ruins, Alfonsín left office six months early.\textsuperscript{578} On July 8, 1989, Carlos Saúl Menem was inaugurated as President, marking the first peaceful and constitutional turnover in sixty years of Argentina's history.\textsuperscript{579}

On October 6, 1989, at the height of an economic collapse and facing continued military rebellions, Menem pardoned the military for human rights abuses committed during the 'dirty war'.\textsuperscript{580} He declared that "permanent reconciliation among all

\begin{footnotesize}
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\item judicial convictions are central reasons for the military's present subordination to constitutional power in Argentina (at 93-94).
\item Huntington, \textit{ibid.} at 222-223.
\item Pion-Berlin, "Proseceute or Pardon", \textit{supra} note 187 at 129.
\item Feitlowitz, \textit{supra} note 18 at 197 quoting President Menem in a March 24, 1996 radio interview.
\item Huntington, \textit{supra} note 381 at 224 quoting the \textit{New York Times} (30 December 1990 p. 9).
\item Linz & Stepan, \textit{supra} note 34 at 194; and Garro, \textit{supra} note 5 at 8.
\item Miller, \textit{supra} note 438 at 1077; and Garro, \textit{ibid.}
\item Decree 1002/89. Kritz, \textit{Transitional Justice}, \textit{supra} note 336 at 324 (Volume II): Menem granted pardons for 39 military officials convicted or charged with violations of human rights, along with more than 200 other pardons for the leftist guerrillas, military personnel charge in connection with the Falklands/Malvinas war, and those convicted for the mutinies under Alfonsín.
\end{itemize}
\end{footnotesize}
Argentinians...is the only possible solution for the wounds that still remain to be healed". Then on December 29, 1990, he pardoned the convicted leaders of the *junta.* Menem claimed he had personal moral authority to authorize the pardons since his Peronist Party had endured years of military repression during the 'dirty war' and since he himself had spent five years unlawfully detained by the military.

### 3.5 Impunity Reigns in Argentina

What lessons can be learned from Argentina's transitional justice situation? Alfonsín's initial strategy to afford the military the opportunity to "clean house" failed. The armed forces continued to justify their actions during the 'dirty war' by the "Doctrine of National Security" and showed no sign of remorse for committing gross violations of human rights.

Though holding trials for human rights abuses was unprecedented in Latin American history, military rebellions gave way to a political compromise. Alfonsín's "full stop" and "due obedience" laws effectively granted an amnesty to hundreds of officers facing prosecutions. The courts were too weak institutionally to secure

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581 Ibid.
582 Decree 2741/90. Roniger & Sznajder, *supra* note 439 at 76: Among those pardoned were: General Videla, Admiral Massera, General Viola, Admiral Lambruschini, Brigadier Agosti, General Camps, General Ricchieri, General Suárez Mason, Montonero leader Mario Firmenich and former Finance Minister José A. Martínez de Hoz. One million citizens signed a letter of protest addressed to Menem rejecting the pardons (at 288). In fact, after the pardon, General Videla sent an open letter to the Chief of Staff stating that the armed forces deserved an apology (at 76).
583 Garro, *supra* note 5 at 17; Osiel, *Mass Atrocity, supra* note 29 at 20; and Teitel, *supra* note 218 at 167.
584 Jaime Malamud-Goti, *Game Without End: State Terror and the Politics of Justice* (Norman: University of Oklahoma Press, 1996) states although trials for human rights abuses are widely acclaimed as essential to transitions to democracy, in Argentina they may have "reinforced the very authoritarian trends they were established to overcome" (at 4 and 5). In his opinion, three negative factors suggest that trials in fact tend to erode democracy: (1) Trials reproduce and authoritarian view by splitting the trials into innocent and guilty or allies and enemies, (2) Those who are not declared guilty are then judged to be innocent, and (3) Since the trials were restricted in scope, they reinvented history by attaching the blame to one social group – the military (at 7 and 8).
confidence in the general population. Judges appointed by Alfonsín's administration were young and inexperienced: they were pressured by a military that would not accept any convictions, and human rights groups that would never have accepted acquittals. Finally, what few convictions were made out were later overturned by Menem's sweeping pardons.

One author asks: "Were the Argentine trials too ethical for the difficult and risky features that characterize a process of democratic transition? Did they undermine the consolidation of the democratic process instead of favouring it?"

By retreating from prosecutions already instituted, the first government of the transition left the impression that it was too weak to prosecute those it believed deserved punishment, and by exculpating the officers principally responsible for organizing the machinery of terror, the second transitional government confirmed the popular belief that the rule of law does not apply to the powerful in Argentina. That is, to be sure, a failure of both transitional governments that cannot be excused by invoking the justification of avoiding military backlash against Argentina's fledgling democracy. Although the threat of contempt was real and the government admittedly confronted an extremely difficult situation, the circumstances were more propitious than ever before for upholding the rule of law and standing up against the demands of the military.

While it is disappointing to note that the perpetrators of state terror in the Southern Cone have since been pardoned for criminal wrongdoing, it is also fathomable, considering the political constraints of the time. If there is a generalization to be had from the Southern Cone experience, it is this: that the political leaders there accomplished far less than what the human rights idealists would have desired, but far more than what the hard core realists would have predicted.

However, recent developments in domestic and international law indicate that there is still hope that former junta leaders may finally be held accountable for their actions during the 'dirty war'. The next Chapter will examine amnesty laws as they apply to the international legal system.

585 Ibid, at 185.
586 Acuña & Smulovitz, supra note 201 at 116.
587 Garro, supra note 5 at 22.
588 Pion-Berlin, "Prosecute or Pardon", supra note 187 at 130.
CHAPTER FOUR: INTERNATIONAL LAW

4.1 International Legal Framework in Support of Accountability

As noted in Chapter One, impunity occurs in a variety of forms and involves the failure of governments to meet their obligations under international law.\(^{589}\) This Chapter's main focus is on amnesty laws and their application to states' international law obligations, in general, and to Argentina, in particular.

In the wake of the Second World War, a "corpus" of international law evolved placing positive obligations on states to investigate and prosecute those responsible for committing certain human rights abuses in an effort to combat international impunity.\(^{590}\) The former League of Nations became the United Nations Organization ("UN") and officially came into existence on October 24, 1945.\(^{591}\)

In the aftermath of the war and the Holocaust, the international community came to the realization that "democracy must be grounded in a profound respect for human rights and justice".\(^{592}\) At this point in history, the notion that every human being has certain fundamental rights independent of domestic law became entrenched in international law by the implementation of various treaties and declarations.\(^{593}\) The

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\(^{589}\) See supra note 74; and Joyner, supra note 7 at 615.
\(^{590}\) Joyner, ibid. at 597.
\(^{592}\) The Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada, "Good Criminal Justice: A Global Commodity" in Changing Face, supra note 35 at 13. Chief Justice McLachlin describes what constitutes an individual's fundamental rights: "The most basic rights are those guaranteed by the criminal law – the right to life; to liberty; to freedom from arbitrary detention, abuse and torture; the right not to be detained without just cause; and the right, upon being detained, to due process" (at 14). She goes on to suggest three reasons why the international community has become increasingly concerned with improving justice: (1) a conception of democracy founded not only on majority rule but on human rights; the recognition that the law is tied to economic progress; and the recognition that world peace is best attained and preserved through the law (at 15).
\(^{593}\) Orentlicher, supra note 81 at 2560.
principle of individual criminal responsibility for egregious criminal acts became fundamental to the punishment of human rights crimes.\textsuperscript{594}

One author comments that we are witnessing a revolution in human rights and in international law, and describes the progress in internationalizing human rights law since the Nuremberg precedent as a "literal explosion of human rights, where human rights has emerged as the new secular religion of our time..."\textsuperscript{595} In fact, the Nuremberg trials and prosecutions were based on a set of norms rooted in international law, and in what would later form the fundamental norms of human rights.\textsuperscript{596}

However, another author notes that since the Second World War and the advent of protection under international law, although the number of international conflicts has decreased, the number of internal domestic conflicts has dramatically increased.\textsuperscript{597} This raises the question: how can international law be of assistance to states dealing with gross violations of human rights that have occurred during a domestic conflict?\textsuperscript{598}

In international law, international criminal law and international human rights law

\textsuperscript{594} Joyner, supra note 7 at 607: "International criminal law today thus confronts the principle that individuals may be held criminally liable under international law, even though their conduct might have been sanctioned or even mandated by domestic law".

\textsuperscript{595} Irwin Cotler, Q.C., M.P., "Globalization, Human Security, and the Role of International Criminal Law" in Changing Face, supra note 35 at 22. Cotler states "this revolution in human rights has itself been anchored in, and inspired by, the revolution in international law..." (at 22). Michael Ignatieff, Human Rights as Politics and Idolatry (Princeton: Princeton University Press, 2001) at 5 calls this a "juridical revolution".


\textsuperscript{597} Bassiouni, "Searching for Peace", supra note 78 at 10 where he states that in the twentieth century alone, an estimated 170 million deaths have occurred due to non-international conflicts.

\textsuperscript{598} For a discussion on the role of international law in general, see Orentlicher, supra note 81 at 2546-2551. Orentlicher states that "By drawing a bright line between crimes that must be punished and those for which amnesties are permissible, international law helps answer an agonizing question confronting many transitional societies: How is it possible to seek accountability without setting off an endless chain of divisive recriminations?" (at 2550).
are complementary to one another and take effect through a variety of mechanisms; "developments in one of these fields affects developments in the other fields". Therefore domestic, regional and international tribunals and declarations play an important role in defining the parameters of international law in a transitional justice context. Legal discourse and scholarly writing are also important in providing an arena in which to open the debate concerning accountability and the limits of granting amnesties for international crimes.

Decisions from various tribunals and literature from leading international law scholars indicate there is an emerging norm in international law requiring states to investigate, prosecute, and provide redress for gross violations of human rights. The legal framework for this norm is derived from various treaties and customary norms that are well established propositions of international law. States must therefore comply with these affirmative obligations in response to massive and systematic violations of fundamental human rights. As such, amnesties, pardons, and impunity laws are generally considered to be in violation of a state's international law obligations.

In her book entitled Impunity and Human Rights in International Law and
Practice, Professor Roht-Arriaza describes three types of provisions in post-World War II multilateral treaties that support the notion that states have a duty to investigate gross violations of human rights: (1) international treaties specifying a state's obligation to prosecute and punish perpetrators of international crimes, (2) authoritative interpretations from broad human rights treaties holding state parties who do not affirmatively investigate, prosecute, and provide redress for grave violation of human rights in breach of the "ensure and respect" provisions, and (3) the right to a remedy included in many human rights instruments providing a strong basis for inferring an obligation to investigate, prosecute, and provide redress.  

In a transitional justice context, conformity to international law obligations should be of paramount concern to new democratic governments. As will be evidenced below, international bodies, and domestic and regional courts decisions indicate that a failure to hold past governments accountable for gross violations of human rights violates the duty to investigate, prosecute, and provide redress that exists under international law.

4.1.1 International Criminal Law Treaty Provisions as a Source of a Duty to Investigate, Prosecute, and Provide Redress for Gross Violations of Human Rights

The doctrine of universal jurisdiction, or a state's duty to punish individuals who commit crimes deemed "international", is not new to international law. At the origin of

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603 Roht-Arriaza, Impunity, supra note 96 at 24.
604 Roht-Arriaza & Gibson, supra note 95 at 844; and Naomi Roht-Arriaza, "Combating Impunity: Some Thoughts on the Way Forward" (1996) 59 Law & Contemp. Probs. 93 [Roht-Arriaza, "Thoughts"] at 95: In addition to growing domestic court practice, international bodies continue to clarify the extent of a state's international law obligations to investigate, prosecute, and compensate victims of international crimes and serious human rights violations. The general tenor has been to reaffirm and expand on duties to investigate, prosecute, and compensate, and to be critical of amnesties that preclude any of these things.
this doctrine is the concept of piracy (pirates were regarded as *hostis humani generis*, or enemies of all humanity that threaten world peace) and *any* state could punish these individuals through their domestic courts. However, universal jurisdiction is permissive, not mandatory, and states had, and often still have, the option of choosing whether or not to prosecute these individuals under international law. On the other hand, the principle *aut dedere aut judicare* (extradite or prosecute) dates back to Grotius, one of the earliest international legal scholars, and makes prosecution mandatory for crimes under international law.

Since World War II and the Nuremberg precedent, individuals may be prosecuted under "contemporary international law" for a variety of international human rights crimes, namely, grave breaches of the *Geneva Conventions*, acts of apartheid, genocide, torture, crimes against humanity in general, and those crimes listed under the *ICC Statute*. Taken together, these international criminal law treaty provisions show an increasing trend in international law requiring states to investigate and prosecute human right abuses:

Overall, the trends with respect to international criminal law show a movement from permissive to mandatory jurisdiction and from the idea of an international tribunal to reliance on national legal systems to prosecute offenders. The crimes covered by these conventions remain few: murder, torture, and inhumane acts such as rape or disappearance. Taken together, these provisions provide one basis for an emerging

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605 Kittichaisaree, *supra* note 37 at 15.
607 Roht-Arriaza, "State Responsibility", *supra* note 219 at 463-464. Roht-Arriaza notes that this provision is also included in many treaties, such as the *Genocide Convention*, the *Geneva Conventions*, the *Torture Convention*, and several other conventions relating to terrorism.
608 Joyner, *supra* note 7 at 598; and see generally Roht-Arriaza, *Impunity, supra* note 96. Steiner & Alston, *supra* note 596 state that it was not until the *Geneva Conventions and Protocols* came into force that the concept of individual criminal responsibility was systematically developed (at 113).
consensus that these human rights violations must be investigated and prosecuted.\textsuperscript{609}

\textbf{(a) Grave Breaches of the Geneva Conventions}

The \textit{Geneva Conventions}\textsuperscript{610} contain a provision listing "grave breaches" of the rights enumerated therein as a war crime under international law, and for which states have universal jurisdiction over the perpetrators. The Conventions provide that "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts...[or] hand such persons over for trial to another High Contracting Party..."\textsuperscript{611}

The definition of "grave breaches" aids in determining what constitutes a crime under international human rights law. Under the Conventions, "grave breaches" of international humanitarian law that states are required to punish are defined as crimes committed against persons or property protected by the Conventions and include:

[W]ilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.\textsuperscript{612}

State parties to the Conventions have an obligation in international law to search for, prosecute, and punish perpetrators of grave breaches, unless that state chooses to turn

\textsuperscript{609} Roht-Arriaza, \textit{ibid.} at 28.
\textsuperscript{610} See \textit{supra} note 112.
\textsuperscript{611} Geneva Conventions, \textit{ibid.} (Convention I, Article 49; Convention II, Article 50; Convention III, Article 129; Convention IV, Article 146.
\textsuperscript{612} \textit{Ibid.} (Convention I, Article 50; Convention II, Article 51; Convention III, Article 130; and Convention IV, Article 147).
over perpetrators for trial to another state party. However, this duty to prosecute "grave breaches" of the Conventions is limited to conflicts of an international character. Yet, as will be discussed below, crimes against humanity, genocide and torture would entail a duty to investigate and prosecute irrespective of the nature of the conflict.

Nevertheless, common Article 3 of the Conventions establishes minimum humanitarian safeguards for non-international conflicts, without an explicit requirement to prosecute crimes stemming from this type of conflict. One could therefore argue

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614 Common Article 2 of the Geneva Conventions states: "In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them".

615 Bassiouni, "Searching for Peace", supra note 78 at 15.

616 Common Article 3 of the Geneva Conventions states:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) Taking of hostages;

(c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2. The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

See also Roht-Arriaza, Impunity, supra note 96 at 25 where Professor Roht-Arriaza notes that the distinction between international and non-international conflicts as set out in the Geneva Conventions is becoming "increasingly blurred" as domestic violence reaches the status of international crimes.
that, under international law, common Article 3 implicitly provides that Argentina had a duty to investigate and prosecute the state-sponsored terrorism that occurred under the 'dirty war', even though this was uniquely a domestic conflict.

Additional Protocol II to the Conventions\(^\text{617}\) set out the obligations of states parties to non-international armed conflicts. Article 6(5) allows for amnesties to be granted in certain circumstances, providing: "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained". This will be the subject of further discussion below in section 4.2.

\(\textbf{(b) The Genocide Convention}\(^\text{618}\)\)

The *Genocide Convention* makes genocide an international crime and establishes universal jurisdiction over its perpetrators. Article 1 of the Convention provides an absolute obligation on states to prevent, punish, and prosecute those individuals responsible for committing acts of genocide.\(^\text{619}\) Article 2 defines genocide as any acts:

\[\text{Committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.}\]

Article 4 provides that any person committing genocide, whether "constitutionally

\(^{617}\) See supra note 113.

\(^{618}\) See supra note 55.

\(^{619}\) Article 1 of the *Genocide Convention* states that "The Contracting Parties confirm that genocide, whether committed in time of peace or war, is a crime under international law which they undertake to prevent and punish".
responsible rulers, public officials, or private individuals" will be punished. Article 5 requires Contracting Parties to enact legislation necessary to give effect to the Convention "and, in particular, to provide effective penalties to persons guilty of genocide..." Finally, Article 6 specifies that "a competent tribunal of the State in the territory of which the act was committed" or an "international penal tribunal" has jurisdiction to try cases of genocide. Notwithstanding the Convention, genocide also remains a "gross crime under customary international law and gives rise to universal jurisdiction to the same degree as over war crimes and crimes against humanity". 620

However, one author notes that the Convention contains two important limitations: (1) the Convention only applies to those perpetrators who specifically intend to destroy a substantial portion of the population of a targeted group, and (2) the victims must constitute one of the targeted groups enumerated in the Convention, namely, national, ethnic, racial, or religious. 621 Acts directed against "political groups" were excluded from the Convention's definition of genocide. 622

In light of these limitations, the Convention would likely be inapplicable to the case of Argentina since the systematic state-sponsored killings that took place during the 'dirty war' were directed against perceived political opponents deemed "subversives".

620 Joyner, supra note 7 at 604.
621 Scharf, supra note 613 at 45.
622 Orentlicher, supra note 81 at 2565 states: "Proposals to include 'political groups' in the definition were rejected in large part because delegates fear that their governments would face interference in their internal affairs if genocide were defined to include acts committed to destroy political groups".
(c) **The Torture Convention**\(^{623}\)

The *Torture Convention* makes torture an international crime and establishes universal jurisdiction over its perpetrators. It also requires states to investigate, prosecute, and compensate victims of torture. Article 1(1) of the Convention defines torture as:

...[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination or any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Unlike other treaties, the *Torture Convention* is not limited to international conflicts and it applies to a state's treatment of its own nationals. Article 2 requires state parties to take effective measures to prevent torture in any territory under their jurisdiction. Article 4(2) obliges states to provide "appropriate penalties" and Article 7(1) requires states to extradite or prosecute those responsible for acts of torture. Articles 12 and 13 of the Convention explicitly require state parties to investigate complaints from alleged victims. Article 14(1) requires states to provide redress for acts of torture. Finally, the Committee against Torture ("CAT") is established under Article 17 to investigate alleged violations of the Convention and review records of state parties. However, the *Torture Convention* cannot be applied retroactively, and a prominent decision concerning Argentina rendered by the CAT dealing with this obstacle will be the subject of further discussion in section 4.3 below.

\(^{623}\) See *supra* note 116.
(d) **The Rome Statute of the International Criminal Court**

The *Rome Statute* states in its preamble that "...it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". Article 5 lists genocide, crimes against humanity, war crimes, and the crime of aggression as international crimes within the jurisdiction of the Court. Article 6 provides the same definition for genocide as in the *Genocide Convention*. Article 7 lists murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment, torture, persecution, enforced disappearance, apartheid, and other inhumane acts of a similar character intentionally causing great suffering as crimes against humanity.

The ICC is widely considered a major step toward ending international impunity for international human rights crimes. It serves as a further international instrument that codifies the duty to investigate and prosecute gross violations of human rights as described above in other international treaties. One government official stated: "The creation of the ICC at the end of the 'bloodiest of centuries' only underscores how interdependent peace and justice are. By strengthening the universal rule of law, which in turn leads to the advancement of universal peace and security, the ICC will be critical in putting an end to the 'culture of impunity'."

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4.1.2 International and Regional Human Rights Instruments as a Source of a Duty to Investigate, Prosecute, and Provide Redress for Gross Violations of Human Rights

(a) Universal System for the Protection of Human Rights

Since states may not have signed or ratified the criminal law treaties described above at the time gross violations of human rights occur, one must consider "broader human rights treaties that provide additional treaty-based sources of an international obligation to investigate, prosecute, and compensate." 626

Several human rights instruments have entered into force since the formation of the UN in 1945. Though most of these instruments do not explicitly refer to a state's duty to investigate or prosecute, they nonetheless impose a general duty on state's to investigate allegations of torture, extra-legal executions, and forced disappearances, and to prosecute and bring to justice those responsible. 627 The international bodies created to monitor enforcement of these treaties and declarations have required that states do so, thereby supporting this emerging norm in international law. 628

Although these existing human rights instruments do not necessarily specify the content of states' obligations toward individuals, they contain provisions to "ensure" and "respect" the full enjoyment of substantive rights. 629 These provisions also recognize an

626 Roht-Arriaza, Impunity, supra note 96 at 28.
627 Orentlicher, supra note 81 at 2540 and 2568.
628 Roht-Arriaza, Impunity, supra note 96 at 28.
629 Méndez, "Accountability", supra note 364 at 259; Roht-Arriaza, ibid. at 29. For example, as will be discussed below, Article 2 of the International Covenant establishes that each state party "undertakes to respect and ensure to all individuals" the rights that it recognizes therein. Article 1(1) of American Convention also commits state parties to "ensure" the rights enumerated therein.
individual's right to remedy when certain rights have been violated. Some scholars argue these provisions obliging states to "ensure" and "respect" rights imply an affirmative duty on states to prosecute gross violations of human rights.

The *Universal Declaration*, while not legally binding, is generally regarded as customary international law, or as embodying the general principles of law. In fact, the Declaration marked the first time in history the rights of individuals received international legal recognition. It has since been codified through specific provisions in many other international treaties and conventions that also call for the prosecution and investigation into gross violations of human rights.

The *Universal Declaration* contains provisions that are considered sources of the duty to investigate, prosecute, and provide redress under international law. Article 5 provides that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". Article 7 states that every person has equal rights and equal protection under the law and Article 8 provides that victims of gross violations of human rights are entitled to redress: "Everyone has the right to an effective remedy by the competent national tribunal for acts violating the fundamental rights granted him by the

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630 Roht-Arriaza, "State Responsibility", *supra* note 219 at 475. See, for example, Article 8 of the *Universal Declaration*; Article 2(3) of the *International Covenant*; and Article 25 of the *American Convention*.

631 Scharf, *supra* note 613 at 48. For an example of those authors who support this proposition, see generally Roht-Arriaza, *Impunity*, *supra* note 96; Roht-Arriaza, "State Responsibility", *supra* note 219 at 467; and Orentlicher, *supra* note 81 at 2568.

632 See *supra* note 120.

633 Joyner, *supra* note 7 at 591 states the *Universal Declaration* is the "cornerstone of modern international human rights law". Warren Allmand, "Combating Impunity: The Convention Against Torture", in *Changing Face*, *supra* note 35 at 161 states the provisions of the *Universal Declaration* have been cited in so many courts, that they have become part of customary international law.

634 Ignatieff, *supra* note 595 at 5.
constitution or by law”. Finally, Article 10 provides "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".

Taken together, one can infer from the provisions of the *Universal Declaration* that states have the obligation to investigate alleged violations of fundamental human rights, take appropriate measures against the perpetrators by ensuring that they are prosecuted and tried, and ensure the victim receives an effective remedy.635

The *International Covenant*636 also provides for the protection of victims of gross violations of human rights. Article 7 (similar to Article 5 of the *Universal Declaration*) provides that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation". The Covenant maintains an interpretive body at the UN devoted solely to its alleged violations, and it includes a provision for a Human Rights Committee to monitor state compliance with it.637

On its face, the *International Covenant* is silent with regard to a specific duty to investigate and prosecute perpetrators of gross violations of human rights.638 However, Article 2 provides for an obligation to bring to justice and punish those responsible for violations of human rights by obliging each state party to "respect and ensure" the rights

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635 Joyner, *supra* note 7 at 592 and 618.
636 See *supra* note 121.
637 Roht-Arriaza, *Impunity, supra* note 96 at 29. For a description of the Committee's duties, see Articles 28-45 of the *International Covenant*.
638 Orentlicher, *supra* note 81 at 2551.
enumerated therein.\textsuperscript{639} One can therefore infer from this provision that a duty to investigate and prosecute exists under the Covenant.

\textbf{(b) \textit{Inter-American System for the Protection of Human Rights}}

Various regional instruments and decisions also play an important role in enforcing international obligations under human rights treaties. The three main regional systems are the Inter-American System\textsuperscript{640}, the African System\textsuperscript{641}, and the European System\textsuperscript{642}. Given the topic of this thesis, only the Inter-American System will be analyzed.\textsuperscript{643} One author goes so far to suggest that "Latin America provides some of the more salient examples of how to respond to gross violations of human rights and how to avoid international obligations for such violations."\textsuperscript{644}

Pursuant to the \textit{Charter of the Organization of American States} ("OAS"), the Inter-American System is comprised of the Commission on Human Rights ("Inter-American Commission") whose role is to promote and protect human rights in all

\textsuperscript{639} Article 2 of the \textit{International Covenant} states: "Each State Party to the present Convention undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Convention, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

\textsuperscript{640} The Inter-American System is comprised of the \textit{American Declaration of the Rights and Duties of Man} (1948) ("American Declaration") and the \textit{American Convention on Human Rights} (1969). Note that neither Canada nor the United States has ratified the latter Convention.

\textsuperscript{641} The African System is comprised of the \textit{African Charter for Human Rights and People's Rights}, which was approved by the Organization of African Unity in 1981.

\textsuperscript{642} The European System is comprised of the \textit{European Convention on Human Rights} of 1950 and the \textit{European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment} of 1987.


\textsuperscript{644} Penrose, \textit{supra} note 14 at 287.
territories of the OAS, and the American Convention on Human Rights ("American Convention") which provides that the Inter-American Court on Human Rights ("Inter-American Court") is the second principal organ of the Inter-American System. The Commission is made up of seven members and has investigative powers to consider complaints of allegations of violations of rights enumerated in the Convention. Once the Commission's procedures have been exhausted, the case can be referred to the Court. The Court is made up of seven judges and has both contentious and advisory jurisdiction to hear cases from state parties brought by either the Commission or an individual from a state party to the Convention.

The Inter-American Court was the first regional or international court to confront the question of governmental policies of gross and systematic human rights abuses, including the international crime of forced disappearance. The Court's decision in the Velásquez Rodriguez case is a widely cited example of how the American Convention has been interpreted to impose an affirmative obligation on states parties to ensure that the

645 Charter of the Organization of American States, 1948, amended 1967, 1985, 14 December 1992, 10 June 1993 (entered into force 13 December 1951). Integrated text of the Charter as amended by the Protocols of Buenos Aires and Cartagena de Indias, the Protocol of Amendment of Washington; and the Protocol of Amendment of Managua, reprinted in 33 ILM 981 (1994), Article 106. See also, Steiner & Alston, supra note 596 at 868-869: The Organization of American States was established in May 1948 at the 9th Inter-American Conference held in Bogotá and the Charter entered into force in December 1951; The Commission was created in 1959, but did not enter into force until 1978; The major challenges the Inter-American System faces are states of emergency, a weak or corrupt domestic judiciary, and large-scale practices involving torture, disappearances and executions.
647 Ibid., Chapter VII, Articles 34-51 for a detailed description of the Commission's role and function.
648 Ibid. Article 50.
649 Ibid., Chapter VIII, Articles 52-69 for a detailed description of the Court's jurisdiction.
650 Pasqualucci, "Whole Truth", supra note 501 at 323.
This landmark case originated from a petition against the state of Honduras for the arrest, detention, torture and disappearance of Manfredo Velásquez, a student activist, by the Honduran military. The Commission submitted the case to the Court recommending the Court find the state of Honduras in violation of numerous rights contained in the American Convention. The case stands for the proposition that states owe a duty to individuals to protect them from torture and disappearance.

In 1988, after seven years of deliberation, the Court found the state of Honduras responsible for the involuntary disappearance of Velásquez, and in violation of the rights guaranteed in Articles 4, 5, and 7 of the American Convention. The Court also held that the state of Honduras failed to guarantee the specific rights enumerated in the Convention, thereby violating the obligation to bring to justice and punish perpetrators of human rights abuses, provided for in Article I(1) "to respect the rights and freedoms recognized herein and to ensure to all persons...the free and full exercise of those rights”.

In the Court's opinion, Article I(1) "is essential in determining whether a violation of human rights recognized by the Convention can be imputed to a State Party".

Referring to a state's obligation to "ensure" the free and full exercise of rights enumerated

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651 Inter-American Court of Human Rights, Case of Velásquez Rodríguez, Judgment of 29 July 1988, Series C: Decisions and Judgments No. 4, reprinted in Kritz, Transitional Justice, supra note 336 at 586 (Volume III).
652 Steiner & Alston, supra note 596 at 881 states this case remains one of the most influential and cited decisions of an international human rights tribunal to date.
653 Penrose, supra note 14 at 290.
654 Article 4 of the American Convention concerns the right to have his life. Article 5 concerns the right to physical, mental, and moral integrity and the right to not be subjected to torture or to other cruel, inhuman, or degrading punishment or treatment. Article 7 concerns the right to personal liberty and security and the right to not be subjected to arbitrary arrest or imprisonment.
655 Velásquez Rodríguez case, supra note 631 at para. 164.
in the Convention, the Court ruled:

This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.656

The Court held that this obligation entails a legal responsibility to "take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation" into every situation of alleged violations of the Convention, in an effort to identify those responsible, impose appropriate punishment, and provide the victim with an effective remedy.657 However, not all failures to investigate human rights abuses would necessarily amount to a breach of the Convention, but the state must undertake this duty in a "serious manner and not merely as a formality".658 The Court concluded:

If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction...659

Finally, the Court noted that this duty "continues as long as there is uncertainty about the fate of the person who has disappeared".660 Human rights groups argue this decision signals that by allowing impunity for gross violations of human rights to continue, a state would be in breach of its international obligations.661

656 Ibid., at para. 166.
657 Ibid., at paras. 174.
658 Ibid., at para. 177.
659 Ibid., at para. 176.
660 Ibid., at para. 181.
661 The International Commission of Jurists, Amnesty International and Human Rights Watch, Occasional Papers: Amicus Curiae Brief on the Incompatibility with International Law of the Full Stop and Due
Although the Court stopped short of encouraging the Honduran state to institute criminal proceedings against those responsible for the disappearance of Velásquez, its holding that states have a duty to "prevent, investigate, and punish any violation of the rights recognized in the Convention" has been widely cited as support for the emerging norm in international law to investigate and prosecute gross violations of human rights.662

In light of the holding in the Velásquez case, the Commission reconsidered the permissibility of amnesty laws in other Latin American countries.663 For example, in 1992, the Commission determined that Argentina's amnesty laws were in violation of Articles 1, 8 and 25 of the American Convention relating to the duty to investigate, prosecute, and provide redress for gross violations of human rights.664

In other cases, the Court held that "the State has the obligation to use all legal means at its disposal to combat that situation, since impunity fosters chronic repetition of human rights violations, and total defencelessness of victims and their relatives"665 and that "the State has a duty to avoid and combat impunity".666

Finally, other Inter-American legal instruments, such as the Inter-American Convention on the Forced Disappearance of Persons667, the Inter-American Convention

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662 Velásquez Rodríguez case, supra note 651 at para. 166.
663 Scharf, supra note 613 at 51.
664 See infra note 735. The Inter-American Commission also revisited the question of permissibility of amnesty in cases concerning Chile, El Salvador and Uruguay (see Scharf, ibid. at 51).
665 Inter-American Court of Human Rights, Case of Paniagua Morales et al., Judgment of 8 March 1998, Series C: Decisions and Judgments No. 37, para. 173, reprinted in International Commission of Jurists et al., supra note 661 at para. 25.
666 Inter-American Court of Human Rights, Case of Nicholas Blake, Reparations Judgment of 22 January 1999, Series C: Decisions and Judgments No. 48, para. 64, reprinted in International Commission of Jurists et al., ibid.
to Prevent and Punish Torture\textsuperscript{668}, and the Draft Declaration on the Protection of All Persons from Enforced or Involuntary Disappearances\textsuperscript{669} provide further evidence of an existing norm to investigate and prosecute gross violations of human rights.

4.1.3 Customary International Law as a Source of a Duty to Investigate, Prosecute, and Provide Redress for Gross Violations of Human Rights

Independent of international criminal law treaty provisions and human rights instruments, states must respect the obligation to investigate, prosecute, and provide redress for gross violations of human rights that arises out of customary international law. Although treaty law provides the "express undertaking of states" and is "the clearest form of a legal obligation", some states may not have signed or ratified the relevant treaties at the time of the alleged violations.\textsuperscript{670}

Customary international law results from a general and consistent practice followed by states out of a sense of legal obligation (\textit{opinio juris}).\textsuperscript{671} Scholars generally agree that torture, extra-legal executions, and forced disappearances are prohibited by customary law.\textsuperscript{672}

Professor Roht-Arriaza suggests that, if combined, four sources indicate an emerging obligation under customary international law to investigate, prosecute, and provide redress to victims of gross violations of human rights: (1) the treaty provisions discussed in sections 4.1.1 and 4.1.2 as a basis of an existing customary norm, (2)
diplomatic practice, (3) the customary law surrounding crimes against humanity, and (4) the practice of arbitral tribunals under the rules of state responsibility for the protection of aliens.673

Practice at international tribunals, conferences, forums, and the UN, as well as statements and scholarly opinions of Special Rapporteurs, experts and NGOs also contribute to the campaign against impunity, and are reflective of an existing customary norm in international law.674 Finally, *jus cogens* and *obligatio erga omnes* support the notion of an existing obligation under international law to investigate, prosecute, and provide redress for human rights violations.

(a) **Crimes Against Humanity**

The law arising from the Nuremberg prosecutions and trials of war criminals after the Second World War characterized certain crimes as offences punishable under international law.675 Article 6(c) of the *Nuremberg Charter* defines crimes against humanity as:

[M]urder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.676

One author notes the Allied powers based the Nuremberg tribunal's jurisdiction on two main rationales: "crimes against humanity could be punished because they violated

673 Roht-Arriaza, "Non-Treaty Sources", *supra* note 123 at 40.
674 Ibid. at 39-56.
675 Ibid. at 50.
elementary principles of humanity, and because they threatened world peace". 677

Another author states the "core principle" of the law relating to crimes against humanity is widely accepted: "atrocious acts committed on a mass scale against racial, religious, or political groups must be punished". 678

Crimes against humanity have become part of customary international law and have been included in various international treaties mentioned throughout this Chapter. A state's failure to punish these acts would be a derogation of its duty under customary law. 679

(b) *Jus Cogens and Obligatio Erga Omnes*

International law recognizes certain peremptory norms from which no state can derogate. These norms carry with them certain obligations since they affect the international community as a whole: "*jus cogens* refers to the legal status that certain international crimes reach, and *obligatio erga omnes* pertains to the legal implications arising out of a certain crime's characterization as *jus cogens*". 680

Crimes deemed *jus cogens* are reflective of the "core constitutive values and

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677 Roht-Arriaza, "Non-Treaty Sources", *supra* note 123 at 50.
678 Orentlicher, *supra* note 81 at 2594.
679 Naomi Roht-Arriaza, "Special Problems of a Duty to Prosecute: Derogation, Amnesties, Statutes of Limitation, and Superior Orders", in Roht-Arriaza, *Impunity, supra* note 96 at 67; and Orentlicher, *ibid.*, at 2593 where she states the *Nuremberg Charter* provided permissive jurisdiction for prosecutions for crimes against humanity, but it did not require states to prosecute; However, subsequent UN resolutions and treaties support an obligation to prosecute such crimes.
680 M. Cherif Bassiouni, "International Crimes: *Jus Cogens* and Obligation *Erga Omnes*" (1996) 59 Law & Contemp. Probs. 63 [Bassiouni, "International Crimes"]. At 68, Bassiouni states that the legal basis for treating a crime as *jus cogens* consists of: (1) international pronouncements reflecting the recognition that these crimes are deemed part of customary international law (opinio juris), (2) language in preambles or other provisions of treaties applicable to these crimes which indicates these crimes have a higher status in international law, (3) the large number of states which have ratified treaties related to these crimes, and (4) the *ad hoc* international investigations and prosecutions of perpetrators of these crimes.
commitments of the international community".\textsuperscript{681} Certain international crimes, such as aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture have risen to the level of \textit{jus cogens} and states are therefore under an obligation in international law to extradite or prosecute those responsible for these crimes.\textsuperscript{682}

\textbf{(c) Practice at the United Nations}

Activities at the UN and other intergovernmental organizations reflect the trend that states have a duty under customary international law to investigate, prosecute, and provide redress for gross violations of human rights.

\[\text{Reports prepared by Special Rapporteurs, Special Representatives, and Working Groups appointed by the Commission on Human Rights of the United Nations to report on human rights conditions in particular countries or on particular types of human rights violations have repeatedly condemned governments' failure to punish torture, disappearances, and extra-legal executions.}\textsuperscript{683}\]

The UN Human Rights Committee ("UNHRC") was established to monitor compliance with the \textit{International Covenant} and to hear individual cases under the First \textit{Optional Protocol} to the Covenant.\textsuperscript{684} The UNHRC issues comments on communications received from individuals alleging they have suffered violation of enumerated rights in the Covenant. The Committee has developed an extensive set of

\textsuperscript{682} Bassiouni, "International Crimes", \textit{supra} note 680 at 63, 65-66 and 68.
\textsuperscript{683} Orentlicher, \textit{supra} note 81 at 2583. For example, the UN General Assembly has stated that extrajudicial, summary and arbitrary executions, and torture constitute flagrant violations of human rights (see generally U.N. Resolution No. 53/147 on "Extrajudicial, Summary or Arbitrary Executions", adopted on December 9, 1998, and Resolution No. 55/89 on "Torture and other Cruel, Inhuman or Degrading Treatment or Punishment", adopted on February 22, 2001, as quoted in International Commission of Jurists et al., \textit{supra} note 661 at para. 9).
comments regarding impunity, finding that the *International Covenant* requires state parties to investigate allegations of human rights abuses, bring those perpetrators to justice, and ensure such acts are not repeated in the future. Some scholars rely on these "authoritative interpretations" by the UNHRC to support the notion that states have a duty to investigate, prosecute, and provide redress for human rights violations.

For example, in a General Comment issued in 1982 interpreting Article 7 of the *International Covenant* the UNHRC stated:

[It is not sufficient for the implementation of [article 7] to prohibit [torture or other cruel, inhuman or degrading] treatment or punishment or to make it a crime. Most States have penal provisions which are applicable to cases of torture or similar practices. Because such cases nevertheless occur, it follows from article 7, read together with article 2 of the Covenant, that States must ensure an effective protection through some machinery of control. Complaints about ill-treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible, and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation.]

In another General Comment issued in 1992 interpreting the same Article, the UNHRC made it clear that states have a duty to investigate allegations of torture and hold the perpetrators responsible, over and above the duty to provide victims with an effective remedy. As such, the Committee issued a statement that amnesties covering acts of torture "are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future."

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685 Roht-Arriaza, "Thoughts", supra note 604 at 95.
686 Scharf, supra note 613 at 48.
688 Human Rights Committee, General Comment No. 20 (44) on Article 7, U.N. Doc. CCPR/C/21/Rev.1/Add.3 (April 1992) at para. 15. See also Orentlicher, *ibid.*
In a further interpretation in 1995, the UNHRC stated that Argentina's amnesties and pardons "impeded investigations" and are inconsistent with the *International Covenant* because they create "promote an atmosphere of impunity" and "deny effective remedy to victims".\(^{690}\)

One author comments that this so-called "authoritative interpretation rationale" is based on the "overstretched" notion that state parties to *International Covenant* are also bound by interpretations rendered by the UNHRC.\(^{691}\) Nonetheless, the author agrees that "an increasing number of commentators, as well as the state-parties themselves, seem to consider the Committee's comments as Covenant jurisprudence...", but in his opinion, the Committee's comments do not support an obligation to prosecute violated rights of the *International Covenant*, but simply "urge" countries "should" bring violators to justice.\(^{692}\)

However, another author argues the language used by the UNHRC may be the result of its mandate "to forward its 'views' to the states concerned rather than to adjudicate cases", and although the interpretations do not explicitly require prosecution, the Committee, through one decision in particular, has suggested that with regard to gross violations of human rights, anything short of criminal prosecution would be in breach of the *International Covenant*'s duty to ensure rights.\(^{693}\)

In light of these comments, one can conclude that the body designated to interpret

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691 Scharf, supra note 613 at 49.

692 Ibid. at 49-50.

693 Roht-Arriaza, "Thoughts", supra note 604 at 95. The UNCHR decision Roht-Arriaza is referring to was Communication No. 563/1993, Views of the U.N. Human Rights Committee (Oct. 27, 1995) concerning a Colombian political activist who was kidnapped and assassinated by armed men.
the Covenant, the UNHRC, has issued declarations in further support of the existence of a norm in international law requiring states to investigate, prosecute, and provide redress for gross violations of human rights. The UN Commission on Human Rights has also turned its attention to the issue of impunity by appointing Special Rapporteurs and creating different Sub-Commissions and Working Groups.694

4.2 Amnesties and International Law

4.2.1 Amnesty Legislation and Liberal International Law Theory

In his article entitled "Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation", William Burke-White constructs a new deontological framework for analyzing impunity laws.695 He raises three problematic foundations of amnesty laws: (1) they are often enacted by self-serving dictators, (2) they may conflict with a state's domestic law or constitution, and (3) they often violate a state's international law obligations.696

The past debate over amnesty legislation has followed a "three mental paradigm": retribution, sovereignty, and expediency.697 Burke-White proposes a new theoretical approach by "imbuing liberal international law theory with certain normative values".698 While past studies have been based on realist models and assumed that governments

694 Ibid. at 96. For example, there is a Working Group on Enforced or Involuntary Disappearances, a Working Group on Arbitrary Detention, a Sub-Commission on Prevention of Discrimination and Protection of Minorities, and a Sub-Commission on the Promotion and Protection of Human Rights. For further detail on Working Groups, Sub-Commissions and Special Rapporteurs, see the U.N. Human Rights Commission website online: <http://www.unhchr.ch/>.
695 Burke-White, supra note 129.
696 Ibid. at 467.
697 Ibid. at 468.
698 Ibid.
enacting amnesty legislation are unified entities, Burke-White's study applies liberal international law theory to the study of amnesty and to determinations of the validity and scope of the amnesty legislation.

He suggests that liberal international relations theory as applied to international law presumes states' functions depend on "individual choices". As such, he incorporates a set of norms and values into liberal international law theory thereby transforming international law theory from a positive theory into a normative tool for judges and policymakers considering amnesty legislation.

Burke-White's model has two key axes: legitimacy and scope. Legitimacy addresses domestic and international sources and the results of the amnesty laws, whereas scope addresses the crimes and individuals covered by the amnesty laws.

In considering legitimacy, he analyzes the following three questions: (1) Did the government supervising the law's enactment base its authority on the will of the people? (2) Was the process by which the law was passed reflective of the people as the ultimate source of authority? (3) Was the process by which the law was applied reflective of the people's will? In other words, the very concept of democracy is in question in any legitimacy analysis — "the will of the people is the basis of the authority of government".

Determining the scope of the amnesty laws involves considering international

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699 Ibid. at 470.
700 Ibid.
701 Ibid.
702 Ibid. at 472.
703 Ibid. at 471.
treaties and customary law as they apply to amnesty legislation in general.\textsuperscript{704} For example, even if the law has full domestic legitimacy, it cannot be granted for international crimes which are non-derogable under international law. In considering scope, one must also evaluate the availability of alternate modes of recourse to victims.\textsuperscript{705}

By using these two axes of legitimacy and scope, Burke-White divides amnesty legislation into four categories: (1) locally legitimized, partial immunity, (2) blanket amnesty, (3) internationally legitimized, partial immunity, and (4) international constitutional immunity.\textsuperscript{706}

In order to apply this model to Argentina's amnesty laws, the first axis, legitimacy, must take into account the three questions mentioned above. First of all, one must consider whether the Alfonsín government was truly a democracy at the time the "full stop" and "due obedience" laws were passed. Second, was the process by which the laws were enacted legitimate and approved by the Argentine people? Third, were the impunity laws applied in a manner reflective of the Argentine people? In determining the answer to these questions, one must also consider the international perspective on these 1986 and 1987 laws.

The author of this thesis concludes that the Argentine laws lack legitimacy. There is no doubt that Argentina was, or was entering a process of democracy at the time the laws were passed. But President Alfonsín enacted this legislation in an effort to thwart a military uprising, rather than reflect the will of the people. In fact, as will be discussed

\textsuperscript{704} Ibid. at 478.
\textsuperscript{705} Ibid.
\textsuperscript{706} Ibid. at 479.
below, many groups and citizens, both nationally and internationally, have always condemned the laws claiming they precluded the prosecution of hundreds of officers who had committed human rights abuses during the 'dirty war'.

As for the scope of the Argentine laws, the "due obedience" clause included an irrefutable presumption that junior officers acted under their superiors' orders and duress, and that they should not be prosecuted for human rights abuses. However, it did not apply to "atrocious and aberrant acts" and the crimes of rape, kidnapping and concealment of minors were excluded from the law.

The effect of the laws' scope was a sweeping and broad amnesty to many officers who committed gross violations of human rights, including murder, torture, and forced disappearance. As such, Argentina violated its international obligations under both treaty and customary law.

Burke-White concludes that "The Argentine amnesty represents a transition from Blanket Amnesty to a Locally Legitimized, Partial Immunity. Its scope is still broad, but it has significantly greater domestic legitimacy".

4.2.2 Amnesties for Gross Violations of Human Rights

Even though there is an established, or at least emerging, norm in international law requiring states to investigate, prosecute, and provide redress for gross violations of human rights, how does international law treat amnesties granted in the wake of a transition to democracy? Are treaty-based rights set out in the Geneva Conventions,
genocide convention, and torture convention derogable? Furthermore, is the duty to investigate and prosecute overcome by certain domestic considerations in a transitional justice context?

In general, states can only derogate from the duty to investigate, prosecute, and provide redress if the failure to do so falls within an accepted exception listed in the treaty. Treaty law provides the defence of "public emergency" to a derogation of treaty rights. For example, Article 4(1) of the International Covenant permits a state to derogate from its obligation under the Covenant "in a time of public emergency which threatens the life of a nation...provided that such measures are not inconsistent with their obligations under international law." Article 27(1) of the American Convention allows a similar derogation "in time of war, public danger, or other emergency" so long as the state party remains in conformity with its obligations under international law.

Customary international law provides the defence of "necessity" in which a state may derogate from its obligations under customary law. However, for a state to invoke necessity, "it must show that there were no alternative measures of confronting the posed danger and that by derogating from customary law, the state did not create a further danger and that the amnesty is not prohibited by a treaty." Nevertheless, scholars generally agree that amnesties for gross violations of human rights, including international crimes such as torture, execution and forced

\[711\] Ibid. at 485.
\[712\] Ibid. at 484.
\[713\] Ibid. at 505.
\[714\] Ibid. at 505.
disappearance, can never be justified under international law or on policy grounds.\footnote{Ibid. at 485; Kritz, \textit{Transitional Justice}, \textit{supra} note 336 at xxxii (Volume II); Ambos, \textit{supra} note 7 at 11; Joyner, \textit{supra} note 7 at 613. For further discussion on amnesties and international law, see generally Douglass Cassel, "Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities" (1996) 59 Law & Contemp. Probs. 197 and Jessica Gavron, "Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court" (2002) 51 I.C.L.Q. 91.} Human rights groups argue that amnesties "help to create a climate of impunity for the perpetrators of human rights violations and undermine efforts to re-establish respect for human rights and the rule of law" which would be in violation of a state's obligations under the \textit{International Covenant}.\footnote{International Commission of Jurists et al., \textit{supra} note 661 at para. 42.} Louis Joinet, Special Rapporteur to the UN, suggested that international crimes such as torture, forced disappearances, and summary executions may be crimes for which amnesty should not be granted.\footnote{Study on Amnesty Laws and their Role in the Safeguard and Promotion of Human Rights, \textit{Preliminary Report} by Mr. Louis Joinet, Special Rapporteur, U.N. Comm'n on Hum. Rts. (Provisional Agenda Item 9(a)), U.N. Doc. E/CN.4/Sub.2/1985/15 (1985), as quoted in Roht-Arriaza, "State Responsibility", \textit{supra} note 219 at 487.}

However, several scholars argue that the wording in Article 4 of the \textit{Torture Convention} to provide "appropriate penalties" may allow for some type of amnesties, whereas the wording in Articles 3 and 4 of the \textit{Genocide Convention} that those who commit genocide "shall be punished" contains direct support for the notion of an existing duty to investigate and prosecute gross violations of human rights.\footnote{Scharf, \textit{supra} note 613 at 46.}

Professor Peter Burns analyzes to what extent general or specific amnesties be regarded as a breach of a state party's obligations under the \textit{Torture Convention}.\footnote{Burns, \textit{supra} note 35 at 156.} He concludes that general amnesties, "by their very nature", would constitute a breach of the
Convention, since they are usually proclaimed by an ousted oppressive regime.\footnote{Ibid.} However, specific amnesties granted to certain individuals who have committed human rights violations present a more complex case, especially if the amnesty is granted in exchange for participation in a process of fostering national reconciliation, like testifying at a truth and reconciliation.\footnote{Ibid. at 157.}

In such cases where the amnesty is conditional upon the perpetrator admitting his or her guilt, Professor Burns concludes that the granting of an amnesty, even for the purposes of national reconciliation, may not meet the obligations specified in the \textit{Torture Convention}.\footnote{Ibid.} On the other hand, if the truth commission was created with the power to order prosecutions or amnesties, the granting of an amnesty could be regarded as part of the investigatory process, and would therefore meet the statutory obligations under the Convention.\footnote{Ibid. at 157-158.}

That is not to say that every amnesty is incompatible with international law. As mentioned above, provisions of certain treaties permit derogation of the rights enumerated therein in the case of a "public emergency".\footnote{See supra note 713.} Article 6(5) of the \textit{Additional Protocol II to Geneva Conventions} allows for the granting of amnesties in a non-international conflict.\footnote{See supra note 113.} However, evidence suggests this provision allows states a limited power to grant amnesties.\footnote{See supra note 113.} For example, the International Committee of the

\footnote{Roht-Arriaza & Gibson, supra note 95 at 863-864.}
Red Cross has officially interpreted the scope of Article 6(5) narrowly, concluding this provision is inapplicable to amnesties that extinguish penal responsibility for persons who have violated international law: "The travaux préparatoires of 6(5) indicate that this provision aims at encouraging amnesty, i.e., a sort of release at the end hostilities. It does not aim at an amnesty for those having violated international humanitarian law".  

Another argument presented against the granting of amnesties is that allowing amnesties for human rights abuses that occurred during non-international armed conflicts is contrary to the stated goal "to ensure more protection for victims" of Protocol II to the Geneva Conventions.

In conclusion, states cannot, in principal, grant amnesties for certain grave violations of human rights, such as torture, extra-legal executions, and forced disappearance. While an international norm permitting amnesties exists in limited circumstances, an amnesty cannot be granted for non-derogable rights and would never apply to gross violations of human rights.

4.3 Argentina's "Full Stop" and "Due Obedience" Laws and Resulting Pardons

Scholars, human rights groups and NGOs have repeatedly condemned Argentina's "full stop" and "due obedience" laws claiming they are incompatible with the state's obligation under international law to investigate, punish, and bring to justice perpetrators.

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727 Letter dated 1995 from the International Committee of the Red Cross to the Prosecutor of the Criminal Court for the Former Yugoslavia and as repeated in another communication from the International Committee of the Red Cross dated April 15, 1997 (reprinted in International Commission of Jurists et al., supra note 661 at para. 48). See also Roht-Arriaza & Gibson, ibid. at 864.

728 Roht-Arriaza & Gibson, ibid. at 866.

729 Joyner, supra note 7 at 613.
of gross violations of human rights.\textsuperscript{730} These groups argue Argentina's impunity laws frustrated and obstructed justice by impeding the investigation, criminal prosecution and providing civil remedies for hundreds of victims of gross violations of human rights.\textsuperscript{731}

With regard to international treaties, Argentina ratified most conventions after the reign of terror that occurred during the 'dirty war'. For example, the country ratified the \textit{International Covenant} in 1986, the \textit{Genocide Convention} in 1956, the \textit{American Convention} in 1984, the \textit{Torture Convention} in 1986, and the \textit{Rome Statute} in 2001.

It is at this point that Argentina's political context must be taken into account. Did President Alfonsín grant these laws out of "public emergency" or "necessity"? Was the threat of military uprising imminent and a real threat to Argentine people and the nation as a whole? As noted above, even if the passing of these laws were to thwart a "public emergency" or out of "necessity", the state must remain in conformity with international law obligations.

In 1989, the Committee against Torture issued a decision regarding Argentina's amnesty laws.\textsuperscript{732} The Committee decided that communications submitted to them by Argentine citizens, on behalf of their relatives who had subjected to state-sponsored torture, were inadmissible. The 1986 and 1987 impunity laws were enacted after Argentina had signed and ratified the \textit{Torture Convention}, but before the Convention

\textsuperscript{730} For example, groups such as Amnesty International, Human Rights Watch, the International Commission of Jurists, and the Mothers and Grandmothers of the Plaza de Mayo have always condemned the laws arguing they are incompatible with Argentina's obligations under international law.

\textsuperscript{731} Roht-Arriaza, "State Responsibility", \textit{supra} note 219 at 484.


However, in *obiter*, the Committee recognized the duty to investigate, prosecute, and provide redress for gross violations of human rights. The Committee noted that the obligation to punish those responsible for acts of torture was already a general rule of international law before the Convention came into effect in Argentina in 1987: "[E]ven if the [Convention] does not apply to the facts of these communications, the State of Argentina is morally bound to provide a remedy to victims of torture and to their dependants, notwithstanding the fact that the acts of torture occurred before the entry into force of the Convention". The Committee then urged Argentina to provide remedies to the victims of torture and their surviving relatives.

In response to this decision, Argentina varied the limitation period and permitted applications for compensation to be made for an extended period. In 1991, President Menem signed a decree providing that persons who had been detained for political reasons during the 'dirty war' were eligible for financial assistance and compensation, and in 1994 the government passed a law which provided each family of the disappeared or killed with monetary reparation in the amount of $220,000 (U.S.), paid in state bonds.

In 1992, the Inter-American Commission concluded the "full stop" and "due obedience" laws were incompatible with Argentina's obligations under the *American*
Convention and the American Declaration.\textsuperscript{735}

In 1995, the UNHRC concluded that since the Argentine amnesty laws denied victims of human rights violations the right to an effective remedy, they violated Articles 2(2) and (3), and Article 9(5) of the International Covenant: 
"[T]he compromises made by the State party with respect to its authoritarian past, especially the Law of Due Obedience and Law of Punto Final and the presidential pardon of top military personnel, are inconsistent with the requirements of the Covenant".\textsuperscript{736} Then in 2000, the Committee again reminded Argentina that "gross violations of civil and political rights during military rule should be prosecutable for as long as necessary, with applicability as far back in time as necessary to bring their perpetrators to justice".\textsuperscript{737}

In fact, the amnesty laws were repealed in March 1998, but this repeal was interpreted as not having retroactive effect and the thousands of cases of gross violations

\textsuperscript{735} Inter-American Commission on Human Rights Report No. 28/92, Cases 10.147, 10.181, 10.240, 10.262, 10.309, 10.311 (Argentina) (October 2, 1992), reprinted in Kritz, Transitional Justice, supra note 336 at 533 (Volume III). In these cases, the petitioners alleged that criminal proceedings for human rights violations committed by the armed forces were "cancelled, encumbered or obstructed" by the amnesty laws and pardons and were in violation of rights guaranteed under the American Convention. The Commission followed the Velásquez Rodríguez case holding that amnesties for grave violations of human rights violate numerous state duties set out in the American Convention to protect and ensure human rights, as well as the victims' right to seek justice. Finally, the Commission stated that the granting of compensation to victims and their relatives and the establishment of truth and reconciliation commissions does not relieve a state of its obligations to bring those responsible to justice and ensure they are punished.

\textsuperscript{736} Comment of the Human Rights Committee, supra note 690 at para. 3. The Committee continued, stating at para. 10:

The Committee reiterates its concern that Act 23.521 (Law of Due Obedience) and Act 23.492 (Law of Punto Final) deny effective remedy to victims of human rights violations during the period of authoritarian rule, in violation of articles 2 (2, 3) and 9 (5) of the Covenant. The Committee is concerned that amnesties and pardons have impeded investigations into allegations of crimes committed by the armed forces and agents of national security services and have been applied even in cases where there exists significant evidence of such gross human rights violations as unlawful disappearances and detention of persons, including children. The Committee expresses concern that pardons and general amnesties may promote an atmosphere of impunity for perpetrators of human rights violations belonging to the security forces. Respect for human rights may be weakened by impunity for perpetrators of human rights violations.

of human rights committed under the military government during the 'dirty war' continued to be covered by these laws. However, regardless of this restrictive interpretation, domestic courts in Argentina began to hand down judgments regarding the constitutionality of the 1986 and 1987 amnesty laws.

In 2001, important developments began to unfold. Judge Gabriel Cavallo issued a decision declaring the amnesty laws to be unconstitutional and null and void on March 6, 2001. Judge Cavallo based this ruling on decisions issued by the Inter-American Commission and the Inter-American Court that declared invalidity of amnesty laws under the American Convention. Judge Cavallo's decision sparked a trend of cases regarding the unconstitutionality of the amnesty laws reflective of the growing international consensus that crimes against humanity cannot be shielded by impunity laws.


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739 Case 8686/2000 entitled "Simón, Julio, Del Cerro, Juan – abduction of 10 years of age", Juzgado Nacional en lo Criminal y Correccional Federal No. 4 (Fourth National Court for Criminal and Correctional Matters), March 6, 2001. This ruling was later unanimously confirmed in November 2001 by Court II of the Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal de Buenos Aires (National Appeal Chamber for Criminal and Correctional Matters for Buenos Aires) which based its decision on international and regional legal instruments, such as the American Convention, the International Covenant and the Torture Convention. Since 2002, this case is pending appeal before the Supreme Court of Argentina. These decisions were issued in response to a lawsuit brought in October 2000 by the Argentinean NGO Centro de Estudios Legales y Sociales (CELS or Centre for Legal and Social Studies) in the case of the 1978 disappearances of José Liborio Poblete Roa, his wife Gertrudis Marta Hlaczik, and their daughter Claudia Victoria. Claudia was located, but her parents remain disappeared.

740 Resolution 586/02P in the context of a case entitled "Ministerio Público Fiscal (Public Prosecutor's Office) – filing of a complaint", File No. 311/02, lodged with the Office for Criminal Matters at Federal Court No. 1 in Santa Fe. Judge Rodríguez declared Article 1 of the "full stop" law (the time period for bringing a complaint) and Articles 1, 3, and 4 of the "due obedience" law invalid (Article 1: presumption of superior orders defence; Article 3: law applied as a matter of course; Article 4: no steps taken to summon persons in Article 1), reprinted in AI, "Full Stop and Due Obedience", supra note 42.
Claudio Bonadio ruled that the amnesty laws were null and void on the grounds that they were contrary to international law.\footnote{Case 6869/98 entitled "Scagliusi, Claudio Gustavo and others – unlawful imprisonment", Juzgado Nacional en lo Criminal y Correccional Federal No. 11 (11\textsuperscript{th} National Court for Criminal and Correctional Matters), September 12, 2002. Judge Bonadio declared the "full stop" and "due obedience" laws to be null and void on the grounds that they not only contravened the national constitution, but they were also contrary to "the law of nations".}

Nicolás Becerra, Attorney General for Argentina, has also taken the position that the amnesty laws are invalid and unconstitutional. On August 29, 2002, he issued a statement recommending the Supreme Court endorse Judge Cavallo's decision finding the laws null and void:

\textit{[T]he duty not to impede investigation and punishment of gross human rights violations, like all obligations derived from international treaties and other sources of international law, is incumbent not only on the legislative authority but on all the State authorities and therefore also obliges the Public Prosecutor's Office and the Judiciary not to ratify the actions of other authorities who may be infringing them.}\footnote{As reprinted in AI, "Full Stop and Due Obedience", \textit{supra} note 42.}

On that same day, the Attorney General issued a statement in another case involving unlawful imprisonment stating "[t]he offence of unlawful imprisonment falls into the category of ongoing offence, the particular nature of which is that perpetration does not end once the offence has been executed but carries on over time [...] in such a way that the ongoing offence goes on being perpetrated until the illegal situation has come to an end".\footnote{Case entitled "Astiz Alfredo and others for delitos de acción pública (offences for which a public prosecution can be brought)" related to the enforced disappearance of Corrado Higinio Gómez in January 1977, as reprinted in AI, "Full Stop and Due Obedience", \textit{ibid.}}

Later, in March 2003, Federal Judge Carlos Skidelsky declared the laws null and void in another case where 22 political prisoners were killed during the 'dirty war'.\footnote{This case became known as the "Margarita Belén Massacre" where 22 political prisoners were killed in December 1976 in the Margarita Belén locality, situated in the province of El Chaco (see reference in AI, "Full Stop and Due Obedience", \textit{ibid.}).} In
August 2003, President Néstor Kirchner's government annulled the amnesty laws and the issue of constitutionality is now before the country's Supreme Court. Finally, in March 2004, Federal Judge Rodolfo Canicoba Corral declared Menem's pardons to be unconstitutional.

One author states that "a key flaw in implementation of Alfonsín's prosecution program was its protracted nature: the prosecutions extended substantially longer than the architects of the program had anticipated." As discussed in Chapter Three, public support for the prosecution was strong in the wake of the transition, but rapidly decreased as time elapsed and economic troubles set in. However, that author concludes that Argentina's impunity laws were not contrary to international law:

If the Argentine government erred in its decisions, it erred as a matter of strategy, not as a matter of law. By retreating from prosecutions already instituted, the government left the impression that it was too weak to prosecute those it believed were deserving of punishment. That is, to be sure, a failure of sorts. But it is merely a political failure – one of nerve rooted in a perception of the government's own powerlessness – and not a breach of international law.

The author of this thesis disagrees with that statement. The cumulative effect of President Alfonsín's "full stop" and "due obedience" laws, together with the subsequent pardons granted by President Menem in 1989 and 1990 for grave violations of human rights are clearly in violation of Argentina's obligations under international law. Argentina remains under the international law obligation to investigate, prosecute, and

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745 See supra note 48.
746 "Former Argentinian Death Camp to Become Museum" The Guardian Unlimited Special Reports (24 March 2004), online: Guardian Unlimited <http://www.guardian.co.uk/argentina/story/0,11439,1177123,00.html>.
747 Orentlicher, supra note 81 at 2596.
748 Diane F. Orentlicher, "A Reply to Professor Nino" (1991) 100 Yale L.J. 2641 at 2642.
provide redress for gross violations of human rights that occurred during the country's 'dirty war'.

In conclusion, as an ensemble, international criminal law treaties, international and regional human rights instruments, and customary international law support the notion that states have an affirmative obligation to protect their citizens, prosecute and investigate gross violations of human rights, and compensate those who are victims of such violations. Argentina's impunity laws and the state practice of impunity are therefore in conflict with this established proposition of international law.
CHAPTER FIVE: COMBATING IMPUNITY

The fight against impunity is crucial, not only because of its implications with respect to human rights violations, but also because of its implications with respect to due process, corruption, security and terrorism, among other concerns, and because of how deeply it undermines the rule of law.

In the wake of gross violations of human rights, transitional governments face difficult and often conflicting legal, ethical and political choices. Successor regimes struggle to nurture democratic institutions, while fostering peaceful relations, in an effort to achieve national reconciliation. At the same time, states must respect their obligations arising out of international law.

In recounting Argentina's history and account of the atrocities that occurred during the 'dirty war', this thesis has attempted to demonstrate that there is an existing, or at least emerging, norm requiring states to investigate, prosecute, and punish those responsible for human rights abuses. It is the author's position that even in the most delicate transitional justice context, this duty must be enforced, albeit at varying degrees depending on the particular circumstances of each successor government.

There is an emerging trend in both international criminal law and international human rights law toward universal jurisdiction, providing a culture of accountability for gross violations of human rights. Not only do international treaties, human rights instruments, customary international law, and regional systems for the protection of human rights support the notion of an existing duty to investigate, prosecute, and punish

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perpetrators of gross violations of human rights, but there is also a growing domestic court practice concerned with the issue of impunity and international law obligations.\textsuperscript{750}

As evidenced in Chapter Four, Argentina's courts have repeatedly found the 1986 and 1987 amnesties to be incompatible with international law, and have based their decisions on Argentina's international law obligation to investigate and prosecute human rights violations. In this respect, Argentina's recent developments influence international human rights law and serve as an impetus for cracking the shell of impunity for gross violations of human rights.

In conclusion, taken together, international criminal law treaties, international and regional human rights instruments, and customary international law provide evidence that states have an affirmative obligation to investigate, prosecute, and provide redress for gross violations of human rights.

All of these tendencies: domestic courts exercising a universal criminal jurisdiction, the development of international criminal tribunals, domestic adoption and implementation of the relevant human rights treaties, regional declarations by norm-creating human rights commissions (and courts), and the unremitting pressure upon all these bodies and institutions by pertinent non-governmental organizations are inevitably leading to the same conclusion. Impunity for gross breaches of international human rights norms (international crimes) is fast becoming a relic of the past.\textsuperscript{751}

Impunity laws and the state practice of impunity are therefore contrary to international law. As such, Argentina continues to have an international obligation to investigate, prosecute, and provide redress to victims of gross violations of human rights that occurred during the 'dirty war'. The 1986 and 1987 amnesty laws, together with

\textsuperscript{750} Roht-Arriaza, "Thoughts", supra note 604 at 93-94.

\textsuperscript{751} Burns, supra note 35 at 159.
President Menem's pardons violate Argentina's obligations under international human rights law.

It has been more than two decades since the end of the reign of terror and Argentina's return to democracy. Former Lt. General and President Rafael Videla was placed under house arrest in 1998 for his role in organizing the theft of babies born of mothers held in torture chambers and secret detention centres; the investigation is ongoing to this day. General Leopoldo Galtieri, former military dictator, was under house arrest and later died in January 2003. Admiral Emilio Eduardo Massera, former head who ran the Navy School of Mechanics torture centre, was arrested and later suffered from a stroke; he remains in a coma. Former naval officer Alfredo Astiz was arrested in Argentina and still faces extradition charges to Italy and France. Mexico extradited ex-Navy Officer Ricardo Miguel Cavallo to Spain where he is awaiting trial for human rights abuses. Last month, President Kirchner signed an order turning the EMSA Navy School of Mechanics into a national museum of remembrance.

Taken together, recent developments in Argentina are indicative of an increasing trend in international law toward accountability for human rights abuses. Those

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753 “Argentinian Dictator Dies at 76” The Guardian Unlimited Special Reports (13 January 2003), online: Guardian Unlimited <http://www.guardian.co.uk/argentina/story/0,11439,873703,00.html>.
755 “Angel of Death Arrested” The Guardian Unlimited Special Reports (26 September 2003), online: Guardian Unlimited http://www.guardian.co.uk/argentina/story/0,11439,1043416,00.html>; see also, supra note 41.
756 See supra note 46.
757 See supra note 746.
individuals who violate human rights are no longer afforded refuge through amnesty laws or sweeping pardons.

Argentina's future actions affect international human rights law in general, and human rights in Latin America, in particular. By annulling the "full stop" and "due obedience" laws, President Kirchner has taken bold steps toward ending the culture of impunity shielding those responsible for committing gross violations of human rights. It is hoped the Supreme Court of Argentina will confirm this decision and advance the future of human rights in Latin America.

The election of President Nestor Kirchner appears to have ushered in a new era of openness and possibility for those who have longed for justice in Argentina for so long. This promise will only be fulfilled, however, if Argentina's judiciary can rise above mounting political pressures and move emphatically to end impunity and restore trust in the rule of law.

Joyner, "Redressing", supra note 7 at 615-616 stresses the importance of recognizing an international legal order that imposes affirmative obligations on successor governments to end impunity:

[I]mpunity derives not as a right or norm sanctioned by society, but rather more so as the result of the distribution of political and social power in that society. Control of that power determines the likelihood of impunity. If the distribution of power in a state changes, the normative character of and prospects for impunity also will change. It is not, therefore, the law that so greatly shapes power relations affecting objective considerations of justice; rather, it is the political power in the state that determines the interpretation and application of that law, which in turn approves policies of impunity. Hence, the responsibility for authorizing impunity rests with the individuals who shape, conceptualize, interpret and apply the law. It is they - the governing policy makers - who determine and are accountable for the legal disposition of human rights violations and effecting redress for victims.

Arriaga, supra note 738.
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