

HUMAN RIGHTS AND THE ARGENTINE LEGAL EXPERIENCE WITH SEEKING ACCOUNTABILITY FOR PAST ATROCITIES

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Part I: The landmark decisions of the Supreme Court of Argentina.

1. “Arancibia Clavel, Enrique Lautaro about aggravated homicide, criminal association and other crimes”.¹ Decided, August 24th, 2004.

Facts of the case: From March 1974 until November 1978, Arancibia Clavel had formed part of “DINA Exterior”, a secret police force under the Pinochet regime. DINA operated under Chile’s Director of National Intelligence both within Chile and Argentina. Members of DINA engaged in kidnapping, murder, torture and forced disappearance of those considered to be political opponents. Arancibia Clavel was accused of being involved in the car-bombing which killed the Chilean General Carlos Prats and his wife, Sofia Cuthbert, in Buenos Aires in 1974. An Argentine federal tribunal (Tribunal Oral en lo Criminal Federal No. 6) sentenced to life imprisonment for participation in a criminal association². Following the appeal filed by the defense of Arancibia Clavel, the National Court of Criminal Cassation partially reversed the lower court ruling and declared that the conviction for criminal association for participating in DINA was barred by statutory limitations. The representative of the government of Chile filed an extraordinary appeal of this decision to the Supreme Court of Argentina. The Supreme Court, in a 5-3 decision,³ reversed the judgment of the National Court of Criminal Cassation. It held that the conduct of Mr. Arancibia Clavel had to be considered as a *crime against humanity* and as such, it was not time-barred.

The majority Decision: The majority vote of the Supreme Court was composed of Justices Enrique S. Petracchi, Antonio Boggiano, Juan C. Maqueda, Raúl Zaffaroni and Elena I. Highton de Nolasco, three of whom appended individual opinions. Justices Augusto Belluscio, Carlos S. Fayt and Adolfo R. Vázquez dissented. According to the Court, these constitute crimes against humanity since the group of which Arancibia Clavel formed part had as its purpose the persecution of Pinochet’s political opponents by means of homicides, forced disappearances and torture with the acquiescence of government officials. To support that assertion, the judges cited the Rome Statute of the International Criminal Court, the Convention on the Prevention and Punishment of the Crime of Genocide, the Inter-American Convention on the Forced Disappearance of Persons, and some decisions of the Inter-American Court of Human Rights on the crime of forced disappearance, such as the *Velásquez Rodríguez*, the *Godínez Cruz* and the *Blake* cases.⁴ In addition, the Court stated that the crimes against humanity were against the law of nations as stipulated in article 118 of the National Constitution. Having established that these are crimes against humanity, the majority went on to say that the applicable law governing the

¹ “Arancibia Clavel, Enrique Lautaro s/ homicidio calificado y asociación ilícita y otros –causa N° 259”, Fallos: 327: 3312.

² Under article 210 bis, sections a, b, d, f and h of the Criminal Code, text according to law No. 23.077.

³ At the time of the decision of this case, one of the positions of Supreme Court Justice was vacant, so only eight Justices took part in this case.

⁴ Inter-American Court of Human Rights, *Velásquez Rodríguez*, July 29th, 1988, Series C N° 4; *Godínez Cruz*, January 20th, 1989 Series C N°5, *Blake*, January 24th, 1998, Series C N°36.

statute of limitations is the 1968 United Nation's Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, which had acquired constitutional hierarchy by law No. 25.778.⁵ The Supreme Court noted that the notion that crimes against humanity were not subject to statutory limitations was part of customary international law even before the adoption of the 1968 Convention. Therefore the Court concluded that holding Arrancibia Clavel criminally liable for such crimes would not result in a retroactive application of the law and thus the prohibition on irretroactivity of the law would not be breached. Quite on the contrary, a customary international law principle would be reaffirmed, which was already in force at the time of commission of the facts. Furthermore, the Court highlighted that this was not about the retroactive effect of a conventional norm since before the adoption of the 1968 Convention, the rule had the character of *jus cogens*, whose principal aim is to "protect States from conventions celebrated in violation of certain values and general interests of the international community of States as a whole, to assure respect of certain general norms that if breached could affect the essence of the legal order itself."⁶ The Argentinean State had also contributed to the formation of the customary international rule of non-applicability of the statutory limitations to the crimes against humanity in the 1960s and a previous case of the Supreme Court (*Priebke*, Fallos: 318:2148) had recognized that the statute of limitations was not applicable to the right to bring a criminal action in the case of other international crimes: those of genocide and war crimes. Given all the aforementioned considerations, the majority stated that the crimes of which Mr. Arancibia Clavel had been convicted were not time-barred and the right to bring the criminal action was not terminated even if the time stipulated in article 62, section 2 of the Criminal Code had elapsed. This was so because said provision was trumped by customary international law and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, which had acquired constitutional hierarchy in terms of article 75, section 22 of the National Constitution.

2. "Simón, Julio Héctor et al. about illegal imprisonment".⁷ Decided, June 14th, 2005.

Facts of the case: Julio Héctor Simón, a former officer of the Federal Police, was indicted for the crimes against humanity of illegal arrest, torture and forced disappearance of José Poblete Roa and Gertrudis Hlaczik de Poblete, a Chilean/Argentine couple, and for the appropriation of their daughter Claudia. The couple had been detained in November 1978 and held at the "Olympus", a secret detention center run by the federal police during the Argentinean military dictatorship. The defense of Julio Simón and the other accused (Julio del Cerro) argued that they benefited from the immunity from prosecution established in

⁵Article 75, section 22 of the Argentine Constitution lists 11 international declarations and conventions on human rights that have constitutional hierarchy and provides that in the future, the National Congress can pass a law with a special majority adding more instruments to the list. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity acquired this status, through law No. 25.778 of September 3rd, 2003.

⁶ Whereas Clause No. 29.

⁷ "Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc. (Poblete) –causa N^a 17.768", Fallos: 328: 2056.

the so-called “due obedience law” (Law No. 23.521) and “full-stop law” (Law No. 23.492). The Federal judge that issued the indictment and the Federal Court of Appeals that affirmed it, held that those laws were null and void and unconstitutional as they were not only contrary to the National Constitution, but also to the law of nations and several international treaties on human rights that are hierarchically superior to the laws, according to article 75 (22) of the Constitution. The defense of the accused filed an extraordinary appeal which was dismissed by the Court of Appeals, so they filed a remedy of complaint before the Supreme Court.

The majority decision: The Supreme Court, by a majority of 7-1,⁸ confirmed the lower-court decisions and held that the amnesty laws were null and void and unconstitutional. The majority vote of the Supreme Court was composed of Justices Enrique S. Petracchi, Antonio Boggiano, Juan C. Maqueda, E. Raúl Zaffaroni, Elena I. Highton de Nolasco, Ricardo L. Lorenzetti and Carmen M. Argibay, of which six appended their concurring opinions. Mr. Carlos Santiago Fayt dissented and Mr. Augusto César Belluscio had excused himself from intervening.

As for the petition of the defendant in the sense that he should be able to seek protection under the “due-obedience law”, the majority recalled that said law –passed by the National Congress under number 23.521- had as its purpose the validation of the political decision of the Executive Branch and of declaring the impunity of the military personnel from “March 24th, 1976 until September 26th, 1983” that took part in the “operations undertaken with the alleged ground of suppressing terrorism”. Thus, article 1 contained a presumption, according to which, those mentioned in the law (low-ranking officers) “shall automatically be deemed to have acted under a state of coercion in a position of subordination to higher authority and to be following orders without any power or capacity to review, oppose or resist them on grounds of timeliness or legitimacy.”⁹

The Court maintained that it could no longer be argued that these laws barred the prosecution of the crimes committed during the “dirty war” years as the 1994 constitutional amendment had given “constitutional hierarchy” to a number of very

⁸ At the time of the decision, the Supreme Court was composed of nine members but since Justice Mr. Augusto César Belluscio abstained, only eight members participated in this decision.

⁹ The full text of article 1 of law 23.521 (Due Obedience Law) reads: “Unless evidence to the contrary has been admitted, it is presumed that those who at the time the act was committed held the position of senior officers, junior officers, noncommissioned officers and members of the rank and file of the Armed Forces, security forces, police and prison staff are not punishable for the offences referred to in article 10 point 1 of Law No. 23,049 on the ground that they were acting out of due obedience. The same presumption shall apply to senior officers who did not hold the position of commander-in-chief, area commander, sub-area commander or head of a security or police force or prison staff unless it has been judicially determined within 30 days of the enactment of this law that they had authority to take decisions or were involved in the drawing up of orders. In such cases the aforesaid persons shall automatically be deemed to have acted under a state of coercion in a position of subordination to higher authority and to be following orders without any power or capacity to review, oppose or resist them on grounds of timeliness or legitimacy.”

important human rights treaties listed in article 75 (22) of the Constitution, and in particular to the American Convention on Human Rights. That legal order prevented the Argentinean State, and the Court as one of its organs, to engage in a balancing exercise the consequence of which is to give up the criminal prosecution of crimes against humanity.

The majority went on to say that even if article 75, section 20 of the Constitution maintained the authority of the Legislative Power to grant general amnesties, that right was subject to important limitations in its scope. In light of the fact that the full stop and due obedience laws were passed to “forget” past human rights abuses, they are in stark contradiction with the provisions of the American Convention on Human Rights and the International Covenant on Civil and Political Rights (article 75, section 22 of the Constitution).

The majority also based its decision on the rulings of the Inter-American Court of Human Rights, in particular, the *Barrios Altos v. Perú* case, in which the Court held that “all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law” (Inter-American Court on Human Rights, *Barrios Altos v. Perú*, March 14th, 2001, Series C N°75, para. 41). The majority expressed that this interpretation by the Inter-American Court was fully applicable to the circumstances of the Argentinean amnesty laws. Thus, the majority reiterated that the Argentinean State could invoke neither the prohibition of irretroactivity of criminal law nor the *res judicata* to escape its duty to prosecute grave violations of human rights.

3. “Mazzeo, Julio L. et al. about cassation appeal and unconstitutionality -Riveros-”¹⁰ Decided, July 13th, 2007.

Facts of the case: Santiago Omar Riveros, a high-ranking commander during the 1976 Argentinean military dictatorship, known for his harsh direction of one of the Army’s clandestine detention centers “Campo de Mayo”, was accused by a federal judge of San Martín (Province of Buenos Aires) in connection with 14 killings and 20 cases of torture at army institutes under his command. He was later acquitted and the acquittal was confirmed by the Court of Appeals of San Martín on the grounds that he had been pardoned by Presidential decree No. 1002 of 1989. Seventeen years later, a group of people under the representation of the Argentine League for Human Rights, filed a petition to the federal judge of San Martín asking him to declare the Presidential pardon unconstitutional and thus to cancel the acquittal of Riveros. The federal judge accepted the petition and held decree 1002/1989 to be unconstitutional, depriving of all effects, within the proceedings, all acts and decisions issued as a consequence of the abovementioned decree. The judge

¹⁰ “Mazzeo, Julio Lilo y otros s/ rec. de casación e inconstitucionalidad -Riveros”, Fallos: 330:3248.

supported his decision on articles 16, 18, 29, 31, 75 section. 22, 99 section 5, 109, 116 and 118 of the National Constitution. On appeal by the defense, the Federal Court of Appeals of San Martín reversed the decision of the federal judge. Afterwards, the Panel II of the National Court of Criminal Cassation, when deciding on the petition for cassation, declared that decree No. 1002/1989 was unconstitutional. Against that decision, the defense of Julio Riveros filed an extraordinary appeal.

The majority decision: The Supreme Court, in a four to two decision (with one abstention)¹¹ held that Riveros could be tried for illegal abductions, torture and killings of dissidents during the military dictatorship as the presidential pardon (decree 1002/89) that had acquitted him was unconstitutional. The Court noted that the alleged crimes violated not only the Constitution but also general international law and treaties with constitutional hierarchy.

The majority of the Court's decision was composed of Chief Justice Ricardo L. Lorenzetti and Justices Elena I. Highton de Nolasco, Juan C. Maqueda and E. Raúl Zaffaroni. Justices Carlos S. Fayt and Carmen M. Argibay dissented. The majority highlighted that both international human rights law and international humanitarian law prescribe the obligation of all the international community to “prosecute”, “investigate” and “adequately punish those responsible” of committing crimes against humanity. After establishing a framework on the relevant treaties, international decisions and on its own case-law, the majority went on to say that in the case under analysis it is necessary to declare the unconstitutionality of the presidential pardon to authors and participants in crimes against humanity since that government act inevitably carries with it the renunciation to knowing the truth, to the investigation of the facts, to the identification of their authors and to the availability of effective remedies to combat impunity.

The Presidential prerogative to pardon is established in article 99, section 5 of the National Constitution. However, a pardon is a resource that the Executive Power has in favor of those people in respect of whom the criminal laws –applied in the particular case- are of an unforeseen and disproportionate severity. It is designed to remedy judicial errors and to mitigate the punishments. However, in the case of crimes against humanity, it is not possible to consider any discretionary decision of any of the Powers of the State in light of the international obligations of investigation, prosecution and, eventually, punishment. These types of conclusions were also arrived at by the Inter-American Court in *Barrios Altos* and ratified in *Almonacid*. In the latter decision, the Inter-American Court stated: “With regard to the *ne bis in idem* principle, although it is acknowledged as a human right in Article

¹¹ At the time of the decision (and currently), the Supreme Court was composed of seven members. Law No. 26.183 of December 15th, 2006 reduced from nine to five the number of Supreme Court Justices. The law established that from its entry into force, the number of Justices would be provisionally reduced to seven (its current number). When there is a new vacancy, the number of justices will be again reduced to six and when there is another vacancy, the number will be permanently reduced to five.

8(4) of the American Convention, it is not an absolute right, and therefore, is not applicable where: i) the intervention of the court that heard the case and decided to dismiss it or to acquit a person responsible for violating human rights or international law, was intended to shield the accused party from criminal responsibility; ii) the proceedings were not conducted independently or impartially in accordance with due procedural guarantees, or iii) there was no real intent to bring those responsible to justice. A judgment rendered in the foregoing circumstances produces an “apparent” or “fraudulent” *res judicata* case. On the other hand, the Court believes that if there appear new facts or evidence that make it possible to ascertain the identity of those responsible for human rights violations or for crimes against humanity, investigations can be reopened, even if the case ended in an acquittal with the authority of a final judgment, since the dictates of justice, the rights of the victims, and the spirit and the wording of the American Convention supersedes the protection of the *ne bis in idem* principle.”¹² Finally, the Inter-American Court held that the State of Chile could not invoke any statutory limitations, irretroactivity of criminal law, *ne bis in idem* or any other excuse to refrain from complying with its duty to investigate and punish those responsible.

In light of the aforementioned considerations, the Court declared the unconstitutionality of Presidential Decree No. 1002/89 that pardoned the appellant, as going against articles 18, 31, 75, section 22, 99, section 5, 118 of the National Constitution; 1, 8.4 and 25 of the American Convention on Human Rights; and 14.7 of the International Covenant and Civil and Political Rights.

Part II. The aftermath of the decisions

Since these cases were decided, several prosecutions of individuals who were involved in these heinous crimes have been pursued, and the main criminal trials were reopened. By 2007 around 829 people have been declared to be suspects for purposes of pre-trial investigation in criminal cases linked to State terrorism.¹³ Amongst those, 400 have been indicted (procesados), 44 are fugitives, 51 cases were dismissed for lacking sufficient grounds (*falta de mérito*), 140 suspects have died, and 5 were declared unfit to stand trial. Finally, more than 15 have been convicted.

¹² Inter-American Court of Human Rights, *Almonacid Arellano and others v. Chile*, September 26th, 2006, Series C N° 154, para. 154.

¹³ See Unidad Fiscal de Coordinación y Seguimiento de las causas por violaciones a los Derechos Humanos cometidas durante el terrorismo de Estado, *Algunos problemas vinculados al trámite de las causas por violaciones a los DDHH cometidas durante el terrorismo de Estado*, available at <http://www.mpf.gov.ar/Novedades/Informe%20Algunos%20problemas%20en%20las%20causas%20de%20DDHH%20-%20agosto%202007.pdf> (August 2007) [hereinafter, Report of the Attorney-General’s Special Unit]; See also Centro de Estudios Legales y Sociales (Cels), *Cels Juicios. Crímenes del terrorismo de Estado- Weblogs de las causas*, available at <http://cels.org.ar.elsever.com/wpblogs/ingles>; Carolina Varsky & Leonardo Filippini, *Desarrollos recientes de la Justicia de transición en la Argentina*, in ABRAMOVICH, BOVINO & COURTIS (EDS.), *LA APLICACIÓN DE LOS TRATADOS DE DERECHOS HUMANOS EN EL ÁMBITO LOCAL* pp. 447-472, at 462 (2007).

The most important are:

1. The conviction of Julio Simón: The inferior courts reopened the case of Julio Simón, a former police officer, and on August 4th, 2006 he was convicted by the Federal Oral Tribunal (TOF) N°5 of Capital Federal¹⁴ and sentenced to 25 years in prison for the illegal arrest and torture of José Poblete and Gertrudis Hlaczik and the taking of their daughter, Claudia.

2. The conviction of Miguel Osvaldo Etchecolatz: On September 19th, 2006, the Federal Oral Tribunal (TOF) No. 1 of La Plata sentenced Miguel Osvaldo Etchecolatz to life imprisonment, legal incapacity and other ancillary orders for illegal arrest, torture and homicide in connection with six disappearances.¹⁵ In 1986, Etchecolatz had received a 23 year prison sentence for similar crimes, but he had been released following enactment of the “due obedience” law a year later.

3. The conviction of Christian Von Wernich: On October 9th, 2007, a former police chaplain was convicted by the Federal Oral Tribunal (TOF) No. 1 of La Plata to life imprisonment for his involvement in seven murders, 42 abductions and 31 cases of torture during the 1976-83 “dirty war”. Von Wernich had been a **chaplain** to the Buenos Aires provincial police –headed by Ramón Camps– which ran numerous torture centers in the province. He had initially avoided prosecution by moving to Chile and working as a priest there under a false name. However, he was tracked down by investigators and extradited to Argentina in 2003.

The case of Von Wernich is unique, not only in Argentina but throughout Latin America. One of the key accusations against the priest was that he abused his status, and the sacrament of confession, to collaborate with the military. The witnesses that gave testimony in the trial identified several incidents where Von Wernich entered the various clandestine detention centers and approached them, dressed in priest’s garb. After the detained people were subjected to torture for several weeks, the priest would approach them and encourage them to confess so that they would not be punished anymore. The witnesses also expressed that the priest came to the detention centers perfectly calm and knew all of their names, which made it evidently clear that he had permission from the head of the center to enter the detention facilities. Several witnesses also reported that some information that they had given to Von Wernich in confession was sometimes revealed to them while they were being tortured, which led them to conclude that the priest was not keeping his oath of secrecy, and that he transmitted the information to the torturers.

¹⁴ Tribunal Oral en lo Criminal Federal No. 5 of Capital Federal, cases N° 1056 and 1207: “Simón, Julio Héctor s/ infr. arts. 144 bis, inc. 1° y último, en función del 142 inc. 1° y 5° y arts. 144ter, pfos. 1° y 2° del Código Penal”.

¹⁵ Tribunal Oral en lo Criminal Federal No. 1 of La Plata, case N° 2251/06 “Etchecolatz, Miguel Osvaldo” September 19th, 2006.

4. The conviction of Nicolaidés: On December 18th, 2007, Federal judge Ariel Lijo¹⁶ sentenced eight former officials to jail terms of between 20 to 25 years for being involved in a criminal association responsible for the kidnapping, torture and disappearance of a group of six Montoneros militants illegally detained upon returning to the country during an operation called “counter-offensive”, at the end of 1979 and beginning of 1980. These people’s names are Ángel Carbajal, Julio César Genoud, Lía Mariana Ercilia Guangirolí, Verónica María Cabilla, Ricardo Marcos Zucker and Silvia Noemí Tolchinsky, who have all disappeared, except Tolchinsky. Among those sentenced was the former head of the Army’s Third Corps, Cristino Nicolaidés, who received a 25 year prison term. To date, he is the highest ranking official to be convicted since the amnesty laws were repealed. Six other former army officers and an ex-police officer were sentenced along with Nicolaidés. The former head of the “Central de Reunión” of Battalion 601, Jorge Luis Arias Duval and intelligence agent Santiago Hoya also received a 25 year sentence. Juan Carlos Gualco and Waldo Roldán were sentenced to 23 years each, Carlos Fontana to 21 years and Pascual Guerrieri to 20 years, while former police agent Julio Simón – who had already been convicted for the torture of the Pobletes – was sentenced to 23 years imprisonment.

5. Some recent convictions:

a) The conviction of Menéndez in Córdoba: The head of the Third Corps of the Army in the Province of Córdoba, Luciano Menéndez,¹⁷ was convicted on July, 2008 to life imprisonment for the kidnapping, torture and killing of four people in Córdoba in 1977: Hilda Palacios, Carlos Laja, Ruben Cardozo and Humberto Brandalasi. The victims were kidnapped in November 1977 and were taken to the clandestine prison and torture center known as La Perla on the outskirts of Córdoba. According to prosecutors, they were killed the following month and then dumped in the street to make it look like they died in a shootout with officials, a tactic commonly used at the time by the military in Córdoba to cover executions of dissidents.

Together with Menéndez, six other former military officers and one civilian were also convicted in connection with these crimes. Luis Manzanelli, Carlos Diaz, Ricardo Lardone and Oreste Padován were sentenced to life in prison and the rest of the accused were subjected to prison sentences starting from 18 years.

The Court highlighted that Menéndez, in his role as head of the Third Corps of the Army, formed part of the ‘organizational apparatus of hierarchical power of State terrorism’ that existed at the time of the commission of the crimes; Menéndez had exercised effective

¹⁶ Case No. 16307/06 “Guerrieri Pascual Oscar y otros s/ Privación ilegal de la libertad” Juzgado Nacional en lo Criminal y Correccional Federal N°4, December 18th, 2007

¹⁷ Case No. 13.172 “Brandalasis, Humberto y otros”, Federal Oral Tribunal No.1 of Córdoba.; “MENÉNDEZ Luciano Benjamín; RODRÍGUEZ Hermes Oscar; ACOSTA Jorge Exequiel; MANZANELLI Luis Alberto; VEGA Carlos Alberto; DIAZ Carlos Alberto; LARDONE Ricardo Alberto Ramón; PADOVAN Oreste Valentín p.ss.aa. Privación ilegítima de la libertad; imposición de tormentos agravados; homicidio agravado” (Expte. 40/M/2008),

control of the units under his command and had issued orders and instructions to his subordinates as a way to carry out the systematic plan of extermination of subversives.

b) The conviction of Menéndez and Bussi in Tucumán for the crime of Senator Vargas Aignasse: Menéndez role as the head of the Third Corps of the Army also extended to Tucumán Province and Antonio Bussi governed that Province during the military dictatorship. On August 29th 2008, the Federal Oral Tribunal of the Province of Tucumán¹⁸ found them guilty of torturing and killing provincial Senator Guillermo Vargas Aignasse, who had been kidnapped on March 24, 1976, and sentenced them to life imprisonment.

c) The conviction of three ex-colonels of the Air Force: This week (on November 5th, 2008), the Federal Oral Tribunal No. 5 of Capital Federal sentenced retired Argentine Air Force Colonel Alberto Barda to life in prison for the torture and killing of Analía Magliaro (in La Plata) and Jorge Candeloro (in Mar del Plata) during the 1976-1983 military dictatorship. Two other convicted former military officials, Hipolito Mariani and Cesar Comes, were sentenced to 25 years behind bars for kidnapping and torture. These former members of the Air Force developed their operations in the clandestine detention center ‘Mansión Seré’, in Morón, Province of Buenos Aires.

6. The ESMA Clandestine Detention Center: The case of the ESMA,¹⁹ the former Naval Mechanics School which was one of the main detention centers during the military dictatorship, presents the most complex case. This case involves over 5,000 victims and at least 1,000 perpetrators, and constitutes one of the detention centers in which the abuses perpetrated by the military are most clearly shown. Even if in a few cases the pre-trial investigation (instrucción) has been completed, and the cases taken to trial, the complexity of the matter in general indicates the need for the cases to be tried in a single set of proceedings encompassing all the crimes committed in the ESMA detention center.

7. The First Corps of the Army: The proceedings known as “Primer Cuerpo” (“First Corps”)²⁰ concern crimes committed in more than sixty clandestine detention centers within the jurisdiction of the First Corps of the Argentine Army, which covers the Capital city and the provinces of La Pampa and Buenos Aires. The pre-trial investigations in some of these cases have been finalized.²¹ The so-called “Fatima Massacre” is amongst the cases concerning the First Corps of the Army that have reached trial and the public hearings started on April 29th, 2008. The facts of the case occurred in the morning of August 20th,

¹⁸ Case No. V-03/08 “Vargas Aignasse Guillermo s/ secuestro y desaparición”

¹⁹ Case No. 14.217/03 “ESMA s/delito de acción pública” of Juzgado Federal No. 12 (Judge Sergio Torres)

²⁰ Case No. 14.216/03 of Juzgado Federal No. 3 (Judge Daniel Rafecas).

²¹ Case No. 1223: “Lapuyole, Juan Carlos y otros s/inf. Arts. 55, 80 inc. 2° y 144 bis inc. 1° Código Penal”; Case No. 1261, “Olivera Róvere, Jorge Carlos s/inf. Arts. 144 bis inc. 1° último párrafo en función del art. 142 inc. 1°, 144 ter primer pfo. Y 80 inc. 2 del Código Penal” of TOF No. 5.

1976 when twenty men and ten women – who had been kidnapped by the military and police forces dependent on the First Corps of the Army and held in the clandestine detention center in the Superintendent of Federal Police – were summarily executed in a nearby road close to the town of Fatima, in the Province of Buenos Aires. Their hands and feet were bound, several exhibited gunshot wounds and two bodies had been dismembered by dynamite. The accused police officers that are being tried before the Federal Oral Tribunal No. 5 (TOF N°5) are Miguel Angel Timarchi, Juan Carlos Lapuyle and Carlos Enrique Gallone. Since May 2004 officer Luis Alberto Martínez has been a fugitive, whereas Captain Carlos Vicente Marcote died before the beginning of the trial.

8. Other Cases: There are also many important cases that are currently underway in Argentine Provinces. Some of those are: the investigation of the crimes committed by the Third Corps of the Argentine Army in the Province of Córdoba; the so-called massacre of “Margarita Belén”, an incident which involved the shooting of a group of prisoners at the police headquarters in Resistencia, Province of Chaco; and the so-called massacre of Trelew, in the Province of Chubut, currently under investigation by Federal Judge of Rawson.

Part III. Legal Framework

1. Concept

A crime would be ‘against humanity’ when: 1. it affects the person as forming part of ‘humankind’, and it goes against the most fundamental human conceptions shared by all civilized nations; 2. they are committed by a state agent pursuant to or in furtherance of a governmental policy, or by a group with the capacity to exercise a similar power to that of the State in a portion of its territory.

The first element shows that what is under attack is the life and dignity of the person, as a member of the human genre, undermining the grounds of civilized social coexistence. From the standpoint of a more precise legal theory, it can be said that they affect fundamental rights of the human being and that these rights are fundamental because they are the ‘foundations’ of and are ‘previous’ to the rule of law.

The second element requires that the action come not from an isolated individual, but from the concerted action of a governmental group or a group of similar characteristics that purports to destroy another group, for instance, through the physical disappearance of those who form part of it or through the application of torture.

What is at stake is not a mere difference of ideas or of different ideologies, but of the extreme denaturalization of the basic principles that give rise to the republican organization of government. We are not faced with a case of abuse or excess in the persecution of a commendable objective, since both the objective of destroying thousands of people that think differently and the means used to pursue that objective –consisting of the physical annihilation, torture and kidnappings that constitute ‘State terrorism’— are illegal and no civilized society should tolerate them.

We are not dealing with a single homicide or an act of torture, or isolated kidnappings, but with a systematic and organized plan to attack a civilian population. Although crimes against humanity may be perpetrated during an armed conflict, these crimes are generally the product of a totalitarian state that sets as its target to exterminate its opponents. These crimes are not necessarily against the law. On the contrary, in many cases, the crime is committed by invoking a legal rule backing the commission of those crimes. This particular context makes the criminal prosecution of the authors of these crimes extremely difficult when these people are still in power. Indeed, it is only possible to prosecute them when they cease to be in power. However, by then, the right to bring a criminal action may well be terminated since the time stipulated in ordinary statute of limitations provisions may have elapsed. These crimes are particularly heinous since they violate the most fundamental principles of humankind.

2. Effects

- The main effect of charactering a crime as a crime against humanity is the non-applicability of statutory limitations.²² The 1968 United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity expressly excluded the application of statutory limitations to these kinds of crimes. In Argentina, this Convention was approved internally by law No. 24.584 (of November 1995) and ratified by the Executive on August 26th, 2003.
- Impossibility of granting amnesties for crimes against humanity. Amnesty laws for these kinds of crimes are null and void and unconstitutional (as was declared by the Supreme Court in *Simón*).
- The applicability of presidential pardons to these kinds of crimes is also a matter of dispute. The Argentine Supreme Court held in *Mazzeo* (July 13th, 2007)²³ that the presidential pardon that had acquitted the defendant in that case was null and void and unconstitutional. To arrive at that conclusion, the Tribunal held that international law restrains the liberty of States –and even of Presidents of States— to grant pardons and leave these types of crimes in impunity.

3. **Retroactive application.**

Taking into account the exceptional character of these types of crimes, there is not a retroactive application of the law given the fact that these conducts were considered as crimes against humanity at the moment in which they were committed. They were against the law of nations (customary international law) and ‘constitutionalized human rights’. Thus, the problem is one of sources of law. If we consider that the only source of criminal law are statutes, then there is indeed a retroactive application of the law; whereas if we

²² On the same issue see: María Cristina Barberá de Riso, *Imprescriptibilidad de los delitos de lesa humanidad*, en *Pensamiento Penal y Criminológico*, V (9) REVISTA DE DERECHO PENAL INTEGRADO 353 (2004); Juan Cianciardo, *La imprescriptibilidad de los delitos de lesa humanidad y la aplicación retroactiva de la ley penal*, LA LEY, 2004-F, 307; Patricia S. Ziffer, *El principio de legalidad y la imprescriptibilidad de los delitos de lesa humanidad*, in: ESTUDIOS SOBRE JUSTICIA PENAL, HOMENAJE AL PROFESOR JULIO B. MAIER 745 (2005).

²³ Mazzeo, Fallos:330:3248.

admit that there is a plurality of sources and that customary international law applies, the law is not applied retroactively.

4. The problem of reconciliation.

One of the criticisms expressed regarding this category of crimes is that it prevents the achievement of reconciliation after an armed conflict. However, crimes against humanity should be distinguished from other kinds of crimes committed during an armed conflict, and therefore different rules apply. Indeed, if there is an international armed conflict and peace is agreed upon, the Geneva Conventions regarding International Humanitarian Law would apply. In the same way, if there is a group that seeks the destruction of the State by affecting a large group of persons, one could think of the possibility of reaching a truce or a permanent peace agreement and thereby giving up prosecution. However, it should be said that if there exists a situation in which the State engages in a massive political repression of its citizens, reconciliation could never be achieved.

In principle, there are no obstacles for political agreements, for truce or for peace. Nevertheless, it should be analyzed if such pacification can include a renunciation of the criminal prosecution. This is a complex subject from any point of view. Who could be entitled to waive that right on behalf of the victims? Is the democratic legitimacy enough for those purposes? It could be possible to imagine that when a citizen votes for a candidate she confers a mandate on the elected person to renounce the prosecution of these crimes.

One of the strategies to tackle this problem is to look towards the past: there is a need for reconciliation in order to build a future with common grounds. Conciliation, forgetting past offenses among groups, looking for consensus, are all perfectly reasonable goals and no one could object them. The problem, however, does not arise from the search for peace, but from its limits.

What are the limits to celebrate a peace agreement? A good starting point is to take into account the future and the incentives created by laws. For instance, if a group seeks to destroy the Rule of Law, it is reasonable to eliminate any incentive that they would have to do so. It is in this respect that the effects of crimes against humanity become important. The non-applicability of statutory limitations, the impossibility of granting amnesties and pardons, and the international prosecution of these crimes all constitute very important deterrents for the perpetrators of this type of crimes.

The ultimate purpose of this idea is the protection of the Rule of Law. The standard of analysis is based on the social contract that free, equal, rational, and reasonable people would agree to abide by in order to live in a society premised on free and fair cooperation between citizens and relying on principles acceptable for themselves and for future generations.²⁴

²⁴ JOHN RAWLS, *A THEORY OF JUSTICE* (1971); see also, JOHN RAWLS, *JUSTICE AS FAIRNESS. A RESTATEMENT* (2001); BRIAN BARRY, *JUSTICE AS IMPARTIALITY* (1995).

Undoubtedly, this type of people –who are placed under a ‘veil of ignorance’ in the sense that they don’t know anything about their own position in society in the future— will try to avoid by all means for the agreement to include the possibility that a group could invoke it to massively murder them for their ideas. On the contrary, this is one of the cases in which reasonable people would accept to remove all types of incentives for those facts to happen, to protect both themselves and future generations.

5. Concluding remarks

As evidenced by the brief account undertaken here, Argentina is carrying out one of the broadest investigations on State terrorism ever to have been carried out in a country, and it is doing so through its judiciary. The importance of these processes does not lie only in the punishment of the people held responsible, but in the future. The assurance that there can be no law or pardon for those who commit acts of political persecution, and that sooner or later they will be subjected to judicial process, is a strong institutional incentive to prevent State terrorism.