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PRESENTATION

Sur – International Journal on Human Rights is a biannual publication that presents an analytical and balanced standpoint on human rights in Southern Hemisphere countries. With the aim to strengthen the South-South and the South-North dialogue among human rights activists, scholars and UN officials, this journal promotes a critical debate on several issues related to the theme. It breaks away from a pseudo-consensus and opens up spaces to improve the quality of this discussion. It therefore invites dissent, since we believe that a consistent human rights doctrine will only be put into place after a wide-ranging exchange of ideas.

We firmly believe that the information that is being produced must be widely publicized and, for this reason, this journal is issued in three languages (English, Portuguese and Spanish). Approximately 6,000 copies of the first two issues have been distributed free of charge in over 100 countries and, to ensure an extended readership, we have made an unabridged version available at <www.surjournal.org>, in the three languages.

For this edition, papers have been submitted from thirteen countries (Argentina, Brazil, Cameroon, Chile, India, Ireland, Namibia, Nigeria, Switzerland, Tanzania, Uganda, United Kingdom, and United States). After a selection by an International Editorial Board, whose members are human rights scholars, specialists and UN officials, we are publishing eight contributions, one of which reports on a research project. The subject matters dealt with are: security and human rights; trade and human rights; access to justice on domestic and international levels; and land reform.

Two papers contributed by participants of the Knowledge Development Group, organized by **Sur** in April 2005, focus on the subject of **trade and human rights**. Caroline Dommen discusses mechanisms that, by protecting human rights, actually favor the trade practices in which they are inserted. Carlos Correa depicts the progresses made in the

process to lend more flexibility to the TRIPS Agreement for medical drugs, and shows how the Doha Declaration and the 2003 Decision of the TRIPS Board are insufficient to ensure a reduction in prices and the negotiation of voluntary licenses.

Tracing a bridge between **security and human rights**, the article of Bernardo Sorj deals with the concept of human security applied to Latin American problems.

Four articles – contributed by Alberto Bovino, Nlerum S. Okogbule, Maria José Guembe and José Roberto Cunha – discuss different aspects concerning **access to justice**, on domestic and international planes. From an international perspective, Bovino dwells on the peculiarities of evidence evaluation conducted by the Inter-American Court of Human Rights, underlining the flexibility shown by this jurisdictional body in dealing with grievous infringements of rights. Okogbule weighs the specific obstacles hampering access to justice in the Nigerian context. Guembe discusses the decision of the Supreme Court of Argentina, which deemed unconstitutional the amnesty laws that benefited military personnel involved in violations of human rights during the dictatorship. Cunha presents the results of his survey among magistrates in the state of Rio de Janeiro, Brazil, as to the extent of their familiarity with and their actual use of international law in issues involving human rights.

Land reform in Namibia is the theme of the text by Nico Horn, who considers the implications of the colonizing process and custom-law.

Although very varied in their themes and approaches, all these papers share a common point of departure – the contextualization of human rights – attempting to contribute to the reconstruction of these rights, with a view at their implementation, and to ensure a better coverage of local and regional demands.

We are wrapping up this issue with a summary of the plan of action submitted by the High Commissary for Human Rights, Louise Arbour, who proposes mechanisms to increase the effectiveness of human rights protection in the several UN member countries.

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ABSTRACT

The Supreme Court of Argentina has recently overruled the laws of amnesty benefiting military personnel involved in gross violations of human rights during the military dictatorship. The laws of Full Stop and Due Obedience had left unpunished the majority of military personnel involved in crimes against humanity. The judicial decision reverting the situation of impunity and warranting the right of the victim to truth and justice is a matter of major political importance, inasmuch as it admits the reopening of the previously closed lawsuits involving torture, kidnapping and murder. The verdict was cast in the course of a long process that Argentine society has had to face in order to deal with the heritage of its recent past. This article comments the most outstanding points of this historic decision and revisits the events that preceded it and contributed to make it possible. [Original article in Spanish.]

KEYWORDS

Military dictatorship – Trials for truth – Torture – Supreme Court of Justice

REOPENING OF TRIALS FOR CRIMES COMMITTED BY THE ARGENTINE MILITARY DICTATORSHIP

María José Guembe

On 14 June 2005 the Supreme Court of Justice of Argentina (Corte Suprema de Justicia de la Nación – CSJN) declared unconstitutional the laws of Full Stop (23492) and Due Obedience (23521) that stayed any punishment for crimes against humanity committed by the state between 1975-1983. This judicial resolution is the corollary of an almost three-decade-long struggle against impunity fought by the human rights' movements.

The aim of the laws of Full Stop and Due Obedience was to provide amnesty for mid and lower-rank officers. The argument presented to the public opinion at the time when these laws were passed was that this was a necessary step in order to uphold social peace.

When the Supreme Court of Justice was called to analyze the validity of these laws for the first time, it held that these laws resulted from considerations specific to the political power regarding serious interests at stake and that, as such, should be admitted by the Courts.

That was the decision of the CSJN in 1987. On that occasion, the Court considered that it was not the role of the Judiciary to evaluate the convenience or efficiency of the means adopted by the Legislative Power in order to reach its aims except if basic individual rights were breached or were unreasonably out of proportion to the aims sought.[1]

Some judges, even when challenging the main features of the Law of

1. CSJN decision of 22 June 1987, vote of the magistrates Caballero and Belluscio.

Due Obedience, resolved that the Congress was entitled to pass such a norm.[2] On that occasion, the Court decision was passed with only one contrary vote.

The years that followed witnessed an important evolution in domestic and international law, which compelled the judges to revise their position. Such judicial revision was carried out step by step, in different cases related to the breaching of human rights, committed during the military dictatorship.

The limits of political decisions in severe cases of violations of human rights

The incorporation, in 1994, of the international treaties on human rights to the National Constitution determined that political decision affecting the rights of the victims of severe violations of human rights could not be tolerated. By adopting the treaties of human rights and giving them constitutional hierarchy, the state acknowledged special obligations of international character.

There is a vast literature on the obligations of the states parties to the American Convention on Human Rights and to the International Covenant on Civil and Political Rights, in cases of severe violation of human rights. Both conventions determine the duty to respect and guarantee rights thereby acknowledged for the benefit of all the people under their jurisdiction (Articles 1.1 and 2.1, respectively)

What is fundamental to our subject matter is the interpretation that has been given to the provisions of these Conventions. It has been established that, as part of the generic obligation, if serious or systematic violations occur, specific obligations are imposed to indemnify the victim for the damages incurred, to punish those responsible for such damages, and to carry out institutional reforms in order to prevent the repetition of such atrocities. For many years, this interpretation has been upheld by the Inter-American Commission and by the Inter-American Court of Human Rights, as well as by the UN Human Rights Committee.

Additionally, the Supreme Court of Argentina has asserted that the jurisprudence that stems out of the organisms in charge of interpreting the treaties constitutes an indispensable guideline for the interpretation of the duties and obligations emanating from these treaties.[3] Thus, obligations

2. Justice Petracchi said that complying with orders does not justify or excuse any conduct and that an irreversible presumption that the military of a lower rank acted obeying orders is a breach of the principle of separation of powers of the state as it forces the magistrates to disregard the empiric objective data. He understood, however, that the law was to be considered as an amnesty that lay within the sphere of competence of the Congress.

3. H. Giroldi, on the appeals, CSJN, award of 7 Apr. 1995, in *Jurisprudencia Argentina*, t. 1995-III.

undertaken at the constitutional sphere and accepted before the international community, the extent of which has become increasingly well defined in more recent years, have limited the power of domestic law to condone with or to omit the infringement of fundamental human rights. The Court has pointed out:

> *Even if it is true that ... the National Constitution upholds the entitlement of the Legislative Power to dictate general amnesties, such an entitlement has suffered important limitations as far as its scope is concerned. As a rule, laws of amnesty have historically been used as tools for social appeasement with the declared purpose of solving conflicts remaining after armed civil struggles were ended. In an analogous way, laws 23492 and 23521 have attempted to overcome the confrontations between "civilians and military". However, and inasmuch as every amnesty tend to induce "forgetfulness" of gross violations of human rights, they are contrary to the ruling of the American Convention on Human Rights and of the International Covenant on Civil and Political Rights, and become therefore, constitutionally intolerable.*[4]

We shall return to this decision of the Argentine Supreme Court; before, however, we shall revise other national and international events and circumstances that prepared the ground for the decision of the judges concerning these amnesties.

How the judges perceived the changes within the international sphere

The Velásquez Rodríguez case,[5] in which the Inter-American Court declared that it was an obligation of the different states to investigate and punish violations of human rights, and the 28/92 report whereby the Inter-American Commission determined that the Argentine state had breached the Inter-American Convention, were the base for the judges to recognize the right to truth and opened proceedings to warrant it. This took place in the year 1995; nevertheless, a shift in judicial thinking and practice was still needed before the validity of the amnesties could be revised.

As from the recognition by the magistrates of their duty to investigate – the other side of the coin of the right to truth – "trials for truth" mushroomed all over the country. The Supreme Court of Justice admitted – not without a

4. CSJN, Simón, Julio Héctor and Others with reference to the illegal deprivation of liberty, etc. Case n. 17768, award of 14 June 2005, paragraph 16.

5. International Court of Human Rights, award of 29 July 1988, Series C, n. 4.

discussion – the right in the year 1998. At first they issued a verdict establishing the right to truth but they denied that the way to execute it was by means of criminal procedures such as the relatives of the victims intended. Quite to the contrary, it ascertained that it was to be achieved by means of the *habeas data*, intended, according to Argentine legislation, to obtain personal information registered in public or private data banks.[6] Only some of the judges followed the jurisprudence of the Supreme Court and most of the cases continued being treated by criminal courts.

The lawsuits for the truth brought the military once again to Court and authorized means of investigation in order to find out what happened to each one of the victims of state terrorism. These trials kept the Judicial Branch with the lawsuits concerning the dictatorship that had been amnestied.

While this was happening on the domestic sphere, the position of the international community concerning the immunity in case of severe violations of human rights began to shift. The different states became increasingly unwilling to tolerate solutions where the rights of the victims remained totally overruled.

In 1995, work was initiated on drafting a treaty that might crystallize the will of having a catalogue of crimes against international law and a permanent International Criminal Court to judge them. This wish took shape in 1998, the very same year that Augusto Pinochet was arrested in London.

In 1996, applying the principle of universal jurisdiction, Spain began to conduct investigations into the events that had taken place in Argentine during the military dictatorship. The same court that had closed the cases against the Argentine military now secured the arrest of Pinochet in London to have him face the court in Madrid. Such a decision gave rise to a universal cry for justice and although the extradition to Spain never took place, it remained clear that the crimes Pinochet was charged with had to undergo trial.

Spanish courts as well as French, Italian and German magistrates began to demand the extradition of Argentine officers so that they could be judged abroad. These events placed an enormous pressure on Argentine authorities. This is how changes in the international sphere came to encourage changes at home.

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6. This jurisprudence was established in two consecutive cases. The first was the Lapacó case, which established that the way to validate the right to truth was not filing criminal suits. The second, known as the Urteaga case, determined that the correct way was to petition for *habeas data*. The former resulted in a presentation being made to the Inter-American Commission of Human Rights at which a settlement was reached, whereby the Argentine state committed itself to admit the right to truth by means of a law and to define an appropriate procedure for its effective enforcement.

In 1998, the National Congress decided to derogate the laws of Full Stop and Due Obedience.[7] Their derogation resulted from the activity of a group of congressmen who presented the bill that posed the annulment of these laws. This initiative generated a vigorous debate on the possibility and effects of the annulment of these laws as well as on the motivation that had led to their enactment The most conservative warned against the institutional effects of the legislative annulment and the need to preserve juridical security. From the opposite side, the duty to investigate, prosecute and punish was proclaimed and the annulment was justified from the viewpoint of the international law on human rights. The result of this debate was a halfway resolution that did not satisfy the victims. The derogation did not eliminate the already accomplished effects of the laws and only affected those that were to be accomplished from that day on. The conservative sectors of the public opinion assuaged the military by asserting that the decision was merely symbolic and that it would not have any real effects. This statement was only partly true. Indeed, the derogation could also be interpreted as giving magistrates a green light to press forward along the path of justice that they had slowly began to pace.[8]

Without making any declarations against the unconstitutionality of the laws of Full Stop and Due Obedience, the Argentine judges began to revise some issues that prevented them from making headway in the judging of the facts that had remained outside the ruling of the laws of impunity. Such is the case of the crime of appropriation of children born out of missing parents and the subsequent change of their identity. The first step in this direction was the acknowledgement of the fact that the offences committed by the military during the dictatorship were crimes against humanity and therefore presented features that were different of crimes described and covered by the Argentine Criminal Code.

This acknowledgement was to produce effects on such issues as the prescription of criminal action. As far as this point is concerned, one of the first decisions on this matter reads as follows:

> *The evolution of the law ... that has taken place particularly in the case of international law, has implied a significant change of the juridical outlook serving as a base for deciding the case we are dealing with. This is so because, in accordance with the international public law, the deeds under consideration, apart from displaying per se a permanent character as long as the fate and the location of the*

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7. The derogation was ordered by law 24952, published in the *Boletín Oficial* on 17 Apr. 1998.

8. Years later, the Congress should take a step forward and declare its complete annulment.

missing people are still unknown, benefit from the statute of limitations, for these were transgressions against humanity, regardless of the date on which they were committed. ... The forced disappearance of people, a concept that includes the deeds here under scrutiny, is a crime against humanity and therefore cannot benefit from any statute of limitations, and this features overrules any domestic laws that may contain contrary provisions, regardless of the date on which the crimes were committed.[9]

At a later date, the Supreme Court of Justice ratified the imprescriptibility of criminal action in cases of crimes against humanity. They did so also in one case that was not covered by the laws of impunity: the murder in Buenos Aires of a former chief of Chilean army, General Prats and his wife, by members of the Chilean Intelligence Service, during the Augusto Pinochet regime.[10]

The problem was that Argentina had ratified the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity a long time after the deeds under investigation were committed. To overcome this obstacle, the Supreme Court declared that the above-mentioned convention merely **asserted** this permanent character that had already been acknowledged as a *ius cogens* norm.

In this manner, the prohibition of the non-retroactivity of criminal law has not been infringed upon and a principle established by usage, already valid at the time the deeds were committed, is asserted. From this point of view, in the same way as it is possible to assert that international usage already deemed crimes against humanity as imprescriptible even before the convention, this usage was generalized in international law before the incorporation of the convention into domestic [i.e. Argentine] law.[11]

Consequently the Court ruled that:

... the deeds for which Arancibia Clavel was convicted could not be declared as

9. CFCyC, Videla on exception to statutory limitations.

10. General Carlos Prats, former commander in chief of the Army during the Salvador Allende administration was murdered in Argentina in September 1974. The murder was committed by members of the Chilean Intelligence Service, who were sent to Buenos Aires and could obviously count on collaboration of their Argentine counterparts.

11. CSJN, Arancibia Clavel, Enrique Lautaro on first-degree homicide and illicit association and others. Case n. 259, resolution of 24 Aug. 2004, paragraphs 28 and 29.

invalid due to the passing of time according to international law on the day they were committed, meaning that there is no retroactive application of the convention but that the rule was valid due to international usage since the 60s, a usage which the Argentine state had ratified. ... The rules of invalidity of criminal action foreseen in the domestic legal framework are superseded by international common law and by the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.[12]

The statutory limitations on the crimes have been one of the most serious obstacles for the prosecution of the military and now this has been overcome. The Court was to return to the issue when the actual unconstitutionality of the law of impunity had to be dealt with.

The unconstitutionality of the laws of Full Stop and Due Obedience

The first decision to analyze the consistency between the laws of impunity, on one hand, and the Constitution and the treaties on human rights on the other was taken in 2001. As mentioned above, the Supreme Court declared these laws valid when they were first passed. The issue, however, reappeared in Court more than ten years later due to the fact that domestic and international law had changed and those changes were to affect the decision with respect to the validity of the laws.

In March 2001, a judge ruled for the first time the laws of Full Stop and Due Obedience to be unconstitutional.[13] This resolution was based on the acknowledgement of the fact that the felonies, inasmuch as they were committed within the framework of a systematic plan of repression carried out by the government and due to their gravity – were tantamount to crimes against humanity. "Such circumstance demands that they should be judged with due concern to the legal regulations of the common law enforced in our country and that are a part of the internal legal order", asserted the judge. The laws of impunity "... are opposed to long-standing universally acknowledged juridical principles and seriously disrupt the system of values on which our juridical system stands. The contradiction between these laws

12. Id., paragraphs 33 y 36.

13. Gabriel Cavallo, at the time in charge of the 4th Federal Court for Criminal and Correctional Matters of the Federal Capital. Case n. 8686/2000, Simón, Julio and Del Cerro, Juan Antonio on the kidnapping of children under 10.

and the said norms leads, as we shall see in due time, to the declaration of their invalidity".[14]

The judge admitted that the laws contradicted the provisions included in the international treaties to which Argentina was a party, which impose the obligation to investigate, prosecute and punish grievous violations of human rights. The obligation to respect and guarantee the rights protected by the Convention and the Covenant, as well as the duty to adopt measures on the domestic sphere to implement the provisions of these treaties implies a mandate for Argentina that involves all branches, including the Courts. In compliance with such obligation, the judge assessed the normative contradiction existing between laws 23492 and 23521 and the above quoted treaties.

With respect to the American Convention on Human Rights, the judge declared:

> *As has been demonstrated, the possibility of the injured party to accede to justice so that offences committed by members of the armed forces be duly investigated has been hindered by laws 23492 and 23521. In this way the possibility for an independent and impartial tribunal to arbitrate in a case of violation of human rights is eliminated, a fact that renders these laws illegal under the American Convention on Human Rights ... Consequently, the passing and the validity of laws 23492 and 23521 infringe the American Convention on Human Rights, inasmuch as they hinder the investigation required for the identification of authors and co-authors of violations of human rights committed by the de facto government (1976-1983) and the application of the corresponding penalties. Given that the enactment and the validity of laws 23492 and 23521 are inconsistent with the American Convention on Human Rights and the American Declaration of Human Rights and Duties, it is necessary to invalidate "Full Stop" and "Due Obedience" laws.*[15]

With similar arguments, the judge stated: "The laws of 'Full Stop' and 'Due Obedience' are contrary to the International Covenant on Civil and Political Rights since they imply an effective obstacle of the duty to warrant a free and full exercise of the rights acknowledged by the aforementioned Covenant in its Articles 2.2, 2.3, and 9.5. This being the case, these laws are to be declared invalid in the light of what has been established by the aforesaid international treaty".[16]

This judicial decision received a strong support when, a few days after it was laid down, the Inter-American Court of Human Rights emitted a verdict

14. Id., case n. 8686/2000.

15. Id.

16. Id.

in the Barrios Altos case[17] and declared the laws of amnesty dictated by the government of Alberto Fujimori invalid.

In its resolution, the Inter-American Court took its stand on the incompatibility of the laws of amnesty with the obligations stemming out of the ratification of the American Convention on Human Rights. The Court asserted that the state is compelled to deprive these laws of any juridical effects on the domestic sphere, to investigate, prosecute and judge all grievous violations of human rights and to punish the culprits. The decision of the Court in the Barrios Altos case marked a new stage in the jurisprudence of the region.

In November 2001, the Chamber of Appeals ratified the judicial decision that had declared the laws of Full Stop and Due Obedience to be null and void.[18] One of the central arguments for the decision of the court of appeals was the ruling by the Inter-American Court. "We are in the presence of an offence against humanity as an international crime, of which the imprescriptibility, contents, nature and conditions of responsibility are determined by international law, regardless of the criteria that may be determined in the domestic law of the states", asserted the tribunal.[19]

The duty to judge crimes of such significance, according to the magistrates, is to be found in Article 118 of the Constitution (the human rights article). On the other hand, the international treaties incorporated into the constitution compel the Argentine state to judge and punish gross violations of human rights. The Inter-American Court of Human Rights has declared the laws of amnesty opposed to the Pact of San José, Costa Rica and therefore invalid. The decisions of this organization, competent as far as the interpretation and application of the Pact is concerned, must be taken into account by the Argentine tribunals in their resolutions.

The Chamber quoted verbatim the main paragraphs of the sentence of the Inter-American Court in the Barrios Altos case. Particular emphasis was laid on: "The impunity of conducts that seriously affect the fundamental juridical goods subject to the tutelage of both manifestations of International Law is unacceptable. The states are liable for the identification of these conducts and the prosecution and punishment of the culprits and this cannot be eluded by such means as the amnesty".[20]

International order does therefore, in accordance to the resolution of the

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17. IAHR Court, Case of Chumbipuma Aguirre and Others v. Peru, judgment of 14 March 2001.

18. CFCyC, case n. 17889, appeal by Simón, Julio, judgment of 9 Nov. 2001.

19. Id.

20. Id.

Federal Chamber, render compulsory the prosecution and punishment of those liable of crimes against humanity. That is why the tribunal asserted that "apart from the laws of Full Stop and Due Obedience, there is no normative impediment to comply with this duty. But as long as these norms clash with the operability of the constitutional mandates the former are to be declared invalid and deprived of any effect".[21] The magistrates also voiced the following views:

> *... there is no doubt that the Supreme Court is under a special obligation to impose respect for the fundamental human rights, since, within its sphere of competence, the Tribunal represents national sovereignty ... As such, it is the head of one of the branches of the Federal Government, competent, to settle issues that may involve international liability of the Argentine Republic, such as those that give rise to the intervention of the above mentioned supranational organisms foreseen in the American Convention.*[22]

After an extensive and comprehensive argumentation, the tribunal concluded that "within the current context of our domestic law the declaration of nullity and unconstitutionality of laws 23492 and 23521 does not stand as an alternative, but as an obligation".

Similar decisions were taken in many cases in different parts of the country.[23] Step by step, tribunals began to declare these laws to be void,

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21. Id.

22. Id.

23. Other courts and chambers in different part of the country dictated resolution declaring the impunity laws unconstitutional: 3rd Federal Court for Criminal and Correctional Matters, case n. 16441/02 ("Massacre of Fatima"), 22 July 2004; 3rd Federal Court for Criminal and Correctional Matters, case n. 14216/2003 (formerly case n. 450 of the Federal Chamber) named "Suárez Mason, Guillermo and Others on aggravated homicide, aggravated illegal deprivation of freedom..." (16 Sept. 2003); 2nd Federal Court of La Plata, in case 7/7768 named Crous, Félix Pablo on his descendents (19 Sept. 2003); Federal Chamber of Salta, case 027/03, named "Cabezas, Daniel Vicente and Others, on Report – Palomitas – Cabezas de Buey" (29 July 2003); Federal Court of Chaco in the case named "Verbitsky, Horacio – C.E.L.S. on the unconstitutionality of laws 23521 and 23492" (6 March 2003); 11th Federal Court, case n. 6859/98 named "Scagliusi, Claudio Gustavo and Others on illegal deprivation of freedom" (12 Sept. 2002); 11th Federal Court for Criminal and Correctional Matters case n. 7694/99, named "Astiz Alfredo and Others, on crime in public action" (1 Oct. 2001). Finally, on 19 March 2004, the 3rd Federal Court for Criminal and Correctional Matters declared to be null and void the pardon decrees 1002/89 and 2746/90, in case 14216/2003 (formerly case n. 450 of the Federal Chamber), named "Suárez Mason, Guillermo and Others, aggravated homicide with illegal deprivation of freedom". This decision was confirmed by the Court for Appeals and the opinion of the Supreme Court of Justice of the Nation is still pending.

thus giving rise to the reopening of the trials concerning violations of human rights during the dictatorship and that had remained off bounds for nearly 20 years.

It took the Supreme Court several years to solve this question. Consequently, the composition of the Court was now changed. Several members of the Court had been removed; others had resigned to evade impeachment and were replaced by means of a procedure that ensured the participation of the civil society.

On 14 June 2005, the Court emitted a sentence and declared the laws of impunity to be contrary to the Argentine Constitution. The Court took into account that the "laws of Full Stop, Due Obedience and the subsequent indults had been scrutinized by the Inter-American Commission for Human Rights in its report n. 28/92. On that occasion, the Court maintained that the fact that trials under the criminal code for violation of human rights – missing people, summary executions, tortures and kidnappings – committed by members of the armed forces had been cancelled, prevented or rendered difficult due to laws ... and to decree 1002/89 stands as a breach of the rights guaranteed by the Convention, and interpreted that such legislation was incompatible with Article 18 (Right to Justice) of the American Declaration of Rights and Duties of Man, and Articles 1, 8 and 25 of the American Convention on Human Rights". It also recommended that the Argentine government should "adopt the necessary steps to shed light on the events and individualize the culprits of the violation of human rights that took place during the military dictatorship".[24]

The decision of the Inter-American Commission of Human Rights established clearly the limits of the power of decision of the states regarding events like the ones that took place during the dictatorship. Report 28/92, however, had no effect on the laws of amnesty. According to the Supreme Court, the concrete scope of the recommendation of the IAHR remained to be defined. According to the Court, it was not clear

> *... if it was enough to merely "shed light on the facts", in the sense of the so-called judgments of the truth or if the duties (and the faculties) of the Argentine state in this scope also implied to deprive the laws and the decree under discussion of all their effects, for such a conclusion would spell a strong restriction of the principle according to which nobody can be judged twice for the same crime and the principle of legality, which prohibits any retroactive prescription of criminal lawsuits, in many cases already fulfilled.*

24. CSJN, Simón, Julio Héctor and Others, above quoted case, paragraph 22.

These doubts were finally settled with the Barrios Altos case, in which the Inter-American Court considered that Peru was responsible for the violation of the rights to life and personal integrity arising from the massacre and also for the amnesty of such crimes. The amnesties violated the judicial guarantees, the right to judicial protection and the obligation to respect the rights and to adopt internal measures of protection. About the latter, the Inter-American Court pointed out explicitly:

> *41. ... provisions on the 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.*
>
> ...
>
> *44. Owing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, the said laws lack legal effect and may not continue to obstruct the investigation of the grounds on which this case is based or the identification and punishment of those responsible ...*

The Argentine Supreme Court determined – as indeed it had done before – that Argentine tribunals should take the decisions of the Inter-American Court as interpretative clues. Considering previous jurisdiction, the highest Argentine Tribunal resolved to accept the verdict in the case of Barrios Altos, and gave it a wide-ranging interpretation, as follows:

> *In order to comply with international treaties covering human rights, the suppression of the laws of Full Stop and Due Obedience cannot be delayed and must be carried out in such a way as to make sure that it will not turn into a normative obstacle for the prosecution of deeds such as those that are the object of the case in point. This means that the persons who were benefited by such laws cannot invoke the prohibition of retroactivity in criminal cases nor the benefit of the principle of not being judged twice for the same crime. This is so because in accordance with what has been stipulated by the Inter-American Court in the above-mentioned cases, such principles cannot hinder the annulment of the aforementioned laws or the prosecution of the cases that were declared extinct because of such laws, nor of any other cases that ought to have been initiated but never were so. In other words: the submission of the Argentine state to Inter-American jurisdiction prevents the principle of "non-retroactivity" in criminal law to be invoked in order to omit complying with the duties undertaken in the matter of prosecution of gross human rights violations.*

The Court also referred to the opinions of the UN Human Rights Committee, according to which "whenever public officials or agents of the state have committed violations of rights recognized by the Covenant, they cannot exempt the authors from their personal responsibility as has been done in the case of certain amnesties".[25] The Committee had told Argentina that the derogation of the laws of Full Stop and Due Obedience was not enough to revert the situation of impunity that these laws had created. "The gross violation of civil and political rights during the military government must remain liable to prosecution as long as necessary and with all the necessary retroactivity to secure the prosecution of the authors".[26]

The Court made its decisions consistently in accordance with decisions of international organisms; it declared therefore the unconstitutional character of the laws of Full Stop and Due Obedience and decided that no act based on them will have any effect that can be opposed to the progress of the suits submitted or to the trial and conviction of the culprits, or in any way create obstacles hindering the investigation of crimes against humanity committed on the territory of the Argentine Nation. It also resolved to confirm the validity of the law voted by the National Congress that annulled the laws of impunity.[27]

The decision is signed by the Justices Enrique Petrachi, Antonio Boggiano, Juan Carlos Maqueda, E. Raúl Zaffaroni, Elena Highton de Nolasco, Ricardo Lorenzetti and Carmen Argibay. The only dissidence came from Justice Carlos Fayt. The ninth magistrate – Augusto Belluscio – decided to excuse himself. Three of the Justices who are current members the tribunal had taken part in the Court verdict under which these laws had been ratified in 1987. Enrique Petracchi altered his position and explained it quoting the pre-eminence of international law over Argentine law since the 1994 constitutional reform. Carlos Fayt repeated his previous position asserting that the context in which these norms had been issued required measures of that type. According to this judge, treaties of human rights are subordinated to the Constitution in spite of the fact that they are incorporated into it.

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25. General Comment n. 31 adopted by the Committee of Human Rights, "The kind of the general juridical obligation imposed", 80th period of sessions (2004) paragraphs 17 and followings.

26. Session 1893, 1st Nov. 2000, paragraph 9.

27. The National Congress had invalidated the laws in September 2003 by law 25779, published in the *Boletín Oficial* of 3 Sept. 2003. This law has been assessed as unconstitutional by the military involved in the case.

Current state of the obligations of the state

The obligation of the Argentine state to investigate the violations of human rights committed in the recent past was faced in 1984 with the appointment of the National Commission on Kidnapping (CONADEP) and, some time later, with the opening of the trials for the truth.

The obligation to prosecute and penalize was partially complied with inasmuch as the members of the military juntas were put to trial, in 1985.[28] Even if the commanders convicted on that occasion were subsequently pardoned by President Carlos Menem, the deeds for which they were being judged were aired in a criminal suit and responsibilities were clearly established. The pardons have been declared unconstitutional by magistrates of the court of the first instance and these decisions have been ratified by courts of appeal. The final decision will be issued by the National Supreme Court of Justice, which has yet to examine the case.

At present, the cases looking into the liability of the other members of the armed and security forces have been opened and are currently in the fact-finding stage. Some of them will be soon sent to oral and public trial. Many of these cases were ready for the oral trial when the laws of immunity were enacted. This is why it will not be long before they move on to the completion of the trial and the issue of the award. Others will have to wait until more thorough investigations have been carried out.

The obligation to compensate for violations of human rights has been object of a specific policy by the Argentine state. At this point, it is fitting to consider the norms that have provided economic compensation for the victims. The compensation came to be defined within the framework of several legal norms, most of them enacted as from 1994.

On one hand, a law was enacted determining a compensatory amount for people who had been illegally deprived of their freedom during the military dictatorship – Law 24043. The beneficiaries of this rule were people who, prior to 10 December 1983, had been detained and placed at the disposal of the Executive Branch by reason of the state of siege.[29] It also covered civilians detained by the decision of military tribunals, with or without a sentence.

At a later date, the Congress passed another law that granted economic compensation to the victims of kidnapping and the heirs of people murdered

28. CFCyC, case n. 13/85, sentence of 9 Nov. 1985.

29. The state of siege was declared on 6 Nov. 1974; the same decree by María Estela Martinez had ordered the "elimination of subversion", which represented the beginning of state terrorism in Argentina.

by the military, members of the security forces or paramilitary groups.[30] There is no doubt that this was the law that brought about the greatest discussion on the meaning of economic compensation for the crimes of the dictatorship, even when no penalty was imposed. To understand the debate that arose, it is necessary to bear in mind the conflicts unleashed by the forcible disappearance of people: the refusal to give any information about the victims during the dictatorship, the lack of individualized answers after the re-establishment of democracy and the impunity of the culprits.

It was in the midst of this process of compensation that a new personal legal status emerged for people in the Argentine juridical order: that of a person "absent due to enforced disappearance". In this way, missing people were legally declared as such and not as dead, and the money handed over by the state was granted to the victims and not to their legal heirs. The declaration by the state that the person is still missing implies an official acknowledgement and the presumption that the body has not been recovered and that their final fate is unknown.[31]

Even though there is no official information about the total amount paid by the Argentine state so far, it is possible to estimate that approx. 1,170 million pesos have been paid as compensation for arbitrary detentions[32] and about 1,912,960,000 pesos as compensation for enforced disappearances and murders.[33] According to these data, the estimated total amount of indemnities paid would reach the figure of 3,082,960,000 pesos.

Compensation for the children that have been victims of the military dictatorship has been ordered by means of another recently enacted law.[34] This legislation provides compensation for people who were born while their mothers were deprived of freedom; children detained due to the detention or disappearance for political reasons inflicted on their parents and people who

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30. Law 24411, enacted on 7 Dec. 1994. Its regulatory decree, n. 403/95, was signed on 29 Aug. 1995.

31. The official response to this problem was the passing of the Law of Absence by Forced Disappearance (24321, enacted on 11 May 1994), that does not presume that the person had passed away but that the state admits that he/she is not present due to illegal kidnapping by agents of the state and has never appeared, neither dead or alive. The relatives of the disappeared persons have almost unanimously applauded this solution.

32. To obtain this figure we calculated that an average of 150,000 pesos was paid to each one of the 7,800 people who collected the compensation.

33. 224,000 pesos were paid to 8,540 people.

34. Law 25914, passed on 30 Aug. 2004.

had been victims of illegal substitution of identity. The latter refers to the cases where children were stolen from their detainee-parents and registered as legitimate children of other families (in many cases as children of the very same policemen or military who had stolen them from their biological parents).[35]

The Argentine state has also provided compensation for the Argentine victims whose rights had been breached in other countries of the region due to the so-called Condor Plan. This was a repressive coordination between several governments of the South Cone of America with the intent to carry out illegal repression. This coordination was first outlined in 1974 and went on until the end of the military dictatorships in the region. By means of this operation, national frontiers were eliminated as far as the repressive action was concerned, which allowed military regimes to violate human rights of their countrymen and women on the territories of other countries. This is how kidnappings and murders of foreigners took place in different countries of South America.

The Argentine state pressed for the passing of laws of reparation by the governments of other countries where Argentine victims of the Plan Condor existed – specially Chile, Uruguay, Paraguay, Bolivia and Brazil. These efforts were in most cases unproductive, except in the case of Brazil, which included the victims of Argentine nationality in their reparatory legislation.[36] Contrariwise, foreign victims of human rights violations in Argentina received the same compensation given to Argentines, as the laws enacted did not make distinctions based on citizenship.

The situation of exiled people required special discussion. For a number of years the discussion has raged in Argentina as to whether those forced into exile should receive an economic compensation. Opinions about this question were split and due to that, exiles were not included in reparatory laws.

On 14 October 2004, however, the Supreme Court of Justice decided that the situation of those who had to leave the country due to persecution by the military and the danger looming over their lives is similar to those who were deprived of their liberty and that, therefore, the economic compensation should be extended to these cases. As from then on, the national government promoted the passing of a law that takes specifically into account compensations for exiled people. So far this bill has received a partial approval from the Chamber of Deputies.

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35. People who have had their real identity suppressed will in all likelihood receive an indemnity equivalent to what has been determined by law 24411, i.e., 224,000 pesos. For all the remaining cases contemplated by the law, the benefit consists in a single payment of the sum equivalent to 71,288 pesos.

36. Law 9140, enacted in December 1995, included in its Exhibit 1, which details the beneficiaries, the names of three victims of Argentine nationality.

Conclusions

This overview shows how far the Argentine state has complied with its international commitments in relation to the crimes of the past. Even though from the standpoint of the victims and their relatives, there is still a long way to go before their rights have been fully vindicated, it is fair to admit that an important headway has been made in the treatment of the past.

Progress achieved in these last years is consistent with the processes taking place in other countries of the South American region. Chile is going through processes similar to those taking place in Argentina with specific features concerning its political and social dynamics. Although lagging behind, Uruguay begins to discuss some of the issues related to human rights and to take steps in that direction. Peru has conducted a complete investigation of what happened in those years and is carrying out inquiries to determine the liability of the culprits.

These processes are very valuable politically, socially and culturally. A lot has been said about the transition to democracy in the 1980s and 1990s. At that time, the analysis of the political situation was a priority and it has even been said that the rights of the victims was the adjustable variable for the difficult achievement of peace or stability of democracy. Many years had to be elapsed before this equation could have been altered. It is becoming increasingly difficult for governments to adopt decisions breaching these rights.

The argument that impunity bolsters democracy has been proved wrong. Recent history has shown that democracy will thrive as long as it is capable to ensure that those who depart from it or uproot its values will pay a high price for that. This is the lesson Argentine institutions are learning.

Translation from Spanish: Elizabeth Jezierski