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# Executive Leadership and the Continuing Quest for Justice in Argentina

Terence Roehrig\*

### ABSTRACT

After Argentina transitioned from military rule to democracy, the new civilian government attempted to prosecute members of the former military regime for human rights abuses. However, military rebellions, pardons, and amnesty laws prevented all but a few from being held accountable for past crimes. In 2003, President Néstor Kirchner along with the Argentine legislature and Supreme Court opened the door for further prosecution. Though many contributed to the revival of these efforts to prosecute military personnel and police, it was the actions of President Kirchner that were most crucial in removing the obstacles necessary to resume judicial proceedings.

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## I. INTRODUCTION

Throughout the 1970s and 1980s, many countries transitioned from military rule to democracy. These military regimes were often responsible for serious violations of human rights including kidnapping, rape, torture, and execution. Once the democratic transitions began, the new civilian governments faced a difficult choice: prosecute and risk upsetting the transition or move on and provide immunity for the military leaders. In Argentina, after initial efforts to prosecute, the new government of President Raúl Alfonsín attempted to limit the scope of its trials. After several military rebellions, the government retreated further from prosecutions, and in 1989 and 1990, President Carlos Menem pardoned members of the military regime and leaders of leftist guerrilla groups. A truth commission chronicled the past, but few from the military appeared likely to pay for their crimes. Despite the apparent end of judicial proceedings, the people's lingering desire to bring the perpetrators to justice remained. In 2003, President Néstor Kirchner and the Argentine legislature opened the door by taking the initial steps to reverse two amnesty laws that had long protected the military and security forces from prosecution. Eventually these efforts reached the Supreme Court where they languished for two more years before the justices reached a decision. Finally, in June 2005 the Court ruled that the amnesty laws were unconstitutional and opened the way for future judicial proceedings.

Several questions arise from this chain of events: Why has the desire to hold these leaders accountable remained despite a multitude of obstacles and the passage of many years? What are the key factors that rekindled these efforts? What lessons can others learn to hold leaders accountable for future human rights abuses? This article argues that while the efforts of several determined individuals, human rights groups, and European courts helped revive attempts to prosecute military personnel and police in Argentina, President Kirchner's actions were the most crucial to remove the obstacles that blocked further judicial proceedings. While the debate continues regarding the wisdom of prosecuting during a transition to democracy, the Argentine case indicates that some level of accountability may be necessary for states and societies to move on from past injustices. Though this may not be the case for all transitions, the level of impunity present in Argentina was not acceptable. Even after considerable time elapsed, most of the public wished to hold the perpetrators accountable for past crimes. This article begins with a review of some of the relevant theory concerning accountability and the transition to democracy in Section II. Section III follows with an overview of the military's past in Argentina, and Section IV recounts early efforts to prosecute former junta leaders and others in the military during the initial transition to democracy. In Sections V and VI, the article examines recent actions in Argentina and their impact on transitional justice. Section VII

addresses some problems presented by revisiting the past through prosecutions. Finally, Section VIII provides some conclusions for these efforts to restart the prosecutions.

## II. THEORY: ACCOUNTABILITY AND THE TRANSITION TO DEMOCRACY

When a military regime transitions to democracy, the new civilian government often faces a difficult decision. Should the new leaders seek to prosecute members of the former military regime in an effort to hold these perpetrators accountable for past human rights abuses, or should they forgo prosecution in the interest of reconciliation and establishing democracy? In the relatively new field of transitional justice, there have been several answers to this vexing question. The studies in these areas have addressed not only transitions from military regimes but also from civilian authoritarian regimes.

Those who oppose prosecutions often fall in line with Samuel Huntington's counsel in *The Third Wave*: "[D]o not prosecute, do not punish, do not forgive, and above all, do not forget."<sup>1</sup> Several concerns underlie this viewpoint. First, efforts to prosecute the military in the midst of a transition to democracy might provoke the military to reenter politics. Upon returning to power in the face of prosecution, military leaders may be even more reluctant to return power to civilian leaders and may become more repressive in an effort to avoid being brought to court. Even if the military were to stay out of government, it might not cooperate with judicial proceedings or with orders from police. Because a new civilian government faces many challenges in the early months of a transition to democracy, attempting to enforce compliance from the armed forces may be distracting and counterproductive. Moreover, deliberate disregard of judicial procedures by the military may undermine the authority of the new government and set a dangerous precedent for the armed forces to maintain its independence from civilian rule. Rather than risk any of these problems, some argue that civilian governments should choose to avoid prosecuting.<sup>2</sup> Leslie Vinjamuri and Jack Snyder identify this stance as the "pragmatist approach," noting that "the consequences of trials for the consolidation of peace and democracy trump the goal of justice per se, since the future prospects for justice depend on the establishment of social peace and unshakeable democratic institutions."<sup>3</sup>

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1. SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 231 (1991).

2. Aryeh Neier, *What Should be Done About the Guilty?*, in *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* 178 (Neil J. Kritz ed., 1995).

3. Leslie Vinjamuri & Jack Snyder, *Advocacy and Scholarship in the Study of International War Crime Tribunals and Transitional Justice*, 7 ANN. REV. POL. SCI. 353 (2004).

In addition to the problems described above, others have raised more specific legal issues regarding prosecutions. As a country transitions to democracy, there may be significant public pressure to hold the previous regime accountable for the past. In the midst of other pressing priorities, the new government may hurry through trials that are often fueled by a desire for revenge. As a result, the proceedings become substandard judicial processes that are based more on retribution than on proper jurisprudence. This is particularly problematic because a goal of the new regime should be to establish the rule of law and sound democratic procedures.<sup>4</sup> Other commentators are also concerned with prosecutions being *ex post facto* proceedings because the actions of the accused may not have been crimes when they were committed. Given that the prosecutions might happen years after the acts were committed, another concern pertains to the relevant statutes of limitation.<sup>5</sup> However, critics of this position argue that there is sufficient basis in international law—the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, among others—that overrides these concerns and establishes a duty to prosecute.<sup>6</sup> Finally, those who oppose prosecution maintain that a successful transition to democracy requires a society to move on from a horrible past and seek reconciliation between the victims and perpetrators. According to those commentators, prosecutions open old wounds and increase the desire for retribution, both of which make it more difficult to create consensus and a functioning democracy.<sup>7</sup>

Those who favor prosecutions, termed the “legalist approach” by Vinjamuri and Snyder, share a “belief in the importance of promoting universal standards of justice” and a “need to create tribunals that can enforce international law and, especially, international humanitarian and human rights law.”<sup>8</sup> These proponents make several arguments for prosecutions. First, many argue that the new civilian government has a legal obligation to prosecute these offenses. As a new democracy, the government must work to establish the rule of law. To ignore the heinous acts committed in the past would subvert these efforts.<sup>9</sup> Prosecutions also demonstrate respect for the victims and help them and the society as a whole bring closure to a tragic period.

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4. A. James McAdams, *Preface to TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES*, at xii (A. James McAdams ed., 1997).
  5. Luc Huyse, *Justice After Transition: On the Choices Successor Elites Make in Dealing with the Past*, 20 L. & SOC. INQUIRY 51, 60 (1995); David Pion-Berlin, *To Prosecute or to Pardon?: Human Rights Decisions in the Latin American Southern Cone*, 16 HUM. RTS. Q. 105, 115 (1994).
  6. Jamal Benomar, *Justice After Transitions*, J. DEMOCRACY, Jan.1993, at 4; Huyse, *supra* note 5, at 60; Neier, *supra* note 2, at 178.
  7. Huyse, *supra* note 5, at 63.
  8. Vinjamuri & Snyder, *supra* note 3, at 346–47.
  9. Huyse, *supra* note 5, at 57. See also RUTI G. TEITEL, *TRANSITIONAL JUSTICE* (2000).

Moreover, according to Juan Méndez, allowing military leaders to escape justice fosters impunity that “will only encourage new abuses in the near or distant future” and “sets the new political order on the weak foundation of privilege and the denial of the rule of law.”<sup>10</sup>

Finally, prosecutions also help to return the military to civilian control, an important element of the transition to democracy. Similar to purges, trials help to replace the worst perpetrators and those loyal to the old regime with officers supportive of the transition to democracy. Prosecutions also help to shame the military for its past bad behavior by focusing public attention on its actions and creating a deterrent effect for any future abuses.<sup>11</sup> To refrain from prosecution would allow the military to have a separate sphere of control where the rule of law does not apply and where the military is out of the reach of civilian control.

As the above views demonstrate, the decision of whether to prosecute is a difficult one and different states arrive at different conclusions. In the case of Argentina, Huntington’s admonition to “never forget” was not enough and the need to provide closure through judicial accountability remained. Thus, despite an effort to do so, a large segment of Argentine society was unhappy with simply reconciling, leaving the past behind, and moving forward. In order to bring accountability, however, concerted executive leadership was required to remove the significant legal and institutional obstacles that blocked further prosecutions.

### III. THE MILITARY IN ARGENTINE POLITICS

Argentina has a long history of military involvement in politics.<sup>12</sup> At times the military has chosen to remove an unacceptable leader and return promptly to the barracks, while at other times it has chosen to remain in power itself. According to J. Patrice McSherry, “the Argentine armed forces became accustomed to governing; they considered themselves the supreme guardians of the nation, embodying the national essence, with a mission to guide an unruly civilian population along the path of order, security, and develop-

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10. Juan E. Méndez, *In Defense of Transitional Justice*, in *TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES*, *supra* note 4, at 3–4.

11. A 1977 Amnesty International report regarding trials in Greece notes that torturers, “even though protected and sponsored by a political regime, can be brought to trial and punished. The traditional process of detection, trial and sentence is here seen to work with torturers as with other criminals, and this should provide a deterrent.” AMNESTY INT’L, *TORTURE IN GREECE: THE FIRST TORTURERS’ TRIAL* 1975, at 58 (1975). See also Jaime Malamud-Goti, *Transitional Governments in the Breach: Why Punish State Criminals?*, 12 HUM. RTS. Q. 1 (1990); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991).

12. See ROBERT A. POTASH, *THE ARMY & POLITICS IN ARGENTINA, 1928–45: YRIGROYEN TO PERÓN* (1969), for a general account of the military’s early involvement in Argentine politics.

ment.”<sup>13</sup> These beliefs also included a relative disdain for democracy, viewing popular political participation as dangerous because it allowed unsavory elements into power. The armed forces believed that only they could rise above the endless squabbling and narrow self-interest that dominated democratic systems. The military viewed itself as the ultimate protector of the state and the guarantor of its national interests. If a civilian government strayed from its duty, military intervention was necessary to protect those interests.

During the twentieth century, the military intruded into politics on several occasions, beginning with a coup d'état in 1930. The generals did not stay in power long, and elections followed soon after. In 1943, the armed forces intervened again to end a thirteen-year period of corrupt civilian rule. Though he was not one of the original coup organizers, Juan Perón eventually emerged from among the military's leaders and won the presidential election in 1946. Perón's rule lasted until 1955 when he, too, was ousted by the military and exiled to Spain. The military ruled for three more years before returning the government to civilian rule in 1958.

In 1966, the generals intervened once again, but this time they adopted a new approach. On most prior occasions, the military's involvement had been relatively brief—it removed politicians and guided the political system for a year or two before returning it to civilian rule. In 1966, the military was determined to stay in power for an extended period of time. Officers believed that they had the necessary training and expertise to bring order to the state and the economy, allowing the country to escape the political and economic malaise that had plagued Argentina for years. In addition to the usual subjects studied in the service academies, the new curriculum included economics, business, and management, which military leaders believed had prepared them to guide the economy. In what Guillermo O'Donnell labeled “bureaucratic authoritarianism,” military leaders, aided by civilian technocrats, provided the policy guidance necessary to bring order and stability to society and the economy.<sup>14</sup> Accordingly, the military believed that Argentina would no longer be stalled in the endless debate and indecision of democratic politics. The country needed new leadership and the armed forces were certain they were most qualified to provide it.

During the early years of military rule, the economy showed significant improvement with decreased inflation and increased industrial production. After a few years, however, Argentina's foreign debt began to consume the profits. By 1969, the economy was in decline, which created growing resentment among the people. Opposition to the regime also escalated from

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13. J. PATRICE McSHERRY, *INCOMPLETE TRANSITION: MILITARY POWER AND DEMOCRACY IN ARGENTINA* 32 (1997).

14. GUILLERMO A. O'DONNELL, *MODERNIZATION AND BUREAUCRATIC AUTHORITARIANISM: STUDIES IN SOUTH AMERICAN POLITICS* (1973); GUILLERMO O'DONNELL, *BUREAUCRATIC AUTHORITARIANISM: ARGENTINA, 1966–1973*, in *COMPARATIVE PERSPECTIVE* (James McGuire trans., 1988).



leftist guerrilla groups. The military and police responded to this dissension with tough measures grounded in the tenets of the National Security Doctrine (NSD), which the military taught in the service academies throughout Latin America. NSD maintained that the most pressing security threat to Latin American states was not any external enemy, but rather the internal threat of communist subversion. Adherents of NSD viewed communism as a threat to the very core of the state and society. According to Gary Wynia, "communism was the enemy of Christianity and capitalism, so those who criticized either were taken to be communist and deserving destruction."<sup>15</sup> The military suspected anyone who did not actively support the regime to be disloyal and treated them as enemies to eradicate.

The subversives were difficult to detect, however, and often utilized violent, unconventional methods to challenge the government and society. In order to eliminate the threat of guerilla groups, the military required constant vigilance and called for extreme measures such as extermination and torture. According to General Jorge Videla, one of the junta leaders, "with the objective [of securing social peace] we will combat, without respite, subversive delinquency in all of its forms until its total annihilation."<sup>16</sup> Members of the military and police cracked down hard on subversives and guerrillas. In their minds, the communist threat had to be crushed, and they were the ones to do it as the guardians of the state.

As the years of military rule progressed, the economy continued to deteriorate and violence escalated as the Left retaliated. The military also became increasingly divided over its own leadership. By 1970, it was clear that the armed forces were having great difficulty sustaining public support for its rule. Violence from the Left was growing and the country appeared to be falling apart with little hope for peace and stability. Many Argentines, even some in the military, began to call for the return of the one man who could unite the country and bring an end to the conflict. That man was Juan Perón.

Finally, the military relented and held elections in 1973. Perón chose not to run, because junta leader General Lanusse indicated that he would veto a Perón candidacy. As a result, fellow Peronist Dr. Héctor Cámpora ran in his stead. Cámpora was the victor, but everyone knew that it was only a matter of time before Perón would be back in office. Peronists often said at the time, "Cámpora to the government, Perón to power."<sup>17</sup> In July 1973, Cámpora resigned and Perón won new elections with over 60 percent of the

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15. GARY W. WYNIA, *ARGENTINA: ILLUSIONS AND REALITIES* 81 (2d ed. 1992).

16. David Pion-Berlin & George A. Lopez, *Of Victims and Executioners: Argentine State Terror, 1975–1979*, 35 *INT'L STUD. Q.* 63, 71 (1991).

17. DEBORAH L. NORDEN, *MILITARY REBELLION IN ARGENTINA: BETWEEN COUPS AND CONSOLIDATION* 45 (1996) (quoting LILIANA DE RIZ, *RETORNO Y DERRUMBE: EL ÚLTIMO GOBIERNO PERONISTA* 55 (1981)).



vote. Perón's rule did not last long; in July 1974, the seventy-seven-year-old president died from a heart condition. His wife and vice president, Isabel Perón, succeeded him but struggled to lead the country. As the economy worsened and political violence grew, the armed forces believed that they must intervene again to rescue Argentina. On 24 March 1976, the military ousted Isabel Perón, much to the relief of many Argentines.

As in 1966, the military believed that no one could guide the country as they could. However, the military was determined to do a better job in reuniting Argentine society, correcting the economic shortfalls, and eliminating the subversive elements that were destroying the country. In October 1975, General Videla asserted, "all those persons necessary will die in order to achieve the security of the country."<sup>18</sup> The new government did its best to fulfill these words, and in the process it committed terrible atrocities.

In the years that followed the 1976 takeover, the military and police pursued in earnest those they considered subversives in what became known as the "dirty war." Because democracy had failed under Perón, the military felt it was time for the armed forces to impose order and security, which was something they did well. For military leaders, leftist, subversive elements were a cancer that had to be eliminated. According to Lieutenant Colonel Hugo Pascarelli, the battle against the Left "knows no moral or natural limits; it takes place beyond good and evil."<sup>19</sup> The military wanted to destroy the "evil" brought by leftist terrorists while remaking society and the economy.

Early in its rule the military launched a massive effort to eliminate the two chief subversive groups, the *Montoneros* and the ERP (*Ejército Revolucionario del Pueblo*) guerrillas. Even after early success against these groups, the government continued to target anyone even remotely associated with the Left. The appearance of one's name in the address book of an alleged subversive was sufficient to make that person a suspect for security forces. Most of those who the government rounded up were never seen or heard from again. The military and police took the *desaparecidos* (the disappeared) to one of more than 350 detention facilities for interrogation. At those facilities, the *desaparecidos* were usually tortured and killed, their bodies then vanished without a trace. It later became known that some of the victims, drugged and naked, were flown over the sea and dropped in the water in order to hide evidence.<sup>20</sup>

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18. McSHERRY, *supra* note 13, at 78.

19. EMILIO MIGNONE, WITNESS TO THE TRUTH: THE COMPLICITY OF CHURCH AND DICTATORSHIP IN ARGENTINA, 1976–1983, at 106 (Phillip Berryman trans., 1988).

20. Calvin Sims, *Argentine Tells of Dumping "Dirty-War" Captives Into Sea*, N.Y. TIMES, 13 Mar. 1995, at A1.

In 1984, the Argentine National Commission on the Disappeared (*Comisión Nacional Sobre la Desaparición de Personas*, or CONADEP) released its report *Nunca Más* (Never Again), which documented 10,000 *desaparecidos* killed by the military.<sup>21</sup> Some human rights groups, however, place the number at 30,000.<sup>22</sup> Precise numbers will never be available to document those who were innocent and those who were involved with the guerrilla groups, but one source notes that at least 10,000 Argentines were involved, at some level, with the guerrillas.<sup>23</sup> However, the remainder had done little or nothing to merit attention from the authorities. Security forces also seized children and pregnant women in their sweeps. When small children were taken with their parents or were born in captivity, their captors often sold those children to military or police families for adoption. The CONADEP report cites approximately 400 children sold for adoption and that “in most cases it can be presumed that the births were [sped] up and performed by means of a Cesarean section.”<sup>24</sup>

By 1981, the military found that it had no greater long-term success in improving the economy than earlier governments. The public was increasingly dissatisfied with military rule and the repression utilized to sustain it. In an effort to bolster public support and unite the country behind the junta, on 2 April 1982, military leaders embarked on a desperate gamble to seize the *Islas Malvinas* (Falkland Islands) from the British. However, the military regime gravely underestimated British resolve and soon suffered an embarrassing defeat when Prime Minister Margaret Thatcher ordered British forces to retake the islands. On 14 June 1982, Argentine forces surrendered. For most Argentines, the devastating loss reinforced the incompetence of the military because it could not succeed in warfare, the area in which it was most trained. With its credibility destroyed, the junta soon broke apart and scurried back to the barracks, promising elections and a return to democracy.

#### IV. THE TRANSITION TO DEMOCRACY AND EARLY ATTEMPTS TO PROSECUTE THE MILITARY

New elections were held in 1983, and voters chose Radical party candidate Raúl Alfonsín to lead Argentina's transition to democracy. Alfonsín's campaign

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21. ARGENTINE NATIONAL COMMISSION OF THE DISAPPEARED (CONADEP), *NUNCA MÁS: THE REPORT OF THE ARGENTINE NATIONAL COMMISSION OF THE DISAPPEARED* (Writers and Scholars Int'l Ltd. trans., 1986).
  22. See, e.g., Project Disappeared, *Presentes*, available at <http://www.desaparecidos.org/arg/victimas/eng.html>.
  23. THOMAS E. SKIDMORE & PETER H. SMITH, *MODERN LATIN AMERICA* 101 (6th ed. 2005).
  24. CONADEP, *supra* note 21, at 286–305.

focused on holding the military accountable for past human rights abuses, proclaiming that the junta “will not only have to be judged by history, but also tried by regular civilian courts.”<sup>25</sup> Shortly before its exit, the junta decreed the “Law of National Pacification” that granted amnesty to all soldiers who served from May 1973 to June 1982.<sup>26</sup> Many soldiers were unhappy with the amnesty, believing that they had done nothing wrong in the first place. After his inauguration, Alfonsín sent a bill to Congress calling for the nullification of the “Law of National Pacification.”<sup>27</sup> The Congress approved the measure unanimously, setting an important precedent for similar laws in the future.

Alfonsín’s plan for prosecution attempted to steer a middle ground between prosecuting extensively throughout the ranks and allowing the military’s amnesty to stand. He chose to prosecute commanding officers who ordered the criminal acts and those who exceeded the orders of superiors of their own volition. Exempt from prosecution were soldiers and police who simply followed orders. Alfonsín hoped he could limit the scale of prosecutions and ensure the transition to democracy while providing some measure of satisfaction for justice and avoiding a military backlash.<sup>28</sup> In December 1983, Alfonsín issued Decree 158/83 that ordered the prosecution of nine leaders from the military regime: Generals Jorge Videla, Roberto Viola, and Leopoldo Galtieri; Brigadiers Orlando R. Agosti, Omar Rubens Graffigna, and Basilio Lami Dozo; and Admirals Emilio Massera, Armando Lambruschini, and Jorge Anaya.<sup>29</sup> These former junta members faced charges of illegal detention, murder, and torture, among other crimes. The Military Supreme Council, a military tribunal composed of retired officers, was given initial jurisdiction. However, after months of stalling, the Council returned not guilty verdicts based on what it claimed was insufficient evidence.<sup>30</sup> Because the military refused to clean its own house, Alfonsín turned the cases over to civilian courts.

The trials produced a horrifying account of the “dirty war,” which the Argentine public followed closely. On 9 December 1985, after hearing the testimony of countless witnesses, the civilian court found five of the nine defendants guilty. The court gave two of those defendants, General Videla and

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25. McSHERRY, *supra* note 13, at 110 (quoting BUENOS AIRES HERALD, 3 May 1983, at 1) (internal quotations omitted).

26. José Zalaquett, *From Dictatorship to Democracy: Kicking out the Generals is Only the First Chapter*, THE NEW REPUBLIC, 16 Dec. 1985, at 18, 20.

27. *Id.*

28. Robert A. Potash, *The Military Under Alfonsín and Menem: The Search for a New Role, in ARGENTINA IN THE CRISIS YEARS (1983–1990)* 55 (Colin M. Lewis & Nissa Torrents eds., 1993).

29. DAVID PION-BERLIN, THROUGH CORRIDORS OF POWER: INSTITUTIONS AND CIVIL-MILITARY RELATIONS IN ARGENTINA 81–82 (1997); NORDEN, *supra* note 17, at 101–102.

30. DAVID PION-BERLIN, *supra* note 29, at 82.

Admiral Massera, life sentences. General Viola was sentenced to seventeen years, Admiral Lambruschini to eight years, and Brigadier Agosti to four and one-half years. The other four defendants—Galtieri, Graffigna, Lami Dozo, and Anaya—were acquitted. An appeals court later affirmed the verdicts but reduced the sentences of Viola and Agosti.<sup>31</sup> The convictions were unprecedented in Latin America. Alfonsín hoped that this would satisfy those calling for justice, but he was mistaken.

While these efforts to prosecute were unfolding, Alfonsín implemented measures to bring the military under civilian control, an important requirement for the transition to democracy. Alfonsín strengthened the powers of the civilian Ministry of Defense at the expense of the service chiefs and slashed the military budget; with the cuts born largely by the army, many soldiers had to take part-time jobs.<sup>32</sup> To remove the military from politics, the government passed laws that increased the penalty for participation in a coup and removed military intelligence from any role in internal defense. Finally, Alfonsín purged numerous top-ranking officers in an effort to clear out some of the leaders from the previous regime and appointed new officers who were more amenable to civilian control.

Despite Alfonsín's efforts to control the prosecutions, the public clamored for greater accountability. Individuals continued to file indictments so that by mid-1986 3,000 cases were pending in Argentine courts.<sup>33</sup> This second wave of trials resulted from two developments. First, in the convictions of the five junta leaders, the court included "Item 30," which maintained that lower level military personnel also shared responsibility for the atrocities.<sup>34</sup> Consequently, the court noted it was required to send the relevant evidence back to the military court that acquitted these officers so that others could be brought to justice. A second reason for the wave of new trials is that Argentine judicial procedure allows for civilians to file a case directly with the courts. The number of cases increased dramatically as individuals and human rights groups made extensive use of this provision.<sup>35</sup> Despite Alfonsín's efforts, the number of cases swelled as the courts pressed on with demands for justice.

While the pressure to prosecute grew, the military remained defiant and determined to oppose efforts to put them on trial. In May 1986, Alfonsín barely escaped an assassination attempt while visiting an army base. Numerous officers also spoke out publicly against government policy, voicing criticism of the budget cuts and the decreased role in internal security. More

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31. *Id.* at 83; NORDEN *supra* note 17, at 102.

32. NORDEN, *supra* note 17, at 94.

33. PION-BERLIN, *supra* note 29, at 91 n.47.

34. *Id.* at 84.

35. *Id.* at 89.

importantly, the military maintained that it was being attacked for doing its patriotic duty in defending the nation, and it should be honored for its service instead of prosecuted.

As tension between the civilian government and the military grew and the possibility of ever-increasing prosecutions became apparent, Alfonsín decided to act. On 24 December 1986, he convinced the Congress to approve *Punto Final*, or the End Point Law (Law No. 23,492). The law stipulated that all current cases would remain on the docket but that there would be a sixty-day time limit for initiating new cases. Any person not charged within this period was exempt from prosecution unless the offenses involved children.<sup>36</sup> Alfonsín convinced the Congress to pass the legislation as a compromise that would allow many to be brought to justice while still imposing a limit to prosecutions that would move the country towards reconciliation. Despite Alfonsín's hopes, the measure actually increased the number of cases, as attorneys and judges worked furiously to file as many as possible before the deadline. Passed on 24 December, the sixty-day time period of *Punto Final* coincided with the Christmas and New Year holidays along with the month of January, the peak of summer and the height of vacation season in the southern hemisphere. Officials no doubt hoped that this would help slow down efforts to meet the *Punto Final* deadline but judges and attorneys cancelled vacations to beat the time line. One estimate indicated that an additional 400 military personnel were charged during this period.<sup>37</sup>

Faced with the prospect of on-going prosecutions, a group within the military decided to act. In April 1987, during Easter week, the *carapintadas* (the painted faces, for their camouflage battle paint) seized the Campo de Mayo army base near Buenos Aires. The group's leader, Lieutenant Colonel Aldo Rico, stressed that this was not a coup, but a demonstration of their resentment toward the trials and the government's vindictive treatment of the military.<sup>38</sup> The public was outraged at the rebels' action. After talks with the rebel leaders, Alfonsín announced that they had agreed to surrender. However, Alfonsín did not announce that in return he agreed to introduce a second amnesty law, *Obediencia Debida* (Due Obedience, Law No. 23,521). This new law exempted from prosecution all soldiers below the rank of colonel. The Congress passed the law on 5 June 1987, and the Supreme Court confirmed the law's constitutionality on 22 June 1987, essentially stopping most of the prosecutions. In line with his original intention to take a middle path, Alfonsín had now successfully confined the prosecutions to the higher echelon officers.

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36. PION-BERLIN, *supra* note 29, at 97.

37. WYNIA, *supra* note 15, at 172.

38. NORDEN, *supra* note 17, at 128–31.

Despite the passage of the amnesty law, another insurrection followed in January 1988, led again by Rico and the *carapintadas*. This time the government responded more decisively. Using troops loyal to the government, Alfonsín forced the men to surrender. Two more insurrections followed in December 1988 and December 1990. However, these had little to do with the trials; instead, they were efforts to grab power for certain sectors in the military. The public and many in the armed forces opposed these efforts to reenter politics, and the rebellions were easily subdued.

The final rebellion occurred in December 1990 under a new president, Carlos Menem, a Peronist who had received a significant share of the military's vote in the May 1989 election. Menem did not hesitate to bring an end to the trials, but he also ensured that the armed forces encroached no further on the government's power. As a result, he cut budgets and reduced the size of the military. Yet, he also raised salaries and allowed for the military's return to a role in internal security. Most importantly, in October 1989, Menem issued pardons for 277 people, believing these pardons were necessary to restore the military's trust in the government. The pardons were controversial and included twenty senior officers still under indictment for "dirty war" atrocities, soldiers facing court martial over their involvement in the rebellions, and three junta members indicted for incompetence during the Malvinas War. These pardons excluded the senior officers who were convicted earlier. However, in December 1990, after the fourth rebellion, Menem pardoned these officers as well, along with several leftist guerrilla leaders.<sup>39</sup> The two amnesty laws, *Punto Final* and Due Obedience, along with Menem's pardons, effectively halted any efforts to prosecute.

When efforts to prosecute began in 1983, Alfonsín attempted to take a cautious approach in holding the military and police accountable, but the process soon escaped his control. The military saw the trials as a vendetta against the armed forces, even though the military believed that it had simply performed its duty. As Deborah Norden notes, the trials

reflected an official condemnation of the military institution, and condemnation of the one front where the armed forces believed they had succeeded. Rather than honoring the military heroes for defending the nation from a dangerous enemy the trials portrayed them as criminals and the "enemy" as innocent victims.<sup>40</sup>

With Menem's pardons, the likelihood of trials appeared remote, and Argentina appeared on a path that chose to move beyond the past rather than to prosecute.

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39. WYNIA, *supra* note 15, at 215; Potash, *supra* note 28, at 64–66.

40. NORDEN, *supra* note 17, at 126.

## V. JUSTICE REVISITED

After the amnesty laws and the military rebellions, most Argentines resigned themselves to the likelihood that the perpetrators of these atrocities would go unpunished. Authorities still pursued charges of rape and crimes committed against children, such as the kidnapping and sale of babies, which the amnesty laws did not cover. Even high level leaders such as Reynaldo Bignone were under investigation for these crimes.<sup>41</sup> However, those crimes seemed to be the extent of any further judicial accountability. Human rights groups continued to collect evidence in the hopes that a few high-profile cases would eventually be prosecuted. These efforts received encouragement from a somewhat unexpected quarter. In 1998, Spanish judge Baltasar Garzón requested the indictment of former Chilean leader, General Augusto Pinochet, who was in Britain for medical treatment. After months of indecision, British authorities sent him back to Chile, arguing that he was not fit to stand trial. While Britain refused the Spanish court's request, the new effort to prosecute, labeled the "Pinochet Effect" by Naomi Roht-Arriaza, elevated hopes in Chile, Argentina, and elsewhere that justice might be possible, even if it occurred outside the home country.<sup>42</sup>

Initially, most requests for extradition from European courts attempted to extradite Argentine perpetrators for crimes against only European citizens.<sup>43</sup> In 1990, prior to the Pinochet extradition request, former Argentine naval Captain Alfredo Astiz was convicted *in absentia* in a French court for the murder of two French nuns. The French government had requested his extradition to stand trial but Argentina refused. Successive Argentine presidents—Carlos Menem, Eduardo Duhalde, and Fernando de la Rúa—adhered to the "official doctrine" that denied any requests for extradition on the grounds of sovereignty.<sup>44</sup>

In spite of the "official doctrine," foreign governments continued to seek accountability from former Argentine leaders. In 2000, Italian authorities prosecuted *in absentia* two generals, Guillermo Suárez-Mason<sup>45</sup> and Santiago Omar Riveros, along with six lower-level personnel. After a four-month trial, all eight were convicted of murder and kidnapping and the

41. *Argentine Ex-Ruler to go on Trial*, BBC NEWS, 24 Apr. 2007, available at <http://news.bbc.co.uk/2/hi/americas/6586853.stm>.

42. NAOMI ROHT-ARRIAZA, *THE PINOCHET EFFECT* (2005).

43. See *id.* at 118–49 for a discussion of the European efforts.

44. *Id.* at 137.

45. Suárez-Mason died in prison in June 2005. He had been under house arrest while under investigation but was sent to prison for violating the terms of this arrangement. He had fled Argentina for the United States but was extradited back in 1988. Suárez-Mason remained unrepentant, declaring in 1996: "I don't regret anything I did. I followed the rules of the army." *Symbol of 1976–1983 Military Brutality Dies*, BUENOS AIRES HERALD, 22 June 2005.



two generals received life sentences.<sup>46</sup> In 2001, Italy and Sweden requested the extradition of Astiz for the disappearance of several of their citizens.<sup>47</sup> A 2001 poll indicated that 62 percent of Argentines favored his extradition, but despite the public support, President de la Rúa maintained the official doctrine and denied the request.<sup>48</sup> Finally, in 2001, a German court filed for the extradition of Suárez-Mason and others involved in the death of Elizabeth Kassemann, a university student and daughter of a well-known German theologian. Argentine judge Gabriel Cavallo approved the request, but as before, the president denied extradition.<sup>49</sup>

The turning point in Argentina came in 2003 when a series of stunning moves by various players in the Argentine government removed several obstacles, allowing authorities to revisit efforts to prosecute. In May 2003, Néstor Kirchner assumed the office of the presidency and declared his support for holding the military and police responsible for their crimes.<sup>50</sup> Soon after taking office, Kirchner reversed the “official doctrine” that had prohibited the extradition of Argentine nationals for prosecution abroad. This move came one day after a federal judge in Buenos Aires ordered the detention of forty-six former government officials. Several of these individuals were already under house arrest for crimes of rape and kidnapping the infants of detainees. In June 2003, after issuing the indictment for Pinochet, Judge Garzón issued forty-six indictments for perpetrators in Argentina.<sup>51</sup>

In addition to annulling the extradition prohibition, Kirchner also pushed to abolish the two amnesty laws, *Punto Final* and *Due Obedience*. In August 2003, both houses of the Argentine Congress voted by large majorities to annul the laws. These statutes had previously been repealed in 1998, but the action was not retroactive because legislators believed that making it so would violate a principle of leaving decided cases undisturbed. As a result, the 1998 action had little effect. By 2003, most legislators viewed the matter differently. First, few saw any difference between repealing these laws and the action Alfonsín and the Congress took in 1983 to rescind the military’s self-proclaimed amnesty. Second, many now believed these laws

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46. ROHT-ARRIAZA, *supra* note 42, at 132–133.

47. Larry Rohter, *Argentines Face Human Rights Trials in Europe*, N.Y. TIMES, 28 July 2003.

48. ROHT-ARRIAZA, *supra* note 42, at 133.

49. *German Justice Pursues Argentina’s Killers*, DEUTSCHE-WELLE, 4 Dec. 2003, available at [www.dw-world.de/dw/article/0,,1049647,00.html](http://www.dw-world.de/dw/article/0,,1049647,00.html); ROHT-ARRIAZA, *supra* note 42, 136–137.

50. In April 2003, Argentina held what was likely to be the first round of a two round presidential election. In a multicandidate contest, Menem won the first round with 24 percent while Kirchner came in second with 22 percent. Though Menem won, it was not sufficiently high to indicate he had the support to beat Kirchner in a head to head runoff. The following month, Menem withdrew from the election giving the office to Kirchner. However, Kirchner was prevented from obtaining a larger, second round vote total so that he was awarded the presidency with only 22 percent of the vote.

51. ROHT-ARRIAZA, *supra* note 42, at 139.

were void from the start since they violated the Argentine Constitution and international law.<sup>52</sup> Constitutional reforms instituted in 1994 incorporated international human rights treaties, which in turn created an opportunity to revisit the repeal of these laws. Argentine courts also indicated that there was no statute of limitations on these types of crimes against humanity that could effectively block further prosecution. Congressional efforts to annul the laws had been sparked in part by President Kirchner's removal of the extradition prohibition, followed soon after by the extradition requests of the Spanish Judge Garzón. Members of Congress feared the loss of Argentine sovereignty should they fail to act. Soon after, Garzón dropped the indictments and extradition requests, believing Argentine authorities were now going to pursue these perpetrators under their own law.

Garzon's move placed even greater pressure on Argentine courts to restart the judicial process. Consequently, the Federal Court of Buenos Aires ordered trials to be reopened in cases dealing with the Navy Mechanics School (*Escuela Mecánica de la Armada*, or ESMA) and the detention centers of the First Army Corps. These institutions were notorious for their horrendous treatment of detainees. Lower courts ruled on several of these cases and declared the amnesty laws unconstitutional. However, most defendants appealed these verdicts to the Supreme Court, where a final decision was needed to overturn the two laws. Here, the efforts to prosecute hit a bottleneck.

During his administration, President Menem had increased the number of judges on the Supreme Court from five to nine, arguing that the increase was necessary for the court to deal with its growing workload. By appointing these new judges, Menem created an "automatic majority" that was loyal to him and his efforts to protect the military from prosecution. According to Justice Augusto Belluscio, who was on the court at the time, this expansion was "disgusting. . . . It was the creation of an artificial majority to co-operate with the authorities taking power at that time, when the aim of the Constitution is for justices to remain in office beyond political changes."<sup>53</sup> The Court was an unpopular institution that had already supported the Due Obedience law and was viewed by many as a compliant supporter of Menem's economic policies during a period of corruption and disaster. The Court would also likely block any attempts to reverse the two amnesty laws.

In an effort to reform the Court, Kirchner reconfigured its composition by forcing some of these judges off the bench. One justice was impeached for malfeasance, which was the first judicial impeachment since 1947. Three others resigned under the threat of impeachment.<sup>54</sup> Their replacements were

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52. ROHT-ARRIAZA, *supra* note 42, at 117.

53. *Government Hints at Reducing Court Size*, BUENOS AIRES HERALD, 9 June 2005.

54. The four justices that left the court were Eduardo Moliné O'Connor, impeached for malfeasance, along with Guillermo López, Julio Nazareno, and Adolfo Vázquez who all resigned before they would have likely been impeached.

more amenable to prosecution and played an important role in continuing the judicial proceedings. However, the shake-up in the Supreme Court, along with an extensive backlog of cases, caused a long delay before a final ruling was issued.

While waiting for the Court to rule on the amnesty laws, Kirchner took measures to ensure that eventual prosecutions would not provoke another military backlash reminiscent of the 1980s. His first measure, which he took after only five days in office, was to purge many top-ranking officers from the military. This measure cemented civilian control of the military, which is an important dimension for the democratic transition.<sup>55</sup> The president appointed Roberto Bendini, a relatively junior officer, to the post of Army Chief-of-Staff. By Army custom, when a general is appointed to this top post, all officers above that rank who are bypassed for promotion are expected to retire. Alfonsín had previously used this approach to force the resignation of close to fifty generals, and Kirchner's move required the retirement of almost half of the top generals. The outgoing chief Ricardo Brinzoni complained that the government was reinstalling "political intrigues" in the military. The next day Kirchner retorted that the military no longer has a role in assessing political decisions.<sup>56</sup>

In an additional move to avoid a military backlash, Kirchner presided over an important symbolic event that demonstrated the military's subjugation to civilian control. In a 2004 ceremony at the Military College that commemorated the Twenty-Eighth Anniversary of the 1976 coup, Kirchner watched as Army Chief Bendini removed the wall portraits of two of the school's former directors, General Jorge Videla and General Reynaldo Bignone, both former members of the junta. Later that day, Kirchner signed an agreement with Buenos Aires officials to turn the Navy Mechanics School into a memorial and museum for the disappeared victims.

Despite the delay in the Supreme Court concerning the constitutionality of the amnesty laws, some progress did occur on other fronts. First, multiple prosecutions continued on charges of rape and the theft of babies from victims at detention facilities. Close to 400 babies were sold after being taken from parents.<sup>57</sup> Second, Spanish proceedings against two Argentine officers, Adolfo Scilingo and Ricardo Miguel Cavallo commenced while awaiting a Supreme

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55. See ALFRED STEPAN, *RETHINKING MILITARY POLITICS* (1988); TERENCE ROEHRIG, *THE PROSECUTION OF FORMER MILITARY LEADERS IN NEWLY DEMOCRATIC NATIONS: THE CASES OF ARGENTINA, GREECE, AND SOUTH KOREA* (2002).

56. Marcelo García, *The First 367 Days of Kirchner's Adventure in Governing*, *BUENOS AIRES HERALD*, 25 May 2004.

57. For example, Jorge Luis Magancco received a ten-year jail term for falsifying the birth certificate of a baby born in detention. The adoptive parents were also given prison terms for illegal adoption. *Argentina Jails "Dirty War" Medic*, *BBC NEWS*, 23 Apr. 2005, available at <http://news.bbc.co.uk/2/hi/americas/4475693.stm>.

Court decision. In October 2003, a Spanish court began proceedings against both men who, as mid-level naval officers, were accused of crimes committed at the Navy Mechanics School. In June 2005, Scilingo was convicted in a Spanish court and sentenced to 640 years for his participation in death flights where detainees, drugged but still alive, were thrown into the sea.<sup>58</sup> Cavallo, after hiding in Mexico, was extradited to Spain in 2003, where he awaited trial on counts that could have resulted in a sentence of 17,000 years in prison. After much wrangling, Spanish authorities finally extradited him to Argentina in March 2008, as they believed Cavallo would now face justice in the country where the crimes were committed.<sup>59</sup>

## VI. REVOKING THE AMNESTY LAWS AND PARDONS

The long awaited decision of the Supreme Court regarding the amnesty laws came on 14 June 2005.<sup>60</sup> With a seven to one majority and one abstention, the Supreme Court affirmed lower court rulings and the actions of the Congress and declared that the *Punto Final* and Due Obedience laws were unconstitutional. Voting to annul the laws were Chief Justice Enrique Petracchi and Justices Juan Carlos Maqueda, Antonio Boggiano, Carmen Argibay, Ricardo Lorenzetti, Elena Highton de Nolasco, and Eugenio Zaffaroni. Petracchi had previously voted to affirm the amnesty laws but now maintained that he had switched because the political times had changed.<sup>61</sup> Of the seven votes in the majority, President Kirchner appointed four of the justices as replacements for the Menem appointments who had left the bench. The lone dissenting vote came from Justice Carlos Fayt, who argued that international agreements and tribunals should not supersede the Argentine Constitution. Justice August Belluscio, who had announced that he would retire in September 2005, abstained, stating he had a previous conflict with one of the plaintiffs.<sup>62</sup>

The amnesty law decision came in the case of Julio Simón (aka “El Turco”—The Turk, or Serpico) and Cerefino Landa, former police officers

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58. See Calvin Sims, *Argentina Tells of Dumping “Dirty-War” Captives Into Sea*, N.Y. TIMES, 13 Mar. 1995; Mar Roman, *Spanish Court Sentences Scilingo to 640 Years*, BUENOS AIRES HERALD, 20 Apr. 2005.

59. *Spain to Extradite Ex-Junta Man*, BBC NEWS, 29 Feb. 2008, available at <http://news.bbc.co.uk/2/hi/europe/7271191.stm>.

60. The court decision was delayed for several years due to a huge increase of cases brought to the Argentine Supreme Court. The court is charged with ruling on constitutional issues but also must handle certain “extraordinary appeals” that led to the court handling 14,000 cases in 2001. Dealing with this caseload of minor individual cases delayed the ruling on the amnesty laws. *Rosatti Talks of Court Reform*, BUENOS AIRES HERALD, 28 Sept. 2004.

61. *Times Present Contained in Time Past*, BUENOS AIRES HERALD, 19 June 2005.

62. *Due Obedience, Full Stop Annulled*, BUENOS AIRES HERALD, 15 June 2005.

accused of the disappearance of an Argentine couple and the subsequent adoption of their daughter. This decision upheld a lower court ruling that declared the two amnesty laws unconstitutional and convicted the two officers. The Court followed a principle of international law dating back to the Nuremberg trials whereby crimes against humanity are not bound by any statute of limitations and that those offenses cannot be pardoned.<sup>63</sup> As a result of the ruling, close to 3,000 officers, of which 300 were still serving in the military, could be called upon for questioning in any future prosecutions.<sup>64</sup>

Originally, the amnesty laws had resulted from concerns that the military might step back into power if it was not protected from prosecution. By 2005, there was less fear of a military backlash. In 2003 opinion polls, Argentines favored revoking the amnesty laws by two to one.<sup>65</sup> President Kirchner said the judges "have given our country a ruling that renews our faith in the system of justice. They have declared unconstitutional [laws] that filled us with shame."<sup>66</sup> Former President Alfonsín supported the reversal but noted that the two laws were "valid and indispensable at the time."<sup>67</sup> Concerning unrest in the military, Army Chief Bendini indicated that "those accused will be prosecuted and found guilty or not guilty."<sup>68</sup> Immediately prior to the Court's decision, however, the Defense Minister José Pampuro sounded a more cautionary note: "Of course there is some worry, but it's only among a few men and not in all members of the armed forces."<sup>69</sup> Later he stated: "I hope that it does not turn into a campaign of political revenge against the military, because then things could get complicated."<sup>70</sup>

The Court's decision did meet with strong criticism from the right. One center-right deputy called the decision "a political ruling," while Senator Ricardo Bussi, son of a former military governor, fumed that the ruling would jail "those who saved the fatherland from terrorist aggression while guerrillas . . . are free."<sup>71</sup> Moreover, Bussi maintained that some of the justices were true to their "ideological commitment to the terrorism of the 70s and other[s] to befriend the government and ensure remaining in their posts,"

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63. *Id.*; *Immunity Laws Unconstitutional*, BUENOS AIRES HERALD, 15 June 2005.

64. *Due Obedience, Full Stop Annulled*, *supra* note 62.

65. Larry Rohter, *With Immunity from Extradition Revoked, Argentines Face Human Rights Trials in Europe*, N. Y. TIMES, 28 July 2003, at A4; Tom Hennigan, *Military Could Face Trials over Argentina "Dirty War"*, TIMES ONLINE, 14 Aug. 2003, available at <http://www.timesonline.co.uk/tol/news/world/article867788.ece>.

66. Héctor Tobar, *Argentine Court Voids Amnesty in "Dirty War"*, L.A. TIMES, 15 June 2005, at A9.

67. *Due Obedience, Full Stop Annulled*, *supra* note 62.

68. Tobar, *supra* note 66.

69. *Id.*

70. Larry Rohter, *Argentine Ruling Revives Cases of "Dirty War" Victims*, N.Y. TIMES, 15 July 2005, at A3.

71. *Serving Military Should Not Fear*, BUENOS AIRES HERALD, 16 June 2005.

alluding to their appointment by Kirchner.<sup>72</sup> However, José Miguel Vivanco, Americas Director of Human Rights Watch, noted, "the crimes of the 'dirty war' are far too serious to be amnestied and forgotten. The Supreme Court's ruling shows that no matter how many years go by, laws that block justice for gross abuses of human rights remain a thorn in the side of democratic governments."<sup>73</sup> As the sister of one former victim noted during a trial soon after the amnesty laws were revoked: "We don't have justice yet, but now we at least have the hope of it."<sup>74</sup>

Following the Court's decision, several new cases were brought to trial. The first case began in June 2006 with the prosecution of former police commissioner general Miguel Etchecolatz for murder, torture, and illegal arrest. He had been convicted in the 1980s, but the decision was nullified by the amnesty laws. Although Etchecolatz was serving a sentence for kidnapping babies, he was convicted and sentenced to life in prison in September 2006.<sup>75</sup>

In October 2007, Fr. Cristián Federico von Wernich was convicted for his involvement in murder, abductions, and torture during his time as chaplain of the Buenos Aires province police force and was given a life sentence. According to testimony, Fr. Von Wernich relayed information he received from inmates to the police.<sup>76</sup> Later in October 2007, the trial of Héctor Febres began on charges of kidnapping and torture while at the Navy Mechanics School. Prior to the verdict, Febres died in his prison cell of an apparent suicide from cyanide poisoning. Some questioned whether it was in fact a suicide, but the authorities treated it as such.<sup>77</sup>

In addition to the prosecutions described above, many others are currently under investigation, including Luis Abelardo Patti, a former police officer who is accused of human rights violations during the "dirty war." Patti was elected to the lower house of the Argentine legislature in 2005 but was barred by members from taking his seat, since this would have given him legislative immunity from prosecution. Although, the Argentine Supreme Court ruled that Patti was entitled to his seat, the Congress continues to maintain that it will not seat him. He remains in custody and is awaiting prosecution regarding past activities.<sup>78</sup>

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72. *Id.*

73. Human Rights Watch, Argentina: Amnesty Laws Struck Down, 13 June 2005, available at <http://www.hrw.org/en/news/2005/06/13/argentina-amnesty-laws-struck-down>.

74. Larry Rohter, *After 30 Years, Argentina's Dictatorship Stands Trial*, N.Y. TIMES, 20 Aug. 2006, §1, at 3.

75. *Argentine Sentenced to Life for "Dirty War" Role*, N.Y. TIMES, 20 Sept. 2006, at A5.

76. "Dirty War" Priest Gets Life Term, BBC NEWS, 10 Oct. 2007, available at <http://news.bbc.co.uk/2/hi/americas/7035294.stm>.

77. *Febrés Family Arrested*, BUENOS AIRES HERALD, 15 Dec. 2007.

78. *Supreme Court Allows Patti to Become a National Deputy*, BUENOS AIRES HERALD, 9 Apr. 2008; *Argentine Politician Barred from Congress, Detained in Human Rights Probe*,



As the renewed effort to prosecute gained momentum, the disappearance of several key witnesses served as a chilling reminder of the past. In September 2006, Jorge Julio López, a former political prisoner, provided important testimony that helped convict Etchecolatz of "dirty war" crimes. The day before Etchecolatz's sentencing, López disappeared and was never heard from again. In December 2006, Luiz Gerez, who had testified against Luis Patti, also disappeared but was found alive two days later. Finally, on 30 April 2008, Juan Evaristo Puthod, a human rights activist and key witness in several cases, was kidnapped, beaten, and reprimanded by his captors for "not having understood the messages we sent you. Your life is in our hands. You live or die when we say."<sup>79</sup> Puthod's captors released him the next day. Referring to the disappearance of López, Felipe Solá, governor of Buenos Aires Province who has had difficulty with police forces in the past, noted, "if someone has the nerve to kidnap a person in a case like this one, we can expect anything."<sup>80</sup>

Though revoking the amnesty laws opened the possibility of restarting prosecutions, approximately 400 former high ranking police and military officials retained protection from pardons given in October 1989 and December 1990 by President Menem. Menem issued these pardons mostly to senior officers under indictment for human rights offenses, and hence were not covered by the amnesty laws.<sup>81</sup> The pardons also included leaders of the *Montoneros* and the ERP, the two chief leftist guerrilla groups. Many called for the executive branch to reverse these pardons, but Kirchner indicated his reluctance to do so, maintaining that "it is up to the courts. That's the road it should take."<sup>82</sup>

In September 2006, the courts began to reverse the pardons, one case at a time, and only if the case had already gone through a lower court first. The first reversal involved José Martínez de Hoz, a civilian economics minister, and former general Albano Harquindéguy, who served as the interior minister during the junta. The two had been acquitted in a case involving the kidnapping of two businessmen.<sup>83</sup> In April 2007, a federal appeals court overturned the pardons for former junta leaders, Videla and Massera, so that both would have to return to prison and serve their life sentences. Videla was already under house arrest for charges of kidnapping babies, and in 2002,

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INT'L HERALD TRIB., 25 Apr. 2008, available at <http://www.ihf.com/articles/ap/2008/04/25/americas/LA-GEN-Argentina-Dirty-War.php>.

79. *Kidnapped Dirty War Survivor Freed*, BUENOS AIRES HERALD, 2 May 2008.

80. Larry Rohter, *Death Squad Fears Again Haunt Argentina*, N.Y. TIMES, 8 Oct. 2006, §1, at 6.

81. ROHRIG, *supra* note 55, at 74 n.67.

82. *Kirchner Says Pardons are up to the Courts*, BUENOS AIRES HERALD, 21 June 2005.

83. *M. de Hoz Pardon Unlawful*, BUENOS AIRES HERALD, 5 Sept. 2006, at 1, available at <http://www.buenosairesherald.com/resources/p01sep%205.pdf>.



Massera, who had suffered a stroke, was declared mentally unfit to stand trial on a similar charge. The court reasoned that the pardons contradicted international treaties to which Argentina was now a party and that the two former leaders would have to return to prison.<sup>84</sup>

In July 2007, the Argentine Supreme Court, in a four to two decision, reversed the pardon given to Santiago Riveros, a high ranking officer who was in command of the Campo de Mayo barracks, one of the army's detention centers. He had been under house arrest for kidnapping babies and arranging illegal adoptions but was now indicted for murder and torture.<sup>85</sup> Finally, in December 2007, a court sentenced Cristino Nicolaides, the military regime's last army commander-in-chief to twenty-five years in prison for "dirty war" crimes. Nicolaides is the highest ranking officer convicted of human rights crimes since the revocation of amnesty laws and pardons. The federal judge also sentenced seven other former military leaders to prison terms ranging from twenty to twenty-five years for similar offenses.<sup>86</sup>

## VII. PROBLEMS OF REVISITING THE PAST

Despite the euphoria over the possibility of new trials, some important problems remain. First, the Argentine government has been slow to provide the funding, investigating magistrates, and judges for a multitude of new cases. In a court system that is already well known for its slow pace, the lack of necessary resources only prolongs the process.<sup>87</sup> Daniel Sabsay, a constitutional lawyer, noted, "the justice system is slow to begin with and this is an unprecedented situation."<sup>88</sup>

Another problem is that the crimes under investigation were committed between 1976 and 1983, over twenty-five years ago. Human rights groups have been gathering evidence for some cases, but most have languished. As a result, meeting the necessary standards for acceptable evidence may be difficult. The leader of one Argentine human rights group lamented:

The justice system is treating this as a common crime and saying that if there are no witnesses, there is no proof, and if you can't prove the crime, it doesn't exist. They don't seem to realize that nobody was tortured or killed with a

84. *Junta Pardons "Unconstitutional,"* BUENOS AIRES HERALD, 26 Apr. 2007, available at <http://www.buenosairesherald.com/argentina/note.jsp?idContent=378490>.

85. Guillermo Háskel, *S. Court Overturns "Dirty War" Pardon*, BUENOS AIRES HERALD, 14 July 2007, available at <http://www.buenosairesherald.com/argentina/note.jsp?idContent=402636>.

86. *25 Years in Jail for Nicolaides*, BUENOS AIRES HERALD, 19 Dec. 2007, available at <http://www.buenosairesherald.com/argentina/note.jsp?idContent=451087>.

87. Rohter, *Argentine Ruling Revives Cases of "Dirty War" Victims*, *supra* note 70.

88. *Argentina Holds "Dirty War" Trial*, BBC NEWS, 21 June 2006, available at <http://news.bbc.co.uk/2/hi/americas/5099028.stm>.

notary public present, that nobody saw what happened and that what they are demanding is impossible.<sup>89</sup>

Moreover, as witnesses pass away, the burden will fall on an increasingly smaller pool of individuals who will be forced to relive the horror of their experiences multiple times. According to one witness in an August 2006 trial, "I'm going to have to testify again in the next trial, and the next one after that and the next one after that. I don't want to have to spend the rest of my life testifying at trials. Every time I do it's like going back to the camp."<sup>90</sup> In response to that problem some human rights groups have proposed bundling cases with multiple defendants for institutions such as the Naval Mechanics School or for particularly egregious cases.<sup>91</sup>

There are some indications that despite these aging cases, the proceedings bring to light new evidence. For example, court testimony has identified prisoners who had given birth to children but were not on lists of those who disappeared. In addition, investigators discovered a previously unknown thirty-year old police register of illegal imprisonments. According to Estella de Carlotto, the director of the Grandmothers of the Plaza de Mayo, "as the years have gone by, people have shaken off the fear they felt, even in the 1980s. As a result, the testimony we are hearing is more complete and detailed than ever."<sup>92</sup>

A third problem is that while the Supreme Court has demonstrated its determination to hold the military and police accountable, not all judges and prosecutors throughout the judicial system share that sentiment. Many of these key players in the courts remain sympathetic to the military regime and have acted accordingly. Human rights groups have requested some of these officials to recuse themselves from the cases, but so far there has been little response.<sup>93</sup>

A fourth problem is that critics argue that a similar zeal to prosecute has been lacking for the guerrillas who also benefited from Menem's pardons.<sup>94</sup> As a result, new trials expose only military and security personnel to future legal action. In a demonstration against the trials, one anti-prosecution protester lamented, "I'm a patriot—a descendant of the people who founded this country. And I suffered the pain a lot from one side and the other. There's not just one side, there's two sides—there was terrorism here."<sup>95</sup> According to Cecilia Pando, President of the Association of Family and Friends of

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89. Rohter, *Argentine Ruling Revives Cases of "Dirty War" Victims*, *supra* note 70.

90. Rohter, *After 30 Years, Argentina's Dictatorship Stands Trial*, *supra* note 74.

91. *Id.*

92. *Id.*

93. Rohter, *Argentine Ruling Revives Cases of "Dirty War" Victims*, *supra* note 70.

94. James Neilson, *Getting Away with Murder*, *BUENOS AIRES HERALD*, 27 Dec. 2007.

95. *Argentina Rights Trials Condemned*, *BBC NEWS*, 6 Oct. 2006, available at <http://news.bbc.co.uk/2/hi/americas/5412224.stm>.

Political Prisoners in Argentina, "we should just turn the page. It was a regrettable war between terrorists and militants trying to defend their country. But if you are going to go after some, you should go after all. We should respect all the victims."<sup>96</sup> Similarly, the author of an opinion piece in the *Buenos Aires Herald* criticized a court ruling that spared seven members of the *Montoneros* from prosecution in 2007 and lamented what he saw as a double standard:

[I]f an army officer or policeman murdered someone thirty years ago he should spend the rest of his days behind bars; if a terrorist did the same he should be regarded as a victim of an unjust social order, if not a hero, who at most deserves a ticking off.<sup>97</sup>

Former President Menem, who is now a senator, argued that his pardons had bought "10 years of peace" along with "justice for all the military who fought against the guerillas. I believe it is wrong to annul the pardons for one side but not the other."<sup>98</sup> In an October 2006 demonstration of supporters of the former military government, José Sacheri, president of the Argentine Association of Victims of Terrorism, charged the Kirchner government with stirring up a "rebirth of the confrontations of the past" and violating the rights of those who were defending the country from the "subversion and terrorism" of the Left.<sup>99</sup> Others have also argued that cases such as that of Von Wernich are politically motivated and are attacks against the church.<sup>100</sup> However, critics such as Myriam Bregman, one of the prosecutors in the Von Wernich case, noted:

The violence committed by the state is absolutely incomparable to anything done by the resistance. In no way can you equate state-sanctioned murder committed by the junta with a resistance, even if it admittedly caused death and violence. Impunity is not a relevant term for the left. These were people who were acting in resistance to successive repressive regimes.<sup>101</sup>

Finally, the legal status of reversing the pardons has also raised several questions. Some have argued that the pardons were invalid in the first place, because by definition, pardons follow only after a conviction and sentencing. Many of Menem's pardons were given to individuals who were awaiting trial and not yet convicted. Thus, it is possible that these pardons are not an obstacle at all.<sup>102</sup>

96. Dan Fastenberg, *The Von Wernich Case, and Argentine Reckoning*, BUENOS AIRES HERALD, 11 Aug. 2007.

97. James Neilson, *Getting Away with Murder*, BUENOS AIRES HERALD, 27 Dec. 2007.

98. *Jorge Videla's Pardon Overruled*, BUENOS AIRES HERALD, 6 Sept. 2006.

99. Rohter, *Death Squad Fears Again Haunt Argentina*, *supra* note 80.

100. Fastenberg, *supra* note 96.

101. *Id.*

102. *Gov't: Pardons a Judicial Issue*, BUENOS AIRES HERALD, 17 June 2005.

On another legal issue, some analysts argue that reversal of the pardons would impose “retroactive enforcement of harsher criminal laws,” something that is prohibited by the Argentine Constitution. In 1994, Argentine constitutional reforms incorporated several human rights agreements including the Convention against Torture, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights. Critics note that imposing these standards on the military regime for the “dirty war” would retroactively apply standards that are tougher on the defendants than those that existed at the time the actions were taken. According to the Constitution, retroactive measures can only be applied if they are beneficial to the defendant. Since these international standards are more rigorous than previous ones, there are numerous questions regarding the validity of erasing the pardons. Thus, Argentine constitutional law expert Juan Manuel Serantes Peña, noted “the ruling entails the retroactivity of tougher criminal law and overrules principles such as that of double jeopardy. So why should it go back only to the Nuremberg trial and not far beyond, so it could be invoked by Indian peoples for atrocities they suffered during the conquest?”<sup>103</sup>

## VIII. CONCLUSION

Despite the seeming finality of the amnesty laws and pardons, the desire to prosecute perpetrators of “dirty war” atrocities remained. Early in Argentina’s transition to democracy, President Alfonsín attempted to implement a carefully controlled effort to prosecute only the leaders of the junta, but he soon lost control of the process. The number of indictments mounted and appeared to be never-ending to the military. When coupled with other measures they believed were intended to destroy the institution, the armed forces rebelled in a manner that threatened to disrupt the transition to democracy. Though efforts were undertaken to exert civilian authority, the military remained a formidable force in Argentine politics. The rebellions forced the government to retreat and adopt Samuel Huntington’s guidance: “do not prosecute, do not punish, do not forgive, and, above all, do not forget.”<sup>104</sup>

People did not forget. Some argued for leaving the past behind to allow the old wounds to heal and to work for reconciliation. However, the old wounds did not completely heal and reconciliation is often in the eye of the beholder. For the military and those not gravely affected by the atrocities, refraining from prosecution may be a road to reconciliation. Even for some who were directly affected, the past may be so horrible that it is better off forgotten. However, for many victims and families, the failure

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103. *Id.*

104. HUNTINGTON, *supra* note 1, at 231.

to prosecute does not bring reconciliation, but prevents old wounds from healing. As indicated by polling data, the Argentine public was clearly not content with leaving the past alone. As a result, groups such as Mothers of the Plaza de Mayo continue to call attention to the memories of the disappeared. Individual activists, attorneys, and other human rights groups did significant work to document some of the cases but were constrained by limited resources and a lack of cooperation from the Argentine government. The efforts of European courts and jurists were also important in creating the international pressure and legal framework that might someday lead to justice. In particular, the Spanish efforts to indict and prosecute Augusto Pinochet gave hope that justice could be done under the principle of universal jurisdiction concerning crimes against humanity. These efforts were important measures in helping to maintain the world's attention on bringing these individuals to justice.

Despite the contributions from all of these areas, it may have all been for naught without the determined leadership of President Kirchner. His efforts helped remove important obstacles that even pressure from human rights groups and the court cases in Europe could not eliminate. In most Latin American democracies, the president is the key power broker in the system, and this is true in Argentina as well. Thus, it should be no surprise that the holder of this office plays a crucial role in efforts to hold the military accountable. Alfonsín tried to finesse a limited prosecution of the military, but was unable to guide events as he intended. Menem came into office determined to end efforts to prosecute the military, but he did not tolerate the military's intrusion into politics. Presidents Duhalde and de la Rúa were equally uninterested in restarting efforts to prosecute, whether in Argentina or abroad, through their continued support of the "official doctrine" that prevented the extradition of military personnel. Thus, determined presidential opposition would likely have continued to be successful in blocking trials.

In 2003, President Kirchner began to reverse the executive's previous opposition to prosecution. First, he campaigned specifically on this course of action and, soon after his inauguration, followed through by ending the prohibition on extradition. Most likely, Kirchner did not relish extraditing Argentine nationals, but it was a way of putting pressure on others to act. Then, through public statements, Kirchner expressed his support for abolishing the amnesty laws that Congress promptly annulled in August 2003. However, these efforts would have been ineffective without a favorable ruling from the Supreme Court to uphold lower court rulings that annulled the amnesty laws. Here again, Kirchner's efforts were crucial. Reversing Menem's actions to manufacture a compliant court, Kirchner pushed for the removal of four justices on the Supreme Court and replaced them with justices that were much more open to prosecution. Certainly, these actions raise concern about politicizing the judiciary and compromising its independence from the

executive branch. However, without determined leadership from President Kirchner, along with the actions of the Congress and the Supreme Court, the amnesty laws and pardons that were the chief impediments to prosecution might still be in place.

Though obstacles remain, Argentina has made significant steps toward bringing justice and has begun to reopen numerous cases of human rights abuses from the "dirty war." More importantly, Argentina's actions have helped advance the acceptance of global human rights norms and brought hope for those in countries that have yet to confront the atrocities of the past. Every country that undergoes a transition to democracy does so with different circumstances. The people in some of these countries may not wish to undertake extensive efforts to hold the former authoritarian regime accountable. However, the Argentine case demonstrates that determined executive leadership may be crucial for a society that wishes to pursue some level of accountability.