Dictatorship on Trial: Prosecution of Human Rights Violations in Argentina

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Between 1976 and 1983, a military dictatorship ruled Argentina and brought that country into an era of state-directed terror aimed at the civilian population. During that period, a small and vulnerable human rights community, allied with international backers, attempted to stay the hand of the military state and provide a measure of protection for the victims and potential victims of the dictatorship. The struggle was to defend the most elementary of human rights: freedom from arbitrary detention, torture, and summary execution. While the stakes in this struggle were high—life or death for thousands of individuals—it was nonetheless an unfortunately familiar effort to define the limits of what a state may inflict on its citizens.

With the election of a civilian government in October 1983, however, this battle moved onto the unfamiliar ground of setting an affirmative agenda for the trial and punishment of those responsible for acts of state terror. With little guidance from Argentine history or the experience of other countries in the transition from military to civilian rule, and with the constant rumblings of future military uprisings as a backdrop, the restored civilian political and legal institutions turned to the issue that would dominate the first year of civilian rule: the prosecution of the military.

The assumption of power by the civilian authorities did not terminate the impact of the military period on the fledgling government. The peculiar method of repression perfected by the Argentine military—disappearance without a trace into a parallel, extralegal police and military network—left behind tens of thousands of family members and friends of

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victims. These people could not simply bury their dead and move on, but were driven by an unyielding need to learn the fate of their loved ones. Perhaps more than any other feature of the Argentine military's guerra sucia—"dirty war"—the practice of forced disappearances generated the demand for prosecution of the perpetrators of human rights abuses which proved a major issue in the 1983 elections.

The government of President Raul Alfonsin faced the virtually unprecedented task of investigating and prosecuting its own armed forces for human rights abuses. The government undertook this task with caution. In particular, it determined that all prosecutions—those brought by victims and their relatives as well as by the government—would be heard in the first instance by a military tribunal rather than a civilian court. In addition, the government created a "following orders" defense available to lower and middle-ranking officers accused of human rights abuses.

This Article will argue that the statute embodying these policies contains many constitutional difficulties, and that the government has attempted to apply the statute to a much broader range of cases than a reasonable statutory construction would permit. Above all, the policy of caution and conciliation underlying the statute has backfired. This Article contends that the government's position in these human rights cases is not only legally untenable but profoundly anti-legal and ill-suited to the government's own stated goal: the establishment of a stable civilian government upon a foundation of the rule of law.

I. Repression Under the Dictatorship

Immediately upon seizing power in 1976, the military junta assumed the task that for several years had been carried out by right-wing paramilitary outfits: the elimination of what they deemed "subversive elements." Instead of leaving the bodies of its victims on the streets, as the paramilitary groups had done, the new dictatorship created an elaborate network of clandestine task forces, torture centers, and concentration camps into which its victims disappeared.1 While many of the desaparecidos were eventually released, a still undetermined number,

1. See generally National Commission on the Disappearance of Persons, NUNCA MAS [hereinafter cited as NUNCA MAS] 8-10 (1984). The National Commission compiled a list of over 1300 names of military officials directly implicated in acts of repression and identified by victims. See Los Nombres de la Infamia, EL PERIODISTA, Nov. 3-9, 1984 (special supplement). While the precise numbers of police and military officials involved is not known—and indeed may never be known—the magnitude of the repressive apparatus may be gleaned from the fact that the Commission identified 365 separate clandestine concentration camps and torture centers operating in Argentina from 1976 to 1983.
many of whom must be presumed dead, still remain unaccounted for.\(^2\)

A. The Technique of "Disappearance"

Although the Argentine experience had the unfortunate distinction of introducing the term *desaparecido* into the international lexicon, the actual workings of such a system are perhaps not as familiar. A typical example can be taken from a leading case now pending in the Supreme Court of Justice. In that case, an individual, Alfredo Giorgi,\(^3\) was abducted from his workplace by an armed "task force" operating under the authority of the Argentine military. Giorgi was taken first to an automobile maintenance shop of the Federal Police, then to the "Club Atlético" concentration camp, and finally to another facility within the city of Buenos Aires currently occupied by the Federal Police. From 1978 to 1979, however, the latter facility functioned as a concentration camp under the direct jurisdiction of the First Army Corps. The camp, known as "Olimpo," had a capacity of 150 prisoners and was run as a coordinated operation of the army and the Federal Police.\(^4\) According to numerous witnesses, the prisoners were severely tortured during their detention and were kept in a cell measuring less than three cubic meters. When the camp was dismantled in February 1979, in anticipation of the September 1979 visit of a delegation of the Organization of American States investigating reports of human rights violations,\(^5\) the persons were transferred

\(^2\) The exact number of deaths caused by the "dirty war" remains unknown. See infra note 7 and accompanying text. The National Commission, which documented the disappearance of 8960 persons, expressed its belief that the actual number of disappearances, which would probably remain uncertain, significantly exceeded 9000 since many family members had been afraid to report disappearances. *NUNCA MAS*, supra note 1, at 479. Furthermore, the means of disposing of bodies, see infra note 7 and accompanying text, renders accounting difficult. Wide variations in the reported number of disappearances occur in media accounts. See N.Y. Times, June 10, 1984, § 6 (Magazine), at 26 (6000); Wash. Post, Feb. 12, 1984, at H1, col. 6 (15,000, including those who reappeared, as estimated by National Commission member Marshall Meyer).

\(^3\) Giorgi's family was represented by CELS. Giorgi, a chemical engineer at the National Institute of Industrial Technology in Buenos Aires, "disappeared" on November 27, 1978. His fate remains unknown.

\(^4\) See *NUNCA MAS*, supra note 1, at 80, 163-66.

\(^5\) The Commission on Human Rights of the Organization of American States conducted an investigation of reports of human rights abuses in Argentina in September, 1979. Argentina, as a member of the OAS, was formally subject to its decision to conduct an investigation, although not until 1984 did Argentina accept the human rights conventions of the OAS and the jurisdiction of the Interamerican Court on Human Rights. The report and recommendations of the Commission, published in 1980, see infra note 11, were thus precatory and unenforceable. Nevertheless, the visit and report were of tremendous importance in creating international political pressure on the Argentine government, as well as receptivity to the thousands of political refugees leaving Argentina. Within Argentina, the report was prohibited but circulated clandestinely—it has now been published as "The Prohibited Report"—and was of great value in awakening many Argentines to a situation many had chosen to ignore. The OAS visit,
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from the camp.

As the desaparecidos believed at the time and the government’s official National Commission on the Disappearance of Persons later confirmed, transfer from a concentration camp such as Olimpo was tantamount to a death sentence.\textsuperscript{6} Many of these prisoners were dropped from army helicopters, dead or alive, into the ocean or the wide Rio de la Plata, buried in unmarked graves, burned, or otherwise disposed of in a manner calculated to make it difficult or impossible to find the body or identify the victim.\textsuperscript{7} The existence and extent of this clandestine system of torture centers and detention centers was a well-kept secret in Argentina for many years, due to a silent and fearful press and a citizenry unwilling to believe that such acts could take place in a civilized country. The disappearance of a young neighbor, classmate, or co-worker was noted with whispers to the effect that “he must have been involved in something,”\textsuperscript{8} i.e. something subversive. The victim’s family was left alone in its search for any clue to the missing person’s fate.

B. The Courts of the Dictatorship

Many families of desaparecidos were intimidated by explicit threats or the general atmosphere of terror from going to the courts;\textsuperscript{9} others were unable to find a lawyer willing to assist them.\textsuperscript{10} For lawyers to sign a habeas corpus petition was, at the height of the dictatorship, virtually to sign their own death warrants.\textsuperscript{11} Petitions for habeas corpus before the courts of Argentina usually accomplished nothing, since the various “se-
curity forces” of the military government invariably denied that the missing person had been arrested or was in their custody. This denial met each of the thousands of habeas corpus petitions submitted to the courts on behalf of individuals arrested or abducted.12

In general, the Supreme Court of Argentina had evolved a policy of acquiescence in the military seizures of power that have plagued Argentine history.13 Nevertheless, the Court, summoning whatever vestiges of independence it retained, recognized that the uniformly negative response to the writ of habeas corpus represented a systematic deprivation of justice. In the Perez de Smith case,14 the Court reviewed consolidated appeals from 400 separate habeas corpus petitions in which the government had denied knowledge of an individual's whereabouts. Because there was no official acknowledgement of custody, the Court declared itself incompetent to review cases “as presented.” However, based on its “implicit powers,” the Court

direct[ed] itself to the National Executive Power to request that it intensify . . . the investigation into the whereabouts and situations of those persons whose disappearance had been denounced before the courts . . . .15

12. See NUNCA MAS, supra note 1, at 400-07 (1984) (on the inefficacy of the writ of habeas corpus). See also OAS REPORT, supra note 11, at 224-33. In only two cases during the first five years of the dictatorship—those of Timerman and Moya—was a habeas corpus petition successful. Only Timerman received unconditional freedom, see NUNCA MAS, supra note 1, at 402, and only as a result of international pressure applied in his case. There were numerous signs of official direction of these disappearances. One of the most telling was the typical practice of the task forces of getting a “green light” or “liberated zone” from the regular police authorities before carrying out an abduction. This entailed notification to the police that an anti-subversive operation was to be carried out at a particular time and place in order to forestall the troublesome interference of uninformed police officers in what otherwise would appear to be an unlawful kidnapping. See id. at 19.

13. In a contract claim brought to compel compliance by the government that seized power in the 1862 coup of Bartolomé Mitre, the Court reasoned that it could not enforce precoup claims since Mitre, after “the Battle of Pavón, was competent authority to know and decide these kinds of cases, by virtue of provisionally exercising all national powers, with the right of the triumphant Revolution and acquiescence of the people, and by virtue of the serious duties which that victory imposed.” Martínez v. Otero, 2 Fallos de la Corte Suprema de Justicia (hereinafter cited as Fallos) 127, 143 (1865).

After the coup d'état of 1930, the Court convened in a special session and declared:

[T]he provisional government that has just constituted itself in this country is, therefore, a de facto government whose title cannot be successfully discussed by the judiciary in that it exercises the administrative and political functions derived from its possession of force as the [final] resort of order and social security.

Acordada sobre reconocimiento de Gobierno Provincial de la Nacion, 158 Fallos 290, 291 (1930). The Court also cited CONSTANTINEAU, PUBLIC OFFICERS AND THE DE FACTO DOCTRINE (inability, for policy reasons, to challenge legality of those holding office). The sole limitation on the Court's recognition of the de facto government was its insistence that the government abide by its commitment to return to constitutional rule as expeditiously as possible. By the time of the coups of the 1960s, this commitment had disappeared.


15. Id. at 341, [1977] B La Ley at 485. See also Celia Sara Machado y Otros, 302 Fallos
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The Court thus exhorted lower court judges to "exhaust all judicial procedures in order to effectuate and expedite the purposes of [the institution of habeas corpus] established in the Constitution and in the law."\textsuperscript{16} Nevertheless, the habeas corpus petitions continued to represent only a minor aggravation for the military government, and not a real recourse for the families of the desaparecidos.

There remained, however, another avenue of judicial relief. Under Argentine criminal procedure, denial of habeas corpus allowed a court claiming jurisdiction to treat the action as a criminal complaint for illegitimate deprivation of liberty. Victims of crimes or their representatives could initiate and prosecute criminal complaints. The victim continued as a party to the criminal proceeding even after the intervention of the government prosecutor (fiscal). The "plaintiff-prosecutor" system,\textsuperscript{17} a vestige of the time when criminal law in Argentina was primarily a means of channelling private retribution, permitted victims and their relatives to pursue criminal prosecutions for human rights abuses in which the state itself was implicated. During the dictatorship, however, these criminal prosecutions, like the habeas corpus petitions out of which they developed, made no headway. Not a single person was successfully prosecuted in either military or civilian courts for any of the disappearances or murders of civilians.\textsuperscript{18}

Not only were the judges unable to secure justice; most were simply

\textsuperscript{16} 297 Fallos at 340, [1977] B La Ley at 484.

\textsuperscript{17} The term "plaintiff-prosecutor" is the authors' translation of querellante, the Argentine term for the victim or relative of the victim who files criminal charges and remains in the case as a party to the prosecution. Under Argentine criminal law, offenses are divided into three categories. The first involves those that are considered private crimes (e.g., defamation) in which the state has no direct interest in the prosecution. The second category comprises non-felonies in which the government prosecutor (fiscal) may join as a discretionary party. The third category, serious felonies, includes crimes considered offenses against both the individual victim and the society. Código Penal, art. 71 (Códigos AZ 1983). The plaintiff-prosecutor takes part in the third category of cases. Código de Procedimiento en Materia Penal, arts. 170-76 (Códigos AZ 1983). The ability of the victim to secure damages in these private criminal prosecutions makes the plaintiff-prosecutions functionally similar to an American civil action under 42 U.S.C. § 1983. See infra note 40 and accompanying text.

\textsuperscript{18} See NUNCA MAS, supra note 1, at 9. The Giorgi case, see supra note 3, was no exception. On the basis of the Perez de Smith case, see supra note 14 and accompanying text, on February 22, 1979, Giorgi's father petitioned the Supreme Court directly to intervene on behalf of his son. Five days later, the Court ordered the judge handling the case, which had been converted into a criminal complaint for illegitimate deprivation of liberty, to pursue all feasible means of ascertaining Giorgi's fate. After finding its way ultimately to Federal Court No. 1 of San Martín, the case was provisionally closed for lack of evidence on May 8, 1980. This resolution was upheld by the Federal Chamber of Appeals Criminal and Correctional Division and, finally, by the Supreme Court.
unwilling to intervene. The military dictators, recognizing the power of an independent judiciary, had replaced most of the judges sitting at the time of the coup, despite their constitutionally guaranteed life tenure. The judges appointed by the military, many drawn directly from the ranks of retired officers, were made subject to removal at the will of the executive branch, or, in other words, the junta.19

It was not until the dictatorship began to falter after the Malvinas War20 of 1982 that the plaintiff-prosecutions made any progress. During this period the human rights community and its supporters21 demanded prosecution of the military in civilian courts under the civilian criminal code. Only after the election did President Alfonsín announce that prosecutions would proceed, instead, in the highest military tribunal. During the first year of civilian rule, this governmental policy found itself at odds with both the demands of the human rights community for civilian justice and the military's insistence that no crimes had been committed and no trials should be held at all. The fate of this policy in the constitutional courts, while still unresolved, exemplifies both the promise of civilian justice and its frustration by the Alfonsín government's decision to place these cases in the tribunals of the military.

II. The Civilian Courts and Military Jurisdiction

A. Progress in the Civilian Courts

During the first months of the civilian government, many new plaintiff-prosecutions were brought in civilian courts. Through the discovery powers of the federal court, which gained effectiveness as the military's power declined, testimony of several desaparecidos who had survived began to reveal the fate of those still missing.22 Evidence began to accumulate concerning the responsibility of the armed forces and particular officers for the disappearances.

The progress of these cases was threatened when the fiscal moved in

19. See Nunca Mas, supra note 1, at 391-92.

20. While recognizing the disputed status of these islands, the authors refer to them as Malvinas, rather than Falklands, as the former comports with the accepted usage in Argentina.

21. There were eight major national human rights organizations in Argentina at the end of the dictatorship: the Mothers of the Plaza de Mayo, the Grandmothers of the Plaza de Mayo, the Service for Peace and Justice, the Center for Legal and Social Studies, the Permanent Assembly on Human Rights, the Commission of Relatives of the Disappeared, the Ecumenical Movement for Human Rights, and the Argentine League for the Rights of Man. E. Mignone, Organizaciones de Derechos Humanos en Argentina (unpublished memorandum on file with the Yale Journal of International Law).

22. For example, testimony of these witnesses revealed nearly all that is known about the fate of Alfredo Giorgi. See supra note 3 and accompanying text.
various cases to declare the civilian courts without jurisdiction and to transfer the cases to the Supreme Council of the Armed Forces.\textsuperscript{23} The \textit{fiscal}, acting under the express instructions of the executive branch, contended that all criminal accusations against military personnel based on “acts of service” or acts allegedly committed “in a place subject to exclusive military authority” were subject to military jurisdiction under Article 108, section 2, of the Code of Military Justice.\textsuperscript{24} The \textit{fiscal} also referred to the military justice reforms recently passed by the Congress, soon to be promulgated as Law 23.049, which provided for military jurisdiction over prosecutions of “military personnel of the Armed Forces and personnel . . . under operational control of the Armed Forces [who] acted from March 24, 1976, until September 29, 1983, in the operations undertaken with the alleged motive of curbing terrorism.”\textsuperscript{25} The government’s decision to place these cases under military jurisdiction must be evaluated in the context of its overall human rights policy.

**B. Human Rights and the Politics of Military Jurisdiction**

When President Alfonsin took office on December 10, 1984, he issued a presidential decree ordering the arrest and prosecution \textit{in military court} of the nine generals who had headed the first three juntas.\textsuperscript{26} He also created the National Commission on the Disappearance of Persons, under the chairmanship of author Ernesto Sábato, to investigate the fate of the desaparecidos.\textsuperscript{27} Both actions exposed the government to criticism by both the right wing and the human rights community. The latter regarded these decrees as too conciliatory to the military. They criticized the decision to prosecute the nine former junta members in a military tribunal as opposed to civilian courts as a hidden amnesty and a sacrifice of the rule of law.\textsuperscript{28} They regarded the National Commission as a watered-down version of the bicameral congressional commission which

\textsuperscript{23} The Supreme Council of the Armed Forces is the highest appellate tribunal of the armed forces.

\textsuperscript{24} Código de Justicia Militar, art. 108, §2, [1951] Anales de Legislación Argentina 18-19. The section was amended and narrowed by Law 23.049, but only as applied to subsequent acts. \textit{See infra} note 36.

\textsuperscript{25} \textit{See infra} notes 36-39 and accompanying text.

\textsuperscript{26} Decree No. 158/83, promulgated Dec. 13, 1983. On the same day, President Alfonsin issued Decree No. 157/83, ordering the capture and trial of suspected leaders of the Montoneros guerrilla movement. These decrees followed the newly elected legislature’s rejection of the military government’s self-amnesty decree issued shortly before it left office. \textit{See Law} 23.040, promulgated Dec. 27, 1983.

\textsuperscript{27} Decree No. 187/83, promulgated Dec. 15, 1983.

\textsuperscript{28} \textit{See}, e.g., \textit{Alfonsin is not Forceful Enough}, Newsweek, Feb. 6, 1984, at 52-53 (interview with Emilio Mignone).
they had proposed.29

This criticism grew more insistent with the government's proposal to channel all criminal actions against the military for human rights abuses—including those brought by the growing number of plaintiff-prosecutors—through the Supreme Council of the Armed Forces. The military justice reforms constituted the main vehicle for the policy announced by President Alfonsin upon taking office. The reforms provided that military and police officers accused of human rights abuses under the dictatorship would be tried in the first instance by their military peers, subject to review after a limited period by the civilian courts.30

The decision to route all criminal proceedings through military tribunals rested on a political rather than a jurisprudential calculation by the Alfonsin government.31 Any evaluation of this strategy must begin with an understanding of what the Argentine experience was not. Unlike the much-cited precedent of Nuremburg, any Argentine prosecutions would not have the security of those initiated by a victorious foreign military power standing in judgment over its defeated wartime adversary.32 The armed forces remained omnipresent after the victory of President Alfonsin.

The legal framework which the new government devised was therefore inextricably linked to the political decision to avoid confronting as an institution the armed forces that had seized power six times since 1930,33

29. The National Commission was empowered to collect information and testimony and to issue its report in eight months. However, it lacked the power of congressional commissions to subpoena witnesses and compel testimony. Thus, it necessarily relied upon the voluntary testimony of victims and a small group of military personnel. See generally NUNCA MAS, supra note 1, at 443-53. Given these limitations, however, the National Commission conducted a thorough investigation.

30. See infra note 36 and accompanying text.

31. Although a few government officials attempted to justify the decision by arguing that the acts would have been subject only to military jurisdiction at the time they were committed, some of the president's closest advisors frankly acknowledge in public and private the political nature of the decision. See Foster, After the Terror, Mother Jones, Feb./Mar. 1985, at 37 (comments of Presidential advisor Jaime Malamud).

32. Notwithstanding its celebrated rejection of the "following orders" defense, the Nuremberg trials provide only limited guidance for Argentina. In post-war Germany, the balance of power between the accusers and the accused appeared far more conducive to a full investigation and punishment of the atrocities of the state, yet standards of guilt remained ill-defined and few convictions resulted. The difficulties encountered at Nuremberg highlighted "the inadequacy of the prevailing legal system and of current judicial concepts to deal with the facts of administrative massacres organized by the state apparatus." H. ARENDT, EICHMANN IN JERUSALEM 294 (1963). Thus, while Nuremberg represents a rare attempt to apply legal norms to punish state terror, its invocation as a legal and historic precedent in the Argentine context must be carefully qualified.

33. The current cycle of military coups began with the overthrow of President Hipólito Yrigoyen in 1930. In 1943, President Ramón S. Castillo was overthrown in a military uprising that included Colonel Juan D. Perón. Perón subsequently became president and was in turn removed from office by a coup in 1955. In 1962, the military again intervened and deposed
and whose aggregate tenure had since considerably outweighed that of civilians. By vesting original jurisdiction in the military tribunals, the government sought to avoid the military solidarity that might ensue if all military personnel faced trials in civilian courts. Trials in the military tribunals would, according to the government, allow a section of the armed forces to condemn its own, and, in the process of purging itself of the taint of the \textquoteleft dirty war\textquoteright, to repudiate the most culpable officials.\textsuperscript{34} In terms of deterrence, criminal sanctions imposed by fellow military officers could, arguably, have a greater impact on future military conspirators than those meted out by civilian courts, the latter being dismissable as \textquoteleft revanchisme.\textquoteright

The government also believed that, as a practical matter, trials before military tribunals offered the best possibility of ending the conspiracy of silence which the institutional loyalty of the armed forces had created. As the National Commission noted, Argentina \textquoteleft distinguished itself from the methods employed in other countries by the total secrecy in which [the repression] was carried out, the detention of persons following their disappearance and the persistent official refusals to recognize the responsibility of the intervening organisms.\textquoteright\textsuperscript{35} Testimony on the methods of repression, except for isolated instances, came from the survivors and was necessarily incomplete. A discovery process initiated within the armed forces themselves could arguably help to reveal the source of actual orders and the direct chain of responsibility.

C. Law 23.049 and the Attack on Military Jurisdiction

The critical provisions of Law 23.049, which applies to government-initiated prosecutions as well as to plaintiff-prosecutions, are contained in Articles 10 and 11.\textsuperscript{36} In prosecutions fitting the descriptions given in Ar-
article 10, the Supreme Council of the Armed Forces will utilize its relatively expeditious “summary proceedings.” Six months after the initiation of its proceedings, the Supreme Council must report to the civilian Federal Chamber of Appeals the reasons for its failure to complete the proceedings. The appellate court then has the option of returning the case to the Supreme Council for a fixed period, requiring additional progress reports, unless the court finds that there has been “unjustified delay or negligence in the conduct of the trial,” in which case the civilian court shall “assume the conduct of the proceedings at whatever stage they may be.”

Neither Law 23.049 nor any other law prescribes the procedures that the appellate court should use in the event it assumes jurisdiction over a case.

Article 11 creates a defense for “acts committed by personnel . . . who acted without decisionmaking capacity according to orders or directives pursuant to plans approved and supervised by the superior organic command of the Armed Forces and by the military junta.” For such

of the Code of Military Justice, of the crimes committed prior to the effective date of this law as to which:

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

2) The acts would have been comprehended within the Code of Military Justice, Article 108, sections 2, 3, 4, or 5, under its previous text.

Appeal in such cases shall be to the Federal Chamber of Appeals [corresponding to the area in which the case arose], using the requirements, parties and procedures established in Article 445 below.

Upon the completion of six months after the initiation of proceedings, the Supreme Council shall report to the Federal Chamber within the following five days the reasons preventing it from reaching a conclusion. Such report shall be submitted to the parties so that within three days thereafter they may make whatever observations or pleas they deem pertinent, which shall be submitted with [the report].

The Federal Chamber may order the remission of the proceedings and fix a period for the completion of the trial; if [the proceedings] are excessively voluminous or complex, the Chamber shall indicate an additional period within which a new report shall issue in accordance with the provisions of the preceding paragraph.

If the Chamber finds an unjustified delay or negligence in the conduct of the proceedings, it shall assume jurisdiction of the proceedings at whatever stage the cases are encountered.

Art. 11—Article 34, section 5 of the Penal Code shall be interpreted in accordance with the rule of Article 514 of the Code of Military Justice with respect to acts committed by the personnel mentioned in the preceding Article who acted without decision making capacity according to orders or directives [issued] pursuant to plans approved and supervised by the superior organic command of the Armed Forces and by the military junta. [In such cases] it shall be presumed, in the absence of evidence to the contrary, that [the act] was committed with inevitable reliance upon the legitimacy of the order received, except when consisting in the commission of atrocious or aberrant acts.

37. Id. at art. 10.
38. Id. at art. 11.
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an act, "it shall be presumed, in the absence of evidence to the contrary, that [the act] was committed with inevitable reliance upon the legitimacy of the order received, except when consisting of the commission of atrocious or aberrant acts."³⁹ The statute thus enacts the tripartite assignment of responsibility advocated by the Alfonsín government: lower-ranking officers who merely followed orders are to be absolved of criminal responsibility; high-ranking officials who gave the orders and lower-ranking officers who committed excesses—either by exceeding the orders or by obeying manifestly excessive and illegitimate orders—may be held criminally responsible for their actions.

1. Practical Objections to Military Jurisdiction

It may not be immediately evident to foreign observers of the Argentine experience why the human rights community and the plaintiff-prosecutors have so tenaciously resisted military jurisdiction. In order to understand the basis of their objections, it is necessary to have some understanding of the nature of the Argentine criminal justice system. Under Argentine criminal law, serious criminal acts (e.g., felonies) are considered offenses against both the individual victim and society as a whole. The fiscal must participate in criminal proceedings to represent the interest of the state. Separate participation by the plaintiff-prosecutor or his or her lawyer is optional, but may not be denied.⁴⁰ The direct participation of the victim is singularly valuable where the alleged crimes were committed under the color of state authority. It can provide a useful counterweight to the inevitable considerations of political expediency occasioned by the subordination of the fiscal to the executive branch. The querellante system, combined with the widespread representation of victims by the now-active human rights bar, has provided the central vehicle for the introduction into the discovery process of the fruits of research conducted by human rights groups during the dictatorship.

In contrast to the querellante system, the procedure of the Supreme Council of the Armed Forces effectively excludes any participation by the plaintiff-prosecutors or their lawyers. Proceedings are held in secret without the attendance of complainants and in accordance with strict military rank. For instance, in Argentine civilian trials, when a contradiction in testimony occurs, the judge may order a face-to-face confrontation between the witnesses as well as question them directly.⁴¹ However, in the military tribunal, no such confrontation is permitted between a higher and a lower ranking officer, much less between an officer

39. Id.
40. See supra note 17.
41. Código de Procedimientos en Materia Penal, supra note 17, at arts. 309-315.
and a soldier. Much critical evidence against the highest officers, in the form of testimony by a very few "turncoat" military men of low rank, thus cannot be verified or authenticated in the traditional manner of Argentine jurisprudence.

Most important, the nature of the judges differentiates military from civilian trials. The military judiciary, as an integral part of the armed forces, consists of active or retired high-ranking officers deeply imbued with a sense of strict hierarchy and discipline and with an aggressive esprit de corps. Furthermore, the Argentine military had supported, almost without dissent, the "battle against subversion" which spawned the human rights violations. Human rights lawyers thus remained, at best, highly skeptical of the willingness of the officers of the Supreme Council to view objectively the evidence against their military colleagues, evidence flatly denied by the accused officers and offered by civilians who themselves had been fingered as "subversives" or who were tainted by their relation to supposedly "subversive" victims.

The provision of Law 23.049 for civilian review of proceedings in the Supreme Council does not resolve the difficulties. It is unclear whether the plaintiff-prosecutors would be readmitted into the proceedings upon the emergence of a case from the military tribunal. Further questions are raised by the limitations of an appellate tribunal in dealing with an inadequate factual record. The Federal Chamber of Appeals, like an American appellate court, ordinarily deals with a closed factual record assembled in the trial court below; it is not even physically equipped to hear witnesses or take evidence. In addition, the law is silent on whether or to what extent the court in these review proceedings could reconsider evidence discounted—or available but not considered—by the military tribunal.

The human rights lawyers representing plaintiff-prosecutors thus attempted to avoid the transfer of jurisdiction. The legal argument against military jurisdiction proceeded along two fronts: a narrow construction of the statutory language describing the class of cases to which the law applies, and a direct attack on the constitutionality of military jurisdiction in these cases.

42. Código de Justicia Militar, supra note 24, at art. 288.

43. In some respects, however, military procedure may favor conviction. Various procedural protections for the defendant are curtailed. Furthermore, in civilian court, criminal conviction must be supported by "legal proof": the court must explain its evaluation of the evidence, following certain statutory guidelines. See, e.g., Código de Procedimientos en Materia Penal, supra note 17, at arts. 305-308, 316, 346, 352, 357-58. Military tribunals may use "free conviction": they need not justify their decision to convict or follow any particular standards in weighing the evidence. See Código de Justicia Militar, supra note 24, at arts. 360, 392.

44. See infra note 93 and accompanying text.
2. Narrowly Construing the Scope of Military Jurisdiction

In any individual case, the government bases the assertion of military jurisdiction upon Article 10 of Law 23.049. Article 10, in turn, requires both that the acts have been committed between March 24, 1976, and September 26, 1983, "with the alleged motive of curbing terrorism," and that these acts fall within the ambit of Article 108 as it stood at the time the acts were committed. Until Article 108 was amended by 23.049, it provided for military jurisdiction if the alleged crime was either an "act of service" or an act committed "in a place subject to exclusive military authority." The plaintiff-prosecutors denied that the abduction and "disappearance" of civilians not formally accused of any crime could ever be deemed an "act of service." Furthermore, in many cases, neither the site of the abduction nor the place of detention could be considered subject to exclusive military authority, inasmuch as the latter had often not been lawfully conveyed to the military. However, by attempting to prove the responsibility of the army and some of its highest ranking officers in the crimes, the plaintiffs often undermined their arguments concerning the application of Law 23.049. Law 23.049 also imposes limitations with respect to the date of the acts covered. In most cases involving disappeared persons, the primary crime charged was "illegitimate deprivation of liberty." The plaintiff-prosecutors thus argued, in the many cases where the victim was still missing, that the crime was a continuing one that fell outside of the dates specified by Article 10.

In several cases, civilian trial courts avoided consideration of any constitutional issues by rejecting the fiscal's motion to transfer jurisdiction on the grounds that Law 23.049, narrowly construed, did not apply. The Supreme Court rejected some arguments for a narrow reading of Law 23.049 in the only plaintiff-prosecution it has yet considered, the

45. Article 1 of Law 23.049 amended and narrowed the peacetime scope of Article 108 and thus military jurisdiction with respect to subsequent acts.
47. In the Giorgi case, supra note 3, the lawyers also argued that his detention was not undertaken “with the alleged motive of curbing terrorism,” as required by Law 23.049. See supra note 36. Giorgi had never been charged with any crime. Furthermore, the law uses a particularly narrow definition of the word “terrorism.” In common usage, terrorism implies an element of violence in addition to the purely political opposition which the military called “subversive.”
48. See supra note 36. The fiscal responded to this argument in the Giorgi case, supra note 3, by suggesting that, since Giorgi could certainly not still be in a clandestine detention center, it was more logical to presume that the “illegitimate deprivation of liberty” had ended. The fiscal thus suggested that Giorgi had died or been released within the dates specified by Law 23.049.
49. For example, in a decision issued on March 24, 1984, the judge in the Giorgi case, supra note 3, accepted the plaintiff’s argument that Law 23.049 did not apply due to the continuing nature of the offense.
Bignone case, which involved the disappearance of two conscripts.\footnote{50} The military status of the victims made the Bignone case a less problematic one for military jurisdiction and neatly distinguishable in several respects from the typical plaintiff-prosecution. The Supreme Court has pending before it numerous such cases which raise not only more substantial statutory construction arguments but also more weighty constitutional concerns than were present in Bignone.

3. The Constitutional Attack on Military Jurisdiction

The decision to vest original jurisdiction in the military tribunals created the first serious constitutional conflict for the restored civilian government. The Argentine constitution is based upon eighteenth century constitutionalism, primarily the United States Constitution and the French Declaration of the Rights of Man. Its constitutional jurisprudence draws heavily upon U.S. constitutional law.\footnote{51} In particular, all legislation is subordinated to the Constitution and the judiciary is empowered to review and strike down unconstitutional legislation.\footnote{52} Consequently, the judicial forum became an important test site for a constitutional attack upon the government’s decision to divest civilian courts of their customary jurisdiction over common crimes committed against non-military persons.

a. The Issues

The numerous plaintiff-prosecutors seeking to avoid military jurisdiction directed a series of constitutional attacks upon Law 23.049. They based the first of these challenges upon Article 16 of the Argentine Constitution, which incorporates both an equal protection clause and a prohibition on privileged judicial treatment (fueros personales) for identifiable social groups or persons. In the landmark Espina case,\footnote{53} the Supreme Court applied Article 16 to repudiate special judicial treatment for military officials. In ruling that military officers involved in an abortive insurrection led by Colonel Mariano Espina could not avoid military jurisdiction, the Court stated: “Military laws are exceptional laws in that they govern military states, states of war and relations between individuals who form part of the army and navy of the nation.”\footnote{54} The Court further declared that, as of independence from Spain and the ratification of the Constitution in 1853,
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... no military officer any longer enjoys the privilege of being tried before military tribunals for reasons of his status, that is, because of his military character or as a member of the army, in civil cases or for crimes that do not implicate a violation of the [military] ordinance, and the trial of which falls under the competence of other tribunals according to the nature of said crimes.

Therefore, the jurisdiction of the courts-martial or of the military tribunals in all cases that implicate an uprising of troops or of individuals of the army has not been established for purely personal reasons, derived from the military character of the delinquents, but rather by reason of the law that was infringed... 55

Since the crimes committed during the dictatorship corresponded to sanctionable criminal offenses such as kidnapping, battery, homicide, and illegitimate deprivation of liberty, and since the offenses charged did not constitute a violation of military discipline, the establishment of special forums for the alleged commission of these crimes by military officials creates a direct confrontation with the prohibitions of Article 16 as interpreted in Espina.

The identical result is reached through an inquiry into the components of a military offense. Traditional Argentine jurisprudence requires two elements for criminal proceedings to fall within the ambit of military jurisdiction. First, the alleged infraction must have been committed by a military official and, second, the offense in question must constitute a violation of military duty. As two leading commentators on Argentine criminal law have concluded, "as a result of being an infraction of military duty, [the offense] should be treated under the purview of military jurisdiction." 56 Since no human rights prosecution suggested that any officer was delinquent in the discharge of military duties, the critical second requirement for military jurisdiction is absent.

The remaining constitutional arguments revolve around the concept of the "natural judge" derived from the due process guarantees of Article 18, 57 the creation of constitutional courts by Article 94, 58 and the vesting

55. Id. at 589 (emphasis added).
56. F. ZAFFARONI & R. CABALLERO, DERECHO PENAL MILITAR 27-28 (1980). There is more than a touch of irony in the proposal of the restored civilian authority to redirect civilian legal claims back to the same military tribunals that were the ultimate arbiters during the de facto government.
57. "No inhabitant of the nation may be condemned without a prior trial based upon laws predating the facts at trial, nor tried by special commissions, nor removed from the judges designated by the law [existing] before the fact of the case." CONSTITUCIÓN DE LA NACIÓN ARGENTINA [hereinafter cited as CONSTITUCIÓN], art. 18.
58. "The Judicial Power of the Nation shall be exercised by a Supreme Court of Justice and by such inferior tribunals as Congress shall establish in the territory of the Nation." CONSTITUCIÓN, art. 58.
of jurisdiction over cases arising under the Constitution and national statutes by Article 100. As the Supreme Court stated in the *Severo Chumbita* case:

> the object of Article 18 of the Constitution has been to proscribe ex post facto laws and trials by commissions especially named for that case, taking the accused out of the permanent jurisdiction of natural judges in order to be submitted to accidental or circumstantial tribunals or judges.

Although due process arguments in the criminal context are generally reserved for criminal defendants, the state action involved in the harms suffered by the victims suggests that the Court's holding should also apply to plaintiff-prosecutors. The Supreme Court has repeatedly declared, most recently in the case of *Bignone*, that guarantees of access to the constitutionally prescribed judicial forum under Article 18 extend to both plaintiff-prosecutors and the accused; "since there is no justification for different treatment among those who claim a legal right..."

The due process claims of the plaintiff-prosecutors derive from the fact that military tribunals are not constitutional courts within the meaning of Articles 94 and 100 of the Constitution. Rather, they are considered administrative tribunals created by Congress pursuant to Article 67, section 23, which empowers Congress to establish regulations for the governance of the military. The plaintiff-prosecutors, therefore, claim that the requirement that they pursue their claims in administrative tribunals violates both Article 18, whose equal protection clause ensures access to constitutional courts, and Article 100, which grants to the federal courts jurisdiction over all cases in which the federal government is a party. The unavailability of the federal judicial forum specifically authorized to adjudicate constitutional claims thus constitutes a denial of due process and equal protection to the plaintiff-prosecutor.

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59. "[It shall] correspond to the Supreme Court and the inferior tribunals of the Nation the knowledge and decision of all cases based upon points governed by the Constitution and by the laws of the Nation. . ." *CONSTITUCIÓN*, art. 100.
60. 17 Fallos 22 (1875).
61. *Id.* at 38.
63. *Id.* at 571. See also Andrés Alfredo Julio, 299 Fallos 17, 18 (1977) (Article 18 of the Constitution grants the right "to all persons recognized by law to act at trial in defense of their rights, be they under character of querellante or defendant").
64. *See* Coronel Don Angel de Hernandez, 149 Fallos 175 (1926); G. Bidart Campos, *The Argentine Supreme Court* 97 (1982) (military tribunals not part of constitutional courts). See also J. González, *supra* note 51, at 631 ("the forum for the trial of a military official is not a personal forum, but rather a true forum or one based on the cause of action, as provided for by Article 16" (emphasis original)).
65. *Hernández*, 149 Fallos at 175; J. González, *supra* note 64, at 629-34.
66. *See* P.Zaffaroni & R. Caballero, *supra* note 56, at 67 ("military officials who commit common crimes that do not affect national defense not only remain outside of military
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the prosecutions to a plaintiff-prosecutor under the procedural norms of military justice further aggravates this constitutional difficulty.

The acts covered by Law 23.049 do not involve breaches of military discipline or failures to act in conformity with military duty. Rather, they involve accusations of criminal activity directed at the civilian population. Consequently, Law 23.049 forces civilians seeking redress for the crimes of the dictatorship to present themselves, in the first instance, before military tribunals, despite the absence of the established prerequisites for military jurisdiction.

The question of the appropriateness of military tribunal jurisdiction over crimes involving civilians has generally been posed in the context of the criminal prosecution of civilians by military courts. Despite the historic instability of Argentine constitutional government over the past half-century, the federal courts, and, in particular, the Supreme Court, have attempted to restrict the reach of military tribunals over civilians.\(^{66}\)\(^{7}\) In Arancibia Clavel,\(^{68}\) for instance, the Court declared, “the submission of civilians to military tribunals requires an exceptional situation as well as an explicit decision of the political power to alter, for this grave reason, the normal order of competency.”\(^{69}\) The leading Supreme Court cases upholding military trials of civilians during the last dictatorship have all turned upon an acceptance of the legitimacy of the political proclamation of an “emergency” situation.\(^{70}\) While acquiescing in the declaration of a state of emergency, the Court has disallowed sentences once the state of emergency had passed, thereby recognizing the limited scope of military jurisdiction over civilians.\(^{71}\)

Although Law 23.049 is concerned with the prosecution of military officials rather than civilians, the questions posed are nonetheless related. Because of the role of the querellante system, the constitutional guarantees of access to the appropriate judicial forum apply both to the defendant and to the victim and his or her representative. Thus the claims of a civilian forced to appear as a defendant before a military court are similar to those of a plaintiff-prosecutor obligated to seek legal redress outside of the constitutional courts, in this case in the Supreme Council.

criminal law but also outside of civilian criminal law under military jurisdiction; they fall under the rule of common criminal law applicable by civilian tribunals\(^{a}\)).

67. See G. Bidart Campos, supra note 64, at 95-98.

68. 302 Fallos 973 (1980).

69. Id. at 973-74.


The use of military jurisdiction in these cases signals a departure from traditional Argentine jurisprudence. Law 23.049 has the paradoxical effect of expanding military jurisdiction at a time when the civilian government is attempting to consolidate its power over the military as an institution. By placing the final legal responsibility for the crimes of the dictatorship outside the constitutionally prescribed judicial power, the Alfonsin government sacrificed an important opportunity in the campaign to reestablish the rule of law, relying instead upon a political calculation to avoid a direct confrontation between the armed forces and the civilian judiciary.

b. The Bignone Decision

The district and appellate courts that have confronted the constitutional issues raised by Law 23.049 have reached contrary conclusions, as in the case of Bignone. Bignone was a criminal action brought by the relatives of three disappeared conscripts, Luis Garcia, Luis Steimberg, and Marín Molfin, against their commanding officer, General Reynaldo B.A. Bignone. In the district court, Judge Oliveri declared Law 23.049 unconstitutional. This decision was, however, reversed on appeal.72

The Supreme Court then heard the case. In a three-to-two decision,73 the Court upheld Law 23.049.74 Chief Justice Carrio concluded that the appellate review provisions and the time limitations imposed by the military tribunals for deliberations were sufficient for the law to withstand constitutional scrutiny on its face. The Court relied upon the doctrine of Fletcher v. Peck,75 holding that, where reasonable doubts exist concerning the validity of challenged legislation, courts should uphold such legislation.76 Moreover, the necessary concurring opinion of Justice Petracchi relied, at least in part, on the military service of both the conscript-complainants and the defendant in upholding the constitutionality of military jurisdiction.77 The Bignone decision thus left open both the scope and the constitutionality of military jurisdiction in cases involving the claims of civilians.

c. The Videla Decision

In its last opinion before the January-February 1985 summer recess,

72. [1984] C La Ley 258. At least four cases, including Giorgi, supra note 3, are now pending in the Supreme Court on this issue.
73. The dissenting judges challenged the procedural posture of the case as an emergency appeal. Id. at 275.
75. 10 U.S. (6 Cranch) 87 (1810).
76. [1984] C La Ley 258, 266.
77. Id. at 269 (Petracchi, J., concurring).
the Supreme Court confronted a claim which was the converse of that raised by the victims. Following the refusal of the Supreme Council to indict the former junta members and the civilian court's assumption of jurisdiction, General Jorge Rafael Videla challenged the constitutionality of civilian appellate court review of decisions of military tribunals. General Videla argued that he was entitled to be tried by a military tribunal for two reasons: first, he claimed that the military judges were his "natural judges," and second, he asserted that he could only have been subject to military jurisdiction at the time the acts were committed. The Court rejected the argument that the constitutional principle of perpetuatio jurisdictionis precluded civilian jurisdiction, at least when the case was on appeal from the military tribunal. The Court conceded to the military the right to "invoke as natural judges the organs of military jurisdiction for those offenses whose modalities authorize their inclusion within military competence," but refused to strike down non-military jurisdiction for other crimes. As in Bignone, the Court did not reach the constitutionality of the adjudication of crimes against civilians in military tribunals.

Ironically, the Court's decision upholding civilian appellate jurisdiction in the Videla case relied upon arguments virtually indistinguishable from those raised and rejected in the cases upholding original military jurisdiction over human rights cases. For example, the Court concluded that members of the armed forces could claim the military tribunals as their natural judges only in offenses concerning military personnel. It would appear, then, that for offenses not essentially military, i.e. against civilians, the military's constitutionally mandated natural judges would consist of the civilian judiciary. The lawyers of the plaintiff-prosecutors who are resisting military jurisdiction and challenging the constitutionality of Law 23.049 from that perspective, of course, have raised this argument in numerous cases. It would be difficult for the Court to uphold military jurisdiction in pending cases without facing this serious contradiction.

However, the Supreme Court, all of whose members were appointed by President Alfonsin, has been exceedingly attentive to political considerations not easily reconcilable with strict legal reasoning. Judging from its decisions in the Bignone and Videla cases, the Court appears to view the provisions of Law 23.049 as a necessary political compromise with the military, one that should not be subjected to rigorous constitu-

78. See infra notes 95-106 and accompanying text.
80. Id. at 19.
81. See supra note 56 and accompanying text.
tional analysis. This outlook may be understood in light of the historical instability of Argentine constitutional rule and precedent: the Court, like the government, appears to have concluded that the need to secure political stability overrides the need to uphold the strict rule of law, and that the compromise embodied in Law 23.049 is a viable means of assuring this goal.

D. The Realities of Military Jurisdiction

Although Law 23.049 was not passed until February 1984, and the diversion of private prosecutions from civilian courts to the military tribunal was slower than anticipated, the Supreme Council has had ample time to demonstrate its approach to the human rights prosecutions. In December 1983, the government initiated prosecutions in the Supreme Council of the nine former junta members, and, shortly thereafter, added the prosecutions of former Buenos Aires police chief, General Ramón Camps, and a handful of other high ranking officers. After one year of these proceedings, no indictments have been issued. The Supreme Council has resisted the role which the government assigned it, and, in the process, produced a serious setback for the government’s human rights policy.

1. Developments in the Supreme Council

By June 1984, at the conclusion of the first six-month period of military jurisdiction for the first nine prosecutions, the Council had not taken initial declarations from all of the accused. Those who had made declarations had apparently not faced any detailed interrogation. For example, six former junta members testified before the Council on their roles in the “battle against subversion” in a single day. Nevertheless, the Supreme Council raised hopes that it might exercise a degree of independence when it ordered the “rigorous preventive detention” of Rubén Chammorro, former head of the torture and concentration camp of the Navy Mechanical School (Escuela Mecánica de la Armada, or ESMA), and ruled against motions by General Camps to invalidate the governmental decree ordering Camp’s arrest, detention, and trial.

The Federal Chamber of Appeals, faced with this mixed progress, granted a ninety day extension to the Supreme Council in July 1984. Although it found no unjustifiable delay or negligence such as would

82. See supra note 36, at art. 10.
83. La Prensa, Feb. 14, 1984, at 1, col. 1.
84. La Prensa, Mar. 23, 1984, at 4, col. 1.
85. La Prensa, Mar. 29, 1984, at 5, col. 1.
86. La Prensa, July 13, 1984, at 1, col. 1.

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merit its taking over the cases. The Chamber did require the Supreme Council to submit within thirty days a report of its progress, not only in the initial nine prosecutions, but in all the human rights cases under its jurisdiction at that time. In August, after receiving the latest report of the Supreme Council, the Chamber of Appeals granted an additional extension. It expressed concern that only two of the accused—Generals Jorge Rafael Videla and Orlando Ramón Agosti, both of the first junta—had actually been interrogated. Although the Council's work was deemed "incomplete," the Chamber refused to take over jurisdiction. Instead, it fixed October 11, 1984 as the new deadline, at which point it was anticipated that, in the absence of significant progress, the Chamber would assume responsibility for the proceedings against the nine former junta members.

For a brief period, the Supreme Council appeared to heed the concerns of the Chamber. On August 26, only days after the second extension was granted, the Council ordered the arrest of General Luciano Benjamín Menéndez, former head of the Third Army Corps, which was responsible for the province of Córdoba, a center of the most extreme repression. Days later, the Council ordered the "rigorous preventive detention" of Menéndez, as well as that of Emilio Eduardo Massera, a member of the first junta.

In the midst of the proceedings in these cases, on September 20, the National Commission on the Disappearance of Persons submitted its report to President Alfonsin, further raising expectations for immediate action against the highest ranking military officials. The report's prologue, released to the press that day, declared with unmistakable clarity that the more than nine thousand documented disappearances were the work of a repressive structure coordinated from the highest levels of the armed forces and various police and security forces down to hundreds of individual police precincts and military task forces. The prologue stated that even the worst abuses of human rights constituted an integral part of the repressive methodology for which the armed forces bore institutional responsibility.

In assigning institutional responsibility for human rights abuses to the armed forces, the report discredited the government's attempt to focus responsibility on a handful of commanding officers and notorious indi-

87. See supra note 36, at art. 10.
88. La Prensa, Aug. 24, 1984, at 5, col. 1.
89. La Prensa, Aug. 29, 1984, at 1, col. 1.
90. See generally NUNCA MAS, supra note 1, at 200-08.
91. La Prensa, Aug. 30, 1984, at 1, col. 4.
92. See supra note 2.
93. See NUNCA MAS, supra note 1, at 7-11 (prologue presented publicly on Sept. 20, 1984).
individuals. The government’s strategy received a severe setback five days later, when the Supreme Council issued a report, in anticipation of the October 11 deadline, declaring its inability and unwillingness to complete proceedings against the junta members.94 The content of the document left little doubt that the Supreme Council had chosen to close ranks behind its colleagues at the risk of an open confrontation with its new constitutional commander-in-chief.

2. The Report of the Supreme Council

The Supreme Council’s provocative declaration contained a number of legal propositions which confirmed the unwillingness of the military tribunal to assess the evidence objectively and issue a verdict free of prejudice. First, the Supreme Council declared that it had reviewed all the orders and decrees issued in the “battle against subversion” and found them wholly unobjectionable; the commanders could be found culpable, if at all, only in failing to exercise adequate supervision over their subordinates in order to prevent possible excesses.95 The Council expressed great doubt concerning the likelihood of proving such excesses. First, the Council stated that the most typical charge, “illegitimate deprivation of liberty,” could only be proved if it were first demonstrated that the alleged victim had not actually engaged in “subversive” activities; it appeared to the Council that most had.96 The Council’s report thus suggested that an individual with “subversive” connections—e.g., membership in a leftist political group—was not entitled to procedural due process rights such as formal arrest, notification of the charges, and a fair trial, but was properly subject to summary “disappearance.”

Second, the Supreme Council cast a blanket aspersion on the credibility of all those tainted by charges of subversion. Thus, the Council stated that the specific allegations of torture and detention in clandestine concentration camps were particularly difficult to investigate in light of what it saw as the biased nature of the witnesses. Most such witnesses were themselves once held by the military as “subversives” or were relatives of such “subversives;” therefore, according to the Council, “their credibility [was] only relative.”97 Furthermore, the Council stated that certain consistencies in the testimony of these observers as to the pattern followed upon abduction of an individual and the nature of the torture methods used suggested that the witnesses had previously agreed among themselves on the content of their testimony.98 The Council thus viewed con-

94. La Prensa, Sept. 26, 1984, at 1, col. 1.
95. Id. at col. 5.
96. Id.
97. Id.
98. Id.
sistent testimony paralleling that submitted to the National Commission not as a confirmation of the accuracy of such accounts, nor as evidence of a uniform, coordinated methodology of, but as a sign of an anti-military conspiracy utilizing deliberate falsification. Finally, the Council paid tribute to the importance of discipline, hierarchy, and obedience to the orders of superior officers.99

The public reacted with dismay to the Council's statement, and the press featured overwhelmingly critical commentary by political leaders, lawyers, human rights activists, and other observers.100 A group of plaintiff-prosecutors petitioned the Supreme Court to intervene and invalidate Law 23.049 on the basis of the prejudgment manifested in the Council's report. The Council responded by sending a letter to the Defense Minister in November complaining of the criticism and, in essence, requesting his intervention to stop what it regarded as scurrilous attacks in the press.101 Defense Minister Raul Borras responded with a brief letter explaining that, under the constitutional government, freedom of speech and press prevailed, and that the members of the Council, like all citizens, retained their right to proceed legally against those whose criticism they considered defamatory.102 Within two weeks, the entire membership of the Supreme Council resigned en masse in protest against what they regarded as disrespectful treatment by the press, the public generally, and the Defense Ministry.103

3. The Civilian Court's Response

As of January 1984, the government was still formulating a policy which would resurrect the Supreme Council and the strategy in which it played a key role. In the meantime, the Federal Chamber of Appeals acted decisively after its October 1984 decision to take over the proceedings against the first nine junta members, in accordance with the provisions of Law 23.049.104 The court implicated the nine former junta members individually as to their responsibility in the "battle against subversion." It placed five of the former members under "rigorous preventive detention" and required the other four to remain at the disposition of the court for further proceedings.105

As of May 1985, the fiscal associated with the Federal Chamber of Appeals has been aggressively collecting and presenting evidence, and

99. Id. at 4, col. 3.
100. See, e.g., La Prensa, Sept. 28, 1984, at 5, col. 1.
102. Id.
103. La Nación, Nov. 15, 1984, at 1, col. 1.
105. La Prensa, Oct. 5, 1984, at 5, col. 5.
the court appears to be conscientiously fulfilling its duty to assess the
evidence and to issue decisions in accordance with that evidence. The
court issued several indictments early in 1985 and public trials began in
April. 106

E. The Politics of Military Jurisdiction Reconsidered

The decision to place in the hands of the military itself the prosecution
of human rights abuses was a gamble. The Alfonsín government hoped
that the Supreme Council—and the vast majority of the armed forces not
directly involved in the human rights violations—would sacrifice a hand-
ful of military officers in order to help rebuild the integrity and prestige
of the armed forces as an institution with a role in the new constitutional
order. This gamble was based on an empirical assessment of the nature of
the armed forces as a largely bureaucratic institution flanked by a small
fascistic fringe and a small democratic sector 107. The government be-
lieved that a condemnation by the prestigious Supreme Council of the
methodology of the repression and its underlying ideology would isolate
the fascist elements and push the large bureaucratic center toward alli-
ance with the the more democratic forces within the military.

However, this entire strategy is plagued by a basic contradiction be-
tween the political task at hand—the reestablishment of the rule of law
and of civilian control over the military—and the means chosen to carry
out that task, namely removal of the human rights prosecutions from the
civilian court system and the establishment of a set of special rules by
which military personnel need answer in the first instance only to the
military itself. The reestablishment of constitutional government must
encompass the resurrection of an independent system of justice to which
individual citizens can turn for redress of their grievances against govern-
ment officials, military personnel, or any other citizens. Yet, in the name
of the survival of the constitutional system itself, the government utilized
a measure designed to limit access to the court system and to shield from
the full force of civilian criminal sanctions most of those responsible for
human rights abuses. The government thus hoped to trade off the legiti-

106. N.Y. Times, Apr. 23, 1985, at 2, col. 3 (nine former junta members on trial in Federal
Chamber of Appeals). The prosecutions initiated by the plaintiff-prosecutors lag behind the
prosecutions of the junta members which the government initiated. The plaintiff-prosecutions
fall into two groups. The first comprises those cases, at varying stages of the appeal process,
challenging the application of military jurisdiction. The second group consists of those cases
that have been transferred to the Supreme Council and whose transfer has not been appealed.
The cases in the latter group are currently passing through the six-month period of exclusive
military jurisdiction before review by the civilian Chamber of Appeals to determine whether
they should be removed to the civilian courts.

107. See supra note 34.
mate claims of many victims for a return to stability and a subordinated military. In so doing, the government's policy has proved profoundly anti-legal in its conception, casting aside the painstaking application of legal standards to concrete facts in favor of a political calculus, and obfuscating the fact that each case of disappearance represents an individual, identifiable victim and a set of individual perpetrators. In the ordinary workings of a criminal justice system, the degree of culpability of the individual criminals would be reviewed in the context of a prosecution. Yet the government's approach rejects the application of criminal justice to each perpetrator in favor of the political prosecutions of those high-ranking officials who held overall responsibility. Moreover, the political calculus itself contains a major flaw: the government cannot impress upon the military its newly subordinate position in the constitutional order without subjecting it in these most extraordinary cases to civilian tribunals.

Nevertheless, the government's policy must also be evaluated on its own terms. While a policy that sacrifices the potential legal redress of just claims of victims bears a very heavy burden of justification, the success of such a policy in helping to democratize, or at least domesticate, the military and to secure a long term of constitutional rule in Argentina would be a major accomplishment.

Unfortunately, there is little evidence to suggest that the military has learned any lessons. The desired repudiation of the "dirty war" by the armed forces has not occurred. One little-recognized sign of failure is the virtual absence of military figures willing to testify against their colleagues concerning the practices of the "dirty war." Only about a dozen of the thousands of military personnel with knowledge of the human rights abuses have ever come forward to the press, the National Commission, or the courts to provide evidence and to repudiate those abuses. This reluctance alone suggests that the government has misjudged the political composition of the armed forces and has not succeeded in turning the majority of the military against the repressive practices of the past.

The attitude of the Supreme Council itself raises greater concerns. Its refusal to proceed against the ex-junta members constitutes an endorsement of the basic goals and strategies of the "war against subversion" and indeed of the national security ideology that thoroughly animated the "war." According to that ideology, the State, as the self-appointed guardian of "Western and Christian" values, has a right to self-preservation that is superior to the rights of any individuals. It considers all those who seek to alter the nature of the state or question its values, e.g., Com-
munists, socialists, labor activists, leftists of any kind, or their sympathizers, to be "subversives" or "terrorists," deserving of no political or legal rights. As General Videla once explained to a journalist, "terrorism is considered to be not only to kill with a weapon or to throw a bomb, but also to activate others according to ideas contrary to our Western and Christian civilization." According to another general, "ingenuousness and indifference imply complicity in subversion." As for these subversives, "ideologically, they have lost the honor of calling themselves Argentine." The disappearances, torture, and killing became almost comprehensible in light of the world view expressed by these leading generals. In its refusal to recognize any "illegitimate deprivation of liberty" where the victim was involved in "subversive" activity, and its blanket impugnation of the credibility of thousands of witnesses, the Supreme Council's declaration approaches a juridical affirmation of the national security ideology.

If the sentiments of the Supreme Council are any indication, the Argentine military as an institution has proved more deeply anti-democratic and supportive of the goals and methods of the prior dictatorship than the government had calculated. As a result, the concession of original jurisdiction over human rights prosecutions to the Supreme Council has produced, not the isolation of the most reactionary forces, but rather, a vindication emanating from the highest and most prestigious levels of the military hierarchy.

III. Moral Responsibility and Military Hierarchy

The diversion of prosecutions from civilian to military tribunals constituted only the first element of the government's political decision to shield the military from the onslaught of plaintiff-prosecutions. A second fundamental aspect of the government's cautious policy toward the human rights abuses concerns the availability to subordinate military or police officials of the affirmative defense that they were merely "following orders" in committing certain acts.

A. Law 23.049 and the Duty of Disobedience

If the government succeeds in interposing a "following orders" defense for acts of repression, Argentine law and society will face a crisis of morality. In each case in which a court accepts such a defense, a new stan-

109. Id. at 24.
110. Id. at 25.
111. Id. at 22.
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dard for the exculpation of human rights violations will emerge. Yet the language of the affirmative defense provided in Law 23.049, if strictly interpreted, should shield from criminal responsibility only a small number of defendants who participated directly in the torture and murder of civilians in the “battle against subversion.” Law 23.049 provides that, for acts committed pursuant to orders by subordinate military personnel without decision-making authority, “it shall be presumed, in the absence of evidence to the contrary, that [such acts] were committed in inevitable reliance upon the legitimacy of the order received, except when consisting in the commission of atrocious or aberrant acts.” In the case most favorable to the defense of a subordinate officer whom the evidence suggests engaged in torture, the officer would offer proof that he had received a direct order to torture a particular individual. However, the refusal of the military to yield its files and the virtually unbroken code of silence among the military renders it almost impossible in most cases to prove that such an order was given. Moreover, even if evidence of such an order surfaced, it seems clear that the commission of torture is an “atrocious or aberrant act” which falls outside the “following orders” defense.

In most cases, the order received by the subordinate officer will have been a relatively ambiguous one, e.g., to “extract all necessary information in the manner most expedient under the circumstances.” For example, in April 1977, General Roberto Eduardo Viola, then head of the First Army Corps and later head of the second junta, issued Directive 504/77, concerning the industrial front of the anti-subversive campaign. The detailed directive concerning goals, strategy, and execution of the campaign contained the following order: “Eradicate the subversive elements, employing the method that in each case is most expedient for the success of the operation.” No evidence has come to light of any more explicit directives which might have served as the basis for the abduction, torture, detention, or execution of any particular person. Assuming, therefore, that General Viola’s order was typical of the directives of the highest officers, the question becomes whether the implicit authorization of repressive acts should be allowed to relieve those who committed such acts of criminal and moral responsibility.

Under the elements of criminal responsibility contained in Law 23.049, two distinct arguments can be advanced for affirming the culpability of the subordinate officials who acted pursuant to instructions such as these.

112. See supra note 36, at art. 11.
113. La Prensa, July 23, 1984, at 5, col. 4.
114. Id.
First, it may be maintained that broad-gauge directives are insufficiently precise to permit the "following orders" defense to be raised. Even if acts such as torture or summary execution might be legally condoned if performed in strict conformity with the dictates of the military hierarchy, there must still be a threshold of military compulsion before a society may remove such acts from the spectrum of punishable offenses. Under this analysis, the individual perpetrator must have lacked the element of volition and must instead have been transformed into a coerced actor. The defense thus fails as a consequence of the broad language of Viola's directive, since its open-endedness restores to the subordinate officer the critical elements of discretion and volition.

Alternatively, it may be assumed that, in the context of the institutional establishment of concentration camps and torture centers, a directive such as Viola's was indeed sufficiently specific to be understood as directing the commission of a series of criminal acts. Even in this case, the "following orders" defense established by Law 23.049 requires both that the orders be executed in good faith and that such orders not require the commission of inherently "atrocious and aberrant" acts. These two elements are logically linked, since the more atrocious an act, the less likely the possibility of a good faith belief in its validity. Thus, even accepting the inevitability of some form of "following orders" defense, the defense cannot be readily applied to the extra-legal and vicious acts committed by the Argentine dictatorship.

A reading of Law 23.049 which preserves the culpability of the vast majority of direct participants in the human rights abuses receives additional support from the Argentine military doctrine of the duty of disobedience. Under this doctrine, the subordinate officer or soldier who receives an order retains a duty to ascertain its validity and authorization and a concomitant duty to disobey any manifestly illegitimate order, i.e. one contrary to criminal and constitutional standards of conduct. An order to abduct, torture, imprison, or kill civilians never arrested or tried clearly constitutes an illegitimate command under this standard.

Fairly construed, Law 23.049 and preexisting military law governing the "following orders" defense actually frustrate the government's effort to shield from criminal responsibility the majority of those involved in human rights abuses. This is because that effort rests upon a distinction

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between a majority who merely "followed orders" and a minority who committed "excesses" which does not correspond to the actual pattern of repression under the dictatorship. It is now established that the "excesses" were a pervasive and systematic feature of that pattern. The report of the National Commission discredited the view that human rights abuses under the dictatorship resulted from aberrant individual conduct or that a majority of participants merely "followed orders." According to the Commission, "human rights were violated in an organic and official form by the repression of the armed forces. They were violated not in a sporadic way, but rather in a systematic manner, always the same way, with similar abduction and identical torments in the entire extent of the territory."116

The language of Law 23.049 and preexisting military law, coupled with the systematic nature of the human rights violations, tends to expose a very large number of lower-ranking officers to criminal conviction.117 However, courts may eventually look past the contradictions and gaps left by imperfect drafting to the spirit of the provision, which clearly was intended by the government to shield the vast majority of lower and middle-ranking participants. The courts ultimately took such a pragmatic view in overlooking formidable gaps between the language of the jurisdictional provisions of Law 23.049 and the facts of individual cases. If courts indeed broaden the "following orders" defense to encompass such systematic excesses and thus prevent the conviction of many hundreds of subordinate military personnel, the defense could shield from criminal liability virtually all those who personally carried out abductions, torture, and summary executions. Such a result would be morally and legally indefensible. The conclusions of the National Commission thus pose a political dilemma for the government, which must reassess its strategy in the human rights prosecutions. The question remains, as in the case of the government's jurisdictional decision, whether the conciliatory approach represented by the broad "following orders" defense fosters the political goal of establishing the rule of civilian law over the armed forces.

B. The Ethics and Politics of the "Following Orders" Defense

The discussion thus far leaves unanswered the moral questions that are sharply posed in each of the thousands of human rights prosecutions in Argentina today: what should be the degree of liability of the general

116. NUNCA MAS, supra note 1, at 8.
117. See supra note 1.
who orders "the eradication of the subversive elements," the captain who
cconducts interrogations after his subordinates have completed a torture
session, or the young lieutenant who applies the electric prod or tightens
the manacles from which his victim is to hang for hours by the wrists?\textsuperscript{118}

The government and the human rights community agree that those at
the very pinnacle of the military hierarchy—the junta members and re-
gional commanders of the armed forces in charge of the anti-subversive
repression—cannot submit a plea of ignorance. General Videla must be
held to have been at least constructively aware of the numerous abuses
discussed in the National Commission report. The very extent and degree
of coordination of the repressive network, together with the hierarchical
and disciplined nature of the armed forces, provide overwhelming evi-
dence from which to conclude, even in the face of denials from the gen-
eral and his cohorts, that the very highest command of the armed forces
was both fully cognizant and completely in control of the entire repres-
sive apparatus.

The next level of high-ranking officers involved—those who com-
manded and administered the concentration camps and torture centers
and coordinated the numerous local task forces which abducted the vic-
tims and conducted initial torture sessions—includes some of the most
notorious criminals. Their physical presence among the captors and tor-
mentors of the \textit{desaparecidos}—as often witnessed by numerous former
prisoners—vitiates any conceivable defense of ignorance; moreover, their
broad decision-making authority should render unacceptable any defense
on the basis of mere obedience to orders, including the defense formu-
lated in Law 23.049.

The lower and middle-ranking officers pose a more difficult case. They
personally abducted civilians from their homes and workplaces using un-
marked vehicles and false identification documents, conducted torture
and interrogation sessions in clandestine detention centers, and carried
out a yet unknown number of summary executions, all in the absence of
any legal authority beyond the order or approval of a military superior.
While the culpability of these young officers is surely diminished to some
degree by their relative lack of decision-making authority, the immedi-
cy of their contact with the victims magnifies the repugnance of their
acts.

Even allowing for the necessity of military institutions in which disci-
pline and hierarchy play a central role, and even if these subordinate

\textsuperscript{118} See \textsc{Nunca Mas}, supra note 1, at 26-53, for an elaboration of the methods of torture
that the Argentine military developed during the dictatorship.
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officers actually acted under orders, the contempt of these individuals for individual human rights and human life should nonetheless subject them to punishment. A dedication to military discipline unlimited by such fundamental values as those trampled upon by the Argentine dictatorship is neither socially desirable nor morally defensible.

The concern here is not with the severity of punishment that should be meted out to the soldier or his commanding officer. Civilian criminal law provides a defense for those who acted under actual duress, and contains well-developed standards for evaluating various mitigating and aggravating circumstances in cases of those who committed crimes at the instigation of others. But the broad "following orders" defense envisioned by the government would shield many of those responsible for gross human rights abuses from any requirement that they answer to the civilian authorities and the civilian victims for their conduct in the "battle against subversion." The government's goal of restoring the rule of law and civilian authority over the armed forces cannot be advanced by suspending the legal standards of a democratic society with respect to the most systematic and pervasive violation of legal and human rights in the history of Argentina.

Conclusion

The ongoing prosecutions of human rights violations in Argentina raise fundamental concerns of individual justice119 and the future of the rule of law. At the individual level, justice to the desaparecidos and their families requires prosecution of all those responsible for the abductions, acts of torture, and killings during the dictatorship. Yet many argue that, if the members of the armed forces face the punishment that justice would demand, the survival of civilian rule could be jeopardized.

On the contrary, the future of Argentine society requires a subordination of the military to civilian justice. The ongoing prosecutions are of enormous historical importance to the Argentine military, whose coup-

119. The conception of justice advanced here is a narrow one: the legitimate expectation of each victim of state-inspired terror to secure legal redress for the overwhelming harms committed. In the poignant words of one such individual:

I do not care who has to fall or how many are condemned. They kidnapped and tortured my daughter. They murdered her in cold blood and made my grandchild disappear. Now, I want justice.

Chelal, Argentina, Prosecute All Officers, N.Y. Times, Mar. 6, 1984, at 23, col. 1. This concept of justice, focusing on the equal access of victims to legal institutions, falls within a rudimentary definition of justice as requiring that there be "no arbitrary distinctions. . . . made between persons in the assigning of basic rights and duties and. . . . [that] the rules determine a proper balance between competing claims to the advantages of social life." J. RAWLS, A THEORY OF JUSTICE 5 (1971).
mongering is a constant undercurrent in Argentine politics. If the hundreds of junior officers who committed acts of repression are shielded from criminal responsibility, they will emerge as the new leadership of the armed forces. These new leaders will have learned that a civilian government, even one armed with with an overwhelming mandate to prosecute the members of a militarily defeated and demoralized armed forces, lacks the will and the power to punish those responsible for lawless repression. Thus, the punishment of the guilty is essential to any governmental policy that seeks to demonstrate to the military that Argentina will never again tolerate such contempt for humanity. In both Argentina and the rest of the world, those concerned with human rights await with hope and some anxiety the outcome of the bold project launched by the government and the people of Argentina.