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The Trial of the Argentine Junta: Responsibilities and Realities

Paula K. Speck

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THE TRIAL OF THE ARGENTINE JUNTA: RESPONSIBILITIES AND REALITIES

PAULA K. SPECK*

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The author wishes to thank Mary Speck, who worked as a reporter in Buenos Aires during the time of the trial, for providing this massive (several thousand page) opinion, as well as many newspaper clippings and valuable insights. Professor Guillermo Margadant, while visiting at the University of Texas Law School, provided an essential overview of the nature and structure of Latin American legal systems; this article derives from a paper originally written for his seminar in Latin American Law. The author spent several months in Argentina in 1976, doing research for a dissertation in 20th-century literature, and her assessment of the social and political atmosphere during the first months of the "dirty war" derives partly from this experience. Unless otherwise specified, all newspapers cited in this article are published in Buenos Aires, and all translations from Spanish or Portuguese into English are the work of the author.

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I. INTRODUCTION

On December 9, 1985, a civilian court in Argentina, the Cámara Federal de Apelaciones en lo Criminal (the Cámara), condemned members of two previous military juntas to prison for human rights violations carried out by their subordinates.¹ The prosecution accused nine generals and admirals of crimes ranging from aggravated homicide, torture and illegal deprivation of liberty to falsification of public documents and cover-ups.² The sheer

1. *La Cámara Federal dictó sentencia*, La Razón, Dec. 10, 1985, at 1, col. 1 special supp.; *Mixed Reaction to junta verdicts*, Buenos Aires Herald, Dec. 10, 1985, at 1; *La sentencia de la Cámara Federal: Parte dispositiva del veredicto*, La Nación, Dec. 10, 1985, at 16, col. 1; Causa originalmente instruída por el Consejo Supremo de las Fuerzas Armadas en cumplimiento del Decreto 158/83 del Poder Ejecutivo Nacional [P.E.N.], Dec. 9, 1985, *aff'd*, Dec. 30, 1986, Corte Suprema de Justicia de la Nación [C.J.N.], Jurisprudencia Argentina [J.A.] [hereinafter *Junta Opinion*] (official photocopy obtained from the Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal); see *Confirmó la Corte la Sentencia de la Cámara*, La Nación, Jan. 5, 1987, at 1, col. 1.

2. *Los delitos imputados por la Fiscalía a cada procesado*, La Nación, Dec. 10, 1985, at

number of crimes in the trial strained the resources of the court to the breaking point: of approximately 9,000 cases of "disappearances" documented by a national commission,³ the prosecution chose the 700 most representative and provable cases. The taking of testimony extended over six months and was avidly followed by the Argentine press and those lucky enough to get seats in the courtroom.⁴ Despite fears that the proceeding would turn into a circus or show trial,⁵ the court succeeded in maintaining order and judicial procedures, and the verdict gave neither the prosecution nor the defense all that they had asked for.⁶

The Cámara is not the first court to grapple with the task of judging military officers for violations of human rights committed in an atmosphere of war or internal unrest. Historic precedents include the trial of Henry Wirz, confederate commander of the notorious Andersonville Prison Camp;⁷ the Nuremberg trials of Nazi officers;⁸ the trial of Japanese General Yamashita after the fall of the Philippines in World War II;⁹ the trials of Lieutenant Calley and Captain Medina for the massacre at My Lai in Vietnam;¹⁰ and the trial of the Greek "colonels" after the fall of their junta in 1974.¹¹

16, col. 1; Junta Opinion, *supra* note 1, at 28,599-629, 28,730.

3. The report of the Comisión Nacional sobre la Desaparición de Personas (CONADEP), headed by novelist Ernesto Sábato, has been published as *NUNCA MÁS* (12th ed. 1986) [hereinafter *NUNCA MÁS*].

4. *Ante una sala colmada y tensa: La culminación de un proceso que comenzó hace dos años*, *La Nación* Dec. 10, 1985, at 10, col. 3.

5. See *La Cámara respondió a versiones que tergiversan el juicio a las ex juntas*, *Clarín*, Apr. 9, 1985, at 5, col. 1; *Massera hizo advertencias al terminar el alegato de su defensa*, *Clarín*, Oct. 4, 1985, at 2, col. 4; *Agosti calificó de "arbitrarias" las acusaciones que se le imputan*, *Clarín*, Oct. 8, 1985, at 8, col. 4; *Viola's Lawyers Say Court Biased*, *Buenos Aires Herald*, Oct. 12, 1985, at 1.

6. The court absolved four of the accused — the members of the third junta, the air force representative in the second junta, and the five convicted officers received lower sentences than the prosecution had requested. *Penas pedidas y condenas*, *La Nación* Dec. 10, 1985; Junta Opinion, *supra* note 1, at 29,832-37. The verdict aroused strong reactions from both pro-junta and human rights groups. *Praise, Harsh Criticism: Mixed Reaction to Junta Verdicts*, *Buenos Aires Herald*, Dec. 10, 1985, at 1, col. 9.

7. H.R. Exec. Doc. No. 23, 40th Cong., 2d Sess., vol. 8 (1867-68).

8. Of the voluminous literature on these trials, a good introduction can be found in R. WOETZEL, *THE NUREMBERG TRIALS IN INTERNATIONAL LAW* (1960).

9. *In re Yamashita*, 327 U.S. 1 (1946).

10. Instructions to the Jury in the Court Martial of William L. Calley, Jr., and Instructions to the Jury in the Court Martial of Ernest L. Medina, *reprinted in* 2 *THE LAW OF WAR: A DOCUMENTARY HISTORY 1703-37* (L. Friedman ed., 1972) [hereinafter L. Friedman].

11. T. THEODORACOPULOS, *THE GREEK UPHEAVAL: KINGS, DEMOCROGUES, AND BAYONETS* 246-54 (1978); R. CLOGG, *A SHORT HISTORY OF MODERN GREECE* 208-09 (1979).

The Argentine junta trial, however, differs from these precedents in several important ways. First, the Nazis, Wirz, and Yamashita were representatives of a defeated power tried by victors immediately after winning the war;¹² the Argentine junta won its "dirty war" against subversion.¹³ Second, the accusations at Nuremberg were based on international law, and raised serious questions as to whether the crimes prosecuted there were created by the tribunal.¹⁴ The Argentine Cámara applied only national criminal laws in existence during the period in which the accused held power.¹⁵ Third, the Greek parliament set the stage for trial of the Colonel's junta by declaring the coup and the entire government it spawned illegal.¹⁶ The Colonels were then tried, not only for conventional crimes committed during their tenure, but also for the acts of taking and holding power from 1967 to 1974.¹⁷ In addition to verging on the prejudgment of a judicial case by the legislature, this procedure raised questions about the power of one government to selectively repudiate the acts of its predecessor.¹⁸ The Argentine court, in contrast, steered clear of judging the legitimacy of the junta as a government or its decision to combat subversion; the Cámara confined itself to judging the defendants for the commission of well-established crimes and struggled to make the proceeding resemble an average criminal trial.¹⁹

Nevertheless, the high rank of the accused officers and the magnitude of the crimes for which they were prosecuted assured that this would be an unusual trial. Indeed, the *juicio del siglo* (trial of the century) raised fundamental questions about the courts' ability to deal with crimes using a governmental organization as an instrument and taking a large segment of society as accomplices and victims. Given that the court is created by a government, is the court competent to handle society-wide crimes? And if

12. See *supra* notes 7-9.

13. See *infra* note 43 and accompanying text.

14. See R. WOETZEL, *supra* note 8, at 111-17, 171, 238.

15. N. MONTENEGRO, *SERÁ JUSTICIA: JULIO CESAR STRASSERA, LUIS GABRIEL MORENO OCAMPO: ENTREVISTAS* 19 (1986) (contains interviews by a journalist with the prosecutors in the junta trial). See also *La comparación con Nuremberg no tiene asidero*, *La Razón*, Apr. 18, 1985, at 24, col. 1.

16. See T. THEODORACOPULOS, *supra* note 11; R. CLOGG, *supra* note 11.

17. T. THEODORACOPULOS, *supra* note 11; R. CLOGG, *supra* note 11.

18. For example, T. Theodoracopulos points out that, if the Colonel's government was illegal, then so were marriages celebrated during its tenure, pension checks that it paid out, and all its civil service appointments, including those of some of the judges and prosecutors involved in the case. T. THEODORACOPULOS, *supra* note 11, at 244.

19. See *infra* notes 88-102, 144-46 and accompanying text.

not, can other branches of government deal with the complexities of society-wide crimes, or must such crimes go unpunished? Would political solutions work better?

This article will provide a basis for addressing these difficult questions. The article first describes the historical and procedural background of the trial, summarizes the Cámara's methodology and findings, and touches on subsequent developments. It then surveys attempts by other legal systems to deal with similar problems, and discusses two questions raised by the trial: to what extent should subordinates be held responsible for acts planned and ordered by superiors; and to what extent should superiors be held responsible for the acts of subordinates.

II. HISTORICAL BACKGROUND

After winning its independence from Spain in the early nineteenth century, Argentina experienced an alternating pattern of dictatorship and anarchy similar to that suffered by other Latin American nations.²⁰ In the 1860's this changed when the country settled into a constitution and a set of stable institutions that fostered economic growth, urbanization, and high immigration for five decades. Consequently, in the 1920's, Argentina enjoyed a homogeneous, educated population of European origin, a strong economy, and a stable constitution protecting individual rights. In 1930, however, a handful of generals took advantage of the onslaught of the Great Depression and weaknesses of the civilian regime and took over the government. Fifteen years of military rule punctuated by fitful attempts to restore democracy followed. In 1945, Juan Domingo Perón, a charismatic former general who had attracted labor union support, wrested control from his colleagues. Perón's movement, which had both fascist and leftist elements and rested on his and his wife Evita's populist appeal, trampled on civil rights, and left the economy in shambles. In 1955, a revolution supported by Argentina's middle class, Britain, France, and the United States, overthrew Perón. Throughout the rest of the 1950's and 1960's, military and civilian governments alternatively failed to solve Argentina's economic problems and were unable to win the

20. Information on Argentine history up to 1970 can be found in H. HERRING, *LATIN AMERICA: FROM THE BEGINNINGS TO THE PRESENT* 693-785 (1972); A. WHITAKER, *ARGENTINA* (1964). Unfortunately, there are few objective histories covering the period since the return of Perón.

support of Perón's working class followers. A number of underground leftist groups sprang up and carried out spectacular assassinations and kidnappings for ransom.²¹

By the early 1970's, the military government, under General Alejandro Lanusse, announced free elections in which all parties, including the Peronists, but excluding Perón, could take part.²² Héctor J. Cámpora, a Peronist hack, ran for election under the slogan *Cámpora al gobierno, Perón al poder!* (Cámpora to the Government, Perón to Power!), and promised to turn power over to Perón himself. In March, 1973, Cámpora won; in July, he resigned and called new elections; by October, Juan Domingo Perón was reinstated in the Casa Rosada, with his third wife, María Estela ("Isabelita") as Vice President.²³ The new government passed an amnesty law for those accused of politically-motivated terrorism, hoping that the movements would wither away under a populist government.²⁴ However, it soon became clear that the fascist and antisemitic tendencies of the Peronist right wing movement dominated the government.²⁵ Perón, old and sick, delegated most of his power to his wife and her closest advisor (and by rumor, her lover), José López Rega, the Minister of Public Welfare.²⁶ Left-wing terrorism resurged, to be met by brutal repression from the government and government-backed para-military groups such as the Alianza Anticomunista Argentina (AAA).²⁷ When Perón died on July 1, 1974, Isabelita, lacking education and the natural charisma of Evita, increasingly relied on López Rega who, rumor had it, governed according to astrological signs.²⁸ When the military forced

21. Junta Opinion, *supra* note 1, at 28,305-27.

22. *Argentina: Who's Winning?*, Latin Am., Dec. 22, 1972, at 402, col. 2; *Argentina: This Year, Next Year, Sometime*, Latin Am., Jan. 12, 1973, at 14, col. 1.

23. *Argentina: Power to Perón*, Latin Am., Mar. 16, 1973, at 81, col. 1; *Argentina: Conciliation*, Latin Am., May 25, 1973, at 167, col. 1; *Argentina: Through the Looking Glass*, Latin Am., July 20, 1973, at 225, col. 2; *Argentina: Victory Challenged*, Latin Am., Sept. 28, 1973, at 305, col. 1; *Argentina: President Perón*, Latin Am., Oct. 19, 1973, at 330, col. 2.

24. Law 20,508, May 27, 1973-A Anuario de Legislación [A.L.J.A.] 605. For an analysis of relations between the Cámpora government and the guerrilleros, see *Argentina: Guerrillas Under the Throne*, Latin Am., June 15, 1973, at 190, col. 1.

25. *Argentina: Hop, Skip, and Jump*, Latin Am., Dec. 21, 1973, at 401, col. 1; *Argentina: Perón Puts On His Uniform*, Latin Am., Jan. 25, 1974, at 25, col. 1; *Argentina: Water-shed*, Latin Am., Feb. 1, 1974, at 39, col. 1.

26. *Argentina: Cultural Revolution*, Latin Am., Mar. 1, 1974, at 66, col. 2; *Argentina: Versions of the Truth*, Latin Am., Mar. 22, 1974, at 93, col. 1; *Argentina: Struggle*, Latin Am., Apr. 12, 1974, at 119, col. 1; *Argentina: Not Dead But Travelling*, Latin Am., May 3, 1974, at 130, col. 1.

27. Junta Opinion, *supra* note 1, at 28,328-31.

28. *Argentina: The Deluge*, Latin Am., July 5, 1974; *Argentina: Triple Crisis*, Latin

López Rega into exile, President Perón spent weeks in her residence refusing to meet with her advisors. Inflation reached over 300%. Violence between the left and right factions increased, and leftist guerrillas in the rural province of Tucumán threatened to capture and hold territory.²⁹

On March 24, 1976, the Armed Forces which had announced that they would take over the government, carried out their promise.³⁰ It is important to note that this coup took place in an atmosphere of national emergency, with wide civilian support. President Isabelita de Perón headed a constitutional government, but she had not been elected, and proved to be an incompetent leader. The Peronist government had already declared a state of seige, suspended many civil liberties, and turned over the responsibility for combatting internal subversion to the Armed Forces.³¹ The first junta, composed of Lieutenant General Jorge Rafael Videla of the Army, Admiral Emilio Massera of the Navy, and Brigadier General Orlando Ramón Agosti of the Air Force, merely had to intensify the dirty war that it had commenced against leftist terrorism.³²

Am., Aug. 16, 1974, at 254, col. 1; *Argentina: Eminence Noire*, Latin Am., Aug. 23, 1974, at 260, col. 2; *Argentina: The Dialectic of Bombs and Machine Guns*, Latin Am., Sept. 27, 1974, at 300, col. 1; *Argentina: State of Seige*, Latin Am., Nov. 15, 1974, at 357, col. 1; *Argentina: Last Trump*, Latin Am., Nov. 22, 1974, at 367, col. 1; *Argentina: Balancing Act*, Latin Am., Dec. 20, 1974, at 398, col. 1; *Argentina: The Queen's Chief Minister*, Latin Am., Jan. 10, 1975, at 12, col. 2; *Argentina: Army Joins In*, Latin Am., Feb. 14, 1975, at 52, col. 2; *Argentina: Can It Endure?*, Latin Am., Mar. 28, 1975, at 103, col. 1; *Argentina: Swastikas Over the Andes*, Latin Am., May 9, 1975, at 140, col. 1; *Argentina: Anticommunists Anonymous*, Latin Am., June 6, 1975, at 172, col. 1.

29. *Argentina: Ending or Beginning*, Latin Am., Feb. 21, 1975, at 57, col. 2; *Argentina: Vandor's Hour Has Struck*, Latin Am., July 18, 1975, at 217, col. 1; *Argentina: One-Way Ticket*, Latin Am., July 25, 1975, at 226, col. 1; *Argentina: 20 Years On*, Latin Am., Aug. 22, 1975, at 261, col. 1; *Argentina: Shaking the Kaleidoscope*, Latin Am., Sept. 5, 1975, at 277, col. 2; *Argentina: Men at Arms*, Latin Am., Sept. 12, 1975, at 282, col. 1; *Argentina: Brewing the Next Crisis*, Latin Am., Sept. 19, 1975, at 289, col. 1; *Argentina: Return of the Unwanted*, Latin Am., Oct. 17, 1975, at 321, col. 1; *Argentina: Hie Thee to a Nunnery*, Latin Am., Nov. 7, 1975, at 349, col. 2; *Argentina: No Coup*, Latin Am., Nov. 14, 1975, at 357, col. 1; *Argentina: Guerrilla Struggle*, Latin Am., Nov. 28, 1975, at 370, col. 1; *Argentina: Massacre or Negotiation*, Latin Am., Dec. 12, 1975, at 386, col. 1; *Argentina: Drifting Into Civil War*, Latin Am., Feb. 6, 1976, at 45, col. 1.

30. *Argentina: Operation Cross the Road*, Latin Am., Feb. 13, 1976, at 54, col. 1; *Argentina: Coup Still at the Planning Stage*, Latin Am., Mar. 5, 1976, at 73, col. 2; *Argentina: At Last*, Latin Am., Mar. 26, 1976, at 97, col. 1; Junta Opinion, *supra* note 1, at 28,343.

31. The Cámara reviews many laws passed by the Peronist government and its successor that have increased the powers of the military and reduced the legal rights of suspected terrorists. See Junta Opinion, *supra* note 1, at 28,333-43.

32. Control passed through three juntas that were comprised of the commanders-in-chief of the Army, Navy, and Air Force, with the Army commander assuming the Presidency. The dates of control for each junta member are set forth in the following table.

During this war it is estimated between 9,000 and 15,000 suspected leftists disappeared.³³

Each disappearance followed a similar pattern. Civilian authorities, such as the police, were told not to interfere in a certain targeted area. An armed unit would burst into the victim's house or apartment in the early hours of the morning; the attackers carried off the victim in an unmarked car, often ransacking the house, and always warning family members that appeals to the authorities would be useless. The attackers then drove the victim, usually with a hood over his head, to a clandestine detention center where they questioned him or her, usually with torture.³⁴ Victims were held incommunicado and warned not to expect any help from the authorities or their families. Family members were also kidnapped and often tortured in each other's presence.³⁵

Some prisoners were detained for years; others were tortured to death. Most, however, simply "disappeared," prompting the invention of a new transitive verb, "to disappear someone." Bodies were found floating in the Río de la Plata or buried in mass graves, often with hands and heads cut off to prevent identification.³⁶ Many of those who died as a result of torture or executions in detention centers were reported by the military, which had instituted press controls, as casualties of "confrontations" between the forces of order and armed bands.³⁷ Relatives of the missing filed hundreds of habeas corpus petitions and appealed to Argentine and other authorities, but to no avail.³⁸ Victims included the elderly,

	Army	Navy	Air Force
Junta 1	Videla 3/24/76 to 7/31/78	Massera 3/24/76 to 9/15/78	Agosti 3/24/76 to 1/25/79
Junta 2	Viola 7/31/78 to 12/28/81	Lambruschini 9/15/78 to 9/12/81	Graffigna 1/25/79 to 12/17/81
Junta 3	Galtieri 12/28/81 to 6/18/82	Anaya 9/12/81 to 10/1/82	Lami Dozo 12/17/81 to 8/17/82

Junta Opinion, *supra* note 1, at 28,343-44. The opinion erroneously gives the year of the Viola-Galtieri transition as 1979 rather than 1981. See Galtieri Takes Presidency and Retains Control of Army, Latin Am. Weekly Rep., Dec. 18, 1981, at 1, col. 1.

33. The CONADEP documented 8,961 disappearances, but estimated that thousands more had occurred. NUNCA Más, *supra* note 3, at 10, 293.

34. Junta Opinion, *supra* note 1, at 28,349-417; NUNCA Más, *supra* note 3, at 16-26.

35. Junta Opinion, *supra* note 1, at 28,417-23, 28,427-47; NUNCA Más, *supra* note 3, at 26-54.

36. Junta Opinion, *supra* note 1, at 28,448-71; NUNCA Más, *supra* note 3, at 223-47.

37. Junta Opinion, *supra* note 1, at 28,464-66; NUNCA Más, *supra* note 3, at 229-32.

38. Junta Opinion, *supra* note 1, at 28,473-93; NUNCA Más, *supra* note 3, at 400-07.

children and pregnant women; Argentines, Uruguayans, and citizens of other nations; students, workers, journalists, lawyers, priests, and former cabinet ministers.³⁹ Many victims disappeared, not because they were suspected of aiding terrorist activities, but because it was hoped that they would denounce family members who had, or because they had submitted habeas corpus petitions or had participated in human rights organizations.⁴⁰ Amid growing international censure, the junta denied committing any violations.⁴¹

A second junta, consisting of Lieutenant General Eduardo Viola (Army), Admiral Armando Lambruschini (Navy), and Brigadier General Omar Graffigna (Air Force), took power in mid-1978.⁴² The junta announced that the war against subversion had been won, and disappearances dropped off sharply.⁴³ However, inflation remained high, the national debt had mushroomed, and patriotic sentiments were irritated by border incidents with Chile.⁴⁴ These problems worsened under the third junta headed by Lieutenant General Leopoldo Galtieri, Admiral Jorge Anaya, and Brigadier General Basilio Lami Dozo which took power at the end of 1981.⁴⁵ Partly to provide a distraction from the growing unrest, the third junta launched an ill-advised invasion of the Malvinas (Falkland) Islands in April 1982.⁴⁶ By June, the invasion ended in disaster and General Galtieri resigned.⁴⁷ A caretaker junta prepared for civilian elections, and in October 1983, Raúl Alfonsín of the Unión Cívica Radical (a middle-class party) was elected president.⁴⁸ Before leaving office, the junta passed a law, ostensibly to benefit

39. NUNCA MÁS, *supra* note 3, at 293-390. Among those who disappeared were Edgardo Sajón, the former Press Secretary of ex-President Alejandro Lanusse, Junta Opinion, *supra* note 1, at 28,604-05; Jacobo Timerman, publisher of the daily La Opinión *id.* at 29,020-22; Hipólito Solari Yrigoyen, an ex-Senator, *id.* at 28,884-88 and Elena Holmberg, a diplomat, *id.* at 29,700-07.

40. NUNCA MÁS, *supra* note 3, at 332-41, 424-29.

41. Junta Opinion, *supra* note 1, at 28,483-93.

42. *Id.* at 28,343-44.

43. *Id.* at 28,349.

44. Alemann's Austerity Plan Brings Reaganomics to Buenos Aires. Latin Am. Weekly Rep. Jan. 8, 1982, at 1, col. 1; *In brief: Argentina/Chile*, Latin Am. Weekly Rep., Feb. 19, 1982, at 11, col. 1; *Argentina: Shaking Hands and Kissing Babies*, Latin Am. Weekly Rep., Feb. 26, 1982, at 6, col. 2.

45. Junta Opinion, *supra* note 1, at 28,343-44. See sources cited *supra* note 44.

46. *Crisis in the South Atlantic: Steaming Into Battle*, Latin Am. Weekly Rep., Apr. 9, 1986, at 1, col. 1; *Stroke of Genius or Fatal Gamble?*, Latin Am. Weekly Rep., Apr. 9, 1986, at 11, col. 1.

47. *Military Defeat Hammers Last Nail Into Galtieri's Political Coffin*, Latin Am. Weekly Rep., June 18, 1982, at 1, col. 1.

48. *All the President's Men*, Latin Am. Weekly Rep., Nov. 4, 1983, at 1, col. 1.

the families of the disappeared, shortening the period necessary for a declaration of "legal death,"⁴⁹ and providing general amnesty for those involved in the "dirty war."⁵⁰

III. THE TRIAL AND THE OPINION

A. Pre-Trial Maneuvering

Three days after his inauguration in December 1983, President Alfonsín promulgated a decree ordering the Consejo Supremo Militar (the Consejo) (the military's highest court) to try the members of the first three juntas for crimes against human rights such as illegal deprivation of liberty, torture, and homicide.⁵¹ The decree provided that both prosecution and defense could appeal to the Cámara Federal; if the Consejo failed to reach a verdict in six months, the Cámara could either grant an extension or take the case and try it *de novo*.⁵² To further guard against delaying tactics, the decree mandated that the Consejo and Cámara follow an expedited procedure provided for in the Código Militar as *juicio sumario en tiempo de paz* (summary trial in peace time).⁵³ On the same day, the President announced the prosecution of heads of the major leftist guerrilla groups, and the submission to Congress of bills reducing military jurisdiction and criminalizing coups d'état.⁵⁴

In September 1984, the Consejo reported to the Cámara that

49. Law 22,062, Aug. 28, 1979, 1979-C Anales de Legislación Argentina [hereinafter A.D.L.A.] 2485. The Law allowed relatives of disappeared persons to apply for benefits after only one year.

50. Law 22,924, Sept. 22, 1983, 1983-D A.D.L.A. 3830. For a finding that this Law is unconstitutional, see Junta Opinion, *supra* note 1, at 28,286, and precedents cited therein. This Law and its context are discussed in Snyder, *State of Siege and Rule of Law in Argentina: The Politics and Rhetoric of Vindication*, 15 LAW. AM. 503 (1984).

51. Decree 158/83, Dec. 15, 1983, 1983-B A.D.L.A. 1943. This decree was sanctioned by the Argentine Congress in Law 23,049, Feb. 9, 1984, 1984-A A.D.L.A. 8 (amending the CÓDIGO DE JUSTICIA MILITAR), reprinted in CÓDIGO DE JUSTICIA MILITAR (CÓD. JUS. MIL.) 427-32 (O. Igounet & O. Igounet eds. 1985).

52. See *supra* note 51.

53. CÓD. JUS. MIL. arts. 502-504 bis.

54. Decree 157/83, Dec. 15, 1983, 1983-B A.D.L.A. 1941; *El presidente anunció medidas para reimplantar el estado de derecho; Sanciones por el golpe de estado; Reformas de fondo*, Clarín, Dec. 14, 1983, at 4, col. 1. The Argentine Constitution forbids ex post facto criminal laws, CONSTITUCIÓN DE LA NACIÓN art 18; CONSTITUCIÓN DE LA NACIÓN ARGENTINA 61 (H. Zarini ed. 1975), but allows procedural changes to be applied to cases arising before their passage. Junta Opinion, *supra* note 1, at 28,285-86. Thus, the juntas were not accused of perpetrating an illegal coup, but the procedural changes contained in Law 23,039 were applied in their human rights trial.

it found all the orders issued by accused junta members during the dirty war unobjectionable.⁵⁵ The Consejo declared that the defendants could only be accused for negligence in failing to control their subordinates.⁵⁶ The Consejo also protested the short period of time allowed by *juicio sumario* procedures, especially because, in its view, any court trying the juntas as "mediate authors" (*autores mediatos*) would have to first decide two threshold questions: (1) the guilt of those subordinates immediately responsible for the alleged crimes; and (2) the extent to which illicit acts by the disappeared victims justified the acts perpetrated against them.⁵⁷ In other words, the Consejo envisioned two massive trials: one trial of the victims, lower-level officers and soldiers and a subsequent trial of the superiors. Such a series of trials would raise the danger of statutes of limitations running out. More importantly, the question of whether "the disappeared" committed crimes for which they could have been prosecuted under Argentina's criminal laws was irrelevant to prosecuting defendants accused of by-passing those laws. Finally, while it is true that the trials of superiors and subordinates involved many of the same facts, there is no theoretical reason to consolidate them into the same proceeding, and many practical reasons not to do so. Indeed, to the extent that courts trying subordinates recognize the defense of superior orders,⁵⁸ there are good reasons to try superiors first.

In early October, the Cámara Federal took jurisdiction of the case, sent for the Consejo's dossier, and announced that it would try the case *de novo*.⁵⁹ Because the case began in the military justice system, the Cámara announced that it would continue to apply the procedural and substantive law of the Código de Justicia Militar, including that of the *juicio sumario*.⁶⁰ Several of the defendants appealed the constitutionality of the law granting the Cámara jurisdiction to the Argentine Supreme Court.⁶¹ The Supreme Court rejected the appeal, upholding the power of the Presi-

55. *Cuestionó las denuncias contra las ex juntas el Consejo Supremo*, Clarín, Sept. 26, 1984, at 2.

56. *Id.*

57. *Id.* at 3. This news story contains an extensive excerpt from the Consejo's report.

58. See *infra* notes 132-43 and accompanying text.

59. *Appeals Court to Handle Junta Trials*, Buenos Aires Herald, Oct. 5, 1984.

60. Junta Opinion, *supra* note 1, at 28,290-97.

61. Judgment of Dec. 27, 1984, Corte Suprema de Justicia de la Nación [hereinafter C.J.N.], 1985-I Jurisprudencia Argentina [hereinafter J.A.] 675 (Causa originariamente instruida por el Consejo Supremo de las Fuerzas Armadas en cumplimiento del decreto 158/83 del Poder Ejecutivo Nacional [*Jorge Rafael Videla* case]).

dent, as Commander-in-Chief of the Armed Forces, to regulate the trial of military offenses.⁶²

B. The Trial

Trial before the Cámara began in February, 1985, with a flurry of preliminary motions and opening statements by the prosecution and defendants.⁶³ On April 22, public interest rose to its highest pitch when the prosecution produced its evidence in open hearings.⁶⁴ Despite intensive journalistic coverage and periodic demonstrations in adjoining streets, the Cámara enforced strict rules of court decorum to prevent the trial from degenerating into a circus.⁶⁵

The prosecution chose to present the most representative 700 cases.⁶⁶ The majority of the witnesses offered were victims; however, ex-Presidents Isabelita de Perón and Alejandro Lanusse, United States diplomat Patricia Derain, Peronist minister Italo Luder, and subordinate officers also testified.⁶⁷ Some of the witnesses established links between high-level officers and specific anti-subversive operations, but most testified to the widespread, serious, and institutionalized nature of the violations. In mid-August, the parade of prosecution witnesses ended.⁶⁸ Prosecution arguments took up the first half of September.⁶⁹ The defendants presented their cases during October. Without attempting to deny the factual picture of the dirty war presented by the prosecution, the defendants' lawyers questioned the legal significance of those

62. *Id.*; Junta Opinion, *supra* note 1, at 28,289-90.

63. *Agosti declaró ante la Cámara Federal*, Clarín, Feb. 26, 1985, at 6, col. 1.

64. *Confirmó la Cámara que el 22 se inicia el juicio a los ex comandantes*, Clarín, Apr. 13, 1985, at 12, col. 1.

65. *Como serán juzgados los ex comandantes*, Clarín, Mar. 3, 1985, at 14, col. 1; *La cámara respondió a versiones que tergiversan el juicio a las ex juntas*, Clarín, Apr. 9, 1985, at 5, col. 1.

66. *Fiscal y defensores ofrecieron mas de 2.200 testigos*, La Razón, Apr. 18, 1985, at 24, col. 2; *El juicio a los ex comandantes*, La Nación, Apr. 18, 1985, at 1.

67. See, e.g., sources cited *supra* note 6; *Former Pilar Police Chief Questioned*, Buenos Aires Herald, May 16, 1985; *Lanusse Says Videla Must Have Known*, Buenos Aires Herald, May 14, 1985; *Harguindeguy: Most Backed Repression*, Buenos Aires Herald, May 15, 1985 (testimony of a former Interior Minister); *Lieutenant Lambasts Army Brass*, Buenos Aires Herald, June 20, 1985; *Admitió un comodoro operativos secretos*, Clarín, Aug. 7, 1985, at 16, col. 1.

68. *Probamos todos los cargos a las ex juntas*, Clarín, Aug. 16, 1985.

69. *Falsedad documental: Argumentos del Fiscal*, Clarín, Aug. 18, 1985, at 12, col. 1; *Junta Chiefs hear Strassera Summary*, Buenos Aires Herald, Sept. 12, 1985; *Life Sentences Sought For Five*, Buenos Aires Herald, Sept. 19, 1985.

facts. Their chief argument was that the state of internal war in which the country found itself necessitated and justified a suspension of all constitutional guarantees.⁷⁰ In addition, some defense counsel argued that their clients were merely obeying orders of the previous government;⁷¹ that many prosecution witnesses were unreliable because they were involved in leftist subversion;⁷² that the defense had been given insufficient time to present its case;⁷³ that the prosecution's theory of responsibility was incorrect;⁷⁴ that the defense was not given enough chance to cross-examine witnesses;⁷⁵ and that the court was biased in favor of the prosecution in what amounted to a trial of the victors by the vanquished.⁷⁶

The Cámara recessed to prepare its opinion, which it announced to an open packed court on December 9, 1985.⁷⁷ Videla and Massera were sentenced to prison for life; Agosti, Viola, and Lambruschini were sentenced to prison for four and a half, seventeen, and eight years, respectively; Graffigna, Galtieri, Anaya, and Lami Dozo went free.⁷⁸ The verdicts and sentences reflected the Cámara's refusal to allocate guilt collectively, by juntas, as the prosecution requested. Hence, the commanders of the Army, which had played a much greater role in the dirty war than had the Navy or Air Force, received longer sentences.⁷⁹

70. *Tavares: State of Revolutionary War Justified Military Actions*, Buenos Aires Herald, Oct. 1, 1985; *Excesses Were Justified, Says Massera Defense*, Buenos Aires Herald, Oct. 3, 1985, at 1, col. 1; *Viola defense says: 'Juntas Trial Helps Extremist Groups'*, Buenos Aires Herald, Oct. 11, 1985. The Cámara rejected this argument in the Junta Opinion, *supra* note 1, at 29,747-84.

71. *Tavares: State of Revolutionary War Justified Military Actions*, Buenos Aires Herald, Oct. 1, 1985; *Tavares Asks for Videla's Acquittal*, Buenos Aires Herald, Oct. 2, 1985, at 1, col. 1; *Lami Dozo: Argentine Society Should Be On Trial*, Buenos Aires Herald, Oct. 22, 1985, at 1, col. 1.

72. *Tavares Asks For Videla's Acquittal*, Buenos Aires Herald, Oct. 2, 1985, at 1, col. 1.

73. *Id.*

74. *Pidieron la absolución del ex titular de la Armada*, Clarín, Oct. 4, 1985, at 4, col. 1; *Lambruschini: 'My Honour Is Intact'*, Buenos Aires Herald, Oct. 16, 1985; *Galtieri: 'Let God And History Be My Judges'*, Buenos Aires Herald, Oct. 18, 1985, at 1.

75. *Viola's Lawyers Say Court Biased*, Buenos Aires Herald, Oct. 12, 1985, at 1.

76. *Id.*; *Viola Defence Says: 'Juntas Trial Helps Extremist Groups'*, Buenos Aires Herald, Oct. 11, 1985; *Videla: Los derrotados se han tomado revancha*, Clarín, Oct. 26, 1985.

77. *See supra* note 1.

78. *Penas pedidas y condenas*, La Nación, Dec. 10, 1985; Junta Opinion, *supra* note 1, at 29,833-38.

79. Junta Opinion, *supra* note 1, at 28,493-511.

C. The Opinion

As is the practice in civil law systems, the Cámara acted both as judge and as trier of fact. Hence, the opinion, which in type-script fills thousands of pages, contained a summary of the facts found in each of the 700 cases put forward by the prosecution, as well as arguments on points of law.

1. Preliminary Questions

The court began by reaffirming the Argentine Supreme Court's ruling that upheld the presidential decree and the statute granting the Cámara jurisdiction over the case and repealing the junta's own amnesty law.⁸⁰ The Cámara rejected the argument that the *juicio sumario* procedure mandated by these laws denied the accused an opportunity to defend themselves, claiming that the defendants had not described what use they would have made of a longer period.⁸¹

The Cámara then narrated the historical context of the dirty war, summarizing the widespread violence from both left and right as well as the state of seige and other adjustments made in the legal regime to deal with the situation.⁸² It described the common *modus operandi* of the disappearances and the elaborate secret support structure of zones of control and detention centers.⁸³ It pointed to the defendants' failure to investigate, and active frustration of, *habeas corpus* petitions and inquiries by other nations and international bodies.⁸⁴

2. Governmental Responsibility

Next, the court handled the prosecution's contention that responsibility for all of the crimes which occurred during the tenure of each junta should be assigned to all three members on a collective basis.⁸⁵ Such an attribution would have enabled the prosecu-

80. *Id.* at 28,285-92, referring to the *Videla* case, 1985- I.J.A. 675. Since this paper does not aim to be, nor is this author qualified to carry out, an analysis of Argentine constitutional or general criminal law, the issues will only be pointed out, not discussed.

81. *Id.* at 28,293-97.

82. *Id.* at 28,306-49.

83. *Id.* at 28,349-471.

84. *Id.* at 28,472-93.

85. *Id.* at 28,493-510.

tion to obtain sentences for the heads of the Navy and Air Force equal to those given the Army heads, despite the fact that the former services contributed less to the dirty war. The Cámara rejected this allocation of responsibility. It found that effective control over anti-subversive operations had only been proven up through the chain of command of each force.⁸⁶ Laws and statements made at the time extolling the junta's unity were dismissed as political declarations.⁸⁷

3. Evidence Linking the Junta with Subordinates' Actions

The court opinion made it clear that the junta members were being tried for the affirmative acts of ordering and otherwise facilitating the crimes charged, not for mere negligence or failure to prevent them. The court pointed to the organized and uniform methods used in the kidnappings.⁸⁸ It observed that subordinates could not have carried out such widespread operations without logistic support, cooperation from civilian authorities, and, most importantly, assurance of impunity.⁸⁹ In fact, the defendants had repeatedly asserted that they were in complete command of their subordinates throughout the entire period.⁹⁰ Conversely, the few subordinates who took the stand declared that all of their actions were authorized from above.⁹¹ The Cámara cited specific testimony where subordinates stated that orders for anti-subversive operations were always given orally, so as to preserve secrecy.⁹² There was proof that, instead of acting on reports of violations, the junta had actively frustrated investigations, sent false responses to judicial inquiries, and established procedures to insure that operations would remain clandestine.⁹³ In its public announcements, the junta had frequently referred to the waging of a dirty war and to the necessity of using unusual procedures.⁹⁴ When the junta announced that it had won the war towards the end of 1979, the number of disappearances dropped precipitously.⁹⁵ In sum, the

86. *Id.* at 28,493-96.

87. *Id.* at 28,495-97.

88. *Id.* at 28,497.

89. *Id.* at 28,498, 28,502-03.

90. *Id.* at 28,501.

91. *Id.* at 28,502.

92. *Id.* at 28,505-07.

93. *Id.* at 28,505-10.

94. *Id.* at 28,503-04.

95. *Id.* at 28,500-01.

court found sufficient circumstantial evidence to establish that the defendants had expressly ordered the operation of a system designed to commit crimes.

The Cámara also rejected defense attempts to impugn the testimony of victims and their families introduced by the prosecution. It found that the Código de Justicia Militar allows "any person with knowledge of the facts" to serve as a witness, entrusting the judge with the responsibility of weighing credibility.⁹⁶ The defense argued that the victims were tainted with subversion and could not accurately testify to events taking place years before. The Cámara, however, noted that the lack of more objective witnesses resulted from the methods of operation chosen by the defendants;⁹⁷ that most witnesses' testimony at trial coincided with their declarations at the time of the events and with the testimony of other prisoners held at the same detention centers;⁹⁸ and that the defense had been given ample opportunity to cross-examine each of the witnesses.⁹⁹

Hundreds of pages containing findings of fact in 700 cases followed.¹⁰⁰ The court classified the facts under the rubrics of illegal deprivation of liberty, torture, torture resulting in death, homicide, and robbery.¹⁰¹ The court rejected the prosecution's charges of cover-ups, involuntary servitude, falsification of public documents, extortion, and usurpation of real property, holding either that the prosecution failed to meet the statutory definitions of the particular crimes or that the prosecution did not establish that these acts were consequences of the system set up by the accused rather than excesses committed by subordinates.¹⁰²

4. Affirmative Defenses

The next two sections, dealing with justifications argued by the defense and the theory of responsibility, form the heart of the

96. Cód. Jus. Mil. arts. 253-54; Junta Opinion, *supra* note 1, at 28,517.

97. Junta Opinion, *supra* note 1, at 28,522-23.

98. *Id.* at 28,525-28.

99. *Id.* at 28,528.

100. *Id.* at 28,599-731.

101. *Id.* at 29,731-36. The crimes listed are codified, with specified aggravating circumstances, in CÓDIGO PENAL [hereinafter Cód. Penal] arts. 144 bis, 144 ter., 80, 164 (F. Zamora, ed. 1982). The Cámara threw out the homicide and torture-death charges that were not backed up by a *corpus delicti*, although there was evidence to the effect that the military systematically destroyed bodies. Junta Opinion, *supra* note 1, at 29,734-35.

102. Junta Opinion, *supra* note 1, at 29,737-40.

opinion. *Considerando Sexto* discusses *causas de justificación* or affirmative defenses.¹⁰³ The defendants claimed three such defenses: (1) necessity; (2) obedience to the law; and (3) self defense or defense of others.¹⁰⁴ The Argentine Código Penal grants a defense of necessity to "one who causes an evil in order to avoid an imminent, greater evil for which he is not responsible."¹⁰⁵ Legal scholars interpret this defense to require that the accused have no other reasonable means to avoid the greater evil, and that the evils and means adopted be judged from the point of view of the accused at the time he made his choice.¹⁰⁶

The Cámara found that the junta had acted to prevent terrorist acts and the violent overthrow of the government.¹⁰⁷ The court conceded that the defendants were not responsible for creating these dangers. However, it found that the danger of a successful revolution was not an imminent danger,¹⁰⁸ nor was the terrorism perpetuated by the state a lesser evil than that by leftists: "[I]f kidnapping and killing was aimed at preventing kidnappings and killings, then the defendants were not producing a 'lesser evil' to avoid a 'greater evil'. . . the evils would be equivalent."¹⁰⁹ Most importantly, the Cámara found that the junta enjoyed ample legal powers to combat terrorism. Beginning in 1973, a series of statutes and decrees gave certain powers to the military police. These enactments put large sections of the country under military government, extended military jurisdiction, proclaimed a state of seige, and empowered the military authorities to legislate in areas under their control.¹¹⁰ The junta, however, exceeded its powers by violating constitutional rights that had not been suspended, including the right to a trial, the prohibition on torture, and the abolition of the death penalty for political offenses.¹¹¹ The court found that the defendants could have defeated subversion by using the legal

103. *Id.* at 29,741-84.

104. Article 510 of Cód. Jus. MIL. incorporates the first book of the Código Penal by reference. Affirmative defenses are found at Cód. PEN. art. 34, incisos 30, 40, 50, 60, 70.

105. "No son punibles . . . el que causare un mal por evitar otro mayor inminente a que ha sido extraño. . .," Cód. PEN. art. 34, inciso 30.

106. Junta Opinion, *supra* note 1, at 29,747-48.

107. *Id.* at 29,748-49.

108. *Id.*

109. "[S]i se secuestraba y mataba para evitar que se siguiera matando y secuestrando, no se estaría produciendo un 'mal menor' para evitar un 'mal mayor' . . . los males habrían sido equivalentes . . ." *Id.*

110. *Id.* at 29,740-48.

111. *Id.* at 29,746.

means that they had at their disposal.¹¹²

Several defendants argued that they had only acted in response to orders of the civilian government. Specifically, they cited a decree of the Peronist government declaring that "the Armed Forces . . . will proceed to carry out whatever military and security operations are necessary to *destroy the activity* of subversive elements in the entire national territory."¹¹³ The Cámara pointed out the irony of the military junta claiming to have acted under orders of the very government that it had overthrown.¹¹⁴ The court then observed that the Peronist executive had no power to abrogate the Constitution and that witnesses from that government had testified that the decree ordered the destruction of the subversives' fighting ability, and not the massacre of subversives.¹¹⁵

Third, the court considered the defendants' claims of self defense and defense of others. It found the leftist terrorists engaged in illegitimate and unprovoked aggression, satisfying two requirements of the defense.¹¹⁶ However, the defendants failed to show a rational necessity for the means they chose to combat this aggression. Again, legitimate means would have sufficed.¹¹⁷

Finally, the Cámara considered broader, nonstatutory defenses.¹¹⁸ The most sweeping of these was the contention that the junta confronted a state of internal war, and that in such a war

112. *Id.* at 29,750.

113. "[L]as Fuerzas Armadas . . . procederán a ejecutar las operaciones militares y de seguridad que sean necesarias a efectos de *aniquilar el accionar* de los elementos subversivos en todo el territorio del país." Decree 2772, quoted in *id.* at 29,752-53 (emphasis added).

114. Junta Opinion, *supra* note 1, 29,753.

115. *Id.* at 29,753-55.

116. *Id.* at 29,755, referring to Cód. PEN. art. 34, incisos 60, 70.

117. Junta Opinion, *supra* note 1, at 29,755-58.

118. *Id.* at 29,758-84. The Cámara discussed the doctrine of *antijuricidad material*, according to which an act may be criminal and fall outside statutory justifications, yet be excused because it conforms to a society's true values. The court rejected this argument, pointing to the military's efforts to keep the disappearances secret as evidence that they were unacceptable to most Argentines. *Id.* at 29,758-61. The court also rejected an argument that the junta's actions deserved a lessened punishment under Cód. PEN. art. 35, *supra* note 101, as excesses committed in the course of carrying out justified actions under extreme circumstances. The court found that the disappearances, torture, and executions were illegal *ab initio*. Moreover, Article 35 is intended to lessen the punishment of individuals who overreact to danger or other stress. The accused, by contrast, were high government officials sitting removed from the battle: "[N]o es admisible que un gobierno que concentraba en sus manos toda la fuerza del Derecho y de las armas obrara como lo hizo, sobre la base de una perturbación del ánimo de sus miembros." Junta Opinion, *supra* note 1, at 29,763.

rules do not apply (*inter armas jura silent*).¹¹⁹ The court accepted the defendants' labelling of the situation as a state of war.¹²⁰ However, the judges refused to concede that the rule of law had been suspended; they cited Article 23 of the Argentine Constitution which limits military power even during a state of seige,¹²¹ powers reserved to the Congress in regard to war,¹²² and rules of conduct during war contained in the Código Penal and the Código de Justicia Militar.¹²³ The court also briefly discussed a long series of international treaties, signed by Argentina, recognizing limits on the conduct of war and treatment of prisoners.¹²⁴ Finally, the court observed that the defendants' arguments amounted to the assertion that some elements of a government are beyond its own laws and that the ends justify any means. The judges declared such a view impermissible in any society claiming to have a legal system.¹²⁵

5. Command Responsibility

The Cámara's affirmation of the applicability of law to internal unrest was probably its most important statement to the Argentine public. It confronts a widely held belief in Latin America that orderly legal procedures and restraints on government power are luxuries dispensable in times of national stress. The extreme right and extreme left of Argentina often agree in this belief.¹²⁶

The most interesting legal issues arise in *Considerando Séptimo* which deals with the responsibility of the junta commanders-in-chief for crimes committed by their subordinates. The issues are important not only because the defendants could not be condemned unless they were held responsible in some way for the crimes, but also because the Argentine Código Penal recognizes diminished roles, such as "accomplice" and "instigator," and assigns lesser punishments to them than to "principals" or "autores."¹²⁷

119. Junta Opinion, *supra* note 1, at 29,766.

120. *Id.* at 29,764-65.

121. *Id.* at 29,768-70; CONSTITUCIÓN DE LA NACIÓN art. 23.

122. Junta Opinion, *supra* note 1, at 29,770-71; CONSTITUCIÓN DE LA NACIÓN arts. 67(15), (21), (23)-(29), 23.

123. Junta Opinion, *supra* note 1, at 29,771-74.

124. *Id.* at 29,774-84.

125. *Id.* at 29,766, 29,780-84.

126. On the philosophy of the violent left, see, e.g., *id.* at 28,306-27. For that of the right, see *id.* at 29,765-66; NUNCA MÁS, *supra* note 3, at 473-76.

127. Cód. PEN. arts. 45-49, is made applicable to this case by Cód. JUS. MIL. art. 513. *Participación criminal or autoría* has been discussed by many Spanish and Argentine legal

Defense counsel argued that, under Argentine law, only those who commit the crime can be considered its authors; that there can be no imputation of guilt when these authors are independent human beings responsible for their own acts, and that, even if the junta members were guilty as instigators, they must be tried together with the executors of the crimes.¹²⁸

First, the Cámara reviewed the three principal theories advanced by Roman-Civil Law legal writers to explain "criminal authorship." The court quickly rejected the subjective theory, which finds all those who participate in a crime with an *animus autoris*, or intention to be perpetrators, should be punished as such; those with an *animus socii* should be punished only as accomplices.¹²⁹ The "formal-objective theory," proposed by the defense, denies authorship to those who do not commit at least some of the elements of the crime.¹³⁰ The mediate author (*autor mediato*) theory holds that those who exercise the *dominio del hecho* or control over the commission of a crime are its authors.¹³¹

The court then analyzed article 514 of the Código de Justicia Militar and articles 34 and 45 of the Código Penal to determine which theory best explained the language of the statutes. Article 514, source of the famous "due obedience" (*obediencia debida*) doctrine, reads:

When a crime has been committed by executing a military order, the superior who gave it shall be held solely responsible, and the subordinate shall be considered an accomplice only when he has committed excesses in carrying out the said order.¹³²

theorists. See, e.g., E. BACIGALUPO, *LA NOCIÓN DEL AUTOR EN EL CÓDIGO PENAL* (1965); L. JIMÉNEZ DE ASÚA, *LA LEY Y EL DELITO: PRINCIPIOS DE DERECHO PENAL*, at 495-509 (1980).

128. Junta Opinion, *supra* note 1, at 29,786.

129. *Id.* at 29,787.

130. *Id.* at 29,786-88. Jiménez de Asúa offers a more sophisticated version of this theory than the one caricatured by the Cámara. According to his version, one who forces another, by duress or deception, to execute a crime, has actually committed the elements of the crime because the executor is a mere instrument. The executor bears no criminal responsibility at all, because he can allege one of the affirmative defenses, such as incapacity (*inimputabilidad*), duress, obedience to orders (*obediencia debida*), or error. If the executor is also criminally responsible, then the situation is one of *codelinuencia*, and the perpetrators must be divided into authors and accomplices. L. JIMÉNEZ DE ASÚA, *supra* note 127, at 501-02. These distinctions are necessary because Spanish criminal law and Latin American codes generally do not recognize the crime of conspiracy except as a type of attempt. *Id.* at 466.

131. Junta Opinion, *supra* note 1, at 29,788; E. BACIGALUPO, *supra* note 127, at 49-55.

132. "Cuando se haya cometido delito por la ejecución de una orden del servicio, el

Conversely, the military code makes it a crime to refuse to carry out the orders of a superior, with no exception for illegal orders.¹³³ On the civilian side, article 34 absolves one who "acts in accordance with due obedience."¹³⁴ The article on civilian responsibility provides:

Those who take part in the execution of a crime or lend the author or authors aid or cooperation without which it could not have been committed, will suffer the punishment established for that crime. The same punishment will fall on those who directly cause another to commit the crime.¹³⁵

The Cámara found the language of these statutes more compatible with a theory that makes responsibility depend on causation and control as opposed to one that hinges on the commission of certain enumerated acts.¹³⁶ It observed that, if guilt depends on execution but a military executor can defend on the basis of due obedience, then many military crimes would have no perpetrator at all.¹³⁷ The control theory, the court maintained, is the one most compatible with the strict discipline of military institutions;¹³⁸ the sister codes of Peru, Brazil, Venezuela, Chile, and Colombia, as well as their venerable ancestors, Roman law and the *Fuero Juzgo*, contained similar provisions.¹³⁹

The defense, however, argued that the existence of independent actors further down the chain of command negated control of the crime.¹⁴⁰ Among other things, acceptance of this theory would force the court to choose between condemning the commanders or their subordinates. The Cámara countered with a concept it labelled "the organized apparatus of power" (*el aparato organizado de poder*).¹⁴¹ According to this concept, the accused commanders didn't use any one subordinate or group of subordinates, but used

superior que la hubiere dado será el único responsable, y sólo será considerado cómplice el inferior, cuando éste se hubiere excedido en el cumplimiento de dicha orden." Cód. Jus. Mil.

133. *Id.* arts. 667, 674, 675.

134. Cód. PEN. art. 34, inciso 50.

135. "Los que tomasen parte en la ejecución del hecho o prestasen al autor o autores un auxilio o cooperación sin los cuales no habría podido cometerse, tendrán la pena establecida para el delito. En la misma pena incurrirán los que hubiesen determinado directamente a otro a cometerlo." *Id.* art. 45.

136. Junta Opinion, *supra* note 1, at 29,788-90.

137. *Id.* at 29,796.

138. *Id.* at 29,789.

139. *Id.* at 29,791-93.

140. *Id.* at 29,786.

141. *Id.* at 29,795, 29,798-800.

the entire apparatus of the state as an instrument to exercise complete control. Even if an individual subordinate possessed and exercised the power to refuse to obey illegal orders, the accused could always have replaced that subordinate. If the second subordinate refused, he could be replaced with a third, and so on. As long as the defendants controlled the state and the armed forces, the fungibility of these instruments assured that the junta's illegal orders would be carried out.¹⁴² Hence, the independent will of the defendants' human instruments does not negate the *dominio del hecho*. Moreover, proof of any particular subordinate's guilt is not a logical prerequisite for proof of the guilt of the defendants. Lastly, a verdict against the commanders does not preclude a verdict against some of their subordinates. This is because the organized apparatus theory does not presuppose lack of legal responsibility in subordinates. In terms of the Codes, "there exist subordinates who will not be covered by the excuse of due obedience."¹⁴³ Thus, the Cámara opened the way for human rights trials of other officers.

6. The Verdict

Having established these legal principles, the court applied them to the facts. It found that, because of the affirmative acts of ordering the use of illegal methods, assuring impunity, providing logistic support, and actively frustrating judicial and other efforts to save the victims, the accused were responsible for the crimes committed by their subordinates during the dirty war. In addition, they were found guilty of certain inevitable consequences resulting from the methods chosen by them such as the pillaging of households of those disappeared.¹⁴⁴ The Cámara proceeded to attribute the crimes it considered proven among the defendants according to whether each crime was committed by subordinates of that defendant *during* his tenure as commander-in-chief.¹⁴⁵ The sentencing of these defendants followed.¹⁴⁶

142. Of course, if enough subordinates refused to carry out the illegal orders, those orders would not be put into effect. But organized disobedience would also negate the junta's control of the "organized apparatus of power." The defendants testified at trial that they were in control of their subordinates. See *id.* at 28,501.

143. *Id.* at 29,796.

144. *Id.* at 29,793-800. However, the Cámara found that the kidnapping of children and rapes included in the prosecution's charges were not ordered by the defendants nor were they foreseeable consequences of their orders.

145. *Id.* at 29,804-31.

146. *Id.* at 29,833-50.

D. Subsequent Developments

Under the Argentine judicial system, the prosecution and the defense may appeal decisions of the Cámara to the Corte Suprema if they allege an error in interpretation of the constitution or national laws.¹⁴⁷ The condemned defendants appealed the Cámara's interpretation of *obediencia debida* and its refusal to apply the "auto-amnesty" law.¹⁴⁸ The prosecution appealed the Cámara's failure to allocate responsibility to each junta as a whole. The prosecution also appealed the rejection of the cover-up and falsification of documents charges and some of the findings in particular cases.¹⁴⁹

On December 30, 1986, the five-member Argentine Supreme Court handed down its decision: a unanimous affirmance. All five members of the Court rejected the defenses's attacks on Law 23,040, giving the Cámara jurisdiction; the Court also rejected the prosecution's theory of collective responsibility.¹⁵⁰ Three justices, José Severo Caballero (the Chief Justice), Augusto Cesar Belluscio, and Carlos Santiago Fayt, voted to reduce Viola's sentence by six months and Agosti's by nine months.¹⁵¹ Caballero and Belluscio also took issue with the Cámara's theory of responsibility. Apparently espousing the "formal objective" theory, they argued that the junta members could be at most instigators, since they did not commit the objective acts defining each crime.¹⁵² Justices Enrique Petracchi and Jorge Bacqué accepted the Cámara's responsibility analysis, including its control theory and the concept of the "organized power apparatus" as an instrument of the crime.¹⁵³ Justice Fayt apparently agreed with part of Petracchi and Bacqué's re-

147. Law 48, art. 14, Sept. 14, 1863, reprinted in *CÓDIGO DE PROCEDIMIENTOS EN LO CRIMINAL PARA LA JUSTICIA FEDERAL* 146 (I. Dova de Zavallia, ed. 1981).

148. *Va a la Corte el juicio a los ex comandantes*, La Nación, Mar. 10, 1986; *Recursos de queja por el fallo a los ex comandantes*, Clarín, Mar. 18, 1986; *El juicio a los ex comandantes: Lo que tratará la Corte*, Clarín, Mar. 9, 1986; *Supreme Court Reviews Junta Trial*, Buenos Aires Herald, Mar. 19, 1986, at 9.

149. See news stories cited *supra* note 148; *Apelación (síntesis)*, in N. MONTENEGRO, *supra* note 15, at 245-49.

150. *Confirmanse las condenas a los ex comandantes*, La Nación, Jan. 5, 1987, at 5, col. 1.

151. *Id.* The Court found that Viola had been sentenced for two crimes not listed in the indictment, while Agosti had been sentenced for three crimes barred by the statute of limitations. *Id.* The remaining two justices argued that Viola and Agosti's remaining crimes were serious enough to bar reduction of the sentences. *Id.*

152. *Id.*

153. *Id.*

sponsibility analysis. He accepted the Cámara's characterization of the defendants as "authors," but would have held that subordinates could not be prosecuted for the same crimes.¹⁶⁴ In short, the Supreme Court affirmed the result of the junta trial and left its analysis of responsibility undisturbed.

Meanwhile, related trials proceeded. Mario Firmenich, a Mononero guerrilla leader extradited from Brazil, was, as of this writing, being tried for several kidnappings and attacks carried out by his group.¹⁶⁵ Like the junta members, Firmenich has not denied that his group carried out the actions, but claims that his subordinates acted independently.¹⁶⁶

Trials of military officers also continued. In mid-May of 1986, the Armed Forces Consejo Supremo sentenced Anaya, Galtieri, and Lami Dozo to prison terms for negligence in fighting the Malvinas War.¹⁶⁷ On December 3, 1983, the Cámara Federal handed down substantial sentences against General Ramón Camps and other top military and police officials in charge of the Buenos Aires area during the dirty war.¹⁶⁸ The civilian courts also moved quickly to take over cases in which the military appeared to be dragging its feet.¹⁶⁹ López Rega, Isabelita's right-hand man, was extradited from the United States.¹⁶⁰ This multiplication of indictments caused unrest

154. *Id.* Fayt would have allowed prosecution of only those subordinates who committed excesses. *Id.*

155. The trial was authorized by Decree 157/83, Dec. 15, 1983, 1983-B A.D.L.A. 1941, *supra* note 54, promulgated by President Alfonsín on the same day as the decree authorizing trial of the junta. *Graves acusaciones contra el jefe de los montoneros*, La Nación, Apr. 14, 1986, at 5, col. 1 [hereinafter *Graves acusaciones*]; *Denegaron la excarcelación de Firmenich*, La Nación, Oct. 6, 1986, at 1, col. 1; *Piden reclusión perpetua*, La Nación, Oct. 6, 1986, at 4, col. 4.

156. *Graves acusaciones*, *supra* note 155.

157. Anaya received 14 years, Galtieri received 12 years, and Lami Dozo received 8 years. *Guerra de las Malvinas; Notificaron las condenas*, La Nación, May 19, 1986, at 1, col. 1; *Informe del Consejo al Ministerio de Defensa*, La Nación, May 19, 1986, at 5, col. 1; *Falklands Verdicts*, Latin Am. Monitor, Apr. 1986, at 282, col. 1; *Argentina: Falklands Trial*, Latin Am. Weekly Rep., May 23, 1986, at 4, col. 2.

158. Camps received 25 years imprisonment, and 4 of his subordinates received from 4 to 23 years. *Condenaron a Camps a 25 años de reclusión*, La Nación, Dec. 8, 1986, at 1, col. 3; *5 Convictions in Argentina*, N.Y. Times, Dec. 7, 1986, § IV, at 2, col. 1. Two lower-level officers were acquitted. *Id.* A police doctor, Jorge Bergés, received six years for helping out in the torture chambers. *Id.*

159. *Una decisión judicial y las relaciones con las FF.AA.*, La Nación, June 23, 1986, at 5, col. 1; *Córdoba: revocan resoluciones del Consejo Supremo*, La Nación, Nov. 24, 1986, at 1, col. 5 (a federal court in the city of Córdoba voided a military court's decision that the cases against Gen. Luciano Benjamín Menéndez and others were barred by the statute of limitations).

160. *Trajerón a López Rega; está alojado en la U-22*, La Nación, July 7, 1986, at 1, col.

in the barracks, which increased when an active-duty officer received a subpoena to testify in federal court.¹⁶¹ Fearing that he was losing control of the trials and that the military would intervene to protect its own, President Alfonsín issued a directive to prosecutors ordering the speed-up of trials and establishing a broad definition of "due obedience."¹⁶²

Alfonsín also pushed through Congress a so-called *punto final* or full stop law.¹⁶³ The *punto final* law extinguishes all criminal prosecutions brought under Law 23,049 (the law that gave civilian courts jurisdiction over these cases) later than sixty days after the passage of the *punto final*.¹⁶⁴ An amendment added by the Senate brought leftist civilian participants in the dirty war under the same protection.¹⁶⁵ The law allows the federal courts to order cases before the military courts transferred to the federal courts.¹⁶⁶ However, it allows the superior officer of any accused soldier to request that the accused await trial in the barracks, carrying out his regular duties, instead of under preventive detention.¹⁶⁷ Any time during which the accused was a fugitive, the case was in the process of being transferred, or the court was hearing motions, is excluded from the sixty-day period.¹⁶⁸ The law does not affect civil suits.¹⁶⁹

Street demonstrators, often violent, protested the *punto final* law, but Congress passed it by a large margin.¹⁷⁰ In the next weeks,

1; *Procesan a López Rega en la causa por la Triple A*, La Nación, July 14, 1986, at 4, col. 1.

161. The witness was Lt. Col. Carlos Pla, who had been chief of police in the town of San Luis during the dirty war. *Serán analizados los juicios a los militares*, La Nación, Sept. 15, 1986, at 5, col. 5. For reports on the rise in tensions, see Christian, *Argentina Agonizes Over "Dirty War" Trials*, N.Y. Times, Sept. 28, 1986, § E, at 3, col. 1; Elon, *Letter from Argentina*, New Yorker, July 21, 1986, at 74.

162. *El gobierno fijó los límites de la obediencia debida*, La Nación, Apr. 28, 1986, at 1, col. 1; *Alternative Found To Military Amnesty: Most Officers Benefit From Obediencia Debida*, Latin Am. Regional Rep.: Southern Cone, May 23, 1986, at 2, col. 3; *Military Trials: Some Cases to be Dismissed*, Latin Am. Monitor, May, 1986, at 293, col. 1. One of the judges who presided at the junta trial resigned upon hearing of this directive. Zibell, *El juez que dijo no*, LA SEMANA, May 7, 1986, at 58; *Appeals judge Torlasco quits*, Buenos Aires Herald, May 4, 1986, at 1, col. 3.

163. *La Cámara de Diputados convirtió en ley el proyecto de punto final*, La Nación, Dec. 29, 1986, at 1, col. 1; Christian, *Argentina and Uruguay Pardon Some Old Abuses*, N.Y. Times, Dec. 28, 1986, § 4, at 3, col. 1.

164. Law 23,492, art. 1, Dec. 23, 1986, 1987-1 Boletín Informativo A.D.L.A. 1; see *El texto de la ley*, La Nación, Dec. 29, 1987, at 8, col. 5 (full Spanish text).

165. *El Presidente atacó los extremismos*, La Nación, Dec. 22, 1986, at 1, col. 4.

166. Law 23,492, art. 2, 1987-1 Boletín Informativo A.D.L.A. 1.

167. *Id.* art. 3; Cód. Jus. Mil. arts. 309-318.

168. *Id.* arts. 1, 4.

169. *Id.* art. 6.

170. *Incidente con Madres de Plaza de Mayo*, La Nación, Dec. 29, 1986, at 5, col. 1;

the federal courts responded to the law with a flurry of transfer orders and indictments, attempting to beat the deadline.¹⁷¹ Some of these trials will raise the difficult issues of superior-subordinate responsibility discussed elsewhere in this article. In April 1987, army units in Córdoba, Buenos Aires, Salta and Tucumán mutinied.¹⁷² Alfonsín succeeded in quelling these rebellions. However, the civilian government was forced to make concessions: Alfonsín asked the Army Chief of Staff to resign, and he persuaded the Argentine Supreme Court to take over a test case in order to resolve the question of due obedience.¹⁷³ Until the test case is resolved by the Supreme Court, other dirty war prosecutions remain in limbo.¹⁷⁴ While human rights organizations have denounced the recent turn of events, Argentines not involved in the cases have expressed a sense that the *punto final* law and the affirmation of the junta verdict will remove the dirty war from the front pages and allow the country to forget.¹⁷⁵

Protesta de ex detenidos frente al Parlamento, La Nación, Dec. 29, 1986, at 5, col. 5; *La Cámara de Diputados convirtió en ley el proyecto de punto final*, La Nación, Dec. 29, 1986, at 1, col. 1.

171. *Argentina/ Military Trials*, Latin Am. Weekly Rep., Jan. 22, 1986, at 12, col. 1; *Fue detenido Carlos Suárez Mason*, La Nación, Jan. 26, 1987, at 1, col. 1 (ex-general, fugitive from corruption and dirty war charges, arrested in the United States); *Opinión contraria a un fallo de la justicia federal*, La Nación, Jan. 26, 1987, at 1, col. 1 (the military Consejo Supremo absolved 15 admirals for murder and torture of detainees at the Naval Mechanics School; the federal courts prepared to take over the case); *El fiscal de Bahía Blanca afirmó que no aceptará presiones del Gobierno*, La Nación, Jan. 26, 1987, at 8, col. 1 (a federal prosecutor declared that, as an officer of the judicial rather than the executive branch, he is not bound by the Alfonsín government's directives on dirty war trials); *Comenzó el juicio por las extradición de Suárez Mason*, La Nación, Feb. 2, 1987, at 1, col. 5 (extradition of Suárez Mason); *Argentina: Trials of officers set to continue*, Latin Am. Weekly Rep., Feb. 5, 1987, at 9, col. 1.

172. Christian, *Argentine Chief Resists Demands of Officers Rebellious Over Arrest*, N.Y. Times, Apr. 17, 1987 at 1, col. 5; Riding, *Argentina Delays Move on Mutinous Troops*, N.Y. Times, Apr. 19, 1987, sec. 1 at 9, col. 1; Riding, *Army Commander in Argentina Quits in Wake of Revolt*, N.Y. Times, Apr. 21, 1987, at 1, col. 3; Christian, *2 Winners in Argentina: Alfonsín and Democracy*, N.Y. Times, Apr. 21, 1987, at 4, col. 1; Christian, *Rumblings Persist in Argentine Army*, N.Y. Times, Apr. 22, 1987, at 1, col. 1; Christian, *Argentina Considering Steps to Appease the Military*, N.Y. Times, Apr. 23, 1987, at 3, col. 3; Christian, *Argentine Generals Reported Helpless in Revolts*, N.Y. Times, Apr. 24, 1987, at 5, col. 1.

173. See sources cited *supra* note 172, especially Christian, *Argentina Considering Steps to Appease the Military*.

174. Christian, *Argentina Considering Steps to Appease the Military*, *supra* note 172.

175. *Punto final: duro ataque de Alfonsín a los extremismos*, La Nación, Dec. 22, 1986, at 5, col. 1.

IV. A BRIEF COMPARATIVE SURVEY OF RESPONSIBILITY IN MILITARY HIERARCHIES

The central legal problem arising from the junta trial is the allocation of responsibility for criminal acts committed by an institution with a hierarchical structure. The problem raises two issues: the extent to which responsibility flows upward from subordinates to superiors; and the extent to which superior responsibility excuses actions of subordinates. A brief survey of how international law, U.S. law, and other Latin American legal systems deal with these questions follows.

A. International Law: The Nuremberg Trials

At Nuremberg, after World War II, civilian and military authorities of the defeated Axis were tried for violations of international criminal law by a tribunal of judges appointed by the Allied powers.¹⁷⁶ Control Council Law No. 10, setting up the tribunal and sketching its ground rules, provided: "The fact that any person acted pursuant to order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation."¹⁷⁷ Although in principle the Tribunal held a subordinate completely responsible for his own acts, the fact that these acts were ordered did, under certain circumstances, allow the subordinate to claim a defense of duress¹⁷⁸ or mistake.¹⁷⁹

Conversely, the International Military Tribunal held that "Those responsible for such [war] crimes by ordering or authorizing their commission, or by, *fail[ing]* to take effective steps to prevent their execution or recurrence, must be held to account"¹⁸⁰ The hard cases all involved the "failure to prevent" part of this rule. The Tribunal found support in both treaties and national laws for the proposition that a military commander has an

176. See generally R. WOETZEL, *supra* note 8.

177. Control Council Law No. 10, art. II, para. 4(b), reprinted in *The High Command Case*, in L. Friedman, *supra* note 10, at 1421, 1430 [hereinafter *High Command Case*].

178. *Id.* at 1431.

179. If the subordinate did not know and should not have known that the order was illegal, then he lacked the intent necessary for the crime. The Hostage Case, *id.* at 1303, 1307. For an interesting discussion of the responsibility of a subordinate who, by performing his otherwise innocent duties, contributes to the efficient functioning of a unit that commits atrocities, see Massey, *Individual Responsibility for Assisting the Nazis in Persecuting Civilians*, 71 MINN. L. REV. 97 (1986).

180. *High Command Case*, *supra* note 177, at 1321 (emphasis added).

affirmative duty to see that his troops obey the laws of war, a duty that cannot be fulfilled by deliberate ignorance.¹⁸¹ However, the Tribunal sought to avoid imputing guilt *ex officio*:

Criminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence.¹⁸²

Following these guidelines, the Tribunal traced the transmission of each illegal order, the rank of each defendant in the German command structure, and the amount of information available to him.¹⁸³ In the Hostage and High Command Cases, the Tribunal resisted the temptation to use a conspiracy theory to link officers to acts of their subordinates, in the absence of more direct evidence.¹⁸⁴

B. *United States Law*

Defenses based on superior orders were generally unsuccessful in U.S. courts in the nineteenth century.¹⁸⁵ One early Supreme Court case held, "[I]t can never be maintained that a military officer can justify himself for doing an unlawful act by producing the order of his superior. The order may palliate, but cannot justify."¹⁸⁶ This position resembles the Nuremberg Tribunal's declaration that superior orders only serve to mitigate. However, by the time of the controversial trial of Lt. William Calley for Vietnam War atrocities, the defense had expanded. The military judge in that trial instructed the jury:

The acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him unless the superior's order is one which a

181. *Id.*

182. *Id.* at 1450.

183. *See, e.g., id.* at 1455-60.

184. *Id.*

185. *See generally* JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, LAW OF BELLIGERENT OCCUPATION 252-55 (J.A.G.S. Text No. 11, 1945). Examples of trials in which the defense failed are *Little v. Barreme*, 2 Cranch 170 (1804); Trial of Henry Wirz, EXEC. DOC. NO. 23, 40th Cong., 2d Sess. (1867-68).

186. *Mitchell v. Harmony*, 18 How. 115, 137 (1851).

man of ordinary sense and understanding would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful.¹⁸⁷

This formulation differs from the previous one in two important ways. First, the proof of superior orders not manifestly illegal goes beyond mitigating punishment and goes towards negating guilt. Second, the burden has shifted to the prosecution to establish that the defendant did know or should have known that the orders were illegal.¹⁸⁸ Because a subordinate will be punished for disobeying a legal order he believed to be illegal, the system encourages him to err on the side of obedience.¹⁸⁹

Cases confronting the opposite question of command responsibility are rare and very controversial. On December 7, 1945, a U.S. Military Commission in the recently-liberated Philippines condemned the Japanese General Tomoyuki Yamashita to death for atrocities committed by his troops during the final weeks of battle for the islands.¹⁹⁰ The commission acknowledged that a commander cannot be held responsible for isolated, independent acts of his troops, but claimed that the Philippine atrocities differed because of their widespread nature:

The Prosecution presented evidence to show that the crimes were so extensive and widespread, both as to time and area, that they must either have been *wilfully permitted* by the accused or *secretly ordered* by the accused With respect to civilian internees and prisoners of war, the proof offered to the Commission alleged *criminal neglect*, especially with respect to food and medical supplies, as well as complete *failure by the higher echelons of command to detect and prevent* cruel and inhuman treatment¹⁹¹

The prosecution presented little evidence to prove that the defendant had actually ordered the atrocities, and the defense presented a great deal of evidence substantiating that, at the time the atrocities were committed, Yamashita had little communica-

187. Court Martial of William L. Calley, Jr. (1971), *reprinted in* L. Friedman, *supra* note 10, at 1703, 1722.

188. The jury must find this "beyond a reasonable doubt." *Id.* at 1723.

189. See the cases cited in L.C. GREEN, *SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW* 126-53 (1976); N. KEIJZER, *MILITARY OBEDIENCE* 153-71 (1978).

190. The Yamashita Case, *reprinted in* L. Friedman, *supra* note 10, at 1596.

191. *Id.* at 1596 (emphasis added).

tion with or control over his troops.¹⁹² The prosecution and the Commission apparently reasoned that the widespread nature of the crimes either supported an inference that Yamashita actually ordered the crimes or a charge that he could have known of them and deliberately failed to inform himself or take any action. The Supreme Court of the United States, in a limited review, affirmed that criminal liability could be imposed on a commander who *failed to prevent* war crimes.¹⁹³ The standard was "knew or should have known," and inferences could be drawn from patterns of criminal activity and positions in the military structure.

By the time of the Vietnam War, the doctrine of command responsibility had shifted in the same direction as the defense of superior orders. At the trial of Captain Medina, Calley's immediate superior, the judge instructed the jury:

[A] commander is also responsible if he has *actual knowledge* that troops or other persons subject to his control are in the process of committing or are about to commit a war crime and he wrongfully fails to take the necessary and reasonable steps to insure compliance with the law of war . . . these legal requirements placed upon a commander require *actual knowledge plus a failure to act* . . . the commander-subordinate relationship alone will not allow an inference of knowledge.¹⁹⁴

Under this version of the doctrine, a commander can be held responsible only for ordering atrocities or for *actually knowing* that atrocities are occurring and failing to try to prevent them; proof that he "should have known" is no longer enough.¹⁹⁵

In sum, Anglo-American and international law, as interpreted at Nuremberg, follow a common approach to hierarchical responsibility. First, the guilt of subordinates and that of superiors are logically independent: both can be guilty of the same act, neither can be guilty, or one and not the other can be guilty. Second, a subordinate is in theory completely responsible for his own acts,

192. For an account of the trial and the controversy surrounding it, see R. LAEL, *THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY* (1982).

193. In re Yamashita, 327 U.S. 1, 16 (1946). The Court declined to review the adequacy of the evidence about the defendant's control of his troops. *Id.* at 17.

194. Court Martial of Ernest L. Medina (1971), reprinted in L. Friedman, *supra* note 10, at 1729, 1732 (emphasis in original).

195. For further analysis of U.S. law as it stood just after the Medina trial, see O'Brien, *The Law of War, Command Responsibility and Vietnam*, 60 GEO. L.J. 605 (1971-72); Note, *Command Responsibility for War Crimes*, 82 YALE L.J. 1272 (1973).

regardless of orders; however, orders furnish several affirmative defenses that, in practice, encourage obedience. Finally, a superior is held responsible only if the prosecution proves that he gave illegal orders or knew of illegal acts. Negligence in failing to inform oneself is not enough.

C. *Latin American Military Codes*

Latin American codes, which form part of the civilian legal family descending from Roman Law, start from a diametrically opposite position on hierarchical obedience, but in practice approach Anglo-American doctrine. The basic principle is that, when a subordinate commits a crime under a superior's orders, the former is free of guilt, and liability falls entirely on the latter.¹⁹⁶ This principle can be traced back to Justinian's Digest, which provided that one who acts upon orders lacks the necessary criminal intent and is thus guiltless. The true agent is the one who gives the orders.¹⁹⁷ The excuse was applied mainly to slaves and children rather than to soldiers.¹⁹⁸ Curiously, most Latin American *civilian* (i.e. non-military) criminal codes continue to list hierarchical obedience as a reason for negating the "imputability" of criminal guilt.¹⁹⁹ Civil law resists recognizing group crimes like conspiracy,²⁰⁰ and labels a small number of participants as authors of the crime, classifying the rest as accomplices, with lesser sentences. The guilt of one group is logically dependent on the lesser guilt of the other.

However, the doctrine of hierarchical obedience is not as absolute as it appears. Even Justinian's scholars withdrew the excuse

196. See generally L.C. GREEN, *supra* note 189, at 159-228; N. KETZER, *supra* note 189, at 180-225.

197. "Velle non creditur, qui obsequitor imperio patris, vel domini" ("Whosoever acted upon orders of his father or master is considered not to have acted wilfully"), D. 50, 17, 4; "Is damnum dat qui iubet dare; eius vero nulla culpa est, qui perere necesse sit" ("He causes loss who orders it to be caused, but he is without blame who is under the necessity of obeying"), D. 50, 17, 169.

198. *Id.*

199. For a survey of provisions of Latin American general penal codes exculpating "due obedience," see L.C. GREEN, *supra* note 189, at 216-28. L. Jiménez de Asúa discusses the theory behind this justification in *LA LEY Y EL DELITO*, *supra* note 127, at 406-10. This author classifies the doctrine as a category of the excuse of mistake. It follows that the subordinate is not excused if the illegality of the order was so manifest that no mistake was possible. *Id.* For a contrary view, see R. MACKAY BARRIGA, *EL DELITO DE DESOBEDIENCIA EN EL CÓDIGO DE JUSTICIA MILITAR DE CHILE* 130-31 (1965).

200. See, e.g., L. JIMÉNEZ DE ASÚA, *supra* note 127, at 466 (conspiracy is a variety of attempt).

for atrocities and for especially heinous crimes.²⁰¹ Modern thinkers maintain that the doctrine does not shelter those who obey manifestly illegal orders, who commit excesses in carrying out orders, or who carry out orders that do not relate to military service.²⁰² The following is a survey of the specific military code provisions regarding hierarchical responsibility of seven Latin American countries.²⁰³

1. Bolivia

The Código Penal Militar of Bolivia provides that one who "decides on the execution" of a crime and "carries it out by means of others" shall be considered an author.²⁰⁴ Any soldier who acts in "due obedience to a superior, in acts of service" is completely free of civil and criminal liability.²⁰⁵ But a soldier who refuses to obey an order is guilty of insubordination; his duty to obey is not limited to legal orders, but the orders must be "relative to the service."²⁰⁶ Conversely, a superior officer may commit "abuse of authority" if he "harasses or allows others to harass . . . aborigines, shopkeepers, or any other defenseless person . . ."²⁰⁷

2. Brazil

One Brazilian scholar contends that his country's military code follows the *dominio del hecho* (in Portuguese, *dominio do fato*) theory of authorship used at the junta trial.²⁰⁸ In any crime committed by a group, the *cabeça* who organizes the action and instigates others to carry it out receives an aggravated sentence; if

201. D. 44, 7, 20 and 50, 17, 157 pr; a slave or child who destroys property is only excused when obeying *ius imperandi*. D. 9, 2, 37 pr.

202. L. JIMÉNEZ DE ASÚA, *supra* note 127, at 406-10; R. MacKAY BARRIGA, *supra* note 199, at 123-32; A. MAYRINK DA COSTA, *CRIME MILITAR* 218-20 (1978); F. BENGIO, 1 *DERECHO PENAL MILITAR URUGUAYO* 72-76 (1980).

203. The author is well aware that, in every legal system, there are gaps between the law on the books and the law as applied, particularly in controversial cases such as any trial of high-ranking military officers. However, it is worthwhile to analyze what the codes say, both because they reveal much about underlying philosophies of criminal responsibility, and because the existence of a provision precludes any defense of *ex post facto* criminal law.

204. Cód. PEN. MIL. art. 16, inciso 2o (Bolivia), *reprinted in* 2 *MANUAL DE DERECHO MILITAR* 142 (C.M. Silva ed. 1969).

205. *Id.* art. 22, inciso 4o.

206. *Id.* art. 187, inciso 2o.

207. *Id.* art. 160, inciso 10o.

208. A. MAYRINK DA COSTA, *supra* note 202, at 208-11.

both officers and enlisted men are involved, the law irrebuttably presumes that the officers are *cabeças*.²⁰⁹ A soldier's duty to obey "in matters of the service" is absolute;²¹⁰ if he does so, he is innocent of criminal guilt unless he committed excesses or the order was "manifestly criminal."²¹¹ The officer who gave the order is guilty, even if the subordinate is not.²¹²

3. Chile

Under Article 334 of the Chilean military code, a soldier must obey "an order relating to the service that, using his legitimate authority, is given him by a superior."²¹³ The next article, however, offers the soldier the novel choice of "representation": if he believes that his superior was not aware of circumstances that make the order inappropriate or if "the order tends notoriously toward the perpetration of a crime," he can delay implementing it and notify his superior.²¹⁴ If the superior repeats the order, the subordinate must "carry it out under the terms of the preceding article."²¹⁵

One Chilean legal scholar denies that a soldier is ever obliged to obey a manifestly illegal order, even after representation and reconfirmation. He argues that such an illegal order would not be "relative to the service" or to the superior's "legitimate authority." The mandate to obey a reiterated order is merely a legal presumption which assumes that, when a subordinate and a superior differ on the legality of an order, the superior is correct.²¹⁶ This reasoning, however, is not persuasive as an interpretation of the statute. If the two men honestly differ on the legality of the order, then it would not be "notoriously" illegal and would not qualify for "representation" at all. If all notoriously illegal orders are by definition not relative to the service, then a subordinate can find his justification for disobeying the order in Article 334, and need not "represent" under Article 335. The two articles only make sense in

209. *Id.* at 210; Cód. PEN. MIL. art. 53 (Brazil), reprinted in *LEGISLAÇÃO PENAL MILITAR* 53 (N. Vital Naves ed. 1980).

210. Cód. PEN. MIL. art. 163 (Brazil).

211. *Id.* art. 38(b).

212. *Id.* art. 38(b)(1).

213. Cód. JUS. MIL. art. 334 (M. Verdugo Marinkovic ed. 1975)(Chile).

214. *Id.* art. 335.

215. *Id.*

216. R. MacKAY BARRIGA, *supra* note 199, at 124-32.

connection with the assumption that the authors of the Code believed that some manifestly illegal orders would still relate to the service and an officer's legitimate authority and that a subordinate should carry out these orders if his commander insists.

4. Colombia

The Colombian military code echoes the Argentine Penal Code by providing that "one who controls another in committing" a crime is an author of that crime.²¹⁷ The Code lists among its *causas de justificación* the fact that a crime was committed "because of a legal disposition or obligatory order from a competent authority."²¹⁸ In such case, the superior is responsible.²¹⁹ In the specific case of a subordinate who commits a crime under a "service order," the subordinate may be held responsible only if he engaged in planning the act or committed excesses in carrying it out.²²⁰ The duty to obey a service order is absolute.²²¹

5. Mexico

Like its sister codes, the Mexican Code of Military Justice imposes a duty to obey *all* superior orders, except those which, because of unforeseen circumstances, would tend to endanger the subjected troops.²²² A superior can be punished for giving orders that "have no relation to the service."²²³ A subordinate who obeys a superior order and commits a crime is guiltless unless it was "notorious" or the subordinate had actual knowledge of its illegality.²²⁴ The Mexican Code draws distinctions not found in the other codes. If the criminality of an act stems from excesses committed in its execution, the executors are punished as authors and the commanders as accomplices.²²⁵ If its criminality derives "directly and notoriously" from the orders themselves, the commander is pun-

217. "En la misma sanción incurrirá el que determine a otro a cometerlo." Cód. Jus. PEN. MIL. art. 18 (E. Vásquez Chacón ed. 1979)(Colombia).

218. *Id.* art. 24(1).

219. *Id.* art. 25.

220. *Id.* art. 30.

221. *Id.* art. 39.

222. Cód. Jus. MIL. art. 301 (M. Andrade, ed. 1942)(Mexico).

223. *Id.* art. 294.

224. *Id.* art. 119(VI).

225. *Id.* art. 100(II).

ished as author and the executors as accomplices.²²⁶ If the commander and executors all participated in planning the crime, all are authors.²²⁷

6. Peru

A Peruvian soldier commits disobedience only when he lacks a "justified cause" for refusing to obey a service order.²²⁸ A subordinate who commits a crime under superior orders is free of guilt unless the orders were "notoriously illicit."²²⁹ Even if the orders were manifestly illegal, the subordinate's punishment is attenuated if he acted "as a consequence of seduction by a superior relying on influence or authority."²³⁰ Conversely, a superior can commit "abuse of authority" not only by ordering illegal acts,²³¹ but also by exerting "pressure on inferiors" to violate the law²³² or "omitting, refusing, or delaying" to do his duty.²³³ The courts could use this last failure-to-act provision to punish an officer who put his troops in a position where they were likely to commit atrocities and then did nothing to prevent them, or who failed to investigate charges of atrocities. Lastly, the Peruvian Code classifies as authors both those who execute a crime and those who "decide on its execution and carry it out through others."²³⁴

7. Uruguay

The Uruguayan military code established a rebuttable presumption that a soldier who carries out a crime pursuant to orders acts under error and is free of guilt.²³⁵ The commission that

226. *Id.* art. 110(I).

227. *Id.* art. 110(III).

228. "Cometen desobediencia los que dejan de cumplir una orden del servicio sin causa justificada." NUEVA LEY ORGÁNICA Y CÓD. JUS. MIL. art. 158 (S. Martínez G., ed. 1980)(Peru).

229. *Id.* art. 19(7).

230. *Id.* art. 20(5).

231. *Id.* art. 180(3) and (5).

232. *Id.* art. 180(6).

233. *Id.* art. 179.

234. *Id.* art. 14.

235. "Cuando un militar ejecuta un delito en acto de servicio, por orden superior, se presume que concurren a su respecto las circunstancias que especifica el artículo 29 del Código Penal Ordinario, salvo la prueba en contrario." CÓD. PEN. MIL. art. 17 *reprinted in* 1 DERECHO PENAL MILITAR URUGUAYO 177 (F. B. Bengoa, ed. 1980)(Uruguay). Article 29 of the civilian criminal code exculpates government officials who act under orders of competent authority. *Id.* at 72-73.

drafted this provision explained:

The supreme rule of the armed forces is subordination. . . . Obedience must carry almost the force of a dogma. . . . A Greek philosopher said more than two thousand years ago that an army of deer commanded by a lion is preferable to an army of lions commanded by a deer. In civilian life, it is reasonable to demand that the legality of obedience be proven; in a military context, it is just that legality be presumed.²³⁶

One Uruguayan commentator has observed that the aim of this provision is to encourage rapid obedience by giving the soldier the right to mistakenly believe that an illegitimate order is legitimate.²³⁷ There is no contrary right to mistakenly believe a legitimate order is illegitimate.

In order to characterize the guilt of several participants in a crime, the Uruguayan military code remits to the ordinary penal code, which labels all those who join willfully in the crime as authors.²³⁸ Presumably, this label would attach to both officers and subordinates who knew of the illegality of their acts. The statute implies that the subordinate's actual knowledge is required. In sum, Latin American military codes purport to completely absolve subordinates acting under orders. However, it is still possible to prosecute such soldiers for excesses that went beyond the order, manifestly illegal acts, or acts that were not related to the service. For their part, superiors are guilty as *principals* for ordering subordinates to commit a crime. Only the Peruvian and Bolivian codes provide explicit authority for punishing officers who wilfully neglect to prevent crimes by their subordinates.

V. TWO THORNY PROBLEMS

A. Subordinate Responsibility

The junta trial, dealing as it did only with commanders-in-chief, did not settle the question of what to do with the thousands of subordinates who carried out the massive crimes. These cases presented a serious political problem to the new civilian govern-

236. Comisión Designada por el Decreto del 2 de enero de 1935, Exposición de motivos del Código Penal Militar, reprinted in *id.*, at 166.

237. *Id.* at 72-76.

238. Cód. PEN. MIL. art. 7 (Uruguay); Cód. PEN. ORDINARIO art. 59 (Uruguay); F.B. Bengoa, *supra* note 235, at 99-100.

ment: would the armed forces tolerate additional trials of other officers for human rights violations, including the prosecution of many still on duty?²³⁹ The Alfonsín administration sought to calm these fears and avert a possible coup, by issuing a directive to the military prosecutor's office in April, 1986.²⁴⁰ This directive only authorized the prosecution of those officers who ordered or committed acts that went beyond the criminal plan authorized by the junta.²⁴¹ Because the Cámara found that the junta ordered illegal detentions, torture, torture to death, illegal executions, pillage, and conversion of real property, the only crimes for which subordinates could be charged were those the Cámara had characterized as unforeseeable or insufficiently proven in relation to the junta commanders. These crimes include rape, abduction of minors, and personal extortion.²⁴²

This directive was widely protested by human rights groups.²⁴³ It clearly represents a decision to prosecute fewer subordinates than the law allows. As the previous discussion indicates, the principle of *obediencia debida* (in appearance so absolute), arguably harbors at least four exceptions. It does not excuse:

(1) the subordinate who actually knew that he was committing a crime (on the theory that *obediencia debida* is a form of the defense of error);

(2) the subordinate who should have known that he was committing a crime, because the acts were atrocities or otherwise manifestly criminal;

(3) the subordinate who was ordered to do acts that were manifestly not service acts, as the acts were not related to military ser-

239. Christian, *Military Tensions Rise in Argentina*, N.Y. Times, June 12, 1986, at A15, col. 1.

240. *El Gobierno fijó los límites de la obediencia debida*, La Nación, Apr. 28, 1986, at 1, col. 1.

241. For the text of the directive, see *Las directivas al fiscal general de las FF.AA.*, La Nación, Apr. 28, 1986, at 5, col. 1.

242. The *Punto final* law also specifically allows prosecutions for abduction of minors. Law 23,492, art. 5, Dec. 23, 1986, 1987-1 Boletín Informativo A.D.L.A. 1.

243. *Alternative Found to Military Amnesty: Most Officers Benefit From Obediencia Debida*, Latin Am. Regional Rep.: Southern Cone, May 23, 1986, at 2, col. 2; *Military Trials: Some Cases to be Dismissed*, Latin Am. Monitor, May 1986, at 293, col. 1. As discussed *supra* notes 172-174 and accompanying text, the Alfonsín government recently persuaded the Argentine Supreme Court to take another look at "due obedience" in a test case. There is a good chance that the Court, which previously failed to reach an agreement on "due obedience," will interpret the doctrine this time along the lines of Alfonsín's directive to the military prosecutors.

vice (derives from the language of *obediencia debida* statutes and overlaps with (1) and (2)); and

(4) the subordinate who was high enough in the military hierarchy to exercise independent decision-making capacity (derives from the *dominio del hecho* theory, which states that only fungible, replaceable instruments are excused). These four exceptions would offer the civilian authorities ample legal tools to prosecute lower-level officers. Hence, the Alfonsín government has sought to foreclose the exceptions.

The larger question is whether any legal system should allow subordinates to plead superior orders as a defense. This author believes that the answer is no. It is true that conditions of combat and danger often require soldiers to obey quickly and, with limited information on a situation, to determine whether their acts are legal. In such cases, the soldiers who obey the orders should be acquitted if a reasonable man, acting on the same information and under the same pressures, could have believed that the orders were legal. The defense should be progressively harder to make as the soldier rises in rank, because higher ranked soldiers have more information and greater leeway in carrying out orders.

Further, when a soldier refuses to obey an order which a reasonable man in a similar position would believe to be criminal, he should have a defense against an accusation of disobedience or insubordination. In other words, he should have the same right to err in disobeying that he has in obeying. To prevent delay and disruption in carrying out legitimate orders, a soldier should be required to show that he knew of affirmative facts that would lead a reasonable man to conclude that the acts ordered were illegal. It would not be enough for a soldier to claim that he didn't see any justification for the order. A superior would not be required to explain an order or marshal justifications for it, nor would the subordinate be required to investigate before obeying, unless investigation is part of his normal duties. However, in cases where relevant facts reasonably lead a subordinate to believe that an order is illegal, he should have the right to refuse to carry it out.²⁴⁴ Of course, a subordinate should still be entitled to allege superior orders as part of a defense of duress, or to mitigate his punishment.

Such reforms are even more necessary today than they were in

244. The right to erroneously believe that an order is illegal is not now granted by civilian or common-law military codes. See generally, L.C. GREEN, *supra* note 189, at 17-234.

World War II. That war was one of the last conventional conflicts with uniformed, hierarchically-commanded armies fighting each other in well-defined battles. Since then, the typical war has been guerrilla style in which the enemy doesn't wear uniforms, conducts swift terrorist attacks, and takes refuge within the civilian population. Organized armies must respond and carry out decentralized operations in the midst of civilian populations, attempting to distinguish the insurgents from the innocent bystanders. Field commanders and subordinates operate with considerable autonomy. Algeria, Vietnam, Afghanistan, Lebanon, and many other conflicts evidence the tendency of this difficult type of warfare to breed atrocities. No one proposes that a soldier should be brought before a criminal court for making a reasonable mistake in combat. However, the only way to maintain minimum standards in the midst of violence is to hold *all* soldiers responsible, regardless of rank. Otherwise, there would be areas of human activity that are outside the rule of law. As recent Argentine history demonstrates, such an exception tends to spread until it swallows up the law.

B. Command Responsibility

Despite the controversy it aroused, the junta trial was a relatively easy case. The commanders-in-chief were accused of expressly ordering acts that were criminal under Argentine *national* law before, during, and after they were committed. Harder cases arise when superiors give orders that merely imply the commission of illegal acts; harder still are those cases in which superiors neglect to prevent crimes committed by their subordinates.²⁴⁵ On one hand, it is unfair to criminally prosecute a desk officer who failed to investigate crimes occurring on a decentralized and distant battlefield if the officer instructed his subordinates against atrocities and received plausible reports that his orders were obeyed. On the other hand, it seems equally unfair to absolve a commander who sends his troops into an atrocity-breeding situation without taking precautions, and then ignores reports that atrocities are taking place. Apart from other considerations, punishing only subordinates in the latter situation generates disrespect for the law. Lower ranked soldiers believe that while they receive punishment, the "brass" do not. Also, the goal of preventing atrocities can only be

245. See, e.g., *In re Yamashita*, 327 U.S. 1; Note, *supra* note 195 (discusses a scale of command responsibility, ranging from direct orders to negligence).

attained if all those who make them possible know that they face punishment.

The goals of atrocity prevention, justice, and military effectiveness would be best served by a system that criminalizes both the giving of expressly criminal orders and gross negligence in preventing criminal acts. The latter could be found only if the accused officer had a high score on the following scales:

(1) *Knowledge*. He knew that crimes were being committed, or he knew of facts that permitted a strong inference that crimes were being committed and he failed to draw inferences and investigate further.

(2) *Position*. His position in the hierarchy gave him the right and the duty to take steps to control the actions of those committing the crimes.

(3) *Power*. He had both the right and the effectual ability to take steps to prevent the crimes, such as issuing further orders or reporting to other officers with authority to act.²⁴⁶ If an officer takes such steps, and his orders are countermanded by a higher officer in the interest of military objectives, the higher officer should be held guilty if he knew the purpose of the preventative orders and if a reasonable man would know that atrocities would result without them.

In addition, every military organization should place the laws of war on its officer-training curriculum and institute monitoring and reporting procedures for operations. They should also provide for lesser sanctions, such as denial of promotion, for officers whose failure to prevent crimes does not rise to the level of criminal responsibility. Only a strong, consistent policy can counter the overwhelming pressure to throw the law aside when dealing with a lawless enemy.

Perhaps the hardest question is how to deal with civilian authorities. The Argentine juntas had taken all governmental powers; yet the Cámara refused to accept the prosecution's argument that each junta, as head of government, should be held collectively responsible for acts done under its authority. In the Cámara's opinion, each junta member should answer only for his acts as com-

246. This last requirement might have absolved Yamashita, if the defense had been able to admit evidence that he had lost communication with and control over his troops. R. LAEL, *supra* note 192.

mander-in-chief of his service, not for his acts as a leader of the government.²⁴⁷ Yet the same arguments that allow responsibility to climb the chain of command within the military, counsel against building an absolute barrier against civilian responsibility. Civilian leaders are usually more removed than high-level officers from information about, and control over, military operations.²⁴⁸ Moreover, a civilian official normally cannot imprison those who disobey his orders. However, widespread and continuing violation of human rights, such as prolonged imprisonment of large groups of people without trial, could not take place without the acquiescence and active cooperation of civilian authorities. If a particular governmental official knowingly acts to further a crime or meets the knowledge, position, and power tests outlined above for criminal neglect, his status as a civilian should not absolve him from responsibility. Of course, both military and civilians should be judged only for their individual acts; collective responsibility runs counter to the entire effort to bring the rule of law to bear on extreme situations.²⁴⁹

VI. CONCLUSION

As many nations in Latin America return to democracy, the question of how to deal with human rights violations by previous governments will continually arise. One approach, chosen in Uruguay and gaining ground in Argentina, is to treat the situation as a political problem that is beyond the competence of the courts. The solution, under this approach, is for the legislature to pass an amnesty law, often balanced to forgive crimes of both the left and the right.²⁵⁰ Other countries have followed the example of the Argentine junta trials and have instituted procedures in their courts. In

247. See *supra* notes 85-87 and accompanying text.

248. After World War II, U.S. occupation courts condemned members of the Japanese wartime cabinet for failing to prevent mistreatment of prisoners and other war crimes. In some cases, civilian officials without direct authority over prisoners were condemned merely for not resigning in protest. L. Friedman, *supra* note 10, at 1037-40, 1058-59, 1118-22.

249. The concept of collective guilt for all those who participated in "criminal organizations" was one of the most-criticized theories used by the prosecution in the Nuremberg trials. R. WOERZEL, *supra* note 8, at 190-217.

250. *Uruguay Dithers Over Rights Trials: Public Favors Them; Politicians Demur*, Latin Am. Regional Rep.: Southern Cone, Jan. 31, 1986, at 4, col. 3; *Human Rights: Democrats & Dictators: How Southern Cone Countries Decide*, Latin Am. Regional Rep.: Southern Cone, May 23, 1986, at 4, col. 3; *Uruguay Approves a Military Amnesty*, N.Y. Times, Dec. 23, 1986, at 3, col. 4; *Uruguay: Human Rights Issue Takes Winding Road*, Latin Am. Regional Rep.: Southern Cone, Dec. 25, 1986, at 3, col. 3.

Haiti, the trials of ex-Duvalier aides were so disorderly that their value in affirming the rule of law is questionable.²⁵¹ In Bolivia, Guatemala, and Peru, courts are taking the first steps toward indicting former military authorities. Analysts believe that some of these investigations will be shortened due to military pressure and amnesty laws.²⁵² In the Central African Republic, televising of the trial of former Emperor Jean Bedel Bokassa converted the proceeding into a national catharsis.²⁵³

Unless these cases are cut short, the judiciary in these countries will again face the problem of defining superior-subordinate criminal responsibility. The challenge will be to allocate guilt among members of a military hierarchy in a way that is just and that will deter future violations, while avoiding the short cuts of collective guilt and revenge. This is not a situation unique to the Third World.²⁵⁴

Given these difficulties, many argue that the only viable solution must be a politically based one in the form of amnesty laws instituted by the elected branches of government. According to this reasoning, no judicial proceeding can escape accusations of bias and "victors' justice." This argument alleges that courts can only deal with individual murder, kidnapping, and extortion. They cannot deal with murders, kidnappings, and extortions carried out by a system that involves all sectors of society and that continues

251. Treaster, *A First in Haiti: Trial of a Duvalier Aide*, N.Y. Times, May 9, 1986, at 4, col. 1; *Haitian Court Convicts Duvalier Aide of Murder*, N.Y. Times, June 1, 1986, at 4, col. 1; *Top Duvalier Aide, at a Rowdy Trial, Condemned to Die*, N.Y. Times, July 17, 1986, at 1, col. 2.

252. *Trial of General García Meza*, Latin Am. Weekly Rep., Jan. 31, 1986, at 5, col. 1 (Bolivia); *Bolivia: Trial of 1980 Coup Leaders*, Latin Am. Regional Rep.: Andean, Feb. 28, 1986, at 7, col. 3; *Bolivia: García Meza Trial*, Latin Am. Weekly Rep., Apr. 18, 1986, at 12, col. 1; *Guatemala: Cerezo's First Moves Decisive; DIT Demise and Supreme Court Investigation Encourage GAM*, Latin Am. Weekly Rep., Feb. 21, 1986, at 5, col. 1; *Guatemala: Amnesty*, Latin Am. Weekly Rep., June 13, 1986, at 12, col. 3; Manz, *A Guatemalan Dies, and What It Means*, N.Y. Times, July 14, 1986, at 17, col. 3; *Peru: State of Emergency Declared in Lima*, Latin Am. Weekly Rep., Feb. 14, 1986, at 4, col. 1.

253. Brooke, *In a Gamble, Bokassa Trial is Broadcast Live*, N.Y. Times, Dec. 21, 1986, at 13, col. 1.

254. For example, federal prosecutors recently indicted Shearson Lehman Bros., a financial services corporation, for money laundering. Gruson, *The Shearson Case Opens New Ground*, N.Y. Times, July 14, 1986, at 21, col. 1. The prosecutors apparently believe that they need not prove that higher management actually knew of the laundering. "In interviews, prosecutors have said only that the pattern of wrongdoing was so obvious that Shearson must have known . . . 'We're putting them on notice that they have [a] duty to supervise their personnel.' " *Id.* The same reasoning might apply to the police chief or mayor in a city where police brutality is widespread.

for an extended period. If such a system takes hold, every member of society will be connected with victims and accomplices and no one will be independent enough to sit in judgment.²⁵⁵

This author does not agree with such reasoning. There is a difference between moral and legal guilt, between the general population's failure to act and the participation of those whose affirmative, conscious acts made crimes possible. If law carries any meaning, criminals must be punished, even if their crimes were widespread and successful. A nation achieves maturity only when all of the players in the political field, left, right, and center, agree that certain ways of fighting are forbidden. A political solution imposed by the group currently in power, whether it takes the form of an amnesty or a purge, tells the group out of power only that it must get back in by any means, so that it can do the same. The judiciary, whatever its faults, must have a set of rules and procedures designed to settle disputes according to objective criteria. By gathering evidence in open hearings and by allowing both sides to make public argument, it can provide a deeply-divided society with a cathartic theater.²⁵⁶

Further developments are taking place as this Article goes to press. In response to the April 1987 military rebellions, President Alfonsín pushed through Congress a "Due Obedience Law."²⁵⁷ The law imposes an irrebuttable presumption that officers at or below the rank of lieutenant colonel during the "dirty war" qualify for the due-obedience defense.²⁵⁸ Officers above that rank can still be prosecuted if they had either "decisional capacity" or "participated in formulating orders."²⁵⁹ The Argentine Supreme Court, by a four-to-one vote, upheld the law as constitutional a few weeks

255. Some of the defendants in the junta trial and its companion cases made these points. *El general Camps niega autoridad moral a la Cámara Federal para que lo juzgue*, La Nación, Mar. 10, 1986, at 4, col. 1; *Videla declinó formular su descargo*, Clarín, Oct. 25, 1985, at 7, col. 1; *Lami Dozo: Argentine Society Should be on Trial*, Buenos Aires Herald, Oct. 22, 1985, at 1.

256. Ronald Dworkin speaks of the healing effect of the junta trial on Argentine society in *Report from Hell*, N.Y. Rev. of Books, July 17, 1986, at 11, col. 1.

257. Law 23.521, reprinted in *Texto del proyecto sobre obediencia debida aprobado por el Senado*, La Nación, June 1, 1987, at 5, col. 4; see also, *Quedó sancionada la ley de obediencia debida*, La Nación, June 8, 1987, at 1, col. 1.

258. Law 23.521, *supra* note 257. Note that the newly-created presumption applies only to "dirty-war" defendants, not to military defendants in general.

259. "[C]apacidad decisoria o participación en la elaboración de órdenes." *Id.*, art. 10. Such cases must be brought within thirty days of the passage of the law. *Id.*

later.²⁶⁰

In the next few weeks, the courts dismissed dozens of cases, but retained an estimated fifty.²⁶¹ Alfonsín announced a restructuring of the military and a reform of the Code of Military Justice, including article 514, the due-obedience provision.²⁶² Thus, the long-term definition of due obedience is yet unsettled, and the officers still subject to trial will no doubt hotly contest the meaning of "decisional capacity" under the new law. Many political and legal questions remain unresolved.

260. *Es constitucional la ley de obediencia debida*, La Nación, June 29, 1987, at 1, col. 1.

261. *Se aplicó la ley de obediencia debida*, La Nación, June 22, 1987, at 1, col. 1; *Uruguay & Argentina tackle amnesty issue*, Latin Am. Regional Rep.: Southern Cone, July 2, 1987 at 4, col. 3; *Obediencia debida: No incluyen a 26 oficiales*, La Nación, July 13, 1987, at 1, col. 1 (26 cases remain in Buenos Aires federal court).

262. *Obediencia debida bill to end some trials, continue with others*, Latin Am. Regional Rep.: Southern Cone, May 23, 1987, at 1, col. 1.