

# Comment

## The Human Rights Policy of the Argentine Constitutional Government: A Reply†

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A recent issue of *The Yale Journal of International Law* featured an article offering a critique of the current prosecution of human rights violations in Argentina.<sup>1</sup> The authors of this piece are a courageous human rights lawyer and active member of the Peronist Party, Emilio Mignone, and two able North American attorneys, Cynthia L. Estlund and Samuel Issacharoff. The article constitutes a valuable contribution to the discussion of the legal and moral implications of the prosecution of past human rights violations in Argentina. However, the article fails to give an impartial perspective on the issues under consideration and commits several errors, thus distorting the aims of the present constitutional government with respect to these prosecutions. The authors also isolate these aims from the general context of the government's human rights policy. While impartiality is often difficult with regard to such emotional issues, the reader may achieve a more balanced view if these issues are presented from a different perspective.

This Comment will first analyze in broad terms the general human rights policy of the Argentine government. Next, it will demonstrate how the prosecution of human rights violations fits into that policy. In so doing, this Comment will lay bare the analytical flaws in the Mignone article.

### I. The Foundations of the Alfonsín Government's Human Rights Program

Raúl Alfonsín and other members of the Radical Party elected to public office adopted as their rallying theme in the electoral campaign of

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1. Mignone, Estlund & Issacharoff, *Dictatorship On Trial: Prosecution of Human Rights Violations in Argentina*, 10 YALE J. INT'L L. 118 (1984).

1983 the need for restoration of ethical values in Argentina. Such a restoration was to be based, mainly, upon the full recognition of basic human rights. They were not alone in promoting such ideals, but the results of the elections held on October 30, 1983, showed that they interpreted better than others the mood of the population. The Argentine people were seeking an end to the violence and cruelty which characterized both the recent military juntas and various terrorist groups. They also sought to eradicate the corruption prevalent in past governments and other sectors of society.

In several speeches before and after the election,<sup>2</sup> Alfonsín and several of his closest colleagues stated the philosophical principles upon which the government would ground its human rights policy: (1) Human rights are moral rights which all human beings possess, regardless of any contingent circumstances, such as recognition by a government or any characteristics of individuals, such as race, sex, religion, or nationality. (2) The function of human rights is to prevent people from being used merely as instruments of others or of governmental or corporate entities. Therefore, such rights cannot be cancelled or outweighed by considerations about the common good or overall social utility. (3) Human rights are violated by both positive actions and omissions; therefore, the dignity of the person is diminished when people are not provided with opportunities and resources to choose and actualize their own plans for life. (4) The basic justification for a political organization is the promotion of human rights; a government is thus morally illegitimate if its actions are not so aimed. (5) The defense of human rights must be the concern of both government and civil society at large; the protection of personal freedoms must, therefore, transcend the limits of national frontiers and must be undertaken by the international community as well.<sup>3</sup>

## II. The Implementation of the Government's Human Rights Policy

On the basis of these principles, as soon as the Alfonsín government took office, it enacted a series of measures to enhance and protect human rights. Some of those measures are forward-looking, seeking to prevent possible violations of human rights. Other measures look to the past, attempting to deal with the atrocious violations under prior governments.

2. *See, e.g.*, D. Caputo, Speech Before the United Nations Human Rights Commission (Feb. 27, 1984) (on file with the author).

3. *Id.* *See also* M. McDUGAL, H. LASSWELL & L. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 313-64 (1980).

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### A. *Measures Taken by the Alfonsín Government to Enhance Human Rights and Prevent Their Violation*

A primary objective of the Alfonsín government has been to reinstate fully what it considers to be an adequate standard of legal protection of human rights. The government sent to Congress a bill, subsequently enacted as Law 23.077,<sup>4</sup> which abolished certain criminal legislation dictated by the military regime and the previous Peronist government. Such criminal legislation had allowed persecution and discrimination and contained draconian penalties for crimes of a political nature. Law 23.077 freed many people jailed for violating such legislation. The process of reinstating civil liberties was also enhanced by the enactment of Laws 23.050<sup>5</sup> and 23.057<sup>6</sup>. These laws, also proposed by the Alfonsín administration, liberalized the freedom of movement permitted under parole, probation, and recidivism statutes. Finally, Law 23.070<sup>7</sup> established a regime to compensate those sentenced under the harsh criminal codes of the past. Under this law's terms, each day of detention during the military government would count as two or three days of imprisonment—according to the severity of the disciplinary sanction imposed—for purposes of compliance with the courts' sentences. The government also sent to Congress a bill, later enacted as Law 23.042,<sup>8</sup> which permitted any civilian convicted by a military court to obtain the nullification of the sentence through the use of writ of habeas corpus.

To deter possible abuses of human rights in those situations in which they most often happen—during military rule—Congress passed Law 23.097, which modified the Penal Code by establishing the same penalty for torture as for homicide.<sup>9</sup> It also declared punishable the failure to denounce acts of torture and adopted measures to prevent acts of torture in military quarters, police stations, and other detention facilities.<sup>10</sup> Law 23.098<sup>11</sup> extended and facilitated the remedy of habeas corpus.

The new government not only attempted to reinstate a standard for human rights by reforming the criminal law, but it also formulated measures aimed at improving the social and economic status of Argentine

4. Law 23.077, promulgated Aug. 22, 1984.

5. Law 23.050, promulgated Feb. 14, 1984.

6. Law 23.057, promulgated Apr. 3, 1984.

7. Law 23.070, promulgated July 20, 1984.

8. Law 23.042, promulgated Jan. 19, 1984.

9. Law 23.097, art. 1, § 1, promulgated Oct. 24, 1984. If the torture victim dies, the torturer faces the same sentence as a murderer. *Id.* art. 1, § 2. *See also* Código Penal, arts. 79, 80 (Códigos AZ 1983) (establishing eight to twenty-five year sentence for homicide and life sentence for murder).

10. *Id.* arts. 2-3.

11. Law 23.098, promulgated Oct. 19, 1984.

citizens. Law 23.052<sup>12</sup> abolished the previous system of censorship over film exhibitions, replacing it with a system of classification that serves only to protect minors and non-consenting adults. Law 23.264<sup>13</sup> equated the hereditary rights of children born out of wedlock with those of legitimate children; it also gave the mother the same rights as the father in the care of their children. Law 23.054<sup>14</sup> abolished a statute that had allowed individuals to be deprived of their nationality.

The government sent to Congress a bill that has so far been approved by the Chamber of Representatives that would prohibit any discrimination on the basis of race, religion, sex, nationality, physical disability, or political ideology in both public administration and the private sector.<sup>15</sup> The administration also sent to Congress a bill which would recognize the possibility of conscientious objection to military service and permit a conscientious objector to perform alternative civil service, such as work in hospitals or schools.<sup>16</sup>

Congress is now discussing an administration-sponsored bill addressed to protecting individual privacy against intrusions such as wiretaps, unconsented photographs, and the gathering of information through computers. This proposed law would also regulate the rights of individuals in such disparate matters as medical care, organ transplants, dangerous activities, and libel.<sup>17</sup> The administration has implemented a National Food Plan which established an organization for distributing each month boxes with essential foods to more than a million families.<sup>18</sup>

With respect to the international protection of human rights, the executive sent to Congress a bill directed at approving the United Nations Convention on Economic, Social, and Cultural Rights and the Additional Protocol thereto.<sup>19</sup> Congress has already passed Law 23.054,<sup>20</sup> which ratifies the American Convention on Human Rights<sup>21</sup> and

12. Law 23.052, promulgated Mar. 9, 1984.

13. Law 23.264, promulgated Oct. 18, 1985.

14. Law 23.254, promulgated Sept. 30, 1985.

15. *Diario de Sesiones de la Honorable Camara de Diputados de la Nación* [hereinafter cited as *Diario de Sesiones*] 3673 (Sept. 12-13, 1984). The Chamber of Representatives and the Senate constitute the two houses of the Argentine Congress.

16. *Diario de Sesiones* 6739 (Mar. 20, 1985).

17. *Diario de Sesiones* 3005 (July 31, 1985).

18. Law 23.056, promulgated Mar. 22, 1984.

19. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 (*entered into force* Jan. 3, 1976).

20. Law 23.054, promulgated Mar. 19, 1984.

21. American Convention on Human Rights (Pact of San José), Nov. 22, 1969, O.A.S.T.S. (No. 36) 1 (*entered into force* July 18, 1978). The Convention guarantees more than twenty broad categories of civil and political rights, grants the right of individual petition to the Inter-American Commission on Human Rights, establishes an Inter-American Court of Human Rights to which the Commission or any state party may bring a case, and recognizes the

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recognizes the obligatory jurisdiction of the Inter-American Court of Human Rights.

In order to deter any future violations of human rights by the military, Congress passed Law 23.049,<sup>22</sup> which abolished for the first time in Argentine history the competence of military courts over common crimes committed by military personnel during the performance of military service. For crimes of an exclusively military nature, the law established an appeal from the military courts to the civilian courts. The government also created an Undersecretariat of Human Rights—reporting to the Home Ministry—which is charged with receiving and investigating any report of a human rights violation.<sup>23</sup> Many local and regional authorities, such as the Buenos Aires County Council, are establishing “ombudsmen” or similar institutions in order to deal with possible abuses by public officials.

### B. *Prosecuting Past Violations of Human Rights*

The politicians now in office in Argentina reached the conclusion that, despite all these preventive measures, human rights would be better ensured in the future only if the horrendous violations of the past were investigated and their perpetrators punished. However, instead of adopting an absolutist approach to punishment, the government sought to address the need for punishment at the minimization of future social cost resulting from the destabilizing effects of widespread retribution.<sup>24</sup> Leaving the most terrible abuses unpunished could encourage future abuses. However, punishment must be applied with prudence if the objective of minimizing social harms is to be achieved. The democratic government adopted serious measures both for investigating the fate of the missing people (*desaparecidos*) and for identifying and punishing those responsible for their fate and other abhorrent violations of human rights.

In order to discover the truth concerning the fate of those who disappeared, President Alfonsín established the National Commission for the Disappearance of People (CONADEP).<sup>25</sup> Its members included many of the country’s most respected citizens known for their concern for human

obligatory jurisdiction of the Court. See *Symposium: The American Convention on Human Rights*, 30 AM. U.L. REV. 1 (1980); Buergenthal, *The American Convention on Human Rights: Illusions and Hopes*, 21 BUFFALO L. REV. 121 (1971).

22. Law 23.049, promulgated Feb. 14, 1984.

23. Decree No. 280/84, promulgated Jan. 18, 1984.

24. Cf. Nino, *A Consensual Theory of Punishment*, 12 PHIL. & PUB. AFF. 289 (1983) (positing that punishment can be justified morally, based upon a criminal’s voluntary and knowing consent to forego his immunity against punishment).

25. Decree No. 187/83, promulgated Dec. 15, 1983.

rights and for their distinguished positions in the arts, sciences, journalism, and religious and civic affairs. While some human rights activists demanded a parliamentary commission, such a commission was unnecessary, since CONADEP had ample powers of investigation,<sup>26</sup> and both chambers of Congress were invited to send representatives to it. The Commission conducted a detailed and highly valuable inquiry, receiving thousands of reports of violations and a large amount of testimony. CONADEP systematized this information, transferred many cases to the courts, and in 1984 issued a report which was presented to the government and published, with the government's endorsement, under the title *Nunca Mas (Never Again)*. The usefulness of all this activity, backed by the Alfonsín administration, is demonstrated by the numerous references to this report in the Mignone article.<sup>27</sup>

Long before the presidential election, the Radical Party candidates announced the outlines of their policy with respect to the punishment of those responsible for the atrocities.<sup>28</sup> Distinctions would be made among: (a) those who established the apparatus of state terrorism and gave the orders putting it into action; (b) those who, whether or not complying with orders from superiors, committed atrocious acts; and (c) those who, in a general climate of pressure and confusion, obeyed orders to commit offences which did not constitute atrocities. While the military personnel in the first two categories would be severely punished under the law, members of the third group would be given the opportunity to serve the democratic system loyally, from within the armed forces. This policy was put forth clearly to the electorate during the campaign and received ample support from it. One alternative proposal, supported by several smaller parties and human rights activists such as Mignone, would have made no such distinctions. At the other extreme, the Peronist presidential candidate, Dr. Italo A. Luder, an able constitutional lawyer, contended that it was exceedingly difficult to punish those responsible for the violations of human rights in the face of the self-amnesty law that the military regime had enacted.<sup>29</sup>

This self-amnesty law constituted a major challenge for the government, because Article 18 of the Constitution<sup>30</sup> prohibits the retroactive

26. The government required all public officials, including military personnel, to testify if called before the Commission. *Id.*

27. *See, e.g.,* Mignone, Estlund & Issacharoff, *supra* note 1, at 119 n.1, 120 n.2, 121 n.11 and accompanying text.

28. *See, e.g.,* R. Alfonsín, Campaign Speech (Sept. 30, 1983) (on file with the author).

29. *See* Law 22.294, promulgated Sept. 22, 1983 (granting amnesty to junta members).

30. "No inhabitant of the nation may be condemned without a prior trial based upon laws predating the facts at trial, nor tried by special commissions, nor removed from the judges

nullification of a penal law, and Article 2 of the Penal Code<sup>31</sup> states that if the law changes after the criminal act, a judge should apply the law more beneficial to the defendant. The government nevertheless fought this self-amnesty law. First, the government posited a jurisprudential argument that statutes enacted by a de facto government have only a precarious validity, outweighed by the obnoxiousness of their content, as was the case with the self-amnesty law. Second, the government offered two constitutional arguments: first, that the statute violated Article 29 of the Constitution, which voids any measure attempting to concentrate all governmental power in certain organs of government,<sup>32</sup> and second, that the statute violated Article 16 of the Constitution, which establishes the principle of equality before the law.<sup>33</sup> These arguments formed the basis for a bill that the government sent to Congress in order to declare void *ab initio* the self-amnesty law. This bill was approved by Congress as Law 23.040,<sup>34</sup> the first statute of the new constitutional period, and it opened the door for prosecuting human rights violations. This statute was declared constitutional by the Federal Chamber of Appeals in *Marino Amador Fernández*.<sup>35</sup>

The administration itself encouraged such prosecutions by enacting two decrees— 157/83 and 158/83<sup>36</sup>—ordering the trial of both the members of the three military juntas under which the worst abuses occurred and the heads of the guerrilla terrorist movements. By further decrees, other military chiefs were prosecuted.<sup>37</sup> Such decrees, of course, did not exclude the prosecution of many more officials through suits by the victims or by public prosecutors or at the initiative of the courts.

At the same time, the government sent to Congress a bill for modifying the Code of Military Justice, later enacted as Law 23.049.<sup>38</sup> The law

designated by the law [existing] before the fact of the case.” CONSTITUCIÓN DE LA NACIÓN ARGENTINA [hereinafter cited as CONSTITUCIÓN], art. 18.

31. Código Penal, *supra* note 9, art. 2.

32. “Congress cannot concede to the National Executive, nor the provincial legislatures to the governors of the provinces, extraordinary faculties, nor the sum total of the public power. . . . Acts of this nature carry with them an absolute nullity. . . .” CONSTITUCIÓN, art. 29. The self-amnesty law would have violated this constitutional provision as it prevented the judiciary from investigating officials of the junta, which itself had seized both legislative and executive power.

33. “The Argentine Nation does not admit prerogatives based on blood or on birth. Neither personal privileges nor titles of nobility exist in it. All its inhabitants are equal under the law and fit for all employment without any condition other than identity. . . .” CONSTITUCIÓN, art 16.

34. Law 23.040, promulgated Dec. 27, 1983.

35. [1985] La Ley 521 (1984).

36. Decrees No. 157/83 & 158/83, promulgated Dec. 13, 1983.

37. *See, e.g.*, Decree No. 3090, promulgated Sept. 20, 1984 (ordering prosecution of General Ramón Camps).

38. *See supra* note 22.

serves as the cornerstone for the implementation of the government's policy towards human rights violations by military personnel. The government explicitly stated the political reason for this reform: to enforce the distinctions among the three categories of responsible individuals announced by the Radical Party, distinctions that had received wider electoral support than proposals making no distinction, and to allow the army forces to regain their prestige by making these distinctions themselves.<sup>39</sup>

### C. *Controversy Surrounding Law 23.049*

Three aspects of the proposed legislation proved the most delicate for its drafters and, after its enactment, aroused the greatest debate: (1) the boundaries of military jurisdiction; (2) the role for the victim or his representative during the trial; and (3) the scope of the principle of due obedience. With regard to each of these aspects, the article by Mignone, Estlund, and Issacharoff makes significant mistakes.

#### 1. Military Jurisdiction

Since 1823, through different statutes, including the present Code of Military Justice enacted in 1951 by the Peronist government,<sup>40</sup> the military has been subject to the jurisdiction of military courts in the case of both exclusively military offenses—those contained only in the Code of Military Justice—and common crimes committed by military men. Military courts have jurisdiction over the latter offenses regardless of the status, civilian or military, of the victim, whenever such crimes are committed either in a military location or in connection with the performance of acts of service.<sup>41</sup> The Mignone article commits three errors concerning the interpretation of these norms.<sup>42</sup> First, the *Espina* case<sup>43</sup> did not establish any additional requirement that the offense be a breach of any specific military statute in order for military courts to have jurisdiction. Rather, it simply said that military jurisdiction was not a personal privilege but that a crime committed under military conditions itself implied an infringement of military duty. Second, an act of military service can never itself be a crime. Rather, the law requires that the

39. See R. Alfonsín, *supra* note 28.

40. Law 14.029, promulgated Aug. 6, 1951, [1951] *Anales de Legislación* 4.

41. *Id.* arts. 108-09.

42. See Mignone, Estlund & Issacharoff, *supra* note 1, at 132-36 (discussion of constitutional attack on military jurisdiction).

43. Coronel Marino Espina, 54 *Fallos de la Corte Suprema de Justicia* [hereinafter cited as *Fallos*] 577 (1893).

crime be committed *on the occasion of* or *in connection with* the performance of an act of service.<sup>44</sup> Third, Mignone is incorrect in stating that, according to traditional Argentine jurisprudence, military jurisdiction was excluded when the victim was a civilian and that the present government has expanded military jurisdiction.<sup>45</sup>

Faced with the preexisting Code of Military Justice and the case law of the Supreme Court, the government confronted a constitutional dilemma. On the one hand, against the precedents of the Supreme Court, the Alfonsín government concluded that, since military courts are administrative courts and form part of the executive branch, military jurisdiction would contravene Article 95 of the Constitution,<sup>46</sup> which forbids the President from exerting judicial functions or imposing penalties. On the other hand, imposition of civilian court jurisdiction could violate Article 18 of the Constitution, which prohibits any conviction by a judge other than one designated by a law in force prior to the commission of the offense.<sup>47</sup> While Article 18 may not be applicable when the prior law is unconstitutional, the Supreme Court has held throughout its history that laws providing for military jurisdiction *were* constitutional.<sup>48</sup>

In light of this dilemma, the government sought a compromise which attempted to maximize the compliance with these two constitutional principles: it repealed military jurisdiction for future common crimes but retained it for past offenses. For the latter, Law 23.049 introduced a broad and obligatory appeal to the civilian federal courts, which could hear new evidence. This procedure of automatic and plenary review is similar to the appeals process from other administrative courts, such as the National Tax Court, and guarantees the constitutionality of a trial by an administrative court.<sup>49</sup>

Moreover, Law 23.049 foresaw the possibility that the military court could commit a miscarriage of justice. The law thus established civilian court control over the military court, whereby a civilian court can take over a trial at any stage if a military court unjustifiably delays it. Therefore, the assertion of civilian court control in the celebrated public trial of

44. See Código de Justicia Militar, *supra* note 40, art. 108 § 2.

45. Mignone, Estlund & Issacharoff, *supra* note 1, at 135-36. Several decisions of the Supreme Court, however, had established that military jurisdiction applied even when the victim was a civilian. See, e.g., José Joaquín Avalos, 100 Fallos 232 (1904) (massacre of Indians).

46. "Under no circumstances may the President of the Nation exercise judicial functions, arrogate the review or decision of pending actions, or reactivate extinguished actions." CONSTITUCIÓN, art. 95.

47. "No inhabitant of the nation may be condemned without a prior trial based upon laws predating the facts at trial, nor tried by special commissions, nor removed from the judges designated by the law [existing] before the fact of the case." CONSTITUCIÓN, art. 18.

48. See, e.g., Coronel Marino Espina, 54 Fallos 577 (1893).

49. Law 23.049, *supra* note 22, art. 3. This policy has been upheld by the Supreme Court. See, e.g., Fernández Arias v. Poggio, 247 Fallos 646 (1960).

the three juntas before the military court,<sup>50</sup> and the likelihood of future civilian control over some of the remaining 1700 criminal complaints, does not constitute an unexpected frustration of the governmental policy, but rather a contingency that it foresaw and for which it provided.

The constitutionality of this interplay between military and civil jurisdiction that was brought about by Law 23.049 was definitively ratified by the Supreme Court both in the cases mentioned in the Mignone article,<sup>51</sup> and more conclusively in the *Alfredo Antonio Giorgi* case.<sup>52</sup> It is unfair to suggest, as Mignone does,<sup>53</sup> that the members of the Supreme Court were sensitive to political pressures simply because all were appointed by the present government. Rather, the justices have a variety of political backgrounds and have already demonstrated a strong independence from the executive.

## 2. The Role of the Plaintiff-Prosecutor

The Mignone article places undue emphasis on the "traditional" active role for the victim in Argentine criminal procedure through the *querelante* system.<sup>54</sup> In fact, while federal procedure allows for victim participation, the criminal procedure of most provinces provides virtually no role for the victim. In addition, the Code of Military Justice did not provide any possibility for the victim to intervene in prosecutions. Nevertheless, the government believed that such a situation had to be corrected. Such participation might, however, violate the constitutional guarantees of the defendants, since it could represent a retroactive worsening of their procedural protections.<sup>55</sup>

Seeking to balance the rights of both parties, Law 23.049 added a provision to Article 100 of the Code of Military Justice. Under this provision, the victim of the crime or his relatives can intervene in the military procedure to request the court to order the production of any evidence and to appeal to the federal civilian court.<sup>56</sup> The victim may also

50. As a result of the decision of the Supreme Council of the Armed Forces not to indict the former Junta members, civilian courts assumed jurisdiction under Law 23.049, art. 10. Clarín, Oct. 5, 1984, at 6, col. 1.

51. Reynaldo B.A. Bignone, [1984] C La Ley 258; Jorge Rafael Videla, [1985] A La Ley 360 (1984). See also Mignone, Estlund & Issacharoff, *supra* note 1, at 136-37 (discussing *Bignone* and *Videla* cases).

52. Alfredo Antonio Giorgi, File 2733 (May 16, 1985). See also Mignone, Estlund & Issacharoff, *supra* note 1, at 120, 123 n.18, 131 nn.47-49, 136 n.72 (description of the *Giorgi* case).

53. Mignone, Estlund & Issacharoff, *supra* note 1, at 137-38. They also state that proceedings in the military court are held in secret. *Id.* at 129. Rather, under the law, plenary proceedings are public. Código de Justicia Militar, *supra* note 40, art. 371.

54. Mignone, Estlund & Issacharoff, *supra* note 1, at 123 & n.17, 129.

55. See CONSTITUCIÓN art. 18, *supra* note 47.

56. Law 23.049, *supra* note 22, art. 9.

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intervene in any stage of the procedure before the civilian court. In the appeals procedure, new evidence can be presented if it was not presented to the military court because of excusable circumstances or was not otherwise considered by it. Therefore, Mignone, Estlund, and Issacharoff are incorrect in stating that the plaintiff-prosecutor is excluded from the military procedure, that his role is unclear during an appeal to the federal court, and that the federal court cannot receive new evidence.<sup>57</sup> Furthermore, the *fiscal* (government prosecutor)<sup>58</sup> is not clearly subordinated to the executive, as the authors suggest.<sup>59</sup> Rather, the legal and constitutional status of the public prosecutors in Argentina is currently under discussion. Most *fiscales* and many commentators think that the prosecutors are part of the judicial branch.<sup>60</sup>

### 3. The Scope of Military Obedience

Article 34 of the Penal Code states: "They are not to be punished . . . 5) those who acted in virtue of due obedience."<sup>61</sup> More specifically, Article 514 of the Code of Military Justice stipulates: "When a crime was committed in the execution of an order of service, the superior who gave the order will be the sole responsible person, and the subordinate will only be considered an accomplice when he has exceeded in the fulfillment of that order."<sup>62</sup>

The literal meaning of these texts seems clear: if the conduct, whatever its nature, is within the scope of an order of service, only the individual who gave the order may be punished. The subordinate who complied with the order is guilty only if he goes beyond the scope of the order,<sup>63</sup> in which case the superior is still the principal individual in the crime and the subordinate a mere accomplice. Fortunately, long before the atrocities committed in recent years in Argentina, legal scholars have rejected this narrow construction of the national codes and argued that they

57. Mignone, Estlund & Issacharoff, *supra* note 1, at 129. Moreover, the authors' claim that the Federal Chamber of Appeals is not even physically equipped for the introduction of new evidence, *id.* at 130, is incorrect, as was amply demonstrated by the facilities available to Federal Court of Buenos Aires (Capital Federal) when it took over the trial of the nine commanders of the previous Juntas.

58. See Código de Procedimiento en Materia Penal, arts. 114-22 (Códigos AZ 1983) (outlining role of *fiscal*).

59. Mignone, Estlund & Issacharoff, *supra* note 1, at 129.

60. See, e.g., 1 C. RUBIANES, MANUAL DE DERECHO PROCESAL PENAL 29 (1976-81). It is true, however, that prosecutors have recently accepted occasional written instructions from the Ministry of Justice.

61. Código Penal, *supra* note 9, art. 34.

62. Código de Justicia Militar, *supra* note 40, art. 514.

63. An example of such an instance would be if the superior gave an order to injure a suspect and the subordinate instead killed the suspect.

establish neither a duty to obey blindly nor any immunity for the results.<sup>64</sup> Rather, the Codes simply presuppose situations of urgency, coercion, or confusion in which a subordinate lacks the duty and ability to question the legitimacy of his orders.

Nevertheless, in the current situation, in which different emotions, interests, and opinions condition the legal analysis, it was foreseeable that the decisions of the different courts would oscillate between the literal interpretation of the text and a reading wherein a defendant would have to provide strong evidence of coercion or mistake concerning the legitimacy of the order as a basis for acquittal. Therefore, to avoid these unwelcome differences of interpretation and the resultant extremes in judgments—impunity for high officers or people who committed inhuman crimes, on the one hand, and harassment of soldiers belonging to the third category, on the other—the executive and legislature decided to clarify the Code's provisions on due obedience, permitting more uniform interpretations.

Clarification of the Code's provisions focuses on the defense of mistake about the legitimacy of orders. Under a literal interpretation of the Code, this factor is irrelevant; under the opposite view, it becomes relevant only upon the introduction of strong evidence. Lower ranking officers and soldiers faced all sort of pressures, propaganda, and religious invocations about the legitimacy of the activities against subversive groups, organizations deemed outside society and even humanity. The government concluded that requiring evidence of these influences in every case would prove exceedingly burdensome, superfluous, and unjust. It was, therefore, fair to establish a *revocable* presumption in Law 23.049 that military personnel who committed such acts within the scope of superior orders were reasonably mistaken about the legitimacy of these orders.<sup>65</sup> This presumption not only allows for the admission of contrary evidence, but is subject to two main constraints: (a) an individual who complied with such an order must not have had any decisionmaking capacity concerning whether and how to comply with the order; and (b) the act committed in the fulfillment of orders must not have been an atrocious or abhorrent act. For example, no person who tortured a prisoner or raped a woman could allege that he had an order to do so which he believed legitimate.<sup>66</sup> The presumption and its two main constraints

64. See, e.g., 2 TERÁN LOMAS, DERECHO PENAL 184 (1980) (no duty to obey clearly atrocious or criminal order).

65. Law 23.049, *supra* note 22, art. 11.

66. *Id.*

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echo the distinctions among the three categories of offenders which constitutes the nucleus of the government's stance on human rights prosecutions.<sup>67</sup>

Curiously enough, Mignone, Estlund, and Issacharoff admit that Law 23.049 may be interpreted in a manner which recognizes and preserves the culpability of those who committed acts such as murder or torture, yet they unjustifiably argue that this interpretation actually frustrates the government's efforts to shield the majority of those who committed human rights abuses.<sup>68</sup> Rather than accepting the obvious conclusion that clarification of the Code's provisions will lead to more just prosecutions, the authors repeatedly accuse the government of sinister purposes.<sup>69</sup> Until there is serious evidence to the contrary, it is only fair to give credit to the explicit and repeated statements of the government concerning its aim—to distinguish between those who created and implemented the apparatus of state terrorism and gave the orders, those who committed atrocities, and those who limited themselves to compliance with orders in a climate of pressure and confusion.

### III. A Note of Optimism

Mignone, Estlund, and Issacharoff repeatedly say that the measures the government has adopted with respect to the prosecution of human rights abuses in Argentina are profoundly anti-legal, raise concerns of justice, and are not suited to the objective of re-establishing the rule of law in the country.<sup>70</sup> These very serious charges should be grounded on firmer arguments than those advanced in their article. They do not demonstrate any illegality of the government's measures, especially given that these laws were passed by a democratically elected parliament, within which almost all parties are represented, and that their constitutionality has been repeatedly affirmed by the Supreme Court.<sup>71</sup> Any alleged injustice must be supported by more than Rawls' characterization of the concept of justice.<sup>72</sup> The authors appear instead to adopt the radical Kantian dictum that any case in which a criminal is not punished is

67. See text accompanying note 28.

68. Mignone, Estlund & Issacharoff, *supra* note 1, at 146-47.

69. *Id.* at 142-43.

70. *Id.* at 143, 149.

71. See *supra* notes 51-52 and accompanying text.

72. See Mignone, Estlund, & Issacharoff, *supra* note 1, at 149 n.119 (justice requires that "there be 'no arbitrary distinctions . . . made between persons in the assigning of basic rights and duties. . . .'" (quoting J. RAWLS, A THEORY OF JUSTICE 5 (1971))).

an absolute injustice which must be remedied regardless of the consequences.<sup>73</sup>

As for the political evaluation of those measures, the fact that they are a means to enforce a general policy that received strong electoral support seems to be of no consequence to the authors. In addition, their conclusion that the government's approach will backfire and endanger the democratic institutions that the government seeks to protect is a prediction that should be based on some empirical evidence. The evidence from other countries in which serious violations of human rights have occurred points towards a conclusion far more optimistic than Mignone's. There, although authorities were in a better position to prosecute violators than in the case of Argentina, they proved much more restrictive in their attempts to do justice. Nevertheless, democratic institutions have survived in those countries.

The Argentine government's firm decision to prosecute human rights violations, irrespective of their source, within a general policy of promotion of such rights, is without precedent in modern times. This policy is not the product of the will of a small group of politicians, but of the conscience of the people of Argentina, who, after having come close to the abyss of absolute evil, have made a profound resurrection of human dignity.

73. *See generally* I. KANT, *FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF MORALS* (1785).