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SWINGING BACK AND FORTH BETWEEN IMPUNITY AND IMPEACHMENT: THE STRUGGLE FOR JUSTICE IN LATIN AMERICA AND THE INTERNATIONAL CRIMINAL COURT

Alberto L. Zuppi*

I. INTRODUCTION: LATIN AMERICAN STRUGGLE FOR DEMOCRACY

The dreadful experiences endured in Latin America during the 1970's and 1980's evolved into a troubled transitional period before democracy began to consolidate. In those two decades, military rulers from all over the region displaced democratically elected governments through the use of force, and imprisoned, tortured and killed their opponents, including the baby-snatching cases or trafficking with the newborn of murdered prisoners.¹ The term "*desaparecido*" was coined to name those who disappeared without a trace after being arrested by members of the security forces, burdening their relatives with the additional anguish of not knowing the fate of their loved ones. These open wounds in the society were, and still are, difficult to patch. The transition from a brutal dictatorship to democracy and the dealing with the horrors of the past have been tried by almost

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¹ See generally PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS* (2002); Jaime Malamud Goti, *State Terror and Memory of What?*, 21 U. ARK. LITTLE ROCK L. R. 107 (1998). The most appealing document on this period is "Nunca Más," or "Never Again," an official report of the National Commission on the Disappearance of Persons [in Spanish *Comisión Nacional sobre la Desaparición de Personas*, also known by its acronym "CONADEP"], established in 1983 by Argentine President Raul Alfonsín. The CONADEP, chaired by the respected writer Ernesto Sábato, documented the cases of 8,960 persons who had been disappeared by the militaries. *Nunca Más (Never Again)*, Report of CONADEP (National Commission on the Disappearance of Persons) - 1984, translation available at http://www.desaparecidos.org/nuncamas/web/english/library/neveragain/neveragain_000.htm (abridged version).

each of the nations here involved in different ways, sometimes risking acts of valiant defiance of the use of force sometimes using more conciliatory arguments.

Argentina is a good example of the forced swinging back and forth pace adopted in the region, oscillating between reinstalling democracy and justice, and consenting to impunity. After its return to democracy, the Argentine justice system tried to prosecute and even convict the members of successive military juntas for the crimes perpetrated during those years. But, when the main judgment against the *de facto* President of the first military junta (Videla) and his accomplices was being enforced, Argentine President Alfonsín, under an increased military pressure threatening to overthrow his government, rendered two laws which interrupted the prosecutions of the remaining members of the armed forces involved in the brutal repression. The first of those laws² called for the mandatory extinction of any legal action originated in acts perpetrated during the dictatorship when the related claim had not been introduced within a peremptory period of sixty days after the publication of the law in the Official Gazette ("*Boletín Oficial*" or "*B.O.*"). The second law³ presumed *iure et de iure* that any act perpetrated during the dictatorship, by anyone from the rank of colonel down to private, was done in fulfillment of due obedience of superior orders. Later, the labile government of President Menem declared an amnesty benefiting even those few like Videla and other members of the military junta who were in military prisons convicted of crimes committed during the dictatorship of 1976-1983. These developments imposed upon Argentine society a palpable sense of impunity, which was increased in 1987 when the Argentine Supreme Court upheld the constitutionality of both laws.⁴

² Law No. 23492, Dec. 29, 1986, 26058 B. O., [XLVII-A] A.D.L.A., 192. known as the "Final Stop Law" or "*Ley de Punto Final*."

³ Law No. 23531, Jun. 9, 1987, 26155 B.O., [XLVII-B] A.D.L.A. 1548, known as the "Due Obedience Law" or "*Ley de Obediencia Debida*."

⁴ See CSJN, 22/6/1987, "Ramón Camps," Fallos 310: 1162, L.L. 1987-D, 194. See also MARCELO SANCINETTI, *DERECHOS HUMANOS EN LA ARGENTINA POST-DICTATORIAL* 126 et seq. (1988). Only several years later, on March 6, 2001, did a federal judge declare the unconstitutionality of both laws in the case Juzg. Fed Crim. Correc. No. 4—, 6/3/2001, "Simon, Julio, et al." *Jurisprudencia Argentina* [J.A.] 2001-III, 240, available at <http://hrlibrary.ngo.ru/research/argentina/jfcc4-cavallo.html> (in Spanish) (last visited Mar. 13, 2008). The Argentine Congress derogated

The perceptible hesitation of the newborn democracies was not only present in Argentina. Uruguay still today maintains similar legislation.⁵ Although Bolivia convicted former president Garcia Meza in 1993,⁶ it conceded a *de facto* impunity to another human rights violator and former military ruler, Hugo Banzer.⁷ Chile assured the impunity of the former members of the Pinochet dictatorship by allowing their participation in the subsequent governments with life positions and by the use of general amnesties.⁸ Brazil issued a general amnesty in 1979, and in 2002 decided that the official archives of the dictatorship

both laws by Law 25.779 of August 21, 2003, and on June 14, 2005, the Argentine Supreme Court revoked its prior decision and ruled the unconstitutionality of both laws. See CSJN, 14/6/2005, "Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc. — J.A. 2005-IV, 378, available at <http://www.derechos.org/nizkor/arg/doc/nulidad.html> (in Spanish) (last visited Mar. 13, 2008). The *Simon* case was judged again on August, 8, 2006, sentencing the main accused to 25 years in prison. See Christine A. Bakker, *A Full Stop to Amnesty in Argentina: The Simon Case*, 3 J. INT'L CRIM. JUSTICE, 1106 (2005). For a conclusive and enrapturing discussion of the topic, see generally NAOMI ROHT-ARRIAZA, *THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS* (2005) (discussing the evolution of developments in the region, before and after Pinochet).

⁵ See Law No. 15848, Dec. 22, 1986, (Uru.), known as "*Ley de Caducidad de la Pretensión Punitiva del Estado*," available at <http://www.parlamento.gub.uy/leyes/AccesoTextoLey.asp?Ley=15848&Anchor=> (in Spanish); see also Report No. 29/92 of the Inter-American Commission on Human Rights regarding the case of *Mendoza et. al., v. Uruguay*, Case No 10029, et. al., available at <http://www.cidh.org/annualrep/92eng/Uruguay10.029.htm> (1992) (last visited Mar. 13, 2008). The Inter American Commission on Human Rights (IACHR) found the law in violation of basic human rights treaties in force in Uruguay.

⁶ See Corte Suprema de Justicia, 21/4/1993, "Sentencia Pronunciada en los Juicios de Responsabilidad Seguidos por el Ministerio Publico y Coadyuvantes contra Luis Garcia Meza y sus Colaboradores," (Bol.) available at <http://www.derechos.org/nizkor/bolivia/doc/meza.html> (in Spanish) (last visited Mar. 13, 2008).

⁷ Andean Information Network, *Continued Impunity Could Aggravate Pending Political Conflict.*, Dec. 2005, available at <http://juiciogoniya.org.bo/verad.php?id=77> (last visited Mar. 13, 2008).

⁸ The military rulers self-conceded an amnesty in 1978, see Decree Law No. 2191 of 1978, and later in 1980 after a referendum modified the 1925 Constitution to allow former presidents to become lifetime senators when they leave office. See article 31 of the 1980 Chilean Constitution. English translation available at <http://confinder.richmond.edu/admin/docs/Chile.pdf>. The Constitution was amended again in September 2005 to abolish the senator-for-life provision of the former article 31. See Constitución Chile 1980, as reformed through 2005, available at <http://www.gobiernodechile.cl/viewEstado.aspx?idArticulo=22484> (last visited Apr. 11, 2008). See also Report No. 36/96 of the IACHR Regarding the Case of *Garay Hermosilla et al. v. Chile*, Case 10843, (1996), available at <http://www.cidh.org/annualrep/96eng/Chile10843.htm> (last visited Mar. 13, 2008). However, the 1978 amnesty by Decree 2191 continues to be applicable even today.

must remain closed for fifty years.⁹ Paraguay, which had a dictator installed for 35 years, simply did nothing.¹⁰ But these are just a few examples of other similar cases.¹¹ Even years after democracy has been restored in countries of the region the affected society was sharply divided between those who saw in the prior military intervention in politics an effective defense against the menace of communism – justifying the crimes perpetrated as “excesses during a dirty war”¹² – and those taking the side of the victims. On both sides, accusations of crimes, cover-ups, pacts of silence within the armed forces, and the acquiescence by major parts of the society to what happened in the past, are issues still present. This antagonism was shown in the conflict between those who were convinced that forgiveness and oblivion were the only available means for dealing with the past, and those who called for unlimited and unrestricted justice.¹³ To overcome this situation, the critical roles played by human rights groups, the press, some members of the court and a few engaged legal practitioners were fundamental.

The considerable changes in international law and international criminal law in the 1990's were observed with hope in Latin America. The fate of Pinochet in London electrified the

⁹ See Law No. 6683, August 28, 1979 (Brazil), available at https://www.planalto.gov.br/ccivil_03/leis/16683.htm (last visited Mar. 13, 2008). Current President Lula da Silva revoked the decree closing the archives and promised to re-open them, which at the time of this Article was still due.

¹⁰ See Alfredo Stroessner, *Dictator of Paraguay*, *ECONOMIST*, Aug. 24, 2006, at 71. On August 16, 2006, former Paraguayan dictator Alfredo Stroessner died at age 93 in a hospital in Brazil where he was in exile.

¹¹ See Brian Loveman, *Protected Democracies and Military Guardianship: Political Transitions in Latin America 1978-1993*, 36 *J. INTER-AM. STUD. & WORLD AFF.* 105 (1994).

¹² See Monte Peel, *Argentine 'Dirty War' Trials Revive Old Fears, Hostilities*, *WASH. POST*, Oct. 20, 2006, at A15, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/10/19/AR2006101901605.html?nav=rss_world (last visited Mar. 13, 2008).

¹³ See Emilio F. Bignone, Cynthia L. Estlund & Samuel Issacharoff, *Dictatorship on Trial: Prosecution of Human Rights violations in Argentina*, 10 *YALE J. INT'L L.* 118 (1984-85); Carlos S. Nino, *The Human Rights Policy of the Argentine Constitutional Government: A Reply*, 11 *YALE J. INT'L L.* 217 (1985-86); Kathryn J. Zoglin, *The National Security Doctrine and the State of Siege in Argentina: Human Rights Denied*, 12 *SUFFOLK TRANSNAT'L L. J.* 266 (1989); Alejandro M. Garro, *Nine Years of Transition to Democracy in Argentina: Partial Failure or Qualified Success?*, 31 *COLUM. J. TRANSNAT'L L.* 1 (1993).

region.¹⁴ The establishment of the international ad hoc tribunals for the former Yugoslavia and for Rwanda, as well as the preparation of the Rome Statute for an International Criminal Court (ICC), refreshed the idea of the existence of crimes considered to be against mankind, as well as tribunals for prosecuting international criminals. In the momentum created after the Pinochet case,¹⁵ some of those attempts to break impunity were successful and revision of the past has finally begun in some countries, sometimes more than thirty years after the fact, as it happened with Argentina.¹⁶

This paper deals with two main aspects of the immunity shielding former and current heads of state in Latin America. I will analyze in the first section of this article how their immunity has been considered by the constitutional texts of several states in the region. I will look for possible contradictions between those texts and the irrelevance of any official immunity asserted by the Rome Statute establishing the ICC. In the second part, I will refer to some practical strategies developed in the region, specifically by human rights groups and legal practitioners, to fight impunity before the tribunals. I will explain how they were helpful in illuminating the right path to follow and in pushing governments to engage in introspection into their own pasts.

II. THE ROME STATUTE AND THE IMMUNITIES FOR THE HEAD OF STATES IN LATIN AMERICA

Of the 20 states that constitute Latin America, 14 have already ratified the Rome Statute establishing the International Criminal Court (ICC).¹⁷ In spite of several projects launched for implementing the Rome Statute, at the time of writing this Ar-

¹⁴ See *World Pinochet Supporters Protest in London*, BBC News, Oct. 19, 1998, available at <http://news.bbc.co.uk/2/hi/196570.stm> (last visited Mar. 13, 2008).

¹⁵ See ROHT-ARRIAZA *supra* note 4.

¹⁶ See "Ramón Camps" and "Simon, Julio, et al." *supra* note 4, for the evolution of the cases Camps and Simon as well as for further references.

¹⁷ See Coalition for the International Criminal Court, *States Parties to the Rome Statute of the ICC, According to the General Assembly Regional Groups*, http://www.iccnw.org/documents/RatificationsbyUNGGroup_18July07.pdf (last visited Mar. 13, 2008). In Latin America, 14 nations have become parties to the ICC: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Dominican Republic, Ecuador, Honduras, Mexico, Panama, Paraguay, Peru, Uruguay and Venezuela. See *id.*

ticle only Uruguay and Argentina have been able to implement legislation for adapting their national laws to the Rome Statute.¹⁸

Other countries have already introduced projects for general laws of implementation, which are at different levels of the parliamentary debate.¹⁹ A few nations are still engaged in a step before the congressional debate, holding constitutional discussions related to the compatibility of the Statute and domestic law.²⁰

Several points of conflict have been identified between the Rome Statute and domestic Latin American legislation.²¹ An

¹⁸ See Law No. 18.026, Sep. 25, 2006, D.O. (Digesto Oficial) Oct. 4, 2006 (Uru.), available at <http://www.parlamento.gub.uy/leyes/ AccesoTextoLey.asp?Ley=18026&Anchor=> (last visited Mar. 19, 2008); Law No. 26.200, Jan. 9, 2007, 31069 B.O. (Arg.), available at http://www.iccnw.org/documents/Ley_de_Implementacion_argentina2.pdf (last visited Mar. 13, 2008). For the author's criticisms of the Project that was finally approved as Law 26.200, B.O. January 9, 2007, see Alberto L. Zuppi, *Implementando los delitos tipificados en el Estatuto de Roma en el Derecho Argentino*, in *LA APLICACIÓN DE LOS TRATADOS SOBRE DERECHOS HUMANOS EN EL ÁMBITO LOCAL – LA EXPERIENCIA DE UNA DÉCADA* 297 (V. Abramovich et al. eds, 2007).

¹⁹ Some projects for adapting domestic legislation are still being considered by the respective parliaments, as it happens, among others with Brazil and Colombia. See Fatima da Camara, *Brazil: ICC Implementation Process Stalled*, INT'L CRIM. CR. MONITOR, Aug. 2005, at 6, available at <http://www.wfm.org/site/index.php?module=uploads&func=download&fileId=211> (last visited Mar. 13, 2008); Colombian Draft Bill on Cooperation with the ICC, Nov. 2005, available at http://www.iccnw.org/documents/Colombia_CooperationBillDraft_Nov05_es.pdf (last visited Mar. 13, 2008).

²⁰ As it happens, for example, with Ecuador and Mexico. On January 28, 2008, the Representative of Ecuador at the Organization of American States (OAS) informed that, in spite of having ratified the Rome Statute as State number fifty-two, a domestic commission is still considering the necessary legislation for implementing the Rome Statute. See report entitled *Sesión de Trabajo sobre la Corte Penal Internacional (Ecuador)* (in Spanish), available at http://scm.oas.org/doc_public/SPANISH/HIST_08/CP19599T04.doc (last visited Apr. 11, 2008). At the end of 2006, the Mexican Ambassador before the Assembly of State Parties of the ICC informed that a bill was going to be sent to the Congress implementing legislation for adapting the Rome Statute. However, nothing happened at the time of writing this Article. See report entitled *5th Session of the Assembly of States Parties of the Rome Statute of the International Criminal Court; Intervention by the Ambassador of Mexico, H.E. Sandra Fuentes-Berain*, available at http://www.iccnw.org/documents/Mexico_GeneralDebate_23Nov06_Eng.pdf (last visited Apr. 11, 2008).

²¹ See INTER-AM. JURIDICAL COMM., *Promotion of the International Criminal Court*, Document OEA/Ser. G CP/doc.41111 at 7-8 (2006), available at http://www.oas.org/DIL/CP-doc_4111-06_eng.pdf (last visited Mar. 13, 2008). According to the research conducted in May 2006 by the Inter-American Juridical Committee of the

extensive analysis of all conflicting points between the criminal law in Latin American nations and the Rome Statute is beyond the scope of this research, which will be restricted to the analysis of immunities and other non-exculpatory defenses such as amnesties and presidential pardons.

1. *General Constitutional Changes*

Brazil was able to reform the constitution, adapting its provisions to the Rome Statute.²² The most significant aspect of the reform was the express submission of Brazil to the jurisdiction of the ICC²³ This clear recognition of Brazil should be compared with the idea contained in other Latin American constitutional texts discussing the hierarchy of international law in general, or international human rights law in particular with the constitutional norms.²⁴ **Colombia** expressly declared

Organization of American States (OAS), among member states, the main conflicting points between the Rome Statute and the domestic legal orders are the following: a) Article 20 ICC and the *ne bis in idem* principle in domestic cases when the court was seen as not constituted independently or impartially, with the due procedural warranties recognized by international law; b) Article 27 ICC and the irrelevance of the official capacity; c) Article 54 para. 2 ICC and the extensive legal authority conceded to the prosecutor, who is permitted to conduct investigations in the territory of a state, what has been seen conflictive with national sovereignty; d) Articles 59 and 89 ICC related with the arrest and surrender from nationals to the ICC; e) Article 77 ICC and life imprisonment which is not contemplated by several Latin American countries; and f) The question of amnesties and presidential pardons. *Id.* at 7-8. To this list should be added the question of recognizing another judicial jurisdiction and the consequent erosion of domestic sovereignty, as well as the establishment in the local legislation of the crimes contemplated in article 5 of the Rome Statute.

²² See Constituição Federal [C.F.] (Brazil), amended December 30, 2004, available at https://www.planalto.gov.br/ccivil_03/Constituicao/Emendas/Emc/emc45.htm (last visited Apr. 11, 2008).

²³ See *id.* art. 5, ¶ 4 (“*O Brasil se submete à jurisdição de Tribunal Penal Internacional a cuja criação tenha manifestado adesão.*” [Brazil submits itself to the jurisdiction of the International Criminal Court to which creation it adheres.]).

²⁴ See *id.* art. 5, ¶ 3, (declaring that human rights treaties adopted with a certain majority by both chambers of the Congress will be equivalent to a constitutional amendment). Compare the same principle of Constitución Argentina [CONST. ARG.] art. 75, ¶ 22 of the Argentine Constitution, available at http://www.argentina.gov.ar/argentina/portal/documentos/constitucion_ingles.pdf. In accordance with the constitutional texts of Costa Rica, Ecuador and Guatemala, international treaties have a superior hierarchy than national laws. See Constitución Costa Rica 1949, art. 7, available at <http://www.asamblea.go.cr/proyecto/constituconst2.htm>; Constitución Política de la República del Ecuador 1998, art. 163, available at <http://www.presidencia.gov.ec/modulos.asp?id=115>; Constitución Guate-

that the parliament may recognize the jurisdiction of the ICC in the terms reproduced in the Rome Statute already in 2001,²⁵ although it also recognized that the Statute will not prevail over a domestic order.²⁶ Other countries, such as **Paraguay** and **Ecuador**, admit a general adherence to supranational institutions without specific reference to the ICC.²⁷

In **Guatemala**, the constitutional court issued an advisory opinion relating to the constitutionality of the Rome Statute.²⁸ The opinion concluded that no issue of constitutionality arises from the exclusive right to exercise jurisdictional functions by the judiciary of Guatemala and the judicial functions of the ICC²⁹ The same conclusion was obtained in advisory opinions

mala 1985, art. 46, available at <http://pdba.georgetown.edu/Constitutions/Guate/guate85.html>. Colombia gives preference in its legal order to the human rights treaties and prohibits their limitation by the executive or the legislative branches during the so called periods of exception. See Constitución Colombia 1991, art. 93, available at <http://web.presidencia.gov.co/constitucion/index.pdf> (last visited Apr. 11, 2008). The May 2006 draft for a penal code in Panama declares in article 5 that the norms and principles of human rights included in the constitution and in international treaties in force in Panama are integrated into the code. The draft was to be discussed in March 2007. See Don Winner, *Final Vote on Penal Code Reforms to be Held in March*, PANAMA GUIDE, Feb. 24, 2007, <http://www.panama-guide.com/article.php/20070224100726295> (last visited Apr. 11, 2008). In Bolivia there is a clear position related to human rights treaties: the constitutional tribunal decided in the case SC 1663/2003 that the declarations and treaties concerning human rights are part of the legal order applicable in Bolivia. See José Antonio Rivera, *Tribunal Constitucional y Protección de los Derechos Humanos*, REVISTA DEL CENTRO DE ESTUDIOS CONSTITUCIONALES, 227, 236, (2004), available at http://www.cecoch.cl/htm/revista/docs/estudiosconst/In_2_2004/arts/227_254.pdf (in Spanish) (last visited Mar. 13, 2008).

²⁵ See Constitución Colombia 1991, art 93 (2005). Text introduced by Act 2 of December 27, 2001 (in Spanish), available at http://www.secretaria.senado.gov.co/leyes/CONS_P91.HTM (last visited Apr. 11, 2008).

²⁶ *Id.*

²⁷ See Constitución Ecuador 1998, art. 161(4); Constitución Paraguay 1992, art. 145, available at http://www.servat.unibe.ch/icl/pa00000_.html (last visited Mar. 13, 2008).

²⁸ See Corte de Constitucionalidad, 25/3/2002, "Expediente No. 171-2002," (Guat.), available at http://www.iccnw.org/documents/CCOpinionGuatemala02_sp.pdf (in Spanish) (last visited Mar. 13, 2008).

²⁹ See *id.* at 20. In a similar situation, however, a different conclusion was reached by the Constitutional Tribunal of Chile interpreting the article 79 of the Chilean Constitution and the administrative powers of the Chilean Supreme Court. See *supra* note 34.

produced by the supreme court of **Costa Rica**³⁰ and the constitutional court in **Ecuador**.

The **Argentine** law implementing the Rome Statute in domestic law³¹ remains silent on this issue as it happened in another occasion with the country's adherence to another international treaty including a judicial body as it happens with the American Convention on Human Rights.³²

The constitutional tribunal of **Chile** has been the only one in Latin America that affirmed a clear incompatibility between the provisions of the Rome Statute and the Chilean constitution.³³ The main argument was the understanding that the ICC, as a supranational tribunal with criminal jurisdiction, could substitute for the Chilean tribunal, and such extension of jurisdiction is not permitted in the actual constitution.³⁴

2. *Constitutional Immunities of Head of States*

In principle, all constitutions in Latin America recognize some grade of immunity to the executive power. Even though Article 27 of the Rome Statute declares the irrelevance of the immunity of a head of state or government when the act concerned is a crime for the jurisdiction of the ICC, this contradiction has not been seen as a considerable impediment by most of the Latin American states to their ratification of the Statute.³⁵ Even when the constitution has been reformed for ratifying the

³⁰ See Constitutional Chamber, 1/11/2000, "Consulta preceptiva de constitucionalidad sobre el proyecto de ley de aprobación del Estatuto de Roma de la Corte Penal Internacional," Exp. 00-008325-0007-Co, Res. 2000-09685, available at <http://www.icrc.org/ihl-nat.nsf/276c23458e6a0d2441256486004ad099/cafa5b74f457664fc1256b1a003f360a!OpenDocument> (in Spanish with English summary) (last visited Mar. 13, 2008).

³¹ See Law No. 26.200, *supra* note 18.

³² See Alberto L. Zuppi, *El derecho imperativo (jus cogens) en el nuevo orden internacional*, 147 EL DERECHO 863, 874 (1992).

³³ See Constitución Chile 1980, art. 73. See also Tribunal Constitucional, 9/4/2002, available at <http://www.iccnw.org/documents/fallo%20chile.pdf> (in Spanish) (last visited Mar. 13, 2008) (decision regarding incompatibility between Rome Statute and Constitution of Chile). For an opinion in favor of the constitutionality of the Rome Statute, see Humberto Nogueira Alcalá, *Consideraciones sobre Constitucionalidad del Estatuto de Roma del Tribunal Penal Internacional*, IUS ET PRAXIS 363 (1999), available at <http://redalyc.uaemex.mx/redalyc/pdf/197/19750214.pdf> (in Spanish) (last visited Mar. 13, 2008).

³⁴ See Constitución Chile 1980, ¶¶ 31 and 46.

³⁵ See Helen Duffy, National Constitutional Compatibility and the International Criminal Court, 11 DUKE J. COMP. & INT'L L. 5, 26 (2001).

ICC generally the question of the presidential immunity remained untouched. For example, in 2005, after introducing a constitutional reform, **Mexico** was able to ratify the Rome Statute.³⁶ Some scholars proposed an amendment for the contradiction between Article 27 of the ICC and the Mexican constitution, but the opinions on the subject differ.³⁷ The constitutions of **Colombia**,³⁸ **Costa Rica**³⁹ and **Nicaragua**⁴⁰ explain that the head of state cannot be prosecuted during the mandate, and the constitution of **Paraguay** forbids even subpoenaing the president.⁴¹ The majority of the Latin American nations, although expressly or implicitly recognizing immunities for their officials, use a positive drafting of the principle, explaining the reasons that will permit the prosecution of the head of state or his ministers. **Mexico**, for example, rules that during his mandate the president can be charged with the crime of treason

³⁶ See Decreto por el que se Adiciona el Artículo 21 de la Constitución Política de los Estados Unidos Mexicanos [Decree adding Article 21 to the Political Constitution of the United Mexican States], Diario Oficial de la Federación [D.O.], 20 de Junio de 2005 (Mex.), available at <http://www.ordenjuridico.gob.mx/JurInt/CORTEPENAL.pdf>.

³⁷ See Sergio González Gálvez, *La Corte Penal Internacional: Posibilidades y Problemas*, 47 DERECHOS HUMANOS 137 (2001), available at <http://www.juridicas.unam.mx/publica/librev/rev/derhum/cont/47/pr/pr23.pdf>; but see Natalia Cañíz García, *Constitucionalidad del Estatuto de Roma y realidad jurídico-política en México bajo la perspectiva del derecho comparado*, 3 ANUARIO MEXICANO DE DERECHO INTERNACIONAL 107, 114 (2003) (making a better argument against the amendment) (in Spanish), available at <http://info.juridicas.unam.mx/publica/librev/rev/derint/cont/3/art/art4.pdf> (last visited Apr. 11, 2008). See also Socorro Flores Liera, *Ratification of the Statute of the International Criminal Court by Mexico*, in STATE'S RESPONSES TO ISSUES ARISING FROM THE ICC STATUTE: CONSTITUTIONAL, SOVEREIGNTY, JUDICIAL COOPERATION AND CRIMINAL LAW 275-80 (2005).

³⁸ See Constitución Colombia 1991, art. 199. The prosecution should be only before the congress, unless the senate has already declared the prosecution as admissible.

³⁹ See Constitución Costa Rica 1949, art. 151.

⁴⁰ See Constitución Política de la República de Nicaragua [Cn.] [Constitution] art. 14, La Gaceta [L.G.] 9 January 1987, as amended by Ley No. 527, Reforma Parcial a la Constitución Política de la República de Nicaragua, Apr. 8, 2005, available at <http://pdba.georgetown.edu/Constitutions/Nica/nica05.html> (last visited Apr. 11, 2008). In 1990, Nicaragua issued the so-called "*Ley de Inmunidad*," - immunity law- which explained that all functionaries can be detained in case of a flagrant commission of a crime. See Ley No. 140, 28 November 1991, Ley de Inmunidad [Law of Immunity], La Gaceta [L.G.], 15 June, 1992 (Nicar.), available at <http://www.glin.gov/download.action?FulltextId=45921&documentId=37650> (author's comment).

⁴¹ See Constitución Paraguay 1992, art. 193.

against the State *and other grave crimes against the common order* in what seems to be an open, albeit unprecedented, alternative to initiating an impeachment proceeding.⁴² In **Bolivia**, a draft circulating in October 2005⁴³ called for a constitutional reform, limiting the immunities of the representatives of the congress up to the perpetration of crimes against international human rights.⁴⁴ In a subsequent article, the congress is relieved from authorizing the impeachment before the Supreme Court of the president, vice-president or ministers in cases of crimes against international human rights and international humanitarian rules.⁴⁵ In **Colombia**, the question of immunity was considered by the constitutional court,⁴⁶ but not seen as problematic for the acceptance of the Rome Statute. Another point considered by this tribunal was in reference to Article 17 of the Rome Statute, and whether the consideration of amnesties and presidential pardons as a reason for not investigating a case could be acceptable.⁴⁷ The decision finally considered that amnesties and presidential pardons that warranted the victim's access to justice should be seen as instruments for consolidating internal peace and accordingly coherent with Article 80 of the ICC.⁴⁸

⁴² See Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, Diario Oficial de la Federación [D.O.], 20 de Junio de 2005 (Mex.), *available at* <http://info4.juridicas.unam.mx/ijure/fed/9/109.htm?s-> (last visited Apr. 11, 2008). *See also* Gálvez, *supra* note 37; Garcia, *supra* note 37, at 114.

⁴³ *See Anteproyecto de Ley de Adecuación Normativa al Estatuto de la Corte Penal Internacional* [Proposed Law Regarding Adequacy Regulations of the Statute of the ICC] (Bol.) (in Spanish), *available at* http://www.iccnw.org/documents/Bolivia_DraftImplementationBill_Oct05.pdf (last visited Apr. 11, 2008).

⁴⁴ *See id.* proposed drafting of art. 51at 7.

⁴⁵ *See id.* proposed drafting of arts. 11.8 and 96.13. at 8-9. Article 96.13 of this draft even prevents the president from conceding of amnesty in cases of crimes against international human rights or international humanitarian norms.

⁴⁶ *See* Revision of Law 742 of June 5, 2002, Judgment C-578/02, LAT-223, ¶¶ 4, 5, Constitutional Court, July 30, 2002 (Colom.), *available at* http://www.secretariassenado.gov.co/leyes/SC578_02.HTM (last visited Apr. 11, 2008).

⁴⁷ A similar question was posed in Peru in relation with article 102.6 of the Peruvian Constitution. *See* Chamorro Balvín & Llatas Ramirez, *Implementación del derecho interno al Estatuto de Roma de la Corte Penal Internacional con especial énfasis al Código Penal*, at 32, *available at* <http://www.cajpe.org.pe/RIJ/bases/dpi/documento.pdf> (last visited Apr. 11, 2008).

⁴⁸ *See* Judgment, *supra* note 36, ¶ 4.1.2.1.7.

Peru⁴⁹ has produced several proposals to reform its constitution,⁵⁰ and to exclude the protection of immunity in cases of crimes against humanity. In addition to the crime of treason, the president could be accused of impeding elections, dissolving the congress, or hindering its meetings.⁵¹ **Panama**⁵² enlarges the list of presidential crimes, to include even “*to overstep his [presidential] constitutional functions.*”⁵³ Another group of nations, including **Ecuador**⁵⁴ and **Guatemala**,⁵⁵ leave the responsibility to impeach the president to the congress. In Guatemala, the question of impeachment directed to certain officers is the objective of one specific law.⁵⁶ Although its text recognizes a certain degree of immunity to those functionaries shielded by the law, the immunity ends when the person ceases to hold his/her office.⁵⁷ The constitution of **Chile**⁵⁸ mentions as a cause for prosecution “grave violations against the constitu-

⁴⁹ See, e.g. Constitución Perú 1993, art. 117, available at <http://www.tc.gob.pe/legconperu/constitucion.html> (last visited Apr. 11, 2008).

⁵⁰ See Law No. 27,600, December 16, 2001 (Peru) (proposing the non-application of the statute of limitations for crimes against humanity and war crimes, as well as the prohibition of amnesties, graces or presidential pardons for these kinds of crimes). For a summary of the law, see Chamorro Balvín & Llatas Ramírez, *supra* note 48, at 10 (in Spanish), available at <http://www.cajpe.org.pe/RIJ/bases/dpi/documento.pdf>.

⁵¹ A Peruvian congressman qualified extension of the parliamentary immunities of article 93 of the constitution as a frontal conflict with the Rome Statute. See Balvín & Llatas Ramírez, *supra* note 38, at 34. Another document, however, prepared by members of the congress, the International Committee of the Red Cross and the Andean Commission of Jurist, declined the modification of article 93 of the Peruvian Constitution, but recognized the problem with the presidential immunity of its article 117. See *id.*

⁵² See Constitución Panamá, art. 186 (1972) available at <http://bdigital.binal.ac.pa/bdp/const/Constitucion1941.pdf> (last visited Apr. 11, 2008). See also art. 314 (punishing the violation of immunity of a foreign head of state, or offending his dignity or decorum). A similar text can be found in article 136 of the penal code of Bolivia, in article 284 of the penal code of Costa Rica, and a more restricted version in article 221 of the Argentine Penal Code.

⁵³ See art. 186.1, *supra* note 53.

⁵⁴ Constitución Ecuador 1998, art. 130(9). The list of crimes authorizing impeachment includes crimes against the state security extortion, bribery, and illegal enrichment. See *id.*

⁵⁵ See Constitución Guatemala 1985, art. 165(h).

⁵⁶ See Dec. No. 85-2002 from December 17, 2002, “Ley en Materia de Antejucios” (Guat.) (in Spanish), available at <http://www.scribd.com/doc/534603/DECRETO-NUMERO-852002-LEY-EN-MATERIA-DE-ANTEJUICIO> (last visited Apr. 11, 2008).

⁵⁷ See *id.*, art. 3.

⁵⁸ See Constitución Chile 1980, art. 48(2)(a).

tion,” and the text of **Uruguay’s**⁵⁹ makes a short reference to “grave crimes.” The **Dominican Republic** conveys the question of presidential responsibility to its high court, which will decide accordingly whether the President committed a crime permitting his/her prosecution.⁶⁰

The question of immunity presents some additional unresolved problems as could be seen in some of the legislative drafts which have been introduced. For example, the Bolivian original project for implementing in domestic law the Rome Statute contains a peculiar reference to the treatment of the immunities recognized by international law to any official of a member State of the ICC.⁶¹ The provision affirms that those international immunities will not represent an impediment for the exercise of the Bolivian jurisdiction. However, if the official belongs to a non-member state immunity will be respected unless expressly waived by that state. The 2002 project of **Brazil** contains a declaration that follows the principles of the Rome Statute, asserting that the exercise of an official position, either civilian or military, will not exempt the agent from prosecution.⁶² The application of military rules for members of the armed forces has even survived some of the projects for implementing the Rome Statute.⁶³ The law of implementation of the

⁵⁹ See Constitución Uruguay 1997, art. 93 (“violation of the Constitution and other grave crimes. . .”); *id.* at art. 172 (related to the impeachment proceeding), available at <http://www.rau.edu.uy/uruguay/const97-1.6.htm#5> (last visited Apr. 11, 2008).

⁶⁰ See Constitución de la República Dominicana 2002, art. 67, available at <http://www.suprema.gov.do/codigos/Constitucion.pdf> (last visited Apr. 11, 2008).

⁶¹ See Bolivian Project art. 7. Copy archived with the author. In accordance with Prof. Elizabeth Santalla Vargas, who advised the Government on the original draft, the Project since her participation has been modified several times, and is still under consideration of the Chamber of Deputies. Letter archived with the author.

⁶² See Brazilian Project art. 9 (“*O exercício de cargo ou função oficial, civil ou militar, não eximirá o agente da responsabilidade penal, nem poderá, per se, constituir motivo para redução da pena.*” [The exercise of an official function, civil or military, will not exempt the agent from criminal liability neither be a motive for reduction of punishment]). Copy of the Project archived with the author. At the time of writing this paper, the draft seems to be stalled at the Ministry of Justice and has not been yet presented to the Congress. See Coalition for the International Criminal Court, *Regional & Country Info*, <http://www.iccnw.org/?mod=country&iduct=24> (last visited Apr. 11, 2008).

⁶³ See, e.g., “*Disposición Transitoria*” of the 2005 Colombian project related to the military jurisdiction entitled “Proyecto de Ley No. . . . ‘Por la cual se dictan normas sobre cooperación con la Corte Penal Internacional,’” (in Spanish), availa-

Rome Statute in **Uruguay**, on the contrary, excludes the grave crimes included in the Statute from the application of military jurisdiction, or their possible qualification as military crimes, or the mere idea of being perpetrated upon official military functions.⁶⁴

In connection with the ratification process of the ICC, some Latin American nations prepared detailed drafts including questions on procedural cooperation with the ICC, as is the case of **Argentina**, Colombia and **Venezuela**. At the time of this paper, **Uruguay** and **Argentina** were the only Latin American countries that had sanctioned national law implementing the Rome Statute.⁶⁵

3. *Bringing Human Rights Offenders Before the Criminal Courts: The case of Argentina*

All Latin American states, with the sole exception of Argentina, resolved questions of foreign state immunity using judicial precedents of former decisions.⁶⁶ Argentina is the only country of a civil law legal family which has enacted specific legislation on immunity as it has been generally done by nations of the common law tradition.⁶⁷ This law has resolved the former tendency problem of the Argentine Supreme Court to favor absolute foreign state immunity, unless immunity has been expressly waived. Article 2, paragraph (e) of the Argentine law prohibits invoking jurisdictional immunity unless the claim is

ble at http://www.iccnw.org/documents/Colombia_CooperationBillDraft_Nov05_es.pdf (last visited Apr. 11, 2008). The Brazilian code of military justice in article 208 includes the crime of genocide when perpetrated by militaries. See Decreto-Lei No. 1.001, de 21 de outubro de 1969 (Brazil), (in Portuguese), available at <http://www.soleis.adv.br/codigopenalmilitar.htm> (last visited Apr. 11, 2008).

⁶⁴ See Law No. 18.026, Sept. 25, 2006, art. 11 (Uru.) (in Spanish), available at <http://www.parlamento.gub.uy/leyes/ AccesoTextoLey.asp?Ley=18026&Anchor=> (last visited Apr. 11, 2008).

⁶⁵ See Law 26.200, *supra* note 23.

⁶⁶ However, the Argentine law shows perhaps a future trend in Latin America. Recently, a detailed project for a law on foreign immunity was introduced in the Mexican congress. See *Iniciativa que contiene proyecto de decreto por el que se expide la ley sobre inmunidad de jurisdicción estatal*, (Mex.), available at <http://www.pan.senado.gob.mx/LVIII-LIX/descarga.php?id=26-296&ext=pdf> (last visited Apr. 11, 2008).

⁶⁷ See Law 24488, June 28, 1995, 28173 B.O., 1995-D A.D.L.A. 4339, available at <http://infoleg.mecon.gov.ar/infolegInternet/anexos/20000-24999/22523/norma.htm> (last visited Apr. 11, 2008).

for losses or damages derived from delicts and quasi-delicts. The text of the law should be construed as referring only to civil claims, and not extending the jurisdiction of the Argentine courts to penal law. In addition, one of the most conspicuous gaps in the Argentine law is that by being concerned only with the question of immunity of jurisdiction, it leaves out of consideration the immunity of enforcement or execution restricting the enforcement powers of the national courts. This omission has been pointed out by the Argentine jurisprudence.⁶⁸ In spite of a considerable number of decisions after issuance of the law, none of the cases discussed the conflict between state immunity and violation of principles belonging to *jus cogens*.⁶⁹

a.) *Presidential Pardons*

Argentine courts had been reluctant not only to consider any exception to immunity in general, but until very recently they were unwilling to resolve questions on the grave crimes committed during a special dark period of Argentina's history. This produced some interesting situations when discussing defenses of immunity which could be repeated in cases of immunity of heads of state. For example, a German Prosecutor in Nürnberg-Fürth requested the extradition of General Carlos Suarez Mason,⁷⁰ one of the main actors in the dictatorship that ruled Argentina between 1976 and 1983.⁷¹ The charge posed for the extradition request was the disappearance, torture and

⁶⁸ See *Blassón, Beatriz Lucrecia Graciela c/ Embajada de la República Eslovaca*, J. A. 2000-IV, at 641.

⁶⁹ The Supreme Court could have opined in relation with this conflict in the 2006 claim against Luo Gan, Secretary of the Falun Gong, for the crime of genocide and torture, one of several prosecutions initiated by the same actors around the world. The opinion of the court was that although Lou Gan may enjoy immunity, he wasn't at the present in Argentina where his visit was for just a few days. Questions on universal jurisdiction or conflict between immunity and *jus cogens* were omitted in the decision of the Argentine Supreme Court. See CSJN, 23/2/2006, "Luo Gan s/ imposición de tortura," L. 38, XLII, available at http://www.csjn.gov.ar/documentos/cfal3/cons_fallos.jsp (in field entitled "N° de expediente" enter: L 38 XLII and click "Buscar;" then select "VER" link next to second document in query result) (last visited Apr. 13, 2008).

⁷⁰ See *In re Extradition of Suarez-Mason*, 694 F. Supp 676 (N.D. Cal. 1988). See also Press information available at <http://www.justiz.bayern.de/olgn/presse/inf/straf/prs120.htm>. Suarez Mason died in June 2005.

⁷¹ See *Suarez Mason, Carlos Guillermo*, ENCYCLOPEDIA BRITANNICA ONLINE, <http://www.britannica.com/eb/article-9403725/Suarez-Mason-Carlos-Guillermo> (last visited Apr. 11, 2008).

death of a German citizen, Elisabeth Käsemann.⁷² When the intervening Argentine federal judge denied the extradition based on the blanket amnesty and presidential pardon of all crimes committed by the military rulers conceded by the Argentine government, Germany, acting as a party in the extradition proceeding, appealed the denial of extradition instead of accepting the Argentine refusal.⁷³ Germany contended that granting the excuse of amnesty and presidential pardon for crimes against humanity contradicted mandatory norms of *jus cogens* prohibiting this kind of non-exculpatory defenses when the crime concerned is an international crime.⁷⁴ The situation was rather unique: a state requesting extradition appealed the domestic decision denying it before the supreme court of the requested state.⁷⁵ The basis of the appeal was double: first, the assertion that conceding a presidential pardon in cases of crimes against

⁷² See Suarez Mason, Carlos G. S. *Extradición*, no. 11819/01 at the *Juzgado Nacional en lo Criminal y Correccional Federal* N° 4, *Secretaría* n° 7, (Arg.), available at http://www.nuncamas.org/juicios/argentin/smason_041201.htm (last visited Apr. 11, 2008); No. 3886.4 at the *Cámara Nacional de Casación Penal*, available at <http://www.abogarte.com.ar/apelacionzuppi.html> (last visited Apr. 11, 2008). See also Andreas Fischer-Lescano, *Völkerrechtliche Praxis der Bundesrepublik Deutschland in den Jahren 2000 bis 2002*, in 64 *ZEITSCHRIFT FÜR AUSLANDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 195, 208-09 (2004). In relation with the case Käsemann see also Kai Ambos & Christoph Grammer, *La Responsabilidad de la Conducción Militar Argentina por la Muerte de Elizabeth Käsemann*, 16 *CUADERNOS DE DOCTRINA Y JURISPRUDENCIA PENAL* 163 (2003).

⁷³ Article 25 of the Argentine extradition law, Law 24.767, allows that the requested State could be represented at the proceeding by proxy holders. As a party of the proceeding the requesting State is authorized to take any procedural position following its interest. See Law No. 24.767, Jan. 16, 1997, 28565 B.O., LVII-A A.D.L.A. 40, available at <http://www.cooperacion-penal.gov.ar/24767.htm> (last visited Apr. 11, 2008).

⁷⁴ See Juan E. Méndez, *Accountability for Past Abuses*, 19 *HUM. RTS. Q.* 255, 259 (1997); José Zalaquett, *Moral Reconstruction in the Wake of Human Rights Violations and War Crimes*, in *HARD CHOICES: MORAL DILEMMAS IN HUMANITARIAN INTERVENTION* 211, 220 (1998).

⁷⁵ A rather unique situation. In the United States, the U.S. Attorney can simply reintroduce the request for extradition before a federal district court judge or magistrate. See PAUST, BASSIOUNI, ET AL., *INTERNATIONAL CRIMINAL LAW* (3d ed., 2007). In Mexico, when extradition has been denied, the requesting state may re-submit the request to the Ministry of Foreign Affairs, and has no standing in court to appeal the refusal. Most likely, it would be the Attorney General representing the Requesting State's interests who could probably appeal; but this is still a difficult decision because the Attorney General has no say in the decision of the Ministry of Foreign Affairs. Information provided by my colleague Rodrigo Labardini Flores.

humanity violated elementary principles of international law; secondly, a presidential pardon granted in a judicial case before any final decision has been reached violated the principles of the Argentine Constitution.⁷⁶ The appeal did not discuss the question of immunity originated in an official position, but rather the resulting impunity obtained through a presidential pardon wrongly conceded. The pardon of General Suarez Mason was issued before his case could be decided by the tribunals and consequently before the situation contemplated by the Argentine Constitution as a presidential prerogative. The appeal introduced by the German government was highly publicized by the media, which created a rather uncomfortable situation for the Argentine government. After the German appeal in the Suarez Mason case was introduced, the government of then-president De la Rúa tried to close any possible gaps in the Argentine legislation to stop future similar situations.⁷⁷ Then, it issued a decree declaring the so-called “*official doctrine*” that consisted of refusing *in limine* already at the Ministry of Foreign Affairs at the beginning of the proceeding any extradition request involving accusations of crimes perpetrated during the dictatorship.⁷⁸ The text of this decree was not only unfounded,

⁷⁶ Current art. 99(5) of the Argentine Constitution affirms among the powers of the Executive. The author’s translation of the text reads: It may grant pardons or commute CONVICTIONS for crimes subject to federal jurisdiction, after the report of the corresponding court, except in cases of indictment by the Chamber of Deputies. [“*Puede indultar o conmutar las penas por delitos sujetos a la jurisdicción federal, previo informe del tribunal correspondiente, excepto en los casos de acusación por la Cámara de Diputados.*”] Constitución Argentina [CONST. ARG.], art. 99(5) (Arg.).

⁷⁷ Confronted with the fact of the Argentine passiveness for resolving its past, in the 90’s several European judges began to request the extradition of members of the military dictatorship charged with forced disappearances of European citizens. See e.g., Victor Hugo Ducrot, *El juex Markevich encierra a Videla con argumentos de Garzón*, EL MUNDO, July 16, 1998 (Spanish news article concerning the request by Spanish Judge Baltazar Garzón) available at <http://www.elmundo.es/1998/07/16/internacional/16N0043.html> (last visited Apr. 11, 2008); Gerardo Young, *Detienen a Videla en un caso por robo de bebés*, CLARÍN, June 10, 1998 (Argentine news article concerning one French extradition request) available at <http://www.clarin.com/diario/1998/06/10/t-00201d.htm> (last visited Apr. 11, 2008); *Argentine ‘dirty war’ officer sought*, BBC NEWS, June 30, 2001, (involving an Italian request) available at <http://news.bbc.co.uk/2/hi/americas/1416020.stm> (last visited Apr. 11, 2008). Similar requests were introduced by Switzerland and Sweden.

⁷⁸ See Decree 1581/2001, Dec. 17, 2001, 29797 B.O. available at <http://infoleg.mecon.gov.ar/infolegInternet/anexos/70000-74999/70794/norma.htm> (last visited Apr. 11, 2008). The decree has been included in the article by Mónica P. Karayan,

but it even contained considerable substantive mistakes.⁷⁹ Ten days later, the government of De la Rúa fell in the midst of political and economical turmoil, but the decree survived the subsequent transitory governments due to the pressure of the military.⁸⁰

In June of 2002, the German government again decided to play a role challenging the legality of this new impediment before the Argentine Supreme Court.⁸¹ As already explained, the Argentine extradition law⁸² allowed an extradition request only by the diplomatic channels of the foreign ministry.⁸³ Germany wanted to request the extradition of two members of the military presumed to have actively participated in the killing of Elizabeth Kässemann.⁸⁴ To avoid the sure refusal at the foreign office by application of the new “official doctrine,” the German Government used the gap left by the bad drafting of article 3 of the decree⁸⁵ and presented the new extradition request **and** the provisory arrest request with all due documentation simultaneously both upon the federal justice and the ministry of foreign affairs.⁸⁶ It was clear that the request was going to be stopped at the Argentine Foreign Ministry but Germany wanted to bring the case before the Argentine Supreme Court

La ‘doctrina’ del Decreto 1581, 16 CUADERNOS DE DOCTRINA Y JURISPRUDENCIA PENAL 197, 234 (annex) (2003).

⁷⁹ See Karayan *supra* note 79, at 200. In spite of the criticism, the Decree remained in force until being derogated in 2003 by Decree 420/03, July 28, 2003, 30200 B.O.

⁸⁰ See Carlos Ares, *El torturador Astiz, en prisión preventiva*, EL PAÍS, Dec. 29, 2001, available at http://www.elpais.com/articulo/internacional/torturador/Astiz/prision/preventiva/elpepiint/20011229elpepiint_10/Tes (last visited Apr. 11, 2008).

⁸¹ The Decree 1581/01 was also badly drafted. After a long list of more than 50 considerations the decree declared its applicability to every foreign extradition request. Article 3 of the Decree stated: The request for provisional arrest will be sent to the judge with jurisdiction leaving notice that the Ministry of Foreign Affairs will act in accordance with this decree in front of a possible case of extradition [*“Las solicitudes de arresto provisorio se enviarán al juez competente dejando constancia que el Ministerio de Relaciones Exteriores, Comercio Internacional y Culto actuará de acuerdo al presente decreto frente a un eventual pedido de extradición.”*]

⁸² See Law 24.767, *supra* note 74.

⁸³ See *id.* art.19.

⁸⁴ See *supra* note 79. The members of the military accused were General Juan Bautista Sasiaiñ who has been chief of the Federal Police during the dictatorship, and Major Pedro Durán Saenz who presumably was in charge of the kidnapping of Kässemann.

⁸⁵ See Decree No. 1581/01, *supra* note 81.

⁸⁶ See *id.*

and any judicial denial automatically will resend the case to the high tribunal. The intervening judge resolved first to accept Germany as a party in the proceeding, but secondly refused to concede the provisory arrest based on the “official doctrine” decree.⁸⁷ That was enough to allow the German appeal to the Supreme Court.

Despite the fact that at the end of the judicial proceeding, the German appeal lost its original purpose when the so-called impunity laws were repealed and was finally denied invoking procedural reasons, it was an element of pressure that contributed to the final decision of the Argentine Supreme Court.⁸⁸ In July of 2007, the Supreme Court of Argentina declared unconstitutional the presidential pardons conceded by President Menem benefiting members of the past military dictatorship.⁸⁹ The case involved some of the accused in the Kässemann case mentioned above. The decision pointed out that amnesties and presidential pardons cannot be conceded in cases of crimes against humanity.⁹⁰ However, the decided case brought some conflict between the principle of *res judicata* in cases already resolved by the tribunal, and constitutional issues related to the recognized independence of the executive to concede some pardons in cases already decided.⁹¹ One dissenting judge who had been heavily engaged in international criminal law as a member of the ad hoc International Criminal Tribunal for the former Yugoslavia expressed her concerns about this decision, issuing a dissenting opinion.⁹² She affirmed that a presidential pardon of an accused person is a clear interference from the executive power on the judiciary.⁹³ However, when the Supreme Court in a prior case⁹⁴ had already resolved the constitutionality of cer-

⁸⁷ See *id.*

⁸⁸ See “Ramón Camps,” *supra* note 4.

⁸⁹ See CSJN, 13/7/2007, “M. 2333. XLII. y otros ‘Mazzeo, Julio Lilo y otros s/ rec. de casación e inconstitucionalidad’,” (in Spanish), available at <http://www.der-echos.org/nizkor/arg/doc/riveros5.html> (last visited Mar. 13, 2008).

⁹⁰ See *id.*

⁹¹ See *id.*

⁹² See *id.* at 125.

⁹³ See point 5 p. 128.

⁹⁴ See CSJN, “Aquino resolving the constitutionality of the presidential pardons” Fallos 315:2421 (Arg.); CSJN, date, “Riveros” Fallos 313:1392 (prior presidential pardon of one of the accused). One of the judges of the prior cases was

tain presidential pardons, the case is closed and the principle of *res judicata* must prevail.⁹⁵

b.) *Statute of limitations and immunity*

In another case resolved by the Argentine courts, Italy requested the extradition of Erich Priebke, a former member of the SS who, during the Second World War, had played a major role in the selection and execution of Italian hostages as retaliation for a terrorist attack by the Italian resistance in Rome.⁹⁶ A hindrance for conceding the extradition was the tolling of the statute of limitations for the crime of murder. In 1994, this crime was the only one in Argentina applicable to fulfill the double-criminality requirement.⁹⁷ Following the position sustained by Italy in the proceeding, the national prosecutor affirmed that the case was one of a crime against humanity and not a case of murder.⁹⁸ When conceding the extradition and accepting this reasoning, the Argentine Supreme Court considered that no statute of limitations could be invoked against a prohibition of *jus cogens* and that the characterization as crimes against humanity "does not depend on the will of both intervening states, but on the principles of *jus cogens* in international law."⁹⁹ The case, as it was decided, presented an interpretation of the hierarchy of *jus cogens* rules, placing it above the national constitution.¹⁰⁰ This interpretation, considered avant-gardist at the time, was contradicted with the constitutional reform of that same year whose main objective was the presidential re-election. The constitutional reform created a hy-

Carlos Fayt, who was a member of the posterior court and voted against the decision of declaring the presidential pardons unconstitutional.

⁹⁵ See Augusto M. Morello, "Cosa juzgada y seguridad jurídica, El caso 'Riveros'" J.A. 2007-III, 628.

⁹⁶ CSJN, 02/11/1995, "Priebke, E. s/ pedido de extradición," J.A. 1996-I-324, available at <http://www.blumkin.com.ar/DIDI/priebke.pdf>; see also, JOURNAL DU DROIT INTERNATIONAL CLUNET 1024 (2006) for the evolution of this process in Italy.

⁹⁷ See G.A. Res 260 (III), 56 UN Dec. A/6286 (Dec. 9, 1948). See also Decree No. 6286/56, available at A.D.L.A 1956, XVI-A, 273. Although Argentina had ratified the Convention for the Prevention and Punishment of the Crime of Genocide, it has neglected to establish in its penal law the crime of genocide as requested by the Convention.

⁹⁸ See CSJN, 02/11/1995, "Priebke, E. s/ pedido de extradición," J.A. 1996-I-324.

⁹⁹ *Id.* point 4.

¹⁰⁰ *Id.*

brid category of treaties with “constitutional hierarchy,” placing such specific and mentioned treaties at the same level as the constitution,¹⁰¹ dragging down what had been considered at the *Priebke* case to be beyond the constitutional limit.¹⁰²

For resolving the non-application of the statute of limitations in *Priebke*, the Argentine Supreme Court relied on a prior extradition case of another former Nazi, Josef Schwammberger, where this question was addressed.¹⁰³ The defenses against the request were basically two. First, it alleged that Germany lacked jurisdiction to request the extradition because it was not the successor of the Third Reich.¹⁰⁴ This question was of importance in 1987, two years before the fall of the Berlin wall, when the Democratic Republic of Germany also claimed to be the successor of the German Empire. Second, the defense contended that the statute of limitations for its crimes had already run out in Germany.¹⁰⁵ Both questions were analyzed by an expert opinion requested by the prosecutor, which affirmed the jurisdiction of the Federal Republic of Germany and explained the successive extensions of the statutes of limitations for crimes committed during the Second World War until the declaration

¹⁰¹ See Alberto L. Zuppi, *Incorporación de Tratados Internacionales a la Constitución Nacional - sus efectos y consecuencias*, 4 Colegio Público de Abogados de la Capital Federal (2002), available at http://www.dpi.bioetica.org/docdpi/zuppi.htm#_ftn1 (last visited Apr. 11, 2008).

¹⁰² Compare current Article 75. 22 of the Argentine Constitution, available at http://www.argentina.gov.ar/argentina/portal/documentos/constitucion_nacional.pdf, with the decision CSJN, 2/11/1995, “*Priebke, E. s/ pedido de extradición*,” J.A. 1996-I-324.

¹⁰³ CSJN, 20/03/1990, *Schwammberger, Josef s/extradición*, Fallos 315:256, available at <http://www.icrc.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/ab9bf298639bfe43c125712500499ce7!OpenDocument> (last visited Apr. 11, 2008).

¹⁰⁴ For decades this problem has been one of the major subjects of legal literature in Germany. See Georg Ress, *DIE RECHTSLAGE DEUTSCHLANDS NACH DEM GRUNDLAGENVERTRAG VOM 21. DEZEMBER 1972*, (1978); Wilhelm K. Geck, *Germany and Contemporary International Law*, 9 TEX. INT’L L. J. 263 (1974) with additional references.

¹⁰⁵ See Robert A. Monson, *The West German Statute of Limitations on Murder: A Political, Legal and Historical Exposition*, 30 AM. J. COMP. L., 605 (1982). The statute of limitations of the German Criminal Code – *Strafgesetzbuch* [“StGB”]—stated in § 78 a period of 20 years for the crime of murder. In 1965 and 1969, the text of the StGB was amended excluding the crimes perpetrated during the Nazi period first and extending the period for crimes punishable with life imprisonment second. In 1979, a new amendment of § 78 StGB extended the period to 30 years. A current English translation of the StGB is available at <http://www.iuscomp.org/gla/statutes/StGB.htm#78> (last visited Apr. 11, 2008).

of their not being subject to any statute of limitations.¹⁰⁶ The opinion was ratified in successive instances and Schwammberger was finally extradited to Germany.¹⁰⁷ In all these cases, the Argentine courts were confronted with different non-exculpatory defenses, but the qualification of the grave crimes against humanity was decisive for resolving the matter.

c.) *Looking for a Last Instance: The Inter-American Pact of Human Rights:*

The rise of the Inter-American human rights organisms¹⁰⁸ during the last part of the 20th Century was a consequence of the authority assumed to investigate human rights violations by the Inter-American Commission as well as the clear message pronounced by the jurisprudence of the Inter-American Court.¹⁰⁹ The number of complaints received by the Commission in recent years is growing exponentially, as the value of the Inter-American System as a last resort for human rights

¹⁰⁶ In 1987, the drafting of § 78 (2) stated: "(2) Serious criminal offenses under Section 220a (genocide) and Section 211 (murder) are not subject to a statute of limitations." Since 2002, the crime of genocide, as well as other grave international crimes, are considered only by the German International Law Penal Code of 26 June 2002 - *Völkerstrafgesetzbuch* ["VStGB"] - published in the BGBl. I at 2254. Art. 5, VStGB states: "The prosecution of crimes pursuant to this Act and the execution of sentences imposed on their account shall not be subject to any statute of limitations."

¹⁰⁷ See *Joseph Schwammberger, 92, Nazi Labor Camp Commander, Dies*, N.Y. TIMES, Dec. 4, 2004, available at http://www.nytimes.com/2004/12/04/obituaries/04schwammberger.html?_r=1&oref=slogin (last visited Apr. 11, 2008). In December 2004, Schwammberger died in the German prison. See *id.*

¹⁰⁸ The system emerged from the Charter of the Organization of American States, available at <http://www.oas.org/juridico/English/charter.html> (last visited Apr. 11, 2008), and the American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992). The Inter-American Commission on Human Rights was created in 1959 and held its first session in 1960. In 1969, the American Convention on Human Rights was adopted - O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123- and entered into force in 1978. The Convention also creates the Inter-American Court of Human Rights and defines the functions and procedures of both the Commission and the Court. See *Inter-American Commission of Human Rights [IHC]*, <http://www.cidh.org/what.htm> (last visited Apr. 11, 2008).

¹⁰⁹ See Tom Farer, *The Rise of the Inter-American Human Rights Regime: No Longer and Unicorn, Not Yet an Ox*, 19 HUM. RTS. Q. 510 (1997).

violations has been recognized.¹¹⁰ The judicial review and the availability of a contentious jurisdiction within the Inter-American System produced a notable evolution of the attitude of the member states toward a new respect of human rights protected by the system. Certainly, still this change should be seen as an evolving development but the concrete meaning of some decisions has proved to be invaluable. The case of the amnesties and presidential pardons has been one of the clearest examples of the value of the Inter-American human rights institutions. In the case of *Barrios Altos* the Inter-American Court of Human Rights decided that:

This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.¹¹¹

This jurisprudence of this case has been followed by the Argentine Supreme Court when deciding the *Simon* case already quoted when resolving the nullity of the impunity laws.¹¹² The alternative of presenting a case before the Inter-American Commission of Human Rights has shown its merits in cases where the involved tribunal has been reluctant to act or the investigation of the case has been burdened by a concrete interest in some particular result from the involved government. The international forum offered by the Inter-American Commission is especially attractive in cases where there is a gross violation of the due diligence to investigate or to secure the rights of the victims.

¹¹⁰ See Annual Reports of the Inter-American Commission on Human Rights, available at <http://www.cidh.org/annual.eng.htm> (last visited Apr. 11, 2008).

¹¹¹ See Inter-American Court of Human Rights, Mar. 14, 2001, "Barrios Altos Case (Chumbipuma Aguirre et al v. Peru)," Series C No. 75 [2001] IACHR 5, ¶ 41, available at <http://www.worldlii.org/int/cases/IACHR/2001/5.html> (last visited Apr. 11, 2008).

¹¹² See Bakker, *supra* note 4 at 1106.

d) *The Spanish alternative*

Another effective alternative for fighting the reluctance of Latin American tribunals to cope with the past (as shown by the case of Pinochet) has been to bring the problem to Spain, where universal jurisdiction for grave crimes against mandatory norms, after some initial hesitations, has been accepted. This happened, for example, with the 2005 decision of the Spanish constitutional tribunal in favor of the claim of Nobel Peace Prize recipient Rigoberta Menchú¹¹³ against the former dictator of Guatemala, Efraín Ríos Montt.¹¹⁴ In December 2007 the Constitutional Court of Guatemala in a criticized decision held that Spain did not have jurisdiction over crimes committed in Guatemala and refused to extradite to that country Efraín Ríos Montt and other former military officers.¹¹⁵ Notwithstanding the decision in Guatemala, the Spanish Court, in a much-praised move, decided to continue to investigate the crimes of genocide, torture, killings and illegal detentions, committed against Guatemalan civilians.¹¹⁶ When no international tribunal has been seen as having jurisdiction for the case, and the concerned state is not ready to begin a prosecution despite the requested person's no longer being protected by immunity, then the subsidiary jurisdiction offered by Spain is a valid and appreciated alternative.¹¹⁷

¹¹³ See *Decision of the Spanish Constitutional Court*, STC, Sept. 26, 2005, (STC 237), available at <http://www.tribunalconstitucional.es/jurisprudencia/Stc2005/STC2005-237.html> (in Spanish) (last visited Mar. 13, 2008).

¹¹⁴ See Hervé Ascensio, *The Spanish Constitutional Tribunal's Decision in Guatemalan Generals*, J. INT'L CRIM. JUST. 1 (2006); Angel Sánchez Legido, *La Práctica Española en Materia de Jurisdicción Universal*, available at <http://www.uclm.es/profesorado/asanchez/webdih/03Materiales/ART%C3%8DCULOSPYBIL.doc> (last visited Apr. 11, 2008).

¹¹⁵ See *Guatemala: Inconsistent ruling by the Constitutional Court rejects extraditions sought by Spain*, Amnesty International Comment, Dec. 21, 2007, available at <http://www.amnesty.org/en/library/asset/AMR34/026/2007/en/AMR340262007en.html> (last visited Apr. 11, 2008).

¹¹⁶ See *Exemplary ruling of the Spanish Audiencia Nacional concerning the Guatemalan Genocide*, FIDH.org, Jan. 16, 2008, available at <http://www.fidh.org/spip.php?article5124> (last visited Apr. 11, 2008).

¹¹⁷ Geoff Pingree & Lisa Abend, *Spanish Justice: - Guatemala and Efraín Ríos Montt*, THE NATION, Sept. 21, 2006, available at <http://www.thenation.com/doc/20061009/pingree> (last visited Apr. 11, 2008).

1) *The case of Adolfo Scilingo*

Adolfo Scilingo was a member of an infamous Navy squad acting in Argentina during the 1976-1983 dictatorship. They kidnapped and caused the disappearance of thousands of Argentinians, and Scilingo took an active part in the so-called "death flights."¹¹⁸ Scilingo, in a long interview with a journalist, acknowledged that he had taken part in several flights over the Atlantic Ocean in different airplanes from the Argentine forces where around thirty narcotized detainees, presumed to be considered missing by public opinion, were dropped into the sea letting them drown. That was the first time that the public heard a confession of this kind of killings from one of its executors. He presented himself to the Spanish Judge Garzón in 1997, was arrested, and after a long judicial process was convicted.¹¹⁹ The conviction of Scilingo was ratified in 2007.¹²⁰ In this last decision the *Tribunal Supremo* considered the defenses adduced by Scilingo, among others, that the Spanish law on international crimes declared applicable to the case was issued more than twenty years after the crimes attributed to Scilingo had been perpetrated.¹²¹ This would be a violation of the principle of legality reproduced in the Spanish Constitution.¹²² The tribunal accepted the position of judge Garzón that the new article of the Spanish Criminal Code only materialized mandatory prohibitions and rules of international customary law. It was unacceptable for the court to consider that Scilingo could have not realized the criminality of his acts as murder or illegal detentions.¹²³ Although among the victims were some Spanish citizens and Scilingo was arrested in Spain, the court considered

¹¹⁸ See HORACIO VERBITSKY, *EL VUELO* (1995).

¹¹⁹ See decision available in Spanish at <http://www.apdhe.org/InformacionDestacada/documentos/STS01oct07ScilingoArgentina.pdf>; see also Alicia Gil Gil, *The Flaws of the Scilingo Judgment*, 3 J. OF INT'L CRIM. JUST. 1082 (2005).

¹²⁰ See Decision 798/2007 by the Second Chamber of the *Tribunal Supremo*, dated October 1st 2007, available at <http://www.apdhe.org/InformacionDestacada/documentos/STS01oct07ScilingoArgentina.pdf> (last visited Apr. 11, 2008).

¹²¹ See Spanish Criminal Code, art. 607 bis, created after the amendment of the Criminal Code by Law 15/2003, in force since October 1, 2004, (in Spanish) available at http://noticias.juridicas.com/base_datos/Penal/lo10-1995.12t24.html#c2b (last visited Apr. 11, 2008).

¹²² See Constitución [C.E.], art. 25, (Spain) available at <http://constitucion.rediris.es/legis/1978/ce1978.html> (last visited Apr. 11, 2008).

¹²³ See decision quoted at point 5.6.

the application of universal jurisdiction.¹²⁴ It quoted a former decision of the Constitutional Tribunal deciding that the principle of universal jurisdiction recognized in Spanish Law is absolute, without restrictions and without hierarchical subordination to other principles ruling jurisdiction of the courts. As a consequence, the criteria for determining universal jurisdiction would depend on the particular nature of the prosecuted crimes.¹²⁵

2) *The case of Ricardo Cavallo*

Ricardo Cavallo was a former member of one of the most terrible military squads that kidnapped and forced the disappearance civilians during the 1976-1983 military dictatorship in Argentina. In addition to these charges, he was presumed to have obtained economic benefits dispossessing his victims from their property. The case of Cavallo is somehow paradigmatic because he was arrested in Mexico in 2000 when he was identified by some of his victims and a reporter who had brought the story to the press and the public opinion.¹²⁶ Judge Baltasar Garzón of Spain issued an arrest warrant and an extradition request against Cavallo for the crime of genocide, tortures and forced disappearances.¹²⁷ It was a case in which a person accused of human rights violations in one country, Argentina, was sought for trial in a second nation, Mexico, and extradited by a third, Spain, on the principle of universal jurisdiction that the laws governing crimes against humanity know no borders.¹²⁸ Cavallo alleged in his defense that he was obeying orders as member of the armed forces, but the Mexican Supreme Court stated in a

¹²⁴ See *Ley Orgánica del Poder Judicial* (LOPJ), art. 23.4 (Spain).

¹²⁵ See STC 237/2005.

¹²⁶ See Virginie Ladisch, *Argentine Military Officer Extradited to Spain on Genocide Charges*, July 10, 2003, Crimes of War Project, available at <http://www.crimesofwar.org/onnews/news-argentina.html> (last visited Apr. 11, 2008).

¹²⁷ See *Auto solicitando la extradición de Ricardo Miguel Cavallo*, Sept. 12, 2000, available at <http://www.derechos.org/nizkor/arg/espana/cavallo2.html> (last visited Apr. 11, 2008).

¹²⁸ See Tim Weiner, *Mexican Ruling May Let Spain Try Argentine*, N.Y. TIMES, Jan. 13, 2001.

memorable opinion that the defense of superior orders is of no avail when dealing with crimes against humanity.¹²⁹

At the time of Cavallo's arrest in Mexico, the afore-mentioned impunity laws were still in force in Argentina and it seems problematic that he could have been prosecuted there.¹³⁰ After being imprisoned in Mexico for almost three years, in 2003 he was extradited to Spain.¹³¹ As it has been explained, Argentina finally nullified the impunity laws and opened again the related cases for the prosecution of members of the military forces. An Argentine judge then requested from Spain the extradition of Cavallo. After some initial investigation, the Spanish *Audiencia Nacional* decided in favor of extraditing Cavallo to Argentina considering that the Argentine judiciary have a better jurisdiction than the one cited by Spain. In May 25, 2007¹³² the Spanish Council of Ministers demanded from Mexico authorization for the re-extradition of Cavallo and having obtained it, in the last day of March 2008 with the consent of Cavallo he was extradited again this time to Argentina.

CONCLUSION

Besides the problems of reforming the constitutional texts to adapt to the ICC, Latin America must overcome its reluctance to deal with its past openly and with impartiality. The trend initiated in international criminal law is irreversible and must be confronted, and one may hope that in the near future human rights violators will not find a place to hide. The Inter-

¹²⁹ See José de Jesús Gudiño Pelayo, *Contemporary Judicial Dialogue in Mexico*, 5 MEXICAN L. REV. (Jan-Jun. 2006), available at <http://info8.juridicas.unam.mx/cont/5/arc/arc3.htm>.

¹³⁰ See *id.*

¹³¹ According to Judge Garzón, Ricardo Miguel Cavallo was accused of having participated in 227 kidnappings and acts of torture concerning 110 people, as well as in the kidnapping of 16 babies who had been removed from their mothers who were in prison. Originally the case of Cavallo was linked with other case of an Argentine naval officer Adolfo Scilingo. See Richard J. Wilson, *Spanish Supreme Court Affirms Conviction of Argentine Former Naval Officer for Crimes Against Humanity*, 12 ASIL Insights (2008), American University, WCL Research Paper No. 2008-30, (discussing the case of Scilingo), available at <http://ssrn.com/abstract=1090245>. See also Trial Watch Report on Ricardo Miguel Cavallo, http://www.trial-ch.org/en/trial-watch/profile/db/facts/ricardo-miguel_cavallo_48.html (last visited Apr. 11, 2008).

¹³² See Spanish Re-Extradition Request of Ricardo Miguel Cavallo, available at <http://www.derechos.org/nizkor/espana/juicioral/doc/cavallo21.html>

American Court of Human Rights stated in the case *Barrios Altos*:¹³³

[T]hat all amnesty provisions, provisions on prescription and the establishment of measures designated to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.¹³⁴

Conceding a presidential pardon or deciding an amnesty is a classical example of a sovereign act. The decision of the executive power to pardon what the judiciary already condemned, or the congress rendering a law in a matter on national policy agreeing to an amnesty on a related matter, are both acts of exercise of sovereignty. The beneficiaries of these kinds of non-exculpatory defenses will be shielded against prosecution or enforcement. However, in spite of the majestic exercise of sovereign power, a presidential pardon or a congressional amnesty of crimes against *jus cogens* prohibitions will be considered by an unbiased domestic or international tribunal as null and non-existent. The Latin American journey to the complete reestablishment of human rights in the region is far from being concluded. Adjusting its domestic orders to the requirement of the Rome Statute will help to consolidate democracy in the region. The exposure to the international arena has shown to be an effective means to propel the necessary debate in a society too much accustomed to totalitarianism.

¹³³ See *Barrios Altos Case*, Mar. 14, 2001, Inter-Am. Ct. H.R. (ser. C.) No. 75 at 105, ¶ 41, available at <http://www1.umn.edu/humanrts/iachr/C/75-ing.html>.

¹³⁴ *Id.*