

ARGENTINA

Legal Memorandum

The Full Stop and Due Obedience Laws

SUBMITTED BY AMNESTY INTERNATIONAL AND
THE INTERNATIONAL COMMISSION OF JURISTS

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Chapter I

1. Introduction

Amnesty International and the International Commission of Jurists have repeatedly expressed their concern about the incompatibility of Argentina's Full Stop Law, Law No. 23,492 of 12 December 1986, and Due Obedience Law, Law No. 23,521 of 4 June 1987, with international law and, in particular, with Argentina's obligation to bring to justice and punish the perpetrators of gross violations of human rights. Until now these laws have been used to obstruct the investigation of thousands of cases of forced disappearance, torture and extrajudicial execution committed between 1976 and 1983 when the military governments were in power.

Law No. 23,492, the Full Stop Law, and Law No. 23,521, the Due Obedience Law, which had been approved by the Argentine Congress in 1986 and 1987 respectively, were repealed in March 1998. However, their repeal was interpreted as not having retrospective effect and cases of human rights violations committed under the military governments therefore continued to be covered by them. Nevertheless, in a judgment handed down by the *Juzgado Nacional en lo Criminal y Correccional Federal No.4*, National Court No. 4 for Federal Criminal and Correctional Matters, on 6 March 2001 in Case No. 8686/2000 entitled "Simón, Julio, Del Cerro, Juan - abduction of 10-year-old juveniles", Federal Judge Gabriel Cavallo declared the Full Stop and Due Obedience Laws to be unconstitutional, null and void. This ruling was confirmed by Court II of the *Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal de Buenos Aires*, National Chamber of Appeals for Criminal and Correctional Matters for Buenos Aires. The judgment handed down by Judge Gabriel Cavallo has been before the Supreme Court of Justice since June 2002.

Other Argentine courts have also taken the view that these laws are null and void. For example, in September 2002, in case No. 6,869/98 entitled "Scagliusi, Claudio Gustavo and others - unlawful imprisonment", Federal Judge Claudio Bonadio ruled that "the so-called full stop and due obedience laws are null and void on the grounds that, as well as being contrary to the national constitution, they are also contrary to the law of nations". In addition, in March 2003, Federal Judge Carlos Skidelsky declared these same laws to be null and void in the case of the so-called "Margarita Belén massacre" of December 1976, in which 22 political prisoners were killed in the town of Margarita Belén in the province of El Chaco.

Amnesty International and the International Commission of Jurists work for full respect for human rights, observance of international human rights law and the eradication of impunity for violations of fundamental rights. The judgment handed down by Judge Gabriel Cavallo, the first in which such laws were declared null and void, and decisions reached by several other Argentine courts which have ruled on the subject since then, have signalled the direction in which the Argentine justice system must go if it is to ensure that the State complies with its international human rights obligations and its obligation to bring to justice and punish those responsible for gross human rights violations.

Under international law, crimes such as torture, summary, extrajudicial and arbitrary executions, and enforced disappearances are gross violations of human rights that cannot be subject to any type of measure that would impede investigation and prevent those responsible from being punished. The United Nations General Assembly has repeatedly stated that extrajudicial, summary and arbitrary executions and torture constitute gross violations of human rights. The Declaration on the Protection of All Persons from Enforced Disappearance reiterates that enforced disappearance is a grave violation of human rights.

2. General Background

Military Governments

The seven years of severe repression that followed the *coup d'état* of 24 March 1976 left thousands of victims of human rights violations in its wake in Argentina. The use of torture, extrajudicial executions and disappearances provided examples of just how the military junta intended to carry out its aim of eliminating subversion in any possible way. "Task groups" made up of individuals from all branches of the armed forces were set up to capture and question all known members, sympathizers and associates of "subversive organizations", as well as their relatives or anyone else who might be opposed to the government. Congress was dissolved, the state of siege which had been imposed by the previous government was extended, judicial guarantees were abandoned, kidnapping took the place of formal arrest and the number of "disappeared" persons reached monstrous proportions.

However, despite the climate of fear and the curbs on the press, the scale of disappearances in Argentina gradually became known to groups of families brought together by desperation and an absence of official information. By 1978 individual and collective petitions were still being rejected by the courts and the Supreme Court of Justice. In that same year details of 2,500 cases of disappearance were published. As time went by, new evidence came to light: released prisoners made statements about secret detention centres and unmarked graves were discovered in cemeteries throughout Argentina. Several governments were persistently asking questions about what had happened to citizens of their countries who had disappeared in Argentina. Faced with national and international outrage, the government admitted that "excesses" had occurred but said that the actions of members of the armed forces in the "war against subversion" had been carried out in the line of duty.

"We waged this war with our doctrine in our hands, with the written orders of each high command," General Santiago Omar Riveros told the *Junta Interamericana de Defensa*, Inter-

American Defence Board] on 24 January 1980¹. This “war” which the Argentine Armed Forces were waging against the Argentine population generated unparalleled violence and an atmosphere of terror. The machinery of state was used to commit crimes against the population: military barracks and establishments belonging to the security forces became centres of enforced disappearance, torture and extrajudicial execution.

Civilian Governments

At the end of October 1983 the state of siege was lifted and free elections were held. The civilian government of President Raúl Alfonsín took office on 10 December 1983 and the *Comisión Nacional sobre la Desaparición de Personas (CONADEP)*, the National Commission on the Disappearance of Persons, was set up, under Decree 187 of 15 December 1983, to “clarify the tragic events in which thousands of people disappeared”.

The CONADEP report, *Nunca Más*, Never Again, was published in November 1984 and recorded 8,960 cases of disappearance, while pointing out that the true figure could be even higher. It listed 340 secret kidnap centres in Argentina and concluded that the armed forces had violated human rights in an organized fashion by making use of the state machinery. It rejected assertions that torture and disappearance were excesses that occurred only rarely. CONADEP concluded that the human rights violations perpetrated by the military government, such as disappearances and torture, were brought about as a result of the widespread use of a method of repression which was set in motion by the Argentine Armed Forces who had “absolute control of the resources of the state.”²

CONADEP reported that “among the victims are thousands who never had any links with such [subversive] activity but were nevertheless subjected to horrific torture because they opposed the military dictatorship, took part in union or student activities, were well-known intellectuals who questioned state terrorism, or simply because they were relatives, friends, or names included in the address book of someone considered subversive”.³ The Prosecutor who conducted the case against the commanders of the Military Juntas, Dr. Julio Strassera, concluded at the end of the trial that the acts carried out by the Argentine Armed Forces should be classified as crimes against humanity and described the years of *de facto* rule as “State terrorism”.⁴

In December 2003 Rodolfo Mattarollo, Cabinet Secretary to the Department of Human Rights, reported to the United Nations High Commissioner for Human Rights quoting a new figure of 13,000 disappeared persons. This figure resulted from additional reports of disappearances received from victims’ relatives.

¹ Nunca Más - Informe de la Comisión Nacional sobre la Desaparición de Personas [Never Again - A Report by Argentina's National Commission on the Disappearance of Persons], Editorial Universitaria de Buenos Aires, Argentina, 1984, p. 8.

² Ibid., p. 479.

³ Ibid., p. 480.

⁴ Amnesty International, Argentina: The Military Juntas and Human Rights, AI Index: AMR 13/04/87.

In 1983 the military government passed an amnesty law⁵ to ensure that they would not be punished for their crimes. However, when institutional government was restored later that year the law was abrogated and the commanders of the military juntas which had ruled Argentina during the period of *de facto* rule, as well as other members of the military who were responsible for human rights violations, were ordered to be brought to trial. Nine military commanders were prosecuted. It was a remarkable trial in which proof of the human rights violations committed under military rule was put forward in evidence by the prosecution. After a complicated appeals process, five commanders were sentenced to imprisonment in 1985. Prosecutions were also brought against other members of the military.

The need for Argentine society to see justice done was frustrated when the Government of President Raúl Alfonsín enacted the Full Stop and Due Obedience Laws in 1986 and 1987 respectively. In 1989 and 1990 the Government of President Carlos Menem granted pardons to members of the military implicated in human rights violations.

Argentine society had certainly not turned its back on truth and justice. Proof that the search for truth and justice continued was evidenced by the great efforts made to keep criminal prosecutions open, clarify the fate and whereabouts of the disappeared and bring to justice those responsible for human rights violations.

3. Judicial actions in other countries

Judicial investigations and proceedings related to human rights violations committed under military rule were started in several countries including Italy, Spain, Germany and Mexico, and requests for the extradition of former members of the Argentine armed forces were presented.

In 1996 the Italian and Spanish courts started legal proceedings in connection with cases of Italian and Spanish nationals who had disappeared in Argentina. Over 100 members of the Argentine security forces, including former members of the military juntas, were summoned by a judge at the *Audiencia Nacional de España*, National Court of Spain, to testify in the cases of 300 Spanish citizens who had disappeared in Argentina between 1976 and 1983. Relatives of the victims, as well as the victims of human rights violations themselves, gave evidence before the court.

In the same year, an Italian judge ordered investigations into the cases of over 70 Italians and Argentinians of Italian origin who had disappeared in Argentina while the military were in power. Amnesty International has repeatedly asked the Argentine authorities to cooperate with the judicial proceedings taking place in other countries in connection with the disappearances that occurred under military rule. In December 2000, an Italian court sentenced seven former officers of the Argentine army to prison sentences ranging from 24 years to life imprisonment. The trial, which took place in Rome *in absentia*, related to the kidnapping and murder of seven Italian citizens and the kidnapping of the son of one of the seven in Argentina during the period of military rule. On 17 March 2003 the Court of Appeals

⁵ Law 22,924 of 22 September 1983.

in Rome upheld the prison sentences of the seven former Argentine officers passed in December 2000.

In June 2003 the Mexican Supreme Court confirmed the extradition to Spain of Ricardo Miguel Cavallo, a former captain in the Argentine navy accused of committing gross human rights violations at the Navy Mechanical School (ESMA) in Buenos Aires. Ricardo Miguel Cavallo was extradited to face charges of genocide and terrorism. Ever since Cavallo's arrest in Mexico in 2000, the Spanish authorities had been requesting his extradition to stand trial in relation to his alleged participation in the grave violations of human rights committed in Argentina under the military governments of 1976-1983. The decision of the Mexican Supreme Court did not, however, grant extradition to face charges of torture as the Spanish authorities had been requesting, on the ground that under Mexican law the statute of limitations for torture had expired. Amnesty International, while recognizing the importance of the ruling, stressed that the widespread and systematic use of torture that was occurring in Argentina under the military governments is a crime against humanity and is not therefore subject to any statute of limitations under international law.

In December 2003 the state prosecuting authority in Nuremberg issued an international arrest warrant against former Argentine president Jorge Videla and two other officers, Carlos Guillermo Suárez Mason and Emilio Massera, for the disappearance and murder of two German citizens, Klaus Zieschank and Elisabeth Kasemann, between 1976 and 1977. The Nuremberg prosecuting authority is currently investigating ten cases of disappearance in Argentina at the request of relatives of victims of German nationality or German origin.

4. Judicial, presidential and legislative actions in Argentina

Cases involving the abduction and concealment of children and the changing of their identities are not covered by the Full Stop and Due Obedience Laws or the presidential pardons. Some 200 cases of disappearances of minors at the hands of the security forces during the period of military rule have been recorded in Argentina. In 1997 a federal judge in Buenos Aires began an investigation into "disappeared" children who had been kidnapped by the security forces together with their parents or who had been born in captivity.

In September 1999 the Federal Chamber confirmed the pre-trial detention of Jorge Rafael Videla, the former commander-in-chief of the army and president of the military junta from 1976 until 1981, and Emilio Massera, a former admiral and member of the first military junta. It rejected the argument that their case had already been tried and that, under the statute of limitations legislation, the time limit for prosecuting the offence had expired. This decision of the Federal Chamber set an important precedent in that it deemed the kidnapping of minors to be a continuing offence and ruled that the statute of limitations did not apply as long as the fate of the victim remained unknown. The Chamber also upheld international law by determining that enforced disappearance is a crime against humanity and therefore falls within the scope of Article 118 of the Constitution which stipulates that crimes against humanity must be tried in accordance with international criminal law.

In November the same year, as part of an amicable settlement sponsored by the Inter-American Commission on Human Rights of the Organization of American States (OAS) in **the case of Carmen Lapacó** whose daughter had “disappeared” in 1977, the Argentine Government accepted and guaranteed that the statute of limitations should not apply to the right to the truth. It committed itself to introducing legislation which would allow the national courts to defend that right.

In March 2001, in a judgment given by Argentine judge Gabriel Cavallo, the Full Stop and Due Obedience Laws were found to be unconstitutional, null and void. The judgment was given in a criminal complaint brought in October 2000 by the Argentine non-governmental organization *Centro de Estudios Legales y Sociales (CELS)*, Centre for Legal and Social Studies, in relation to the enforced disappearance of José Liborio Poblete Roa, his wife Gertrudis Marta Hlaczik and their daughter Claudia Victoria, which took place in 1978. Claudia Victoria Poblete has been traced but her parents are still missing. The judgment was unanimously upheld in November 2001 by Court II of the *Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal de Buenos Aires*, National Appeals Chamber for Federal Criminal and Correctional Matters for Buenos Aires, which based its decision on such treaties as the American Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The three Court II judges stressed that in previous decisions the Supreme Court had already recognized that international law took precedence over all domestic legislation. In their ruling they stated that, in the current environment of a developing constitutional law of human rights, “invalidating Laws 23,492 and 23,521 and declaring them to be unconstitutional is not an option. It is an obligation”.

On 14 August 2002 judgment No. 586/02P, in proceedings entitled “Public Prosecutor’s Office - filing of complaint, Case No. 311/02” conducted at the Office for Criminal Matters at Federal Court No. 1 in Santa Fe, Federal Judge Reinaldo Rubén Rodríguez declared article 1 of the Full Stop Law and articles 1, 3 and 4 of the Due Obedience Law to be invalid and unconstitutional⁶. The case related to an alleged offence of unlawful imprisonment, doubly

⁶ Law 23,492 (“Full Stop Law”): Article 1. The right to bring a criminal action shall cease with respect to any person alleged to have participated in any capacity in the offences referred to in article 10 of Law 23,049, who is not a fugitive, has not been declared to be in default, or on whom a summons to make a statement has not been ordered to be served by a competent court within sixty days of the date of enactment of this law. The same conditions shall apply to any right of criminal action against any person who may have committed offences connected with the use of violent forms of political action prior to 10 December 1983.

Law 23,521 (“Due Obedience” Law): Article 1. Unless evidence to the contrary has been admitted, it is presumed that those who at the time the act was committed held the position of senior officers, junior officers, non-commissioned officers and members of the rank and file of the Armed Forces, security forces, police and prison staff are not punishable for the offences referred to in article 10 point 1 of Law No. 23,049 on the ground that they were acting out of due obedience. The same presumption shall apply to senior officers who did not hold the position of commander-in-chief, area commander, sub-area commander or head of a security or police force or prison staff unless it has been judicially determined within 30 days of the enactment of this law that they had authority to take decisions or were involved in the drawing up of orders. In such cases the aforesaid persons shall automatically be deemed to have acted under a state of coercion in a position of subordination to higher authority and to be following orders without any power or capacity to review, oppose or resist them on grounds of timeliness or legitimacy.

aggravated by being accompanied by violence and threats, in combination with an offence of aggravated torture, committed under military rule in the province of Santa Fe.

In a ruling dated September 2002, Federal Judge Claudio Bonadio declared the Full Stop and Due Obedience Laws to be null and void in case No. 6,869/98 entitled “Scagliusi, Claudio Gustavo and others - unlawful imprisonment”. In point 7.4 of his ruling, Judge Bonadio established that “the acts which are the subject of the proceedings in this case took place within the framework of a systematic plan of unlawful repression ordered and organized [by] the authorities of the military government that usurped institutional power between 24 March 1976 and 10 December 1983 [...]” and that “these acts can [be] classed as crimes against humanity, given that there is abundant evidence in the case of the use of kidnapping, torture, enforced disappearance and murder, etc., [and that these were] carried out in a systematic and planned manner [...]”. Referring to the Full Stop and Due Obedience Laws, he concluded that: “In view of the foregoing, there can be no doubt as to which laws take precedence in this case and I am therefore obliged to declare the so-called ‘full stop’ and ‘due obedience’ laws to be null and void in being not only contrary to the National Constitution but also to the law of nations.”

In March 2003, Federal Judge Carlos Skidelsky declared article 1 of Law 23,492 and articles 1, 3 and 4 of Law 23,521 to be unconstitutional and irrevocably null and void and that they were invalid, affirming “the unconstitutionality of Laws No. 23,492 and 23,521 and the invalidity of their application in the present case”. In his ruling, Judge Skidelsky stated that “these laws mean that the deaths of thousands of Argentine citizens and foreigners over a specific period of time (1976 to 1983), and for that period only, will go completely unpunished and, as a consequence, create a special category of people who have no right to the protection of that most sacred of possessions, human life. In other words, they allow a perverse inequality to be enshrined in law.” Judge Skidelsky’s judgment relates to proceedings concerning the enforced disappearance of persons, torture and aggravated murder in the case known as the “Margarita Belén massacre” which took place in December 1976 in the locality of Margarita Belén in the province of el Chaco. In his ruling Judge Skidelsky also stated that domestic courts must ensure that international standards on human rights protection that are binding on Argentina are implemented throughout the country. The judge

Article 3. This law shall apply as a matter of course. Within five (5) days of its entry into force, in all proceedings in which judgment is pending, whatever procedural stage they have reached, the court in which they are taking place shall take no further action and shall, with regard to the personnel referred to in article 1, first paragraph, make an order under article 252 bis of the Code of Military Justice or, if applicable, cancel any summons for such person to make a statement.

The absence of any pronouncement by the court within the said five-day period or the period specified in the second paragraph of article 1 shall have the effects set out in the previous paragraph, with the force of *res judicata*. If in any proceedings the rank or status held at the time of the events by the person summoned to make a statement has not been established, the said period shall begin to run on the date on which a certificate or statement attesting to such rank or status is issued by a competent authority.

Article 4. Without prejudice to any provisions of Law No. 23,492, in any proceedings with respect to which the time limit specified in article 1 of the first paragraph of the said Law has not expired, no action shall be taken to summon any person mentioned in art. 1 of the present Law to make a statement.

pointed out that the case in question must be examined “not only on the basis of domestic criminal law but also in the light of the human rights treaties that have been ratified by Argentina.”

The Attorney-General of the Nation, Nicolás Becerra, has also made pronouncements confirming rulings of federal judges with regard to the invalid and unconstitutional nature of the Full Stop and Due Obedience Laws. In an opinion of 29 August 2002 addressed to the Supreme Court of Justice, the Attorney-General stated his agreement with the judgment of Judge Gabriel Cavallo declaring both laws to be null, void and unconstitutional. In the opinion, the Attorney-General felt the need to emphasize that “the duty not to impede the investigation and punishment of gross human rights violations, like all obligations derived from international treaties and other sources of international law, is incumbent not only on the Legislature but on all branches of government and therefore requires that the Public Prosecutor’s Office and the Judiciary do not validate actions taken by other branches of government who are infringing them.”

On 29 August 2002, in proceedings entitled “Astiz Alfredo and others, for *delitos de acción pública* (offences for which a public prosecution can be brought)” arising from the enforced disappearance of Conrado Higinio Gómez in January 1977, the Attorney-General addressed another opinion to the Supreme Court of Justice in relation to the Full Stop and Due Obedience Laws. This case was concerned both with the disappearance itself and also with a number of related acts of wrongdoing in connection with property that were prejudicial to the victim and his family. One of the points made by the Attorney-General in the opinion was that “the offence of unlawful imprisonment falls within the category of continuing offences, the particular nature of which is that perpetration does not end once the offence has been carried into effect but continues over time [...] in such a way that the continuing offence goes on being perpetrated until the illegal situation has come to an end.”

In July 2003 the President of the Republic, Néstor Kirchner, revoked Decree No. 1581-01 which had been passed by former President Fernando de la Rúa in December 2001, prohibiting extraditions requested by judges in other countries of persons allegedly implicated in human rights violations committed during the period of military government.

In August 2003 the Full Stop and Due Obedience Laws were annulled by the Argentine Senate; the annulment was confirmed later that month by the Chamber of Deputies. The final decision on whether or not these laws are constitutional has to be taken by the Supreme Court. This decision will remain pending until a ruling has been delivered by the *Cámara de Casación Penal*, Court of Criminal Cassation, to which the Supreme Court had submitted a position paper on the unconstitutional nature of these laws.

5. The Argentine State

The vast majority of human rights violations which took place in Argentina during the period of military rule between 1976 and 1983, resulting in the torture and extrajudicial execution of thousands of people and the “disappearance” of thousands more, have gone unpunished. Most

“disappearances” in Argentina have still not been clarified, the fate of the victims has not been determined and the perpetrators remain at large.

Under international law the Argentine State is not permitted to invoke provisions of domestic law in order to avoid complying with its international obligations, but must bring its legislation into line with those obligations by repealing such provisions and ensuring that they cease to have any legal effect.

The Full Stop and Due Obedience Laws are incompatible with Argentina's international obligations to investigate, bring to justice and punish the perpetrators of such violations. Amnesty International believes that the Argentine courts must open investigations and institute criminal proceedings to try the human rights violations committed under military rule in order to ensure that those responsible for gross violations such as torture, enforced disappearance and extrajudicial execution do not benefit from impunity.