

Impunity Reconsidered

International Law, Domestic Politics, and the Pursuit of Justice

Patricio Nazareno*

INTRODUCTION

Government-directed political violence has left a lasting mark in many nations around the globe. Throughout the 20th century, authoritarian regimes orchestrated their state security forces and judiciaries against their own citizens in order to implement heinous purges and repress political dissidents.¹ Illegal state repression by Latin American dictatorships during the 1970s and 1980s, which claimed or severely affected the lives of tens of thousands of individuals, represents a primary example of this scourge.² The Argentine case was particularly traumatic.³ To counter violent actions by political groups, the state initially restricted itself to legally available means,⁴ yet quickly switched to unlawful tactics. These tactics escalated from sporadic extrajudicial executions⁵ to the deployment of para-police death squads⁶ and, finally, to a massive operation launched by the dictator-

* Assistant Professor of Law, Universidad de San Andrés Law School. I want to thank the thoughtful comments on earlier drafts by Robert Barros, Fernando Braccini, Alejandro Chehtman, Owen Fiss, Roberto Gargarella, Cecilia Garibotti, Sebastián Guidi, Cecilia Hopp, Sam Issacharoff, Ezequiel Malarino, Stratos Pahis, Robert Post, and Guido Waisberg. Excellent research assistance was provided at different stages by Agustín Otero, Mauro Meloni, Victoria Franzolini, Eva Langbehn, and Florencia Lacapmesure. I also want to thank Alicia Alvero Koski and the editing team of the Harvard Human Rights Journal for their assistance with editing this piece. This investigation was in part possible by a PAI grant from Universidad de San Andrés. All translations from Spanish are my own.

1. See generally PAUL BROOKER, TWENTIETH-CENTURY DICTATORSHIPS: THE IDEOLOGICAL ONE-PARTY STATES (1995); Eric Hobbsbawm, *Barbarism: A User's Guide*, 206 NEW LEFT REV. 44 (1994).

2. See GREG GRANDIN, THE LAST COLONIAL MASSACRE: LATIN AMERICA IN THE COLD WAR 184–198 (2011); see generally JOHN DINGES, THE CONDOR YEARS: HOW PINOCHET AND HIS ALLIES BROUGHT TERRORISM TO THREE CONTINENTS (2004).

3. See ANTONIUS ROBBEN, POLITICAL VIOLENCE AND TRAUMA IN ARGENTINA 341–359 (2005). See also MARGUERITE FEITLOWITZ, A LEXICON OF TERROR: ARGENTINA AND THE LEGACIES OF TORTURE (2011).

4. The dictatorial government in power during 1966–1973 sought to reform the criminal justice system in order to increase its capabilities to deal with prosecutions for offenses related to terrorism. See Law [de facto] No. 19.053 (1971), Jun 1, 1971, [22.186] B.O. 2.

5. See ROBERT POTASH, THE ARMY AND POLITICS IN ARGENTINA 1962–1973 444–47 (1996) (describing the Trelew Massacre).

6. The Argentine Anticommunist Alliance (known by the acronym AAA) was a para-police group organized and financed by the right-wing factions of the Peronist government in the mid 1970s to

ship that took power in the 1976 Coup.⁷ Under military rule, being a target of the regime implied disenfranchisement from legal protection⁸ and subjection to vicious brutality, including kidnapping, torture, the theft of newborns, execution, and cover-ups through “disappearance.”⁹ The human costs of these atrocities, committed decades ago, are still palpable today.

These (long) past episodes of illegal state repression have remained present in the lives of now-consolidated democracies for another reason as well. As yet, most countries have been unable to hold perpetrators accountable.¹⁰ Outgoing authoritarian regimes either forced or negotiated their way to impunity during transitions to democracy, and political conditions adverse to justice and legal obstacles shielded this status quo thereafter.¹¹ Some transitional projects did make attempts to settle accounts; still, these attempts were characteristically pursued in limited fashion through selective prosecutions and the imposition of mainly symbolic punishments.¹² This widespread phenomenon of post-conflict impunity led the United Nations Secretary-General in 2004 to foresee that:

In the end, in post-conflict countries, the vast majority of perpetrators of serious violations of human rights and international humanitarian law will never be tried, whether internationally or domestically.¹³

Latin America has been one of the main contributors to this state of affairs. Prosecutions were very scarce during democratic transitions, and since then, only a few countries have sought to partially revisit the impunity arrange-

exterminate the socialist-leaning factions of its own political movement. Its death-squad killings are portrayed in Academy Award winner for Best Foreign Language Film *The Secret in their Eyes* (2009).

7. See generally JACOBO TIMERMAN, PRISONER WITHOUT A NAME, CELL WITHOUT A NUMBER (1981); IAIN GUEST, BEHIND THE DISAPPEARANCES (1990).

8. See MARK OSIEL, MASS ATROCITY, ORDINARY EVIL, AND HANNAH ARENDT 71–78 (2001) (analyzing the repressive apparatus and the judiciary’s role).

9. The Argentine dictatorship was sometimes heinously innovative. While other regimes adopted the disappearance to suppress dissent, it was implemented by Argentina “most barbarously.” GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY 356–58 (2012). Many killings were conducted through shocking “death flights,” in which prisoners were drugged and then thrown, alive, into the sea. See ANTONIUS ROBBEN, ARGENTINA BETRAYED 168–174 (2018). Similarly unprecedented were atrocious instances of newborn identity theft. See *infra* Section IV.A §1.

10. This is essentially the scenario in Spain, Brazil, Paraguay, etc. Other countries have only subjected some perpetrators to trial and punishment.

11. The retributive-justice “score” of several democratic transitions suggests a pattern. Justice efforts were basically absent in transitions negotiated between outgoing and incoming regimes and were only present in the handful of transitions that followed the downfall of authoritarian rule (as it was in the case of Argentina, after the Malvinas/Falkland War defeat). Cf. SAMUEL HUNTINGTON, THE THIRD WAVE 211–231 (1991).

12. See JON ELSTER, CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE 211–15 (2004); LARRY MAY, CRIMES AGAINST HUMANITY 211–16 (2005).

13. U.N. Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies: Rep. of the Secretary-General*, ¶46, U.N. Doc. S/2004/616 (August 23, 2004).

ment.¹⁴ However, this region is also home to the one worldwide exception that has disproved the Secretary-General's pessimism. Over the past fifteen years, Argentina has been conducting a remarkable wave of trials to settle accounts for violations of human rights at the hands of the dictatorships that ruled the country back in the 1970s and early 1980s. This justice enterprise breaks with standard expectations. Neither the fact that the crimes had been perpetrated decades earlier nor the advanced ages of many defendants seems to have made a difference. Instead of being selective, the prosecutions in Argentina have been extremely thorough.¹⁵ The indictments have reached about 3,000 suspects—many of whom were immediately placed in preventive detention—and most have been (and are still being) tried with notably high conviction rates.¹⁶ Furthermore, rather than being merely symbolic, the punishments imposed have been quite severe. Most perpetrators have received lengthy prison sentences, and they are specifically denied common benefits like house arrest.¹⁷

This latest wave of trials has reasserted Argentina's status as the "global leader" in accountability for human rights violations.¹⁸ Not once but twice in recent history have Argentine justice policies ended up being influential internationally. The country first pursued justice for its last dictatorship's crimes immediately after transitioning into a democracy in the mid-1980s, a time when most inaugural democratic governments turned their backs on similar atrocities.¹⁹ This courageous pursuit created a powerful global precedent. As Owen Fiss notes, although the prosecutions fundamentally concerned Argentine criminal law, their framing as a "human rights" matter "enabled them to transcend the limitations of the local culture to which they belonged."²⁰ The intellectual interest this justice endeavor attracted

14. For a thorough review, see generally TRANSITIONAL JUSTICE IN LATIN AMERICA: THE UNEVEN ROAD FROM IMPUNITY TOWARDS ACCOUNTABILITY (Elin Skaar, Jemima García-Godos, & Cath Collins eds., 2016); Naomi Roth-Arriaza, *After Amnesties are Gone: Latin American National Courts and the New Contours of the Fight Against Impunity*, 37 HUM. RTS. Q. 342 (2015).

15. For a detailed account of the rationale determining who is to get indicted, see *infra* notes 263–276, 349–351 and accompanying text.

16. Official data on suspects who have heard a verdict by March 2018 allow for some rough calculations. Approximately 80% of the suspects who have had an investigation against them completed have been put on trial (the remaining had pre-trial acquittals). The conviction rate on trial stands at approximately 90%. See PROCURADURÍA DE CRÍMENES CONTRA LA HUMANIDAD, INFORME ESTADÍSTICO SOBRE EL ESTADO DE LAS CAUSAS POR DELITOS DE LESA HUMANIDAD EN ARGENTINA 11 (2018), <https://www.fiscales.gob.ar/wp-content/uploads/2018/03/LESA-Informe-estadistico.pdf> [<https://perma.cc/FF93-TY2Z>].

17. See *infra* Part II.B §1.

18. Kathryn Sikkink, *From Pariah State to Global Protagonist: Argentina and the Struggle for International Human Rights*, 50(1) LATIN AM. POL. & SOC'Y 1, 1 (2008) (arguing that "Argentine human rights activists were not just passive recipients of this justice cascade but instigators of multiple new human rights tactics and transitional justice mechanisms").

19. See GUILLERMO O'DONNELL & PHILIPPE SCHMITTER, TRANSITIONS FROM AUTHORITARIAN RULE 32–41 (2013); HUNTINGTON, *supra* note 11, at 213–15 (presenting the prosecutions for human rights violations as a dilemma for transitional episodes).

20. OWEN FISS, THE DICTATES OF JUSTICE x (2011).

was so intense that it sparked the field of “transitional justice” studies.²¹ Furthermore, on the institutional plane, Kathryn Sikkink attributes to this Argentine “first wave” of trials the initiation of a “justice cascade” of global reverberations that still endure.²² Argentina’s second landmark moment occurred shortly thereafter, when that first wave of trials was terminated due to a combination of amnesty and pardons.²³ This sequel also had widespread effects—this time by discouraging neighboring nations from embarking on similar justice-seeking endeavors.²⁴ Part I will provide a brief background on the legacy of this Argentine transitional justice effort and its later collapse into impunity.

Over the past fifteen years, breaking an impasse of over a decade, Argentina has restarted its crusade for accountability through its second campaign of trials.²⁵ This second-wave anti-impunity offensive unfolds in circumstances very different from those present during the Latin American transitions to democracy decades ago. The main contextual difference is that transitional politics are over. As concerns over the consolidation of democracy are now off the table, accountability-seeking endeavors are no longer hostage to dilemmas like peace-versus-justice or truth-versus-justice.²⁶ For instance, in contrast to the fate of the first trials, the present justice effort has been ratified recently by outstanding popular support, making it virtually irreversible.²⁷ Apart from the different political landscape, justice projects in these post- (or non-) transitional contexts show two characteristic *legal* features that are worth noting.

First, projects to have impunity reconsidered face severe legal obstacles, usually more challenging than those encountered during transitional stages.²⁸ Although the specifics vary from country to country, the archetypal plan requires targeting amnesties that are settled and were likely

21. See MARCOS ZUNINO, *JUSTICE FRAMED: A GENEALOGY OF TRANSITIONAL JUSTICE* 62–76 (2019); Paige Arthur, *How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice*, 31 *HUM. RTS. Q.* 321, 322, 349–353 (2009).

22. See KATHRYN SIKKINK, *THE JUSTICE CASCADE* 87–95 (2011). Sikkink portrays this “cascade” as leading to the International Criminal Court, whose first Prosecutor had taken part in the Argentine Juntas Trial. *Id.* at 91–92, 97.

23. See *infra* Part I §3.

24. See ARYEH NEIER, *THE INTERNATIONAL HUMAN RIGHTS MOVEMENT* 259–260 (2012). However, even then the Argentine case influenced international law developments. See Ariel Dulitzky, *The Latin American Flavor of Enforced Disappearances*, 19 *CHI. J. INT’L L.* 423, 483–85 (2019).

25. See *infra* Part II.

26. See CATH COLLINS, *POST-TRANSITIONAL JUSTICE: HUMAN RIGHTS TRIALS IN CHILE AND EL SALVADOR* 7–9 (2011).

27. See *infra* Section IV.C.

28. For example, consider the standard transitional-justice difficulty about whether statutes that legalized human rights violations or amnestied perpetrators can be invalidated. The fact that such legislation was passed by a dictatorial regime, which is the standard case in justice endeavors that take place after transitions, opens up a range of arguments that one would not dare to use against, say, democratically-enacted impunity measures. See, e.g., Gustav Radbruch, *Statutory Lawlessness and Supra-Statutory Law* (1946), 26 *OX. J. LEG. ST.* 1, 6 (2006); Lon Fuller, *Positivism and Fidelity to Law*, 71 *HARV. L. REV.* 630, 631–32 (1958).

passed through regular procedures, which must be undone in ways that respect the constitutional ban on retroactive punishment.²⁹ The Argentine case reflects this pattern. After impunity was established as the output of the transition to democracy, pro-accountability activism was defined in scope and ambition by the *legal* obstacles against justice.³⁰ Overcoming these barriers appeared nothing short of titanic. Amnesties, pardons, and statutory limitations protecting perpetrators from prosecution had been enacted democratically, upheld by the courts, and deemed constitutionally solid for over a decade.³¹ To launch a second wave of trials thus depended, first and foremost, on major constitutional transformations that overturned impunity. Subsequently, further adjustments to constitutional doctrines on imprisonment were required in order to accommodate the program's demands for severe punishment. Part II describes these changes in detail.

Second, in contrast to the first feature, in the aftermath of the democratic transitions there has been a growth in international law tools for fostering criminal accountability. Institutional frameworks like ad hoc international tribunals and the International Criminal Court have emerged to either replace or supplement national justice systems.³² In parallel, international norms against impunity (seeking to guide domestic authorities) have proliferated in human rights conventions: clauses that require criminalizing perpetrators have multiplied, and even treaties that are silent on the issue are currently being interpreted with a punitive spin.³³ The latest Argentine anti-impunity assault seems to have profited significantly from these developments. Unlike the early trials back in the 1980s, in which international

29. See generally LOUISE MALLINDER, *AMNESTY, HUMAN RIGHTS AND POLITICAL TRANSITIONS* (2008); RENÉE JEFFERY, *AMNESTIES, ACCOUNTABILITY, AND HUMAN RIGHTS* 170–197 (2014); and the contributions to the volume *AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY* (Francesca Lessa & Leigh Payne eds., 2012). Overturning amnesty is currently *the* agenda of human rights activists in many countries in Latin America and elsewhere.

30. By contrast, the main obstacles during the first wave of trials in the 1980s were political instead of legal. See CARLOS S. NINO, *RADICAL EVIL ON TRIAL* 108–117 (1996). Although Nino speaks in passing of “formidable legal obstacles,” *id.* at 113, by his own authoritative account these obstacles were not formidable at all. He distinguishes between two sets of legal issues faced by human rights trials after transitions. *Id.* at 149–164. One is the “absence of democratic laws to regulate the trials and punishment for human rights violations,” which, he acknowledges, “was not felt in Argentina.” *Id.* at 159. The other problem arises when oppressive regimes enact statutes to legalize their own wrongdoing, which only came up in Argentina obliquely, through a self-amnesty de-facto law passed by the dictatorship, and was done away rather easily with an adjustment to the doctrine of validity of de facto enactments. *Id.* at 149–150. Nino himself was influential in retailoring this doctrine to exclude the self-amnesty. *Id.* at 66, 156–57.

31. See *infra* Part II.

32. See Rome Statute of the International Criminal Court art. 1, July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (1998) (entered into force July 7, 2002) (establishing that the Court's jurisdiction “shall be complementary to national criminal jurisdictions”).

33. See Alexandra Huneeus, *International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts*, 107 AM. J. INT'L LAW 1, 1 (2013). See *infra* notes 185–189 and accompanying text.

law played no role whatsoever,³⁴ during the second wave, lawmakers and judges sought to overcome the obstacles shielding impunity by appealing to norms of international law. Argentine law seems to present an ideal scenario for such a move. Following its transition to democracy, when the first wave of prosecutions was thwarted, Argentina's bond to international law intensified rapidly. The country was among the frontrunners in a trend of ratification of human rights conventions that spread throughout Latin America after the continent moved away from authoritarian rule.³⁵ Later on, in 1994, the Argentine Constitution was amended to incorporate these treaties by adopting a model of profound integration of international sources, which comparative studies have deemed "unique in South America and, arguably, the world."³⁶ When, years later, the Supreme Court confronted the myriad issues pertaining to the second wave of trials in a series of rulings starting in 2004, the justices openly claimed they felt bound to overturn impunity in accordance with the requirements of international sources: developments in *jus cogens*, obligations arising from human rights treaties, and jurisprudential elaborations by international tribunals.³⁷ Part III presents and scrutinizes this judicial argument.

Argentina's proclamation that it was international law that caused the country to move so radically past impunity may infuse hope in justice projects worldwide. The literature has shown optimism about the possible effects of international law in justice-seeking endeavors after serious human rights violations.³⁸ The aspiration is that international norms and exemplary international prosecutions may prompt domestic authorities to overturn impunity. A natural pathway to achieve this is for national authorities to enact constitutional and legislative reforms that enable accountability in compliance with international requirements.³⁹ Yet a more daring (and per-

34. The role that international law did not play but should—or perhaps could—have played in the Argentine transitional justice effort fueled the Orentlicher-Nino debate. Compare Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *YALE L.J.* 2537, 2596–2606 (1991), with Carlos Nino, *The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina*, 100 *YALE L.J.* 2619, 2631–640 (1991).

35. See Alejandro Chehtman, *International Law and Constitutional Law in Latin America*, in *THE OXFORD HANDBOOK OF CONSTITUTIONAL LAW IN LATIN AMERICA* (Conrado Hübner Mendes & Roberto Gargarella eds., forthcoming). See Tom Ginsburg, Svitlana Chernykh & Zachary Elkins, *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 2008 *U. ILL. L. REV.* 201, 203, 229, 236 (2008) (hypothesizing that a reason why nations commit to international law is their recent transitioning to democracy).

36. Janet Koven Levit, *The Constitutionalization of Human Rights in Argentina: Problem or Promise?*, 37 *COLUM. J. TRANSNAT'L L.* 281, 312 (1999). See also Ginsburg, *supra* note 35.

37. See cases cited *infra* notes 103, 108–09, 116–17, 125, 146, 157, 161.

38. See the literature cited in this paragraph.

39. For example, consider the Organization of American States, *Inter-American Convention on Forced Disappearance of Persons*, June 9, 1994, O.A.S.T.S. No. 68, 33 *I.L.M.* 1429 [hereinafter, *IACFDP*]. One of its main goals is that those responsible for committing this crime are punished by state parties within their jurisdictions. In order to achieve such a purpose, the treaty demands that every state must "adopt, in accordance with their constitutional procedures, the legislative measures that may be needed" to make of this atrocity a crime with an appropriate punishment. *IACFDP* art. 3; see also arts. 1(d), 4. The Argentine government deposited the instrument of ratification on February 28th, 1996. However, it

haps common) alternative involves domestic courts more immediately.⁴⁰ The claim here is that, under favorable domestic law conditions, international norms may directly provide compelling reasons to prosecute.⁴¹ Moreover, a more technical form of this claim emphasizes that, even when bringing perpetrators to justice entails the overturn of legally entrenched impunity, applying international norms may actually remove these legal obstacles.⁴² The Argentine second wave of trials seems to fit this blueprint well and thus presents an excellent opportunity to consider these claims. Given recent history, it is not unthinkable that Argentina could be at the verge of sparking a trend of accountability for state-directed human rights violations for a third time.⁴³

This brings us to this Article's main question: what, exactly, did prompt the Argentine anti-impunity shift? In line with the judicial narrative,⁴⁴ scholars have overwhelmingly agreed that international law has been *the* main factor behind the second wave of trials.⁴⁵ Yet an analysis of this thesis casts doubt in important respects. The judges' claim that international norms provided compelling reasons to overturn impunity entails that the second wave of trials came to be in a somewhat oblique manner. It was not

took fifteen years for Argentina to comply with the bulk of its rather simple obligations under the treaty by properly making "forced disappearance" a crime, which came in 2011. See Law No. 26.679 (2011), May 9, 2011, [32.145] B.O. 1, art. 1.

40. See STEVEN R. RATNER, JASON ABRAMS & JAMES BISCHOFF, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 185–197, 203–07 (2009) (reviewing prosecutions concerning international crimes before national courts). See generally WARD N. FERDINANDUSSE, DIRECT APPLICATION OF INTERNATIONAL CRIMINAL LAW IN NATIONAL COURTS (2006).

41. FERDINANDUSSE, *supra* note 40, at 271.

42. See RUTI G. TEITEL, TRANSITIONAL JUSTICE 20–21, 60–62 (2000); Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 762, 791–96 (2004).

43. See, e.g., M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY 692 (2011) (noting that "[t]hrough its unique approach to national prosecutions for [crimes against humanity], Argentina serves as an important historical precedent"); RUTH KOK, STATUTORY LIMITATIONS IN INTERNATIONAL CRIMINAL LAW 141, 211–223, 346 (2007) (presenting Argentine judgments as path-breaking a third main application for international crimes, besides World War II and crimes committed by communist regimes).

44. See *infra* Section III.A.

45. See EZEQUIEL A. GONZÁLEZ-OCANTOS, SHIFTING LEGAL VISIONS 51 (2016) (highlighting that "arguments derived from international human rights law represent the only normative source that enables judges to challenge the validity of amnesties and to ignore statutes of limitations"); SIKKINK, THE JUSTICE CASCADE, *supra* note 22, at 78–79 (attributing the defeat of impunity in the 2000s to the application of international law by domestic courts as a result of the "propitious environment" created by a new constitutional framework that integrated international sources); ELIN SKAAR, JUDICIAL INDEPENDENCE AND HUMAN RIGHTS IN LATIN AMERICA 16–18, 45–46, 91–92 (2011) (claiming that the incorporation of international law into the Constitution "is arguably the single most important factor accounting for the onset of post-transitional justice in Argentina"); Ricardo Gil Lavedra, *The Possibility of Criminal Justice: the Argentinean Experience*, in THE ROLE OF COURTS IN TRANSITIONAL JUSTICE 56, 72, 79–80 (Jessica Almqvist & Carlos Espósito eds., 2012) (noting that developments in international law since the 1990s have been a "decisive factor" in reopening the trials); Fabián Raimondo, *Overcoming Domestic Legal Impediments to the Investigation and Prosecution of Human Rights Violations: The Case of Argentina*, 18 HUM. RTS. BRIEF 15, 19–20 (2011) (finding the Supreme Court's reliance on regional human rights jurisprudence to "have paved the way" for future prosecutions); Christine A.E. Bakker, *A Full Stop to Amnesty in Argentina: The Simón Case*, 3 J. INT'L CRIM. JUST. 1106, 1107 (2005) (noting the "precedence of international law over national law in the Argentine legal order" in amnesty cases).

the Argentine polity that decided to overturn impunity; rather, Argentines chose to be bound by international law,⁴⁶ which later on developed anti-impunity norms that domestic courts were obliged to honor.⁴⁷ One should wonder what would lead a polity so actively involved in the accountability/impunity struggles of the 1980s to completely let go of its sovereign autonomy in order to comply with whatever it was instructed to do on the subject a little over a decade later.⁴⁸ This Article argues that these views on how the anti-impunity shift came about are mistaken. International norms have neither prompted the second wave of trials nor diluted concerns over the legality of the enterprise. Of course, the arguments that the justices advanced depend on technical legal claims. We must therefore analyze the Court's arguments in order to determine whether they are sound, which Section III.B undertakes to do. This analysis of the anti-impunity opinions from the internal point of view will show that we have no basis to believe that the court's claims are correct as a matter of professional legal reasoning, which disproves the explanatory function that judges and scholars have ascribed to international law in the second wave of trials.

At this point, we should take a step back and pause over two new questions posed by these findings. The first is why scholars fall for this account. Clearly enough, scholars have chosen to explain the passage from impunity to trials in a manner consistent with the technical legal arguments that judges and lawyers have articulated.⁴⁹ Taking the judicial account at face value is what produced the above-mentioned incongruities in the understanding of the political processes that led to the trials and what, after legal reasoning is proved wrong, ultimately leaves us without a reasonable explanation for the episode. In order to avoid this predicament, I will argue for endorsing a certain degree of skepticism about judicial discourse. But there is also a second question to address. Given that, under principles of legal reasoning, international law does not seem to justify the rulings, why did the judges appeal to it? This cannot be answered without first addressing the main question of the Article: what caused the Argentine anti-impunity shift? I propose to move beyond the primary focus on legal reasoning and instead explore the anti-impunity rulings from an external point of view that highlights their social and political context. Part IV develops this alternative account. A focus on this perspective, I argue, has the advantage of freeing our analysis from the restraints of the conventional approach focused

46. See *infra* notes 216 to 225 and accompanying text.

47. See *infra* Section V.A(I) §3.

48. Still, such outward-looking methodology conforms to longstanding idiosyncratic traits of the Argentine legal elites. See Jonathan M. Miller, *The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite's Leap of Faith*, 46 AM. U. L. REV. 1483, 1484 (1997) (noting that Argentina used the U.S. Constitution as both a model and a "source of authority").

49. See, e.g., Bakker, *supra* note 45, at 1111 (arguing that the Supreme Court that struck down amnesty laws did so because "there was a consensus about the precedence of international law over municipal law").

on judicial argument. As a result, this new insight allows for a much-improved understanding of the legal intricacies of the judicial decisions that overturned impunity and provides a new basis for considering the political legitimacy of the anti-impunity shift even amidst its legal flaws. I will briefly present these two claims here.

The second wave of trials cannot be fully grasped without considering its political and sociological underpinnings. Retributive justice for the dictatorship's crimes in Argentina has traversed a long, winding path that far exceeds discrete legal developments, both international and domestic. For a start, social movements and mass mobilization have driven the anti-impunity agenda much more substantially than party politics and elections. Indeed, it is beyond dispute that the growing compound of groups and diverse NGOs that make up the Human Rights Movement has been central to the justice endeavor since its inception.⁵⁰ It was, after all, the denunciation of human rights violations by activists in the late 1970s that called global attention to the horrors of state repression.⁵¹ Especially compelling were the iconic protests of middle-aged mothers in white headscarves walking the Plaza de Mayo to demand information about their disappeared children and the award of the Nobel Peace Prize to a Movement activist in 1980.⁵² But the story that concerns us begins in the 1990s, after impunity was instituted. This Article will focus first on the defiance of this status quo through a wide array of norm-contestation strategies by a gradually growing movement against a backdrop of reluctant administrations and courts.⁵³ I will then map the Movement's decisive influence in the design and implementation of the second wave of trials in a context where incumbent officials and justices became supportive of the anti-impunity agenda.⁵⁴ Exclusive focus on the internal point of view of judicial pronouncements misses the fact that it was actually alternative modes of engagement between activists, citizenry, and officials that prompted and shaped the assault on impunity.

At the same time, the external perspective also provides the basis for an argument as to why the second wave of trials is legitimate despite its legal shortcomings. The claim I explore here is that the overturn of impunity was legitimate insofar as the judges made decisions that were responsive to dominant societal demands. As an example, the limitations of the internal explanation were thrown into sharp relief by a recent very important epi-

50. See ALISON BRYSK, *THE POLITICS OF HUMAN RIGHTS IN ARGENTINA* 45–56 (1994) (describing the Movement's origins and early activism).

51. See MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS* 103–110 (1998); JEAN H. QUATAERT, *ADVOCATING DIGNITY* 109–140 (2009) (describing the Movement's strategies during the dictatorship).

52. See generally MARGUERITE GUZMAN BOUVARD, *REVOLUTIONIZING MOTHERHOOD: THE MOTHERS OF THE PLAZA DE MAYO* (1994); JO FISHER, *MOTHERS OF THE DISAPPEARED* (1989).

53. See *infra* Section IV.A.

54. See *infra* Section IV.B.

sode. In mid-2017, a reconstituted Supreme Court passed a judgment that was widely interpreted as a repeal of the second wave of trials.⁵⁵ This caused an overwhelming reaction, including mass mobilizations, the likes of which had not been seen in Argentina previously in response to a judicial decision. The response swiftly incited backlash across the political spectrum.⁵⁶ The new government, which had been ambivalent about the second wave of trials (and had appointed the crucial swing votes in the decision), was compelled to take a position against the judgment; Congress enacted an almost-unanimous statute to reverse the Court;⁵⁷ none of the lower courts followed the precedent;⁵⁸ and, finally, by late 2018, the Supreme Court overturned itself.⁵⁹ Orthodox accounts get entangled in the intricate technicalities of these cases, thus failing to account for the validating force of popular expression.

This analysis reveals a tension from which several intriguing questions arise. Given the occasionally-overshadowing presence of these alternate dynamics of collective decision-making, what role does the law—its materials, standard practices, and institutions—play within their domain? And—even more fundamentally—under which circumstances, if any, may a legitimate policy *justifiably* trump legality? Part V explores these issues and articulates possible responses. The first inquiry will lead us to what I believe is the correct assessment of the importance of international law for the second wave of trials. Notwithstanding powerful criticism about the outsourcing of political governance,⁶⁰ professional recourse to international norms in this episode has enabled judges to increase their ability to respond to societal demands. In tackling the second question, I will show the limitations of the existing frameworks to account for the legitimacy-versus-legality dilemma and will suggest a new direction.

I. BACKGROUND: THE ARGENTINE TRANSITIONAL JUSTICE EXPERIENCE (1983-90) AND ITS LEGACY

The inauguration of a democratically-elected president and congress by the end of 1983 marked Argentina's transition to democracy, putting an end to almost eight years of dictatorial regime.⁶¹ A few months earlier, the election had launched the difficult enterprise of a democratic restoration,

55. See case cited *infra* note 157.

56. See *infra* Section IV.C.

57. See *infra* note 160.

58. See *infra* note 427.

59. See *infra* Section IV.C.

60. See *infra* Section V.A(1) §3.

61. See Alejandro M. Garro, *Nine Years of Transition to Democracy in Argentina: Partial Failure or Qualified Success?*, 31 COLUM. J. TRANSNAT'L L. 1, 7 (1993) [hereinafter Garro, *Nine Years*].

which included many institutional challenges.⁶² We must bear in mind that the country had suffered six coups d'état since 1930 and that, for over half a century, was ruled by de facto regimes for nearly as long as it was by democratically-elected administrations.⁶³ This restoration stage came to an end around 1990, when, for better or worse, it had responded to all of its main challenges—including transitional justice.⁶⁴

Aside from its institutional facets, the restoration of democracy included a vital moral dimension.⁶⁵ At the forefront of the restoration was the clamor for justice against those responsible for horrific human rights violations, especially state agents who alleged that they acted in defense of the nation. The issue was brought up during the 1983 presidential campaign, revealing the contrasting views of the main political parties.⁶⁶ Consequently, when the candidate committed to transitional justice won a landslide victory, it was widely interpreted as popular endorsement for justice.⁶⁷ The project began with a strong drive to gather evidence by forming a commission to

62. See Raúl Alfonsín, *Confronting the Past: "Never Again" in Argentina*, 4 J. DEMOCRACY 15, 15 (1993) ("[T]he building of democracy . . . was essentially a process of creating new institutions and implementing new routines, new habits, and new ways for people to live together.").

63. See BRIAN LOVEMAN, *THE CONSTITUTION OF TYRANNY* 290 (1993). See also LUIS ALBERTO ROMERO, *A HISTORY OF ARGENTINA IN THE TWENTIETH CENTURY* (2013) (describing the coups in 1930, 1943, 1955, 1962, 1966, and 1976). Electoral fraud (1932–1943) and political proscriptions (1955–1973) had also played an important part in the mix.

64. *Three* indicators had roughly characterized the fragility of the Argentine constitutional democracy throughout the Twentieth Century, none of which was instantly reversed with the 1983 inauguration. However, all of these challenges disappeared by 1990. (i) First, as revealed by the six military coups and dictatorial interludes between 1930 and 1983, the Argentine military had been a highly relevant actor in domestic politics, like in most Latin American countries. See generally ROBERT A. POTASH, *THE ARMY & POLITICS IN ARGENTINA 1928–1945: YRIGROYEN TO PERÓN* (1969); ROBERT A. POTASH, *THE ARMY & POLITICS IN ARGENTINA 1945–1962: PERÓN TO FRONDISI* (1980); ROBERT A. POTASH, *THE ARMY & POLITICS IN ARGENTINA 1962–1973: FROM FRONDISI'S FALL TO THE PERONIST RESTORATION* (1996). Even the first two democratic administrations still endured military rebellions throughout the democratic restoration (in 1987, twice in 1988, and again in 1990). These were far from attempts to mount coups, but they did put pressure on fragile institutions. See DEBORAH L. NORDEN, *MILITARY REBELLION IN ARGENTINA: BETWEEN COUPS AND CONSOLIDATION* 1, 128–130 (1996). No military rebellions took place after 1990; since then, the political relevance of Armed Forces has basically evaporated. (ii) Second, for over 70 years, political institutions had shown serious trouble in accommodating political turnover between rival parties, the litmus test of a democratic regime (it had last been achieved in 1916). This practice was restored with the presidential inauguration of 1989, and was then maintained with relative smoothness in 1999, 2015, and 2019. (iii) Third, the political system had been remarkably unable to cope with catastrophic government failures, normally related to economic crises, within rule-of-law parameters: the standard escape valve for critical crossroads was an administration's downfall followed by de facto solutions. This scenario presented itself as soon as 1989, prompting the President to step down, yet this was not followed by a de facto arrangement (although it required the then-unregulated early inauguration of a President-elect). Years later, in 2001, a similarly dramatic crisis also cornered a weakened administration into stepping down in the midst of social turmoil, also without forcing the constitutional rule of law into a de facto situation.

65. See Raúl R. Alfonsín, *Building Democracy*, 12 YALE J. INT'L L. 121, 123 (1987).

66. See José Sebastián Elías, *Constitutional Changes, Transitional Justice, and Legitimacy: The Life and Death of Argentina's "Amnesty" Laws*, 31 HASTINGS INT'L & COMP. L. REV. 587, 596–600 (2008).

67. Congress was unanimous in quashing the dictatorship's self-amnesty when it first convened. See Law No. 23.040 (1983), Dec. 29, 1983, [25.331] B.O. 1.

investigate the dictatorship's crimes.⁶⁸ This has been deemed "the first important truth commission in the world, [which] provided a model for all subsequent truth commissions."⁶⁹ Prosecutions also began immediately, though, as we shall see, not all produced results. The efforts peaked in 1985, when the nine members of the military juntas who had run the country—including three de-facto presidents—were put on trial before an ordinary criminal court.⁷⁰ This famous Trial to the Juntas of commanders in chief stands as a global landmark of criminal accountability for human right atrocities.⁷¹ Yet when efforts at justice sought to move on to lower-ranking officers, they encountered heavy resistance,⁷² which started a gradual slide towards impunity.

Evaluations of the transitional justice legacy have been the subject of never-ending disputes.⁷³ Given that these policies were launched with ambitious goals and considerable popular support,⁷⁴ subsequent reversals were all the more disappointing. Still, important accomplishments must be noted. This legacy may be summarized around three main points.

1. *Legality*. Without a doubt, the most crucial objective of the democratic restoration was reestablishing the (constitutional) rule of law as a foundational value.⁷⁵ With regard to the transitional justice project, adherence to law was especially relevant in criminal proceedings against defendants accused—inter alia—of breaking the law. This contrast mesmerized Jorge Luis Borges upon attending the trials:

It is curiously noteworthy that the military, which abolished the [Criminal] Code and preferred kidnapping, torture, and clandestine executions to the public rule of law, now wants to benefit from this obsolescent antiquity and seeks good defense attorneys. No less admirable is that there are lawyers who, no doubt altruis-

68. See generally Emilio Crenzel, *Argentina's National Commission on the Disappearance of Persons: Contributions to Transitional Justice*, 2 INT'L J. TRANSITIONAL JUST. 173 (2008).

69. Kathryn Sikkink & Carrie Booth Walling, *Argentina's Contribution to Global Trends in Transitional Justice*, in TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY 301, 305 (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006). See *id.* at 308–310 (explaining the influence of the Argentine commission).

70. See Evan W. Gray, *Human Rights: Conviction of Former Argentine Military Commanders for Human Rights Abuses Committed by Subordinates*, 27 HARV. INT'L L. J. 688, 691–92 (1986). Of the nine Junta members, Generals Jorge R. Videla, Roberto E. Viola, and Leopoldo F. Galtieri had successively held the de-facto presidency of Argentina between March 1976 and June 1982.

71. See FISS, *supra* note 20, at ix–xiii.

72. See NORDEN, *supra* note 64, at 103–04.

73. See generally Alejandro M. Garro & Henry Dahl, *Legal Accountability for Human Rights Violations in Argentina: One Step Forward and Two Steps Backward*, 8 HUM. RTS. L. J. 283 (1987); Garro, *Nine Years*, *supra* note 61; Kathryn Lee Crawford, *Due Obedience and the Rights of Victims: Argentina's Transition to Democracy*, 12 HUM. RTS. Q. 17 (1990).

74. See Garro, *Nine Years*, *supra* note 61, at 21; Elías, *supra* note 66, at 598.

75. See Catalina Smulovitz, *The Discovery of Law: Political Consequences in the Argentine Case*, in GLOBAL PRESCRIPTIONS 249, 251–53 (Yves Dezalay & Bryant G. Garth eds., 2002) (noting that "the establishment of the rule of law became not only a demand for justice but also a political program," with lasting effects into the 1990s).

tically, devote themselves to protecting from all hazards their own deniers of yesterday.⁷⁶

Strict compliance with legality in the pursuit of accountability was not only a requirement of fairness but was also vital in the larger scheme of the democratic restoration.⁷⁷

2. *Awareness and Indignation.* Although often overlooked, a major achievement of the transitional justice effort was to expose the brutality and scope of the dictatorship's crimes. The military had been especially secretive regarding its methods, which is why it opted for "disappearing" most of its victims.⁷⁸ The transitional plan sought to lift this veil through highly visible actions, most notably by having the truth commission's *Nunca Más* (*Never Again*) report, which documented "the greatest and most savage tragedy in the history of Argentina,"⁷⁹ made widely available and by assembling reports on the crude depositions produced in the Juntas Trial.⁸⁰ These were actions primarily directed at gathering evidence to inform prosecutions and proving criminal accusations; nonetheless, a crucial collateral effect was to give the public access to firsthand accounts of the horror, building a social sentiment of indignation toward these atrocities.⁸¹ As one in situ observer, Ronald Dworkin, thought, the enterprise was worthy for precisely this reason:

The Mothers of the Plaza de Mayo, and the others who call for prosecution of all torturers and murderers in the military ranks, are right,—not because they are entitled to vengeance, but because the best guarantee against tyranny . . . is a heightened pub-

76. Jorge Luis Borges, *Lunes, 22 de julio de 1985*, EL PAÍS, Aug. 9, 1985.

77. See NINO, *supra* note 30, at 149–185; Jaime Malamud-Goti, *Transitional Governments in the Breach: Why Punish State Criminals?*, 12 HUM. RTS. Q. 1, 4 (1990). Arguably, the one exception to this idea was in the integration of the tribunals, entirely by newly appointed judges. *But see* FISS, *supra* note 20, at xii, 20–23; Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 27/12/1984, "Jorge Rafael Videla," FALLOS 306:2101 (1984), §16.

78. See JOHN SIMPSON & JANA BENNETT, *THE DISAPPEARED AND THE MOTHERS OF THE PLAZA* 152–164 (1985) (discussing the aims of this strategy and its impact on the Human Rights Movement).

79. *NUNCA MÁS (NEVER AGAIN): THE REPORT OF THE ARGENTINE COMMISSION ON THE DISAPPEARED 1* (CONADEP, 1986 (English translation)) [hereinafter *NEVER AGAIN REPORT*]. The original report was published in Spanish as *NUNCA MÁS: INFORME DE LA COMISIÓN NACIONAL SOBRE LA DESAPARICIÓN DE PERSONAS* (CONADEP, 1984). This Article will refer to later editions in Spanish only to note additions and subtractions, *see infra* notes 335 (2006 edition) and 404 (2016 edition).

80. See LUIS RONIGER & MARIO SZNAJDER, *THE LEGACY OF THE HUMAN RIGHTS VIOLATIONS IN THE SOUTHERN CONE* 62–66, 162, 171 (1998) (reporting on the public impact of these measures); Antonius Robben, *Witness Testimony and the Incommensurability of Truth in Argentina*, in *TRANSITIONAL JUSTICE AND THE PUBLIC SPHERE* 221, 229–236 (Chrisje Brants & Susanne Karstedt eds., 2017) (noting the context-specificity of accounts of the truth in the mid-1980s and their impact).

81. See MIHAELA MIHAI, *NEGATIVE EMOTIONS AND TRANSITIONAL JUSTICE* 38–41, 121–22 (2016) (arguing that accommodating social resentment and indignation through justice is crucial for constitutional democracies transitioning after violence). *But see* Nancy Rosenblum, *Justice and the Experience of Injustice*, in *BREAKING THE CYCLES OF HATRED*, 77, 89 (Martha Minow & Nancy L. Rosenblum eds., 2009) (arguing that trials, which "highlight and punish *selective deeds*," can "shut[] out the voices of the aggrieved") (emphasis in original).

lic sense of why it is repulsive. Trials that explore and enforce the idea that torture can have no defense may encourage that sense.⁸²

Awareness of the horror is the main theme of a cultural icon of the era, Oscar-winning film *La Historia Oficial* (The Official Story), which, due to its timely release and success, also contributed—collaterally—to the creation of awareness.⁸³

3. *Impunity*. Disappointingly, the retributive justice effort came to an end before it could realize its promise. The initial drive for justice faced a backlash of military rebellions that threatened to destabilize the emerging democracy.⁸⁴ In the context of increasing economic turmoil,⁸⁵ this prompted the weakened democratic leadership to bring the project to a close. First, in response to the rebellions, an amnesty was promoted in favor of military and police personnel through a couple of Congressional acts during 1986–87,⁸⁶ which specifically excluded the military high command. Then, in 1989–90, the following administration buried all accountability achievements with two sequences of Presidential pardons, benefiting both the officers not covered by the amnesties⁸⁷ and the members of the guerrilla organizations.⁸⁸ These measures sealed the fate of the transitional effort to bring perpetrators to justice and would remain the status quo for about fifteen years.

The triad of subjection to law, social awareness, and ensuing impunity shaped the legacy of the transition as far as retributive justice went. Legality was consciously preserved throughout—even the enactment of the impunity measures complied with the constitutional mechanisms.⁸⁹ Yet vivid tensions lingered between the remaining two: the resulting impunity stood in conflict with the desire that developed in an increasingly-aware community to have perpetrators punished.⁹⁰ As the anti-impunity program sought to unravel the tensions imbedded in this legacy, it was set on a course to confront major legal obstacles.

82. Ronald Dworkin, *Report from Hell*, 33 NY REV. OF BOOKS 12 (1986).

83. *La Historia Oficial* (1985). The plot depicts Alicia, an upper-middle-class wife (metaphorically personifying a huge sector of Argentine society), as she gradually discovers that her recent prosperity was due to her husband's involvement with the dictatorship and that her adopted daughter is a child of a "disappeared" couple.

84. See NORDEN, *supra* note 64, at 103–04, 106–07.

85. See William C. Smith, *Democracy Distributional Conflicts, and Macroeconomic Policymaking in Argentina*, 1983-89, 32 J. INTERAMERICAN STUD. & WORLD AFF. 1, 1 (1990).

86. See Law No. 23.492 (1986), Dec. 29, 1986, [26.058] B.O. 1 (known as the "Full-Stop Act"); Law No. 23.521 (1987), June 9, 1987, [Suplemento Especial] B.O. 1 (known as the "Due Obedience Act").

87. See Decree No. 1002 (1989), Oct. 10, 1989, [26.736] B.O. 4; Decree No. 1005 (1989), Oct. 10, 1989, [26.736] B.O. 8; Decree No. 2741 (1990), Jan. 3, 1991, [27.044] B.O. 9; Decree No. 2745 (1990), Jan. 3, 1991, [27.044] B.O. 10; Decree No. 2746 (1990), Jan. 3, 1991, [27.044] B.O. 11.

88. See Decree No. 1003 (1989), Oct. 10, 1989, [26.736] B.O. 5; Decree No. 2742 (1990), Jan. 3, 1991, [27.044] B.O. 9.

89. See RONIGER & SZNAJDER, *supra* note 80, at 176–77.

90. See *infra* Part IV.

A few years after the democratic restoration ended, a constitutional reform crowned the process by incorporating the lessons learned during both the dictatorship and the transition.⁹¹ The scars left by the country's recent history are noticeable in several clauses of the text reformed in 1994. Indeed, the Reformed Constitution criminalizes de facto regimes, nullifies rule-of-law breaches, and enthrones human rights by granting international conventions constitutional rank.⁹² As we shall see, these changes produced an important shift in the legal platform over which the new era of disputes over impunity unfolded.

II. THE CORE OF THE (NEW) JUSTICE PROGRAM: CONSTITUTIONAL TRANSFORMATIONS ON IMPUNITY AND IMPRISONMENT

Plans for the criminal punishment of those responsible for human rights violations during the dictatorship encountered major constitutional obstacles. We may group these numerous barriers in two categories. To begin with, (a) constitutional safeguards against retroactive punishment protected perpetrators from prosecution and trial, especially after impunity measures were passed.⁹³ This first group of obstacles I will refer to as the “impunity cluster.” Nonetheless, once this impediment was overcome and investigations re-opened, further issues arose. Most of the crimes had occurred in the late 1970s, which meant that thirty years later, many of the suspects, if they were still alive, were of advanced age, especially the higher-ranking officers who bore more responsibility for exercising command functions.⁹⁴ Moreover, different circumstances led to the prolongation of the investigations and trials,⁹⁵ which further postponed sentencing and increased the chances that plenty of the perpetrators would die before hearing a verdict.⁹⁶ In such a context, (b) stringent constitutional protections against pre-trial detention and inhumane imprisonment⁹⁷ served as a second group of hur-

91. See Levit, *supra* note 36, at 287–292. Although an important part of the Argentine constitutional text remains as it was written in 1853, with the few amendments passed in 1860, 1866, 1898, and 1957, the 1994 reform made substantial changes to an important number of clauses. See CONSTITUCIÓN NACIONAL [CONST. NAC.] (text promulgated by Law No. 24.430 (1994), Jan. 10, 1995, [28.057] B.O. 1).

92. *Infra* Section III.B (explaining these new constitutional features as part of the argument).

93. See RONIGER & SZNAJDER, *supra* note 80, at 176–77.

94. See, e.g., Daniel Schweimler, *Argentine Chiefs Jailed for Life*, BBC (Aug. 28, 2008), <http://news.bbc.co.uk/2/hi/americas/7587199.stm> [<https://perma.cc/BK9S-BAH3>] (noting the ages of the main accused); *Videla Trial Opens in Argentina*, BBC (July 3, 2010), <https://www.bbc.com/news/10496171> [<https://perma.cc/84XS-QBQ3>] (specifying former dictator Videla's age).

95. See PROCURADURÍA DE CRÍMENES CONTRA LA HUMANIDAD, TRAYECTORIAS TEMPORALES DE LOS JUICIOS POR CRÍMENES DE LESA HUMANIDAD (2018), <https://www.fiscales.gob.ar/wp-content/uploads/2018/03/LESA-Informe-trayectoria.pdf> [<https://perma.cc/QF25-P2DQ>].

96. As of March 2018, one sixth of all suspects indicted had passed away before a verdict. See INFORME ESTADÍSTICO, *supra* note 16, at 12.

97. See Art. 18, CONST. NAC.; Organization of American States, *American Convention on Human Rights*, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR], arts. 7, 8, 9; *International Covenant on Civil and Political Rights*, Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999

dles to the justice program. Unless these were retailored to accommodate the demand for severe punishment, most perpetrators could end up serving minimal, if any, time in prison. This Part analyzes each group of obstacles and the constitutional transformations that were crucial to overcome them in order to accommodate the new justice program starting in the 2000s.

A. *Overcoming the Impunity Cluster*

By 1990, the transition period had left a constitutionally entrenched “cluster” of impunity structured in an overlay of constitutional stipulations of different kinds. (i) One kind was the clauses that granted powers to the branches of government to, in particular, enact statutes of limitations impeding criminal prosecutions after the passage of time and pass impunity measures in the form of congressional amnesties and presidential pardons.⁹⁸ (ii) Another kind was the provisions stipulating that, once criminal law measures (including all of the aforementioned) were validly enacted, defendants had the *right* to benefit from the most favorable conditions and to not have posteriorly-enacted harsher ones be applied to them retroactively.⁹⁹ Given this cluster-like arrangement, there seemed to be two ways to overcome impunity. One strategy was to block the provisions of the latter kind by amending the Constitution to exclude perpetrators of illegal state repression from the protection against retroactive changes. An alternative course of action was to focus on the provisions of the first kind, having the courts reinterpret them in ways that rendered unconstitutional all of the enactments on limitations and impunity favoring these offenders. It was this latter plan that was mostly followed.

1. *Statutory Limitations.* The Argentine Criminal Code establishes general statutory limitations that apply to all offenses, which specify that the most serious crimes must be prosecuted within fifteen years of their commission.¹⁰⁰ Consequently, even if impunity measures had not been part of the equation, statutory limitations in force when these crimes were committed in the 1970s and 1980s presented an obstacle for prosecuting them in the 2000s.¹⁰¹ Hence, disallowing the applicability of these limitations for

U.N.T.S. 171 (entered into force Mar. 23, 1976), arts. 2, 14; *Universal Declaration of Human Rights*, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), arts. 8, 9, 10, 11. See also CÓDIGO PROCESAL PENAL DE LA NACIÓN [CÓD. PROC. PEN.] [CRIMINAL PROCEDURE CODE] (enacted by Law No. 23.984 (1991), Sep. 9, 1991, [27.215] B.O. 1), art. 313.

98. See Arts. 75.12 (on criminal legislation), 75.20 (on amnesties) and 99.5 (on pardons), CONST. NAC.

99. See Art. 18, CONST. NAC.; Art. 9, AHCR; and CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] (enacted by Law No. 11.179 (1921), Nov. 3, 1921, [8.300] B.O. 21, full text in [Diario de Sesiones de la Cámara de Senadores Año 1921] Sesiones Ordinarias y Extraordinarias 25/4/1921 –18/4/1927, 826), art. 2.

100. See CÓD. PEN. [CRIMINAL CODE], arts. 59.3, 62.1, 63.

101. Later legal reforms establish that the limitations clock for forced disappearances does not begin until the victim or her remains are found. See *Inter-American Convention on Forced Disappearance of Persons*, *supra* note 39, art. III, approved by Law No. 24.556 (1995), Oct. 18, 1995, [28.251] B.O. 7.;

crimes related to illegal state repression was vital for re-opening the trials. Congress made a first attempt at this through a limited mechanism of constitutional change in 2003.¹⁰² Yet it was the Supreme Court that definitively achieved this effect in 2004 by striking down statutory limitations for these crimes on the grounds that they were already unconstitutional by the 1970s.¹⁰³

2. *Amnesties and Pardons.* Both Congress and the President had exercised their impunity-granting constitutional powers in favor of perpetrators of crimes related to illegal state repression: amnesties were passed in 1986–87 and pardons were issued in 1989–90.¹⁰⁴ As expected, challenges to each of these measures eventually reached the Supreme Court, who decided to uphold both—the amnesties in 1987,¹⁰⁵ the pardons in 1992.¹⁰⁶ Some of the constitutional objections against these impunity measures provoked at the time did seem powerful and were endorsed by the few dissenting justices,

International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. 61/177, 2716 U.N.T.S. 3 (Dec. 20, 2006), art. 8.I(b), approved by Law No. 26.298 (2007), Nov. 30, 2007, [31.293] B.O. 3. Yet these entered into force after the dictatorship had perpetrated its crimes. There is an argument, however, that connects this continuous nature of the forced disappearance crime with the fact that statutory changes apply to perpetrators even when these changes are for the worse. To my knowledge, this argument has only been referred to sporadically in Argentina.

102. Congress sought to produce this effect by granting constitutional rank to the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, Nov. 26, 1968, 754 U.N.T.S. 73 [hereinafter, CNASL]. See Law No. 25.778 (2003), Sep. 3, 2003, [30.226] B.O. 1. This Convention came right on point, given that its explicit purpose was “to affirm in international law . . . the principle that there is no period of limitation [preventing the prosecution and punishment of persons responsible for] crimes against humanity.” CNASL Preamble ¶7. Accordingly, it proclaims that “[n]o statutory limitation shall apply to [such] crimes, irrespective of the date of their commission.” CNASL art. I. In order to achieve this goal, the treaty seeks “to secure [the] universal application” of this norm of international law in lieu of “rules of [domestic] law relating to the period of limitation for ordinary crimes.” CNASL Preamble ¶¶6–7. Now, there are reasons to believe that this attempt was futile under the constitutional system of incorporation. Certainly, Congress may grant “constitutional hierarchy” to human rights treaties. See Art. 75.22, CONST. NAC. Although the effects of this elevation are far from clear, the most explicit guideline is that elevated treaties do not alter provisions contained in the bill of rights. See *infra* notes 224–225. Because the ban on retroactive punishment is one of such provisions, see Art. 18, CONST. NAC., one would think that the effects of elevated conventions over criminal law could only be prospective. As we will see, however, the Supreme Court’s holdings on the second wave of trials, which would begin a year after Congress’ enactments, would make this congressional strategy superfluous. See *infra* Section III.A.

103. See Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 24/8/2004, “Arancibia Clavel, Enrique Lautaro s/homicidio calificado y asociación ilícita y otros—causa 259,” FALLOS 327:3312 (2004) [hereinafter: *Arancibia* (2004)]. For the judicial criticism of the Congressional strategy analyzed *supra* note 102, see *Arancibia* (2004) (J. Belluscio dissenting, §§13–16; J. Fayt dissenting, §§13–32).

104. See *supra* notes 86, 87.

105. See Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 22/6/1987, “Causa incoada en virtud del decreto 280/84 del Poder Ejecutivo Nacional—Ramón Juan Alberto Camps y otros,” FALLOS 310:1162 (1987) [hereinafter: *Camps* (1987)].

106. See Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/10/1992, “Aquino, Mercedes s/ denuncia (Caso Martinelli—Oliva) s/plantea inconstitucionalidad del decreto 1002/89,” FALLOS 315:2421 (1992) [hereinafter: *Aquino* (1992)]. See also Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 11/12/1990, “Riveros, Santiago Omar y otros s/ privación ilegal de la libertad, tormentos, homicidios, etc.,” FALLOS 313:1392 (1990) [hereinafter: *Riveros* (1990)] (JJ. Petracchi & Oyhanarte concurring opinion).

yet these criticisms look remarkably different from those that a later generation of justices would direct at these same measures in fifteen years.¹⁰⁷ Judicially blessed, the amnesties and pardons came to define the impunity era and were therefore the primary target of any impunity-overturning program. After a controversial attempt by Congress to nullify the amnesties in 2003,¹⁰⁸ they were definitively struck down by the Court in 2005 on the grounds that it was constitutionally impermissible to grant amnesty to illegal state repression.¹⁰⁹ The pardons were also struck down on the same basis a couple of years later.¹¹⁰ These two judgments opened the gates for a flood of criminal prosecutions across the country.

B. *Re-Tailoring Imprisonment Doctrines*

The reopening of prosecutions for illegal state repression led to the preventive detention of many suspects under the claim that their freedom could jeopardize the criminal proceedings against them. For most of the defendants, however, these conjectures appeared unwarranted: there had been no signs of rebelliousness,¹¹¹ many were elderly, and some even suffered from poor health.¹¹² In time, as the investigations began to take

107. See CSJN, *Camps* (1987) (J. Bacque dissenting, §§10–14) (voting to strike down an amnesty law for infringing the separation of powers and on the argument that, in the Justice's view, there are crimes that cannot be amnestied); CSJN, *Aquino* (1992) (CJ. Levene & J. Belluscio dissenting §§11–14) (voting to strike down presidential pardons for infringing the separation of powers, given that in the Argentine Constitution the President's power to pardon is more limited than in the Anglo-American tradition).

108. Because of the constitutional ban on retroactive punishment, the amnesties had full effect after having validly entered into force (even if later abrogated). Congress sought to erase all effects by establishing both amnesty laws to be “null and void beyond repair.” Law No. 25.779 (2003), Sep. 3, 2003, [30.226] B.O. 1, art. 1. For the judicial fate of this Act, see *infra* note 109.

109. See Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/6/2005, “Recurso de hecho deducido por la defensa de Julio Héctor Simón en la causa Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc.—causa N° 17.768,” FALLOS 328:2056 (2005) [hereinafter: *Simón* (2005)]. Besides considering the constitutional challenges to the amnesty laws, the Court here reviewed Law No. 25.779 (2003), *supra* note 108, to rule on Congress' attempt at nullifying the amnesties. The Court noted that this attempt violated the separation of powers, given that only the judiciary could strike down enacted legislation. Still, the Court upheld the Act as a one-off episode because of its own ruling that the amnesties were unconstitutional. See CSJN, *Simón* (2005) (CJ. Petracchi concurring, §34; J. Maqueda concurring, §17; J. Zaffaroni concurring, §36; J. Highton concurring, §29; J. Lorenzetti concurring, §29).

110. See Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 13/7/2007, “Mazzeo, Julio Lilo y otros s/ rec. de casación e inconstitucionalidad,” FALLOS 330:3248 (2007) [hereinafter: *Mazzeo* (2007)]. See also Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 31/8/2010, “Videla, Jorge Rafael y Massera, Emilio Eduardo s/recurso de casación,” FALLOS 333:1657 (2010) [hereinafter: *Videla y Massera* (2010)].

111. There were episodes where suspects evaded justice: at times the number of fugitives surpassed 50. See Gabriel Di Nicola, *Lawless estuvo ocho meses prófugo con ayuda de su familia*, LA NACIÓN (July 22, 2014), <https://www.lanacion.com.ar/politica/lawless-estuvo-ocho-meses-profugo-con-ayuda-de-su-familia-nid1712011> [https://perma.cc/8PET-K38F]. However, in the ample majority of cases, preventive detention was ordered without such particularized grounds to justify it.

112. See *supra* note 94. See, e.g., Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal de la Capital Federal [CFed.] [Federal Court of Criminal Appeals], panel I, 23/12/2008, “Causa 42.582: Videla, Jorge Rafael s/ detención y traslado,” *La Ley online* 70050957 (2008) (deciding that

longer than expected, the tensions caused by maintaining suspects under custody despite the strict regime on preventive detentions in force became more and more noticeable.¹¹³ The peak of the crisis came as the higher criminal courts were able to scrutinize these imprisonments under the established guidelines, which led to several reversals.¹¹⁴ Yet the Supreme Court intervened, despite the fact that the matter stood beyond the scope of its jurisdiction.¹¹⁵ The justices' decision was not to enforce the general rules on preventive detention in these cases but, instead, to develop a bespoke doctrine for suspects of illegal state repression, which came to be known as the "Vigo Doctrine."¹¹⁶ Although these guidelines primarily pertained to preventive detention, they also engaged with some related issues concerning punishment.

Rules of criminal procedure allow the justice system to keep persons indicted for felonies in custody during the investigation, trial, and ensuing appeals.¹¹⁷ Still, despite being a frequently employed tool, preventive detention is widely acknowledged to stand in tension with fundamental rights.¹¹⁸ Hence, legislative and doctrinal rules have been developed to assure that its implementation conforms to constitutional values and principles of international human rights.¹¹⁹ These regulations basically burden the prosecution by establishing requirements it must meet for preventive

former dictator's Videla advanced age and health issues, while significant, have to be considered in the context of the crimes he committed, thus denying his domiciliary detention); Comm. on the Rights of Pers. with Disabilities, Views Adopted by the Comm. at its Eleventh Session (31 March–11 April 2014), *Communication No 8/2012*, U.N. Doc. CRPD/C/11/D/8/2012 (June 18, 2014) (considering the imprisonment conditions—throughout the investigation, trial and appellate process—of a former police officer who suffered from major health issues).

113. See *infra* II(B)§2 (discussing rules on extensions and time limits for preventive detention). In October 2019, the Bishop for the Military Services criticized the unlimited extension. See *infra* note 151.

114. See Law 25.430 (2001), art. 1 (stipulating automatic oversight by the Courts of Appeals as preventive detentions surpass two years).

115. Thus, dissenting justices voted to deny review.

116. Named after the first Supreme Court precedent that elaborated on the point. See Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/9/2010, "Vigo, Alberto Gabriel s/causa 10.919" (PGN Opinion 31/8/2009, adopted), 261/2009(45-V) (2010) [hereinafter: *Vigo* (2010)]. For the Court itself identifying this doctrine with the *Vigo* precedent, see case cited *infra* note 131, §9.

117. I will only consider the constraints on preventive detention during the criminal investigation and trial. Detentions during the stage of appeals are presently unrestricted. See Law No. 25.430, *supra* note 114, art. 2. However, there is an unresolved issue on whether those prosecuted for illegal state repression can benefit from the more favorable regime in force until 2001, which capped these detentions at six months. See Law No. 24.390 (1994), Nov. 22, 1994, [28.023] B.O. 1, art. 2. Cf. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 8/5/2012, "Acosta, Jorge Eduardo otros s/recurso de casación," FALLOS 335:533 (2012) [hereinafter: *Acosta* (2012)], §12 (noting the issue, yet eluding its consideration).

118. See Art. 15, CONST. NAC.; ACHR art. 7.1. Moreover, it is frequently argued that preventive detention compromises the presumption of innocence given that, despite being conceptually different from any sort of punishment, it does involve roughly the same regime of restrictions to which convicted criminals are subject. See Art. 18, CONST. NAC.; ACHR arts. 7.2, 8.2.

119. See Law No. 24.390 (1994), *supra* note 117, art. 10 (amended by Law 25.430 (2001), *supra* note 114).

detentions to be granted. One is the duty to provide specific reasons sufficient to outweigh the constitutional protection of the suspect's liberty.¹²⁰ The other is that the threshold of scrutiny varies as the time in detention accumulates, following a ladder-like system of standards of increasing stringency.¹²¹ For cases of illegal state repression, however, as we will see, the Supreme Court has implemented a series of doctrinal adjustments that have almost completely relieved prosecutors of such a burden. Indeed, although the scheme of standards and tests has been nominally preserved, radical changes were introduced under the surface, allowing suspects of illegal state repression to be preventively detained rather easily and held in such conditions indefinitely. We will now see how this relaxation works for each of these standards.

1. *Basic Standard—Justifying Detention.* Preventive detention is thoroughly governed by one basic standard, namely, that no indicted person can be held in detention unless her freedom *creates risks* for the investigation or ensuing trial.¹²² To make this case, the prosecution must provide concrete evidence about each suspect's possibilities and attitudes toward the proceedings to show probable cause that she may either alter the evidence or flee to evade justice.¹²³ Provided this standard is met and the risks persist, suspects can be kept in custody for a period that may last *up to* two years.¹²⁴

This general criminal law standard has been entirely supplanted for the second wave of trials by the *Vigo Doctrine*, which was primarily constructed to hypothesize about the possible risks that the freedom of these suspects could create for the investigations. Thus, it began by asserting that

it would be naive to deny that the structures of power that acted in complete disregard of the law at the time of the events [i.e. during the dictatorship (1976-83)], which were integrated into a continental network devoted to illegitimate repression, *still maintain some residual activity today*.¹²⁵

120. This is an instantiation of the principle that requires that imprisonments can only be imposed under a valid justification. See ACHR art. 7.3.

121. This scheme of standards implements the norm that holds that since preventive detention is an instrument associated with a developing criminal investigation, it can only last as long as it is reasonable for such proceedings to endure. See ACHR art. 7.5.

122. See CÓD. PROC. PEN. [CRIMINAL PROCEDURE CODE], *supra* note 97, art. 319.

123. See *generally* Cámara Nacional de Casación Penal [CNCP] [Federal Court of Criminal Cassation], en banc, 30/10/2008, "Díaz Bessone, Ramón Genaro, s/recurso de inaplicabilidad de ley," LA LEY (2008-F-420).

124. See Law 25.430 (2001), *supra* note 114, art. 1.

125. CSJN, *Vigo* (2010), §III ¶5 (my emphasis). See also Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 1/11/2011, "Otero, Edgardo Aroldo s/causa 12.003" (PGN Opinion 2/6/2010, adopted), 83/2010(46-O) (2011) [hereinafter: *Otero* (2011)], §III ¶8 (noting that the suspect "created under the umbrella of a dictatorship that, aside from governing the country for seven years, was a part of a continental network of illegal repression, whose operative structures provided plenty of evidence of their power even after democracy was restored in the region"); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 1/11/2011, "Daer, Juan de Dios s/causa 11.874" (PGN Opinion 18/5/2010, adopted), 174/2010(46-D) (2011) [hereinafter:

The findings provided to back up this conclusion were surprisingly slim.¹²⁶ In any case, the assumption that evil forces still operate in the shadows serves a crucial function in the risk assessments for each individual suspect.¹²⁷ The most challenging situation arose with regard to defendants who had exercised command positions during the dictatorship, most of whom were now elderly—some even suffered health issues—and therefore appeared harmless.¹²⁸ The justices accepted that there was no reason to “fear an elderly person because of his physical capabilities to flee or to actively obstruct the proceedings.”¹²⁹ Still, the Court conjectured that their freedom did present a risk “because of the influence [these retired high-ranking officers] may retain over those structures that once were subordinate to [them] and that, sadly, may still exist in this country.”¹³⁰ Notice, however, how this justification of preventive imprisonment is tuned to a different pitch than what the “basic risks” standard requires. First, the central hypothesis about dirty-war squads continuing to be active stands as a given and, therefore, is immune to refutation by the defense.¹³¹ Second, by focusing on the roles performed by defendants thirty years ago, instead of on their (rebellious) attitudes toward the investigation, risk assessments are based on a template that is applicable to virtually every single person indicted for these crimes.¹³² Lastly, given that, unlike in ordinary cases,¹³³ risk evaluations do not depend on considerations that are particular to each individual, there is no room for situational changes that might warrant reconsidering the restrictions to liberty. The basic risks remain ever present.

This line of precedent, or rather its between-the-lines reading, spread beyond preventive detention. A spin-off doctrine led lower courts to be very strict in granting requests for alleviating restrictions to liberty due to ad-

Daer (2011)], §III ¶10 (noting, without particular references, that “some of the crimes under investigation are still being committed”); CSJN, *Acosta* (2012), §24(b).

126. At first, the Court referred to the confusing episode involving witness Jorge Julio López, a surviving victim of State terrorism who disappeared without a trace in 2006, six months after he had provided testimony on a trial for illegal State repression. See CSJN, *Vigo* (2010), §III ¶¶4–5. This case is unresolved to this day. In later opinions, the Court merely claimed that these forces had provided “plenty of evidence of their power, even after democracy had been restored in the region.” CSJN, *Otero* (2011), §III ¶8; CSJN, *Daer* (2011), §III ¶8.

127. See e.g., CSJN, *Daer* (2011), III ¶¶7, 10 (noting that the defendant was “a rigorously trained military officer, capable of clandestine action and to dispose of or hide all incriminating evidence,” and that he had “the expertise, the means, and the contacts with those structures, which he could use if he were to be released, allowing to presume that he could be in a position to obstruct justice.”).

128. See *supra* notes 94, 112. See also *infra* note 146.

129. CSJN, *Otero* (2011), §III ¶9. See also Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 27/8/2013, “Olivera Róvere, Jorge Carlos s/recurso de casación,” 296/2012(48-O) (2013) [hereinafter: *Olivera Róvere* (2013)], §5.

130. CSJN, *Otero* (2011), §III ¶9.

131. Cf. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 18/4/2017, “Alespeiti, Felipe Jorge s/incidente de recurso extraordinario,” FALLOS 340:493 (2017) [hereinafter: *Alespeiti* (2017)] (JJ. Rosatti & Rosenkrantz concurring, §10) (pointing out that the basic risks must be reasonably established).

132. *Id.* at §9.

133. See generally CNCP, “Diaz Bessone,” *supra* note 123.

vanced age or illness.¹³⁴ Indeed, despite the fact that the law gives judges significant discretion to decide on house arrest or exemption from electronic bracelets,¹³⁵ decisions on these matters appear consistently and notably harsher in cases of illegal state repression than in the rest of cases.¹³⁶

2. *Heightened Standard—Extensions and Time Limits.* Once a suspect's preventive detention reaches the initial two-year time limit, she may continue to be held under custody when the case meets a heightened standard.¹³⁷ The prosecution must now make the case that the basic risks persist *and* that the accusations have proven *complex to investigate*.¹³⁸ Requests to extend preventive detention are attentively scrutinized by higher courts.¹³⁹ Allegations of complexity are balanced against the progress made in an investigation to make sure that the justice system is not to blame for the delays.¹⁴⁰ Therefore, when granted, extensions are typically authorized for shorter spans, allowing for periodic oversight of the case's progress.¹⁴¹ Moreover, time extensions granted on grounds of "complexity" face an additional restriction: the law caps them to one extra (third) year.¹⁴² Further extensions, while legally permissible, are constitutionally tolerable only for cases that concern *serious* crimes.¹⁴³ In practice, this added stringency ends up being more effective than it might appear due to the fact that serious crimes (e.g. murder, rape) hardly ever qualify as "complex" enough to allow surpassing the two-years deadline.¹⁴⁴ Thus, as a matter of fact, preventive detention almost never extends beyond the three-year cap.¹⁴⁵

As for the human rights violations that occurred during the dictatorship, their seriousness cannot, of course, be overstated. The Court itself estab-

134. See CSJN, *Alespeiti* (2017) (J. Maqueda concurring, §§11, 17–18).

135. See Law No. 24.660 (1996), Jul. 16, 1996, [28.436] B.O. 2, art. 32 (stipulating that inmates over 70 years old or suffering from poor health *may* qualify for house arrest).

136. It may be argued that such deviant application further compromises constitutional values, given that this involves the constitutional ban against cruel, inhumane, and degrading treatment for inmates. See Art. 18, CONST. NAC.; ACHR art. 5.2.

137. See Law 25.430 (2001), *supra* note 114, art. 1.

138. *Id.*

139. *Id.* (stipulating that extensions must be notified to a higher court for mandatory review).

140. *Id.*

141. This is general practice in Argentine federal criminal courts.

142. Legislation is confusing on this point. Although in spirit it has intended to cap extensions to a three-year limit, it has not actually set a firm ban against further postponements. This has resulted in institutional disagreements when interpreting old Law No. 24.390 (1994), *supra* note 117. Compare Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 9/12/1996, "Bramajo, Hernán Javier s/incidente de excarcelación—causa 44.891," FALLOS 319:1840 (1996) (construing the statute as not setting a strict 3-year limit to preventive imprisonment) *with* Bayarri v. Argentina, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 187, ¶ 74 (Oct. 30, 2008) (interpreting the statute as indeed setting a strict 3-year maximum).

143. *Cf.* Law 25.430 (2001), *supra* note 114, art. 3; CSJN, *Acosta* (2012), §21 (noting that extensions beyond 3 years are only constitutionally tolerable if interpreted within the general pattern of increasing restrictiveness).

144. See CSJN, *Acosta* (2012) at §23 (recognizing that serious crimes are technically complex to investigate only on very rare occasions).

145. *Id.*

lished this in rejecting the request of an elderly suspect who had demanded to be released upon reaching the three-years deadline.¹⁴⁶ The justices endorsed the view that,

taking into consideration the seriousness of the human rights violations the suspect is charged with, to keep him in preventive detention [beyond the three-year limit] does not appear to infringe on his fundamental rights.¹⁴⁷

Now, when “complexity” is factored in, an interesting phenomenon occurs. The Court categorically asserted that investigations of state repression during the dictatorship are of a “much higher complexity than the cases ordinarily dealt with by Federal judges.”¹⁴⁸ But then, how could it be that the features of complexity and seriousness that so rarely coincide in ordinary crimes always do in this particular set of cases? The Court explained this peculiarity by postulating that the complexity of these investigations is due to a circumstance unique to them—namely, the major lapse of time since the crimes were committed.¹⁴⁹ Notably, however, this assessment stands *a priori* of the specifics of any case and applies to all of them, which basically dissolves the bite of the heightened standard as a safeguard against time-unrestricted detentions. No doubt there are genuine reasons for why these investigations may be especially complex. Nonetheless, under the general rules, requests for the extension of imprisonments are always balanced against the prosecution’s own diligence in conducting each investigation and subject to periodic control.¹⁵⁰ For cases of state repression, by contrast, the Court dismantled this test by turning complexity into a given, which paved the way for preventive detentions to be extended without bounds.¹⁵¹

146. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 18/12/2007, “Mulhall, Carlos Alberto s/excarcelación—causa 350,” [M.389.L.XLIII] DIARIO JUDICIAL (2008-I-853) (2007) (PGN Opinion 25/9/2007, adopted by CJ. Lorenzetti & J. Zaffaroni concurring). At the time, the suspect was being preventively detained under house arrest due to health issues, yet the Court denied his release.

147. *Id.* at §III. Taken out of context, the quoted passage was controversial, as it seemed to convey that the Court believed that the fundamental rights of these suspects were to be redefined in the measure of the gravity of their crimes.

148. CSJN, *Acosta* (2012), §23.

149. *Id.* at §24(f) (attributing this circumstance to the fact that “subjecting these cases to trial has collided with an enormous number of obstacles over decades”).

150. See Law 25.430 (2001), *supra* note 114, art. 1 (establishing automatic review for extensions).

151. Strangely, there are no official statistics on preventive detention of suspects of illegal state repression. The most recent data come from a speech by the Argentine Catholic Bishop for the Military Services. It notes that the average length of preventive imprisonments for suspects of illegal state repression surpasses 6 years. More detailed data show that, considering suspects who have spent more than 3 years preventively imprisoned, as of October 2019, 28% have spent between 3 and 6 years, 55% have spent between 6 and 10 years, and 17% have spent more than 10 years imprisoned. See Santiago Olivera, *Detenciones y derechos humanos*, Presentation at Fifth International Course for Catholic Military Chaplains on International Humanitarian Law, Augustinian Patristic Institute (Oct. 29, 2019), <http://www.aica.org/documentos-s-TW9ucy4gU2FudGhZ28gT2xpdmVyYQ=-7990> [<https://perma.cc/PXF9-XBFF>].

3. *Bonus “Standard”—The Double-Count Rule.* One last feature further highlights the importance of the two-year time limit for preventive imprisonments. When a defendant is found guilty on trial and sentenced to serve, any time spent in preventive detention is deducted from the sentence.¹⁵² Between 1994 and 2001, however, a rule was in force establishing that any time spent in preventive detention beyond two years would count *double* toward the sentence.¹⁵³ Although this double-count rule was abrogated long ago,¹⁵⁴ courts allowed offenders (who had committed crimes before its abolition) to continue benefiting from the rule due to the constitutional principle of using the most favorable criminal law.¹⁵⁵

The issue of the enduring application of the old double-count rule became problematic for cases of illegal state repression. The reasons were mostly practical. Double counting benefits convicts who have been preventively detained in excess of two years. Hence, when detentions are scrutinized under the regular standards, there should be little, if any, effect. However, due to the fundamental changes effected by the Vigo Doctrine, lengthy preventive imprisonments became common among suspects of illegal state repression.¹⁵⁶ Thus, double counting would have significantly shortened many of their sentences. The stance of lower courts on whether the rule should apply varied until 2017, when the Supreme Court stepped in.¹⁵⁷ After an important change in membership, and with a tight majority, the Court decided that persons convicted for illegal state repression were to benefit from double counting.¹⁵⁸ Yet the decision generated enormous social outrage,¹⁵⁹ to the point where the episode ended up confirming the constitutional transformation spurred by the Vigo Doctrine. Within a week of the Court’s decision, Congress passed an Act “authoritatively interpret[ing]” that the double-count rule “shall not apply to . . . crimes against humanity.”¹⁶⁰ By late 2018, with two justices switching their 2017 votes on the basis of this “Backlash” Act, the Court overturned its 2017 precedent and held double counting inapplicable.¹⁶¹

152. See CÓD. PEN. [CRIMINAL CODE], art. 24.

153. See Law No. 24.390 (1994), *supra* note 117, art. 7.

154. See Law 25.430 (2001), *supra* note 114, art. 5 (abrogating the double count rule).

155. See ACHR art. 9; CÓD. PEN. [CRIMINAL CODE], art. 2.

156. See *supra* note 151.

157. See Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 3/5/2017, “Recurso de hecho deducido por la defensa de Luis Muiña en la causa Bignone, Reynaldo Benito Antonio y otro s/ recurso extraordinario,” FALLOS 340:549 (2017) [hereinafter: *Muiña* (2017)].

158. *Id.*

159. See *infra* Section IV.C.

160. Law No. 27.362 (2017), May 12, 2017, [33.623] B.O. 1, arts. 1, 3.

161. See Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 4/12/2018, “Recurso de hecho deducido por Batalla, Rufino en la causa Hidalgo Garzón, Carlos del Señor y otros,” FALLOS 341:1768 (2018) [hereinafter: *Batalla* (2018)]. See *infra* note 430 and accompanying text.

III. THE ANTI-IMPUNITY SHIFT FROM THE INTERNAL POINT OF VIEW: THE ARGUMENT OF CONSTITUTIONAL SUBJECTION TO INTERNATIONAL LAW AND ITS DIFFICULTIES

In spite of its initial promise that perpetrators of illegal state repression would be held accountable, the democratic restoration came to an end in 1990, with a far-reaching entrenchment of impunity.¹⁶² Come the 21st century, the constitutional transformations reviewed in Part II reversed that state of affairs, reviving the justice program. These changes were implemented by the sequence of Supreme Court “anti-impunity rulings” examined earlier: a handful of landmark decisions that invalidated impunity (2004–07),¹⁶³ and a sequel series of pronouncements about detainment and punishment (2007–19).¹⁶⁴ Yet how did these transformations come to be? What prompted them? These questions will be this article’s main focus of attention during Part III and, from a different angle, in Part IV.

The central holding of the anti-impunity rulings is that the Constitution commands tough criminal policies toward all offenses related to illegal state repression, which has consequences for impunity measures, statutory limitations, preventive detainment, punishment, and so forth.¹⁶⁵ The justices’ opinions expound on the internal justification for ruling this way; that is, they account for why it is that the law requires such an outcome. Indeed, the most crucial aspect of these decisions is how the Court reinterpreted the Constitution in order to establish the anti-impunity principle absent a direct textual basis and given the amount of precedents pointing in the opposite direction. The Court’s answer turns on the existence of a connection between domestic and international law according to a scheme whereby the former is thoroughly subjected to the latter. The present Part is devoted to considering whether the Argentine anti-impunity shift can be accounted for from the internal point of view. It first (a) dissects the Supreme Court argument about constitutional subjection to international law and then (b) scrutinizes this reasoning to discern whether it holds up.

A. *The International-Law-Bound Constitution*

A constitutionally-entrenched cluster of impunity impeded the prosecution of the dictatorship’s human rights violations.¹⁶⁶ A majority of Supreme Court justices found a way to elude this barrier by appealing to an alternative legal edifice—that of international law. They appealed both to human

162. See *supra* Part I §3.

163. See *supra* Section II.A, cases CSJN, *Arancibia* (2004); CSJN, *Simón* (2005); CSJN, *Mazzeo* (2007). See also case cited *infra* note 167.

164. See *supra* Section II.B, cases CSJN, *Vigo* (2010); CSJN, *Otero* (2011); CSJN, *Daer* (2011); CSJN, *Acosta* (2012); CSJN, *Olivera Róvere* (2013); CSJN, *Batalla* (2018). See also cases cited *supra* note 146, and *infra* note 198.

165. See *supra* Part II.

166. See *supra* Section II.A.

rights treaties and to the core of imperative norms known as jus cogens,¹⁶⁷ which is binding on states in the international legal plane irrespective of their consent.¹⁶⁸ An initial difficulty, however, is that the content of these peremptory norms is unclear.¹⁶⁹ The key point here is determining whether or not they establish an international obligation to prosecute and punish offenses that qualify as “crimes against humanity” without regard for statutory limitations.¹⁷⁰ Nonetheless, the Court adopted the position that this had already been a well-established jus cogens norm in the 1970s,¹⁷¹ therefore rendering the bulk of the impunity cluster (statutory limitations in force by then, and amnesties and pardons issued later) non-compliant with international law.

Yet what difference did this make to domestic-law-based entrenchments of impunity? The central issue was, therefore, about the terms of the incorporation of international norms into Argentine law.¹⁷² Two concerns seemed particularly pressing. One was the exact time at which these norms had been incorporated, given that more severe criminal rules cannot be applied

167. See CSJN, *Simón* (2005) (CJ. Petracchi concurring at §§16–26, 30–31; J. Argibay concurring at §§16–17); CSJN, *Arancibia* (2004) (CJ. Petracchi concurring at §§23–24). See also Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 21/08/2003, “Videla, Jorge Rafael s/ incidente de excepción de cosa juzgada y falta de jurisdicción,” FALLOS 326:2805 (2003) [hereinafter: *Videla* (2003)] (J. Petracchi concurring at §12; J. Boggiano concurring at §5; J. Maqueda concurring at §§15–17). Through large portions of their argument, the justices seem to be using the term “jus cogens” to refer to customary international law. A possible explanation for why the Court avoided exploring international custom as a source for the anti-impunity principle is the overwhelming amount of measures taken in Latin America in favor of impunity. See literature cited *supra* notes 14, 29. That the anti-impunity principle (in its general formulation, and each of its tenets as well) is jus cogens solves this difficulty.

168. See *Vienna Convention on the Law of Treaties, opened for signature May 23, 1969*, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980), art. 53 (defining jus cogens as norms “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted”).

169. See generally ROBERT KOLB, *PEREMPTORY INTERNATIONAL LAW: Jus Cogens: A General Inventory* (2015); THOMAS WEATHERALL, *JUS COGENS: INTERNATIONAL LAW AND SOCIAL CONTRACT* (2015).

170. The very existence, scope, and extent of this international obligation are subject to debate. See, e.g., KOK, *supra* note 43, at 345–391 (discussing inapplicability of statutory limitations); RATNER, ABRAMS & BISCHOFF, *supra* note 40, at 21–22, 179–185 (reviewing the obligations that international law sources establish for each crime); CHERIF BASSIOUNI & EDWARD WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* 21–25, 51–55 (1995) (arguing that the obligation to prosecute is jus cogens).

171. See CSJN, *Mazzeo* (2007), §16; CSJN, *Simón* (2005) (J. Boggiano concurring, §28; J. Maqueda concurring, §42; J. Zaffaroni concurring, §27; J. Highton, concurring, §§31–32); CSJN, *Arancibia* (2004) (JJ. Zaffaroni & Highton concurring §§28–29, 31–33; J. Maqueda concurring, §§27–31; J. Boggiano concurring, §29).

172. Ultimately, this is always a question for domestic law, which seems to be the widespread view among higher courts, even in national systems engaged into dense supra-national legal frameworks. See, e.g., Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Oct. 24, 1996, 95 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 96, 1996 (Ger.) (holding that treaty override by national statutory law is permissible under the German Constitution); Corte Costituzionale, [Corte Cost.] [Constitutional Court], Oct. 22, 2014, n. 238, FORO IT. 2015, I, 1152 (It.) (holding that the incorporation and application of international norms is thwarted when these conflict with inviolable principles and rights established by the Italian Constitution).

retroactively.¹⁷³ The other was the legal impact of these incorporated norms: how could they challenge the validity of (what were upheld as) constitutionally solid impunity measures? In order to overcome these obstacles, the Court provided what may be reconstructed as a three-step answer to the incorporation question. I will use the label “International-Law-Bound Constitution” (or “ILB Constitution”) to refer to the model that this doctrine embodies.

1. *Incorporation.* How were these norms of international law incorporated in such a generic, non-treaty-specific form and so long ago? What is more, how could they serve as the basis for criminal accusations without infringing on the principle of legality? The Court addressed these concerns by noting that the constitutional endorsement of international law is not limited to treaties.¹⁷⁴ To this end, the justices blew the dust off of an old provision, never amended and rarely used since its original enactment in 1853, to support their view that the Constitution recognizes the “law of nations” as a legal source, in particular as a source of criminal law.¹⁷⁵ Article 118 reads:

The trial of all ordinary crimes . . . shall be held in the Province where the crime shall have been committed; but when committed outside of the borders of the Nation, *against the law of nations*, the trial shall be at such place as the Congress may by special law determine.¹⁷⁶

The provision is evidently an adaptation of the jury-and-venue-clause of the United States Constitution.¹⁷⁷ Nonetheless, the wording is innovative precisely in its addition of the phrase “against the law of nations” to identify a category of offenses.¹⁷⁸ Upon a careful reading, therefore, one may very well interpret the Constitution as acknowledging—and even deferring to—the stipulation of certain crimes by international law.¹⁷⁹

173. See generally CSJN, *Simón* (2005).

174. Cf. Arts. 27, 75.22, 75.24, and 99.11, CONST. NAC.

175. See CSJN, *Mazzeo* (2007), §§14–15. See also CSJN, *Simón* (2005) (J. Boggiano concurring, §§28, 49; J. Maqueda concurring §§38, 60, 95; J. Highton concurring, §31; J. Lorenzetti concurring, §19); CSJN, *Arancibia* (2004) (JJ. Zaffaroni & Highton concurring, §16; J. Boggiano concurring, §40; J. Maqueda concurring §§19–22, 27, 57).

176. Art. 118, CONST. NAC. (emphasis added).

177. Cf. U.S. CONST. art. III, § 2, cl. 3.

178. The addition was inspired by the text of the first Venezuelan Constitution. See CONSTITUCIÓN FEDERAL DE 1811, Dec. 21, 1811 (Venez.), art. 117.

179. Thus, Article 118 may be read as a “jury,-venue-*and-legal-source*” clause. The provision was not debated at all during the Constitutional Convention in 1853. Cf. IV ASAMBLEAS CONSTITUYENTES ARGENTINAS 535 (Emilio Ravignani ed. 1937). However, it is not hard to see that the addendum “against the law of nations” was inspired by another (related) clause of the American Constitution, which has no Argentine counterpart—the one granting Congress the power “to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.” U.S. CONST. art. I, § 8, cl. 10. One may, therefore, notice the contrast between Argentine and American constitutional regulations on the matter. Both acknowledge the law of nations as a source of criminal law, yet the American model cautiously preserves the faculties of the Federal State to “define” which of

2. *Growth*. Once this doctrine of incorporation is accepted, however, new difficulties arise. Written in the mid-1800s, the reference to “crimes against the law of nations” could only have included offenses such as piracy, perhaps the slave trade, and the like.¹⁸⁰ Yet the 21st-century justices intended the clause to provide a constitutional foundation for the prosecution of crimes against humanity as most recently formulated.¹⁸¹ In order to bridge the gap, not only did the Court advance the claim about the constitutional endorsement of international law, but it also adhered to a particular version of this incorporation, one that read the reference to “the law of nations” as alluding to evolving content.¹⁸² On this interpretation, by virtue of a clause dated in the mid-1800s, Argentine law incorporates whatever content may thereafter develop through international custom, especially *jus cogens*, thus functioning as a built-in automatic device of incremental legal change.

But this growth also encompasses conventional international law. Most obviously, the body of treaties to which Argentina is a party expands by ratification (and contracts by denunciation).¹⁸³ Yet obligations arising from treaties may also vary independently of the state’s consent.¹⁸⁴ A main component of this evolution—highly relevant for the anti-impunity shift in international human rights—has been the evolving interpretation of the *American Convention of Human Rights* [hereinafter, ACHR] by the Inter-American Court of Human Rights.¹⁸⁵ As a rights-codifying convention, the ACHR includes no specific references to amnesties, pardons, statutory limitations, or guidelines for criminal prosecutions.¹⁸⁶ Nonetheless, by inferring

these offenses can be validly applied. See, e.g., THE FEDERALIST NO. 42 (James Madison); JOSEPH L. STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1158 (1833). (The Venezuelan 1811 Constitution follows the American model strictly on Articles 71.13 and 117; see *supra* note 178). The Argentine text makes no such specification; thus, it is plausible to infer that crimes stipulated by *ius gentium* are readily applicable, even in the absence of legislative incorporation. However, one *textual* difficulty remains, due to the wording borrowed from the Venezuelan Constitution. Namely, one may interpret that Article 118 of the Argentine Constitution only incorporates international crimes “when committed outside the borders of the Nation.”

180. See CSJN, *Arancibia* (2004) (J. Fayt dissenting, §43); CSJN, *Simón* (2005) (J. Maqueda concurring, §49).

181. See *Rome Statute of the International Criminal Court*, *supra* note 32, art. 7.

182. See CSJN, *Mazzeo* (2007), §§15–16; CSJN, *Simón* (2005) (J. Highton concurring, §31); CSJN, *Arancibia* (2004) (JJ. Zaffaroni & Highton concurring, §32; J. Maqueda concurring §§26–27, 32–33, 44–45, 49).

183. See Arts. 27, 75.22, 75.24, and 99.11, CONST. NAC.

184. See Julian Arato, *Treaty Interpretation and Constitutional Transformation*, 38 YALE J. INT’L L. 289, 291–92 (2013).

185. See Karen Engle, *Anti-Impunity and the Turn to Criminal Law in Human Rights*, 100 CORNELL L. REV. 1069, 1079, 1103–06 (2015). See also Brian D. Tittmore, *Ending Impunity in the Americas: The Role of the Inter-American Human Rights System in Advancing Accountability for Serious Crimes under International Law*, 12 SW. J. L. & TRADE AM. 429, 439–440 (2006).

186. The ACHR, *supra* note 97, is basically structured in two main parts: it begins by stipulating a detailed bill of rights (Arts. 1 to 32) and then establishes an institutional framework for the enforcement of those rights (Arts. 33 to 73). It is worth noting, however, that not all human rights conventions fit the standard “rights-codifying” template. Another sub-genre of human rights treaties is chiefly directed at protecting these rights through the eradication of heinous practices. These conventions,

duties implicitly entailed by the provisions that stipulate rights and freedoms, the Inter-American case law progressively developed norms that do address impunity straightforwardly. Two distinctive phases mark this development. It started when the Inter-American Court began to interpret the Convention as stating that states ought to conduct effective investigations upon detection of any violation of human rights to determine the events, identify the perpetrators, and impose punishments.¹⁸⁷ The second moment developed as the tribunal was confronted with scenarios of legally entrenched impunity, such as in the case of amnesties, statutory limitations, double jeopardy, and the like, especially in cases of illegal state repression.¹⁸⁸ Since 2001, the Court has taken a tough stance against all of these barriers, thus developing strong unwritten anti-impunity principles through authoritative interpretation.¹⁸⁹ These judge-made international norms are particularly weighty in Argentina, where the Supreme Court has long held that they provide authoritative guidance as to the content of the international obligations under this Convention.¹⁹⁰

3. *Impact.* Let us turn to the Supreme Court's argument for its final move. So far, we know that Argentine law incorporates the dictates of international law as it evolves over time. Yet this is still insufficient to solve the main problem, which is, at its core, one of the hierarchy of sources. All obstacles shielding impunity were *constitutionally* entrenched; how could they be defeated by norms of international law? The last step in the argument is therefore to claim that the law of nations is incorporated with the

which may be referred to as “threats-eradicating,” thus focus not on rights but on particular menaces: genocide (e.g., the *Convention on the Prevention and Punishment of the Crime of Genocide*, Dec. 9, 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277), crimes against humanity (e.g., the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, *supra* note 102), torture (e.g., *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85), forced disappearance (e.g., *see* conventions cited *supra* notes 39, 101), etc. Unlike their rights-codifying cousins, threats-eradicating conventions do seek to engage state parties into establishing uniform and coordinated punitive mechanisms against those who perpetrate such atrocities.

187. *See* Velázquez Rodríguez v. Honduras, Merits, Judgment, Inter-Am Ct. H.R. (ser. C) No. 4, ¶¶ 174–77 (Jul. 29, 1988). *See also* Engle, *supra* note 185, at 1080–84.

188. *See* Barrios Altos v. Perú, Merits, Judgment, Inter-Am Ct. H.R. (ser. C) No. 75, ¶¶ 41–44 (Mar. 14, 2001) (rejecting “self-amnest[ies]” covering “serious” violations of human rights, “such as torture, extrajudicial, summary or arbitrary execution and forced disappearance”). *See also* Almonacid Arellano et al. v. Chile, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 154, ¶ 120 (Sept. 26, 2006) (noting, as obiter dictum, that amnesty laws regarding serious human rights violations infringe the ACHR whether they can be considered self-amnesties or not); Gomes Lund et al v. Brasil, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 219, ¶ 175 (Nov. 24, 2010); Gelman v. Uruguay, Merits and Reparations, Judgment, Inter-Am Ct. H.R. (ser. C) No. 221, ¶¶ 225–29 (Feb. 24, 2011) (establishing that all amnesty laws infringe human rights, whether they can be considered “self-amnesties” or not). *See also* Engle, *supra* note 185, at 1091–1103.

189. *See, e.g.,* Lisa J. Laplante, *Outlawing Amnesties: The Return of Criminal Justice in Transitional Justice Schemes*, 49 VA. J. INT'L L. 915, 968–970 (2009); Christina Binder, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, 12 GER. L.J. 1203, 1208–09 (2011).

190. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 7/4/1995, “Giroldi, Horacio David y otro s/recurso de casación,” FALLOS 318:514 (1995), §§11–12.

highest possible standing—as part of the Constitution itself.¹⁹¹ This way, the influx caused by the development of international law produces real-time alterations on the whole legal system, including on the Constitution. The difficulty, however, is that in spite of these implicit “amendments,” the actual constitutional text still reads the same: the alleged incorporation of the duty to punish crimes against humanity did not textually modify any constitutional clause.¹⁹² Thus, it may not be evident that something has, in fact, changed. The doctrine of the ILB Constitution solves this difficulty by establishing a general rationale for constitutional construction. It holds that, should a conflict emerge between a constitutional entrenchment and the rights or duties given by international law, the (domestic) controversy must be decided in a way that does not make the Argentine state liable internationally.¹⁹³ As a rule about constitutional interpretation, this requires constitutional rights and powers to be recalibrated so that they are set in accordance with the international obligations of the state. In other words, courts are *required* not to enforce a commitment that the state has toward its own citizens—by stipulation of the Constitution—if doing so compromises commitments that the state has assumed toward the international community.¹⁹⁴

191. The justices are occasionally very explicit about this aspect. *See* cases cited *infra* notes 454, 458.

192. In particular, the amnesties and pardons clauses still read the same as in 1853. *See* Arts. 75.20, 99.5 CONSR. NAC. (originally numbered 64.17 and 83.6, respectively).

193. This doctrine concerning the primacy of international obligations first emerged, in dicta, to address conflicts between international treaties and domestic laws—i.e. *not* involving the Constitution itself. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 7/7/1992, “Ekmekdjian, Miguel A. c/Sofovich, Gerardo y otros s/recurso de hecho,” FALLOS 315:1492 (1992), §§16, 19. For what may be regarded as a second step in this ladder, *see infra* note 225.

194. This conflict was sharply revealed in a case of police violence, though completely unrelated to illegal state repression. Here, Argentine courts were required to comply with an Inter-American judgment ordering the criminal punishment of a police sergeant notwithstanding the fact that his case qualified for dismissal according to the statute of limitations. *See* Bulacio v. Argentina, Merits, Reparations and Cost, Judgment, Inter-Am Ct. H.R. (ser. C) No. 100, ¶ 116 (Sept. 18, 2003). Supreme Court justices addressed the issue by noting that, “paradoxically,” constitutional due process principles pointed toward a different outcome than the one ordered by the international decision. However, the justices added, domestic courts must still defer to the Inter-American Court and comply with its judgments. Thus, the sergeant’s defenses on statutory limitations were not allowed. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 23/12/2004, “Espósito, Miguel Angel s/incidente de prescripción de la acción penal promovido por su defensa,” FALLOS 327:5668 (2004) [hereinafter, *Espósito* (2004)] (JJ. Petracchi & Zaffaroni concurring, §§5–6, 10, 12, 16; J. Highton concurring, §§6–11). A similar tension arose later by virtue of yet another Inter-American Court case: Bueno Alves v. Argentina, Merits, Reparations and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 164 (May 11, 2007). Although the Supreme Court had already confirmed the criminal investigation’s dismissal, a request for clarification of this judgment was filed, calling the justices’ attention to the recently-issued Inter-American judgment, which ultimately led the Court to rectify its own ruling in order to comply with the international decision. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 29/11/2011, “Derecho, René Jesús s/incidente de prescripción de la acción penal—causa 24.079,” FALLOS 334:1504 (2011) [hereinafter, *Derecho* (2011)] (JJ. Highton, Petracchi & Zaffaroni concurring, §§4–5; J. Maqueda concurring, §§3–4) (deciding to comply with the Inter American judgment without any of the reservations articulated in the *Espósito* case); (JJ. Fayt & Argibay dissenting, §§8–9) (pointing out that to comply with the Inter-American

This doctrine was applied by the courts to decide on the different issues that arose in criminal cases against suspects of illegal state repression. Indeed, by alleging that Argentina is under an international law obligation to prosecute and punish crimes against humanity, the Court: (i) ruled against the validity of amnesties and pardons as well as against the applicability of statutory limitations;¹⁹⁵ (ii) reviewed cases to reverse lower court decisions that had absolved perpetrators due to mere procedural technicalities;¹⁹⁶ (iii) tailored a harsher doctrine regarding preventive imprisonment;¹⁹⁷ and (iv) rejected the application of benefits to suspects and convicts that might otherwise lessen their punishment (like house arrest and exemption from electronic bracelets).¹⁹⁸

judgment would imply to disregard the rights and principles established by the Constitution and the ACHR itself).

195. On the application of this doctrine to amnesty laws, see CSJN, *Simón* (2005) (e.g., J. Boggiano concurring, §48; J. Highton concurring, §18); to Presidential pardons, see CSJN, *Mazzeo* (2007), §§29, 38; CSJN, *Videla y Massera* (2010), §§8, 12; to statutory limitations, see CSJN, *Arancibia* (2004) (JJ. Zaffaroni & Highton concurring, §36; CJ. Petracchi concurring, §23; J. Boggiano concurring, §§34, 36).

196. The Court specified that this “international obligation” to investigate and punish crimes against humanity “entails not only that the State cannot excuse [its lack of compliance] on internal norms . . . (e.g., amnesty laws and statutes of limitations), but also that it must refrain from adopting any other measure that dilutes the possibility of arriving to a conviction.” Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 26/9/2012, “Menéndez, Luciano Benjamín y otros s/denuncia Las Palomitas – Cabeza de Buey s/homicidio, privación ilegítima de la libertad y otros,” FALLOS 335:1876 (2012), §4 (original emphasis). This second corollary and the ones specified as (iii) and (iv), see *supra* note 115 and accompanying text, implied a significant expansion of the Court’s own scope of review.

197. See CSJN, *Daer* (2011), §III ¶11 (arguing that “to release a suspect of crimes against humanity not only endangers the attainment of criminal justice, but also may compromise the international responsibility of the Argentine State”). See also CSJN, *Olivera Róvere* (2013), §5; CSJN, *Vigo* (2010), §III ¶2.

In my view, however, the Supreme Court’s argument is incorrect. According to the Inter-American Court, state parties to the ACHR are indeed under a duty to investigate human rights violations and to punish perpetrators. Nonetheless, this general obligation is in no way restricted to “serious” crimes like illegal state repression. See Inter-Am Ct. H.R., *Velázquez Rodríguez*, *supra* note 187. In terms of the duties to investigate and punish, the difference between ordinary and “serious” human rights violations is rather that, only with respect to the latter, state parties cannot excuse their lack of compliance by alleging that prosecutions were impeded by amnesties, pardons, statutory limitations, double jeopardy, and the like. See cases cited *supra* note 188. In my view, this should be properly interpreted as estoppel: states cannot excuse their failure to investigate and punish “serious” violations because of obstacles created by their *own* action or negligent inaction. Of course, a criminal investigation and trial may fail due to multiple factors, some of which the state cannot necessarily be blamed for (e.g., lack of evidence, the perpetrator passing away or fleeing despite reasonable diligence by the criminal justice system, etc.). As for criminal procedures failing due to these other factors, the Inter-American case law makes no distinction on whether the violations under investigation were ordinary or “serious” in order to decide on state responsibility. (I must surmise that the distinction between ordinary and serious violations has been less clear than one would hope; see, e.g., cases cited *supra* note 194). Now, preventive imprisonment is a tool specifically directed at dealing with obstacles of the second group. Therefore, this international case law does not seem to provide the basis for a more severe doctrine on preventive detention for suspects of serious violations, like illegal state repression.

198. See, e.g., CSJN, *Muñiz* (2017) (J. Lorenzetti dissenting, §19; J. Maqueda dissenting, §12) (denying the application of the double-count rule); CSJN, *Batalla* (2018) (JJ. Lorenzetti & Maqueda concurring, §13) (same). See also Corte Suprema de Justicia de la Nación [CSJN] [National Supreme

The narrative that underlies the argument just laid out aptly addresses the difficulties of unlocking the impunity entrenchments. To recall, a primary concern was to lessen some serious challenges that a re-opening of the trials raised as to the legality and non-retroactivity of criminal prosecutions. The Court achieved this by constructing the notion of a change-prone Constitution via the incorporation of international law. By the Court's argument, these anti-impunity constitutional norms were the result of an extended evolutionary process involving rather small incremental steps instead of discrete, regular amendments.¹⁹⁹ In a nutshell, the contention is that Argentine constitutional law absorbed the international norms on crimes against humanity as they progressively developed in the international plane during the decades following the Second World War. These are the grounds on which the Court held that, by the time illegal state repression was perpetrated in the 1970s, the constitutional order *already* contained norms that required these crimes to be prosecuted and rigorously punished. As a consequence, both statutory limitations and impunity measures pertaining to such offenses had been constitutionally banned since before these atrocities were committed. (Thus, statutory limitations previously in force became invalid in due time, and amnesty laws and presidential pardons had been unconstitutionally enacted in the 1980s).

B. The Internal Account's Breakdown

Both the defeat of the impunity cluster and the legal adjustments that paved the way for the second wave of trials were made possible by constitutional changes embodied in the anti-impunity rulings. For all intents and purposes, these cases have changed constitutional law in the 21st century on all issues pertaining to criminal policies regarding illegal state repression, marking an abrupt departure from what had been mainstream constitutional interpretations up to only a few years earlier.²⁰⁰ Now, the central feature of these developments is that they were judicially decided, and judicial decisions are not self-standing. Indeed, judges cannot present their rulings as if they had made legal changes on their own authority. The courts' claims to decisional legitimacy hinges on whether their holdings (are shown to) follow from authoritative legal materials. Accordingly, the core of the judicial argument is that this anti-impunity line of precedents, which began in 2004, merely implements what constitutional law has required with respect to illegal state repression since the 1970s or 1980s, at the latest.²⁰¹ The argument thus depends on a particular interpretation of the Constitu-

Court of Justice], 7/6/2018, "Fracassi, Eduardo René y otros s/privación ilegal de libertad" (PGN Opinion 4/7/2017, adopted), FALLOS 341:600 (2018), §III (denying the exemption of electronic bracelet).

199. See *supra* Section III.A § 2.

200. See *supra* Part II.

201. This is when anti-impunity norms developed in the Argentine Constitution, according to the Supreme Court's thesis. See *supra* Section III.A.

tion that the Court claims has been the correct one for decades (a view which intimates that 20th-century courts, congresses, presidents, and even a Reforming Convention had been mistaken all along).

The burden of justifying adjudication in this derivative scheme rests fully on legal reasoning. Indeed, the aspiration is that argumentatively-sound opinions set proper exercises of judicial authority apart from mere displays of power from the bench.²⁰² It is therefore crucial for the political legitimacy of the second wave of trials that the anti-impunity decisions pass muster from the standpoint of professional legal reasoning. This Section is thus concerned with whether the Court's innovations can be defended as valid constitutional reinterpretations—that is, from the “internal” point of view. As I will show in the remainder of this Part, however, there is a very strong case for why the Court has gone beyond its capabilities as a judicial interpreter in making decisions in the second wave of trials. Two arguments converge to this effect. Not only (I) has the Court failed to justify its innovative doctrine about the incorporation of international law, but (II) it also seems that, in light of prior authoritative decisions, the constraints of legal argument prevent judicial interpreters from reaching the central holdings of the anti-impunity rulings.

I. *Integration or Subjection? The Concealed Amendment to the Rules on Incorporation*

Courts around the globe have invoked international law to overcome legality concerns over retroactive justice in several transitional justice episodes, from post-communist Eastern Europe to Latin America.²⁰³ This strategy raises two questions: whether international norms actually require

202. John Ely's words on *Roe v. Wade* come to mind, as he argued that this was “a very bad decision. Not because it will perceptibly weaken the Court — it won't; and not because it conflicts with either my idea of progress or what the evidence suggests is society's — it doesn't. It is bad because . . . it is *not* constitutional law and gives almost no sense of an obligation to try to be.” See John Hart Ely, *The Wages of the Crying Wolf*, 82 YALE L.J. 920, 947 (1973) (emphasis in original).

203. See, e.g., Alkotmánybíróság [AB][Constitutional Court], Oct. 13, 1993, “1956 War Crimes Case,” 53/1993, MAGYAR KÖZLÖNY [MK] 147/1993 (Hung.) (holding that the retroactive amendment of statutory limitations is constitutionally permissible whenever Hungary is under an international obligation to prosecute crimes against humanity or war crimes disregarding its own domestic rules on limitations); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Oct. 24, 1996, 95 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 96, 1996 (Ger.) (confirming the illegality of the use of deadly force by the Border Wall guardians, notwithstanding its apparent admissibility under the domestic legal framework of the German Democratic Republic, because of international norms); Corte Suprema de Justicia de la República [CSJR] [Supreme Court], Special Criminal Panel, Apr. 7, 2009, “Casos Barrios Altos, La Cantuta y sótanos SIE—Alberto Fujimori,” Exp. No. A.V. 19-2001, ¶¶ 710–17, 733–34, 742–44 (Peru) (applying international customary norms on crimes against humanity to convict former President Fujimori for human rights violations perpetrated by paramilitary groups conducting anti-terrorist operations, especially concerning the doctrine of command responsibility). *But see* Corte Suprema de Justicia de la República [CSJR] [Supreme Court], Transitory Criminal Panel, July 2, 2019, Nulidad No. 797-2018, ¶¶ 4.1(e), 5.4(b) n.6 (Peru) (conceding that to pardon perpetrators of crimes against humanity “contravenes international obligations to investigate, trial, and punish” these, yet assuming in dicta that such measures are permissible under the Peruvian Constitution when domestic requirements for pardons are met).

criminal prosecutions,²⁰⁴ and whether domestic law grants those international norms enough standing to outweigh the domestic legal constraints that entrench impunity. Although the global observers' understandable bias toward the former question may eclipse the latter one, the terms on which the legal system incorporates international law are this strategy's most crucial link.

The anti-impunity holdings affirm a doctrine about what the Constitution permits and requires regarding criminal policies toward illegal state repression (on statutory limitations, impunity measures, punishment, etc.).²⁰⁵ I will refer to these rules as part of the constitutional *content*. The Court's argument postulates that such content was established by international norms that found their way into domestic law through the mechanism of incorporation described earlier as the ILB Constitution.²⁰⁶ Its central tenet is that changes in international law have always had a deep impact on Argentine law.²⁰⁷ Now, note that this doctrine does not concern the Constitution's content but rather its basic *structure*—that is, the few norms that make up the foundation of the legal system (e.g., the sources of law and their hierarchy, the mechanisms for constitutional change, etc.). This distinction between content and structure will help delimit the scope of the justification that the anti-impunity rulings are burdened with presenting. These decisions openly diverge from previously-held views—sometimes in the form of outright overrulings—on each of the preceding points of content.²⁰⁸ By contrast, the justices' narrative concealed that their decisions produced innovations on the structural plane: the anti-impunity holdings supposedly fit within a constitutional tradition tracing back to the mid-1800s.²⁰⁹ However, despite this rhetorical veneer, the transformations that these judgments introduced into the system of incorporation were drastic: the Court essentially swapped the existing model of integration for another of subjection to international law.²¹⁰ A few examples will illustrate these inconsistencies.

1. *Neglecting Crucial Milestones*. To begin with, the Court's claim that international law has always enjoyed a privileged status among legal

204. See Orentlicher's path-breaking article on this point, *supra* note 34.

205. See *supra* Part II.

206. *Supra* Section III.A.

207. *Id.*

208. See *supra* Part II. CSJN, *Simón* (2005) overruled CSJN, *Camps* (1987) on the permissibility of amnesty laws; CSJN, *Mazzeo* (2007) overruled CSJN, *Aquino* (1992) on the permissibility of presidential pardons.

209. See *supra* Section III.A. §1. The Court is unable to identify case law to support the doctrine of the ILB Constitution. Although a few justices sporadically did refer to precedents, these holdings are far from establishing a doctrine of incorporation of international law of such an impact. For these references, see CSJN, *Simón* (2005) (J. Boggiano concurring, §36; J. Maqueda concurring, §43).

210. See *supra* Section III.A. §3. For an account of this disruption, see Elías, *supra* note 66, at 630–38; Santiago Legarre, *Crimes Against Humanity, Reasonableness and the Law: The Simón Case in the Supreme Court of Argentina*, 5:3 CHINESE J. INT'L L. 723, 727–28 (2006).

sources²¹¹ neglects all landmarks on this issue over a 140-year period since the founding (1853-1993). Examples at each end of the timeline are illustrative. The seminal 1863 Act (formally still in force) that regulated the incorporation of treaties and the “principles of the law of nations” into domestic law assigned to them the *lowest* possible status.²¹² Toward the end of the range, a controversial 1992 Supreme Court decision claimed that only since 1980 were treaties to be deemed superior to acts of Congress.²¹³ The thesis advanced in the anti-impunity opinions simply overlooks all of these milestones.

2. *Disregarding the (Reformed) Constitution.* If one were to pick the most widespread misconception about the anti-impunity cases, it would be that they were made possible by the reconfiguration of the relationship between domestic and international law decided a few years earlier by constitutional amendment.²¹⁴ This view must be discredited. The 1994 Reform did modify the system of incorporation of international law, particularly with regard to treaties.²¹⁵ Since then, the Constitution has established a model that so profoundly *integrates* international and domestic law that it even assigns a “constitutional hierarchy” to certain human rights conventions.²¹⁶ However, the Court advanced a substantially different design of incorporation in the anti-impunity cases. In postulating that the Constitution was to be reinterpreted in accordance with the state’s international law obligations, the Court held that international treaties impact the Constitution through their ratification alone.²¹⁷ This conflicts in two major respects with the design enacted in 1994:

211. See *supra* Section III.A §3.

212. See Law No. 48 (1863), Sept. 14, 1863, [V:1863-1869] Registro Nacional 49, art. 21 (listing, in order of precedence: the Constitution, federal laws, treaties with foreign nations, provincial laws, abrogated laws, and principles of *ius gentium*).

213. The Court’s argument—which, though *dicta*, was very influential at the time—is based on the *Vienna Convention on the Law of Treaties*, *supra* note 168. The justices’ contention is that *since* the entering into force of the Convention on January 27th, 1980, but not before, international treaties have a higher standing than federal statutes in Argentine law. See CSJN, *Ekemekdjian* (1992), *supra* note 193, at §§ 17–18.

214. See the literature cited *supra* note 45; BASSIOUNI, *supra* note 43, at 689; FISS, *supra* note 20, at xiii; Elías, *supra* note 66, at 637.

215. This was at the time a controversial point that the Reforming Convention had the mandate to settle. See Law No. 24.309 (1993), Dec. 31, 1993, [27.798] B.O. 1, art. 3.I.

216. See Art. 75.22 ¶2, CONST. NAC.

217. The justices’ argument focused on two treaties, the ratification of which preceded the impunity measures: the ACHR, *supra* note 97, ratified on September 5th, 1984, and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* [hereinafter, UNCAT], *supra* note 186, ratified on September 24th, 1986. See CSJN, *Mazzeo* (2007), §26 (arguing that the presidential pardons of 1989-90 had always been unconstitutional because, by then, Argentina had already become a state-party to the UNCAT); CSJN, *Simón* (2005) (J. Lorenzetti concurring, §§21, 31; J. Highton concurring, §§20–23) (holding that the amnesty laws of 1986-87 are unconstitutional due to earlier ratifications of the ACHR and the UNCAT). The argument surprisingly overlooks two difficulties. First, that Argentina had made reservations and interpretive declarations upon ratifying the ACHR, where it explicitly stated: “the obligations undertaken by virtue of the Convention shall only be effective as regards acts that have occurred after the ratification.” Second, that the UNCAT only entered into force in 1987, *after* both amnesty laws had actually been promulgated. My point is not that these objections

2.1. *Procedure.* The Reformed Constitution distinguishes (i) the larger group of treaties to which Argentina is a party from (ii) a smaller set among these treaties of select human rights conventions that are granted constitutional rank.²¹⁸ In order to reach higher-law status, human rights treaties in the second category have gone through a more stringent decisional procedure: some were elevated by the Reformers themselves in 1994,²¹⁹ and further elevations have been—and may continue to be—decided by Congress through purposely restricted super-majoritarian voting.²²⁰ Nonetheless, the Court’s doctrine disregards this system altogether. By assigning full effect to merely ratified treaties, the justices appear committed to the view that what the Reformers—and Congress, thereafter—sought to do by elevating some conventions to “constitutional hierarchy” makes no difference whatsoever.²²¹

2.2. *Impact.* Moreover, the Supreme Court decisions overturned, rather remarkably, the Reformed Constitution in regard to the standing of international treaties in domestic law. The 1994 Reformers established that (i) all international treaties stand higher than acts of Congress,²²² and that, (ii) by granting “constitutional hierarchy” to some select international human rights conventions, these enjoy an even higher status.²²³ Although the elevated treaties may stand on pair with *some* constitutional provisions, on the most crucial issues—like fundamental rights or the principles of public law (which are precisely the ones that protected the impunity cluster)—constitutionalized treaties neither alter nor suppress but only enhance the constitutional text.²²⁴ That is, should a conflict emerge between constitutional

cannot be resolved—perhaps they can. But it is noteworthy that the justices would not address such evident concerns, which is exactly what the lone dissenter to the Court’s 1987 ruling upholding the amnesties did with regard to the UNCAT timing issue. See CSJN, *Camps* (1987) (J. Bacqué dissenting, §39). See also Comm. Against Torture, *Communications Nos 1/1988, 2/1988, 3/1988*, U.N. Doc. CAT/C/3/D/1, 2, and 3/1988, §§7.3, 7.5 (23 November 1989) (ruling that Argentina’s amnesty laws do not violate the UNCAT *ratione temporis*).

218. See Art. 75.22, CONST. NAC.

219. See *id.* at ¶ 2 (listing the human rights conventions elevated to “constitutional hierarchy”).

220. See *id.* at ¶ 3. By granting Congress the power to grant “constitutional hierarchy” to other human rights conventions (through the same voting super-majority that is required for a constitutional reform), the Constitution created what may be rightfully considered a limited—but genuine—path for higher lawmaking without the need to resort to a fully-fledged amendment process.

221. See CSJN, *Mazzeo* (2007), §18–19 (presenting the elevation of treaties to constitutional rank in 1994 as the mere recognition of the already existent model of incorporation). See also CSJN, *Simón* (2005) (J. Boggiano concurring, §§42, 45, 47–48; J. Lorenzetti concurring, §16–18).

222. See Art. 36 ¶1 CONST. NAC. (nullifying laws passed by *de facto* regimes).

223. See *supra* notes 218–220 and accompanying text.

224. See Art. 75.22 ¶2, CONST. NAC. This arrangement is owed to the context that led to the Constitution being reformed. The political negotiations took place amidst severe distrust between the major political parties. See GABRIEL L. NEGRETTO, *MAKING CONSTITUTIONS: PRESIDENTS, PARTIES, AND INSTITUTIONAL CHOICE IN LATIN AMERICA* 138–165 (2014). In such conditions, the Amendment Act, which activated the reform process and specified the parts of the constitution to be modified, stipulated that none of the articles included in the First Part of the Constitution were to be touched. See Law 24,309 (1993), art. 7. These 35 articles are important: they contain some foundational stipulations for the Argentine State and most of the bill of rights. The subsequent Reforming Convention was thereby constrained by what may be labeled a “foundations lock.” After the delegates were elected and

provisions and stipulations of constitutionalized human rights conventions, the latter “do not repeal any [fundamental principles or rights established by] this Constitution.”²²⁵ Therefore, in assigning to all ratified treaties full effect over the whole constitutional text, the ILB model bluntly displaces the Reformers’ arrangement.

As this analysis shows, the constitutional disagreements between the anti-impunity judgments and earlier interpretations run far deeper than the Court cared to acknowledge. For the Constitution to be read as stipulating to certain content, the justices had to effect major adjustments to the basic constitutional structure regarding the incorporation of international law. Yet my point here concerns the burden that such a move imposes on legal reasoning. Some may believe that structural features are off limits for judicial reinterpretations; in other words, we may doubt whether it was, in fact, the same Constitution that successive Courts were interpreting.²²⁶ But we need not go that far. Rather, I only wish to note that these rulings are further apart from settled practice *precisely* because they innovated on the structural plane. Consequently, their justification is far more challenging than if the dispute were confined to, say, the few points of substantive content at stake.²²⁷ Questions about how, when, and to what extent domestic law is enriched by international law span myriad cases, congressional acts, executive actions, and even a constitutional amendment. No wonder the justices concealed their innovations under rhetoric of changelessness.

II. *Preclusive Formality: The Limits of Constitutional Reinterpretation by Courts*

The implementation of the second wave of trials required constitutional changes regarding criminal policy toward illegal state repression. As such, these could only be achieved by formal amendment or—its recurrent unof-

convened, nonetheless, initial distrust among the parties eased and they began to consider ways to modernize the old bill of rights without rewriting its provisions. The alternative found was to incorporate at the constitutional level the text of the most important human rights conventions. However, so as to proceed within the confines of their initial reforming mandate, and thereby avoid nullification, the Reformed Constitution explicitly stipulates that the “constitutional hierarchy” of these conventions is to be understood as respecting the “foundations lock.” See Art. 75.22, CONST. NAC.

225. Art. 75.22 ¶2, CONST. NAC. For some time, a plurality of justices held an alternative interpretation of this “foundations-lock” clause. They claimed that, instead of solving potential conflicts between the (core) constitutional text and constitutionalized treaties, because the 1994 Reformers had supposedly ruled out any conflicts by checking that the treaties were fully compatible with the Constitution, all the provision required was accommodating interpretations. See Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 15/3/1996, “Monges, Analía M. c/UBA. s/ resol. 2314/95,” FALLOS 319:3148 (1996), §§20–22. At least implicitly, the ILB-Constitution later repealed this doctrine: given that now-incorporated international obligations are open to evolution, the 1994 Reformers could not have checked for conflicts prospectively. See also Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/2/2017, “Ministerio de Relaciones Exteriores y Culto s/informe sentencia dictada en el caso ‘Fontevicchia y D’Amico vs. Argentina’ por la Corte Interamericana de Derechos Humanos,” FALLOS 340:47 (2017), §19 (ratifying this interpretation).

226. See HLA HART, *THE CONCEPT OF LAW* 153–54 (2nd ed. 1992).

227. See RONALD DWORKIN, *LAW’S EMPIRE* 245–58 (1986).

ficial substitute—judicial reinterpretation. Quite interestingly, these constitutional norms on impunity-related issues motivated transformations through both of these pathways: besides the Supreme Court’s anti-impunity decisions (2004–19), the issue was also touched upon earlier by constitutional amendment (1994).²²⁸ Notably, however, the results achieved through these two paths conflict with each other to a significant extent. I will now consider the interplay between both decisional processes, classically contrasted by Georg Jellinek in terms of “constitutional amendment” and “constitutional transformation.”²²⁹ My aim is to show how earlier decisions by the higher-lawmaking authority severely undermine the Court’s legal reasoning for overturning impunity.²³⁰

The entrenchment of the country’s democratic restoration was a major aspiration of the 1994 Constitutional Reform.²³¹ This included addressing the traumatic legacy left by the violence implemented with the state apparatus by the dictatorship. Although the vast majority of these crimes were then exempted from prosecution by impunity measures, the delegates were particularly bothered by the presidential pardons to the commanders of the military juntas: unlike the amnesties, the pardons had always seemed unnecessary.²³² In trying to build solid foundations for an enduring constitutional democracy, the Reformers felt the country needed to have the lessons learnt engraved in the constitutional text.²³³ These “restorative” provisions are mostly included in Article 36, the only one of the 1994 amendments passed unanimously.²³⁴

A couple of clauses of Article 36 are relevant here. The 1994 Reformers decided to amend the Constitution in order to establish that crimes committed by state agents in *de facto* regimes were excluded from the applicability of statutory limitations²³⁵ and that their perpetrators could not benefit from presidential pardons or commutations of sentences.²³⁶ Equally noteworthy, however, is the fact that the Reformers *remained silent* with respect to amnesties for this sort of crime, deciding to preserve the congress-

228. See *supra* Part I.

229. See GEORG JELLINEK, CONSTITUTIONAL AMENDMENT AND CONSTITUTIONAL TRANSFORMATION (1906), as reprinted in WEIMAR: A JURISPRUDENCE OF CRISIS 54, 54 (Arthur Jacobson & Bernhard Sclink eds., B. Cooper et al. trans., 2000). (“By constitutional amendment, I mean change in the text of the constitution through a purposeful act of will; by constitutional transformation, I mean change that allows the text to remain formally unchanged and is caused by facts that need not be accompanied by an intention or awareness of the change.”).

230. But see David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1463–64 (2001) (discussing the advantages of informal constitutional change over formal amendments). As my argument develops, it will become clearer that my views are more in line with Strauss’.

231. See Art. 3(J), Law 24.309 (allowing the Reforming Convention to consider stipulating “guarantees for democracy” by enacting provisions “in defense of the constitutional order”).

232. See ERNESTO GARZÓN VALDÉS, EL VELO DE LA ILUSIÓN 190–91 (2000) (noting the unexpectedness of the pardons, lack of political necessity, and that they were ill-received by the population).

233. See *passim* Constituent Assembly, Session 3rd, Reunion 12th, 1488 (July 20, 1994).

234. *Id.*

235. See Art. 36 ¶3, CONST. NAC.

236. See Art. 36 ¶¶2–3, CONST. NAC.

sional power unaltered.²³⁷ As a result, the 1994 Reformed Constitution and the pre-reform Constitution as interpreted in the anti-impunity cases look very similar in some respects (pardons and statutory limitations) and quite different in others (amnesties). In fact, something feels odd about the Court holding amnesties for illegal state repression to be constitutionally banned when the 1994 Reform by *the* higher-lawmaking authority seemingly allowed them.²³⁸ Some sense of preclusive formality relating to the rule of law, a hallmark of the legal realm, seems to be lacking here.²³⁹ Likely for this reason, and because the delegates understood their reforms to be ultra-active,²⁴⁰ Article 36 was not referenced in the anti-impunity decisions' majority and concurring opinions.²⁴¹

There is a more compelling way to understand this incongruity. The 1994 Reformers and the 21st -century justices had one crucial point of disagreement, namely, on what the *pre*-Reform Constitution required. The Reformers had to interpret the old constitutional text in order to decide whether or not to amend it. Given the deliberations, voting, and content of the Article 36 amendment,²⁴² we know that the delegates understood that impunity measures for crimes related to illegal state repression were, up till then, permissible.²⁴³ By contrast, the anti-impunity rulings hold that, since the 1970s, the Constitution outlawed such applications for impunity measures.²⁴⁴ It is fair game in legal argumentation for courts to do away with earlier rival interpretations by claiming that they were mistaken. Yet the conflict between *these* opposing interpretations does not seem like a regular interpretive dispute. Do constitutional interpretations by the higher-lawmaking authority stand on equal footing with those by courts? It seems to me they do not. Unless we are prepared to forgo the possibility of amending the Constitution by regular amendment, we are committed to considering

237. Art. 36 does not limit Congress's amnesty-granting powers in any way. Moreover, the 1994 Reform did not amend the amnesties clause. See Art. 75.20, CONST. NAC.

238. However, the conflict might be eluded due to the different conceptualizations at play: "crimes against humanity" versus "crimes perpetrated by de facto regimes."

239. See FREDERICK SCHAUER, THINKING LIKE A LAWYER 35 (2009) (presenting formality in law as a direct consequence of rule-of-law values).

240. The debate on Article 36 reaffirmed that its effects would be ultra-active. However, the urgency to preclude retroactive interpretations came mostly because ¶1 nullifies de facto legislation, which was still abundant in 1994. See Constituent Assembly, Session 3rd, Reunion 12th (July 19, 1994).

241. See CSJN, *Arancibia* (2004); CSJN, *Simón* (2005); CSJN, *Mazzeo* (2007). Dissenting Justice Fayt did analyze Article 36, though for a different argument.

242. The amendment was unanimous, thus also voted affirmatively by the delegates of the right-wing nationalist party MODIN, then the fourth delegation in size. The party, now defunct, was founded by the very military officers who had commanded the insurrections against the government in 1987 and 1988 in demand of impunity. See NORDEN, *supra* note 64 at 146–47.

243. Suppose, for the sake of argument, that the purpose of the new ban on pardons and statutory limitations was to reassert an already-present unwritten rule rather than to produce prospective change. Yet, given that the Reformers decided to preserve the power to grant amnesties, this interpretation cannot overcome the difficulty.

244. See *supra* Section III.A.

that (clear) interpretations by authorities wielding reforming power are binding on other interpreters. Legality thus requires that courts defer to the constituent power as having privileged interpretive authority.

IV. THE ANTI-IMPUNITY SHIFT FROM AN EXTERNAL STANDPOINT:
HUMAN RIGHTS ACTIVISM AND POLITICS IN THE AFTERMATH
OF THE DEMOCRATIC RESTORATION, 1990–2019

Judges typically expound on constitutional developments by referencing juridical discourse and developments within the legal field, as if their decisions were based on legal reasoning alone.²⁴⁵ Part III followed this internal viewpoint to dissect the Court’s argument and analyze its plausibility. However, this account fails by its own standards, which casts doubt on whether the justices were indeed moved to overturn impunity purely based on legal considerations. It may thus be suitable to look elsewhere for clues that explain their choices. In order to adopt a wider perspective, one must believe that judicial opinions do not tell the whole story about the motives behind the rulings but instead represent, at best, only a partial disclosure. This entails the assumption that in many cases judges are also responsive to incentives other than those deemed strictly “legal.”²⁴⁶ Of course, this insight is far from new. Well over a century ago, legal giants Rudolph von Jhering and Oliver W. Holmes ridiculed scholars who approached the law by exclusively looking to legal concepts and legal reasoning, as this made them blind to the exogenous factors that truly drive legal progress.²⁴⁷

In what follows, I will recount the story of the events that allowed for the prosecution and imprisonment of those responsible for the illegal state repression during the dictatorship. This story unfolds around the quest for justice by the Argentine Human Rights Movement (HRM). This Movement is made up of a broad combination of groups and non-governmental organizations of different natures and sizes, under no unified leadership.²⁴⁸ What brings all of the different parts together and defines the HRM as such—at least for purposes of this study—is the shared commitment to, and activism towards, reinforcing the agenda of accountability.²⁴⁹ This

245. See PATRICK ATIYAH & ROBERT SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 5–41 (1987) (theorizing on differences in judicial style regarding legal reasoning between American and English judges).

246. See, e.g., LEE EPSTEIN, WILLIAM LAMDES, & RICHARD POSNER, THE BEHAVIOR OF FEDERAL JUDGES (2013); Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323 (1992).

247. See Rudolph von Jhering, *In the Heaven for Legal Concepts*, 58 TEMP. LQ 799, 806–07 (1985) [1884] (mocking thinkers who discard as “pathological” that which does not strictly follow from established doctrines); Oliver W. Holmes, *Book Notices*, 14 AM. L. REV. 233, 234 (1880) (encouraging analysts to “habitually consider the forces outside of [the law],” “which have actually shaped [its] substance”).

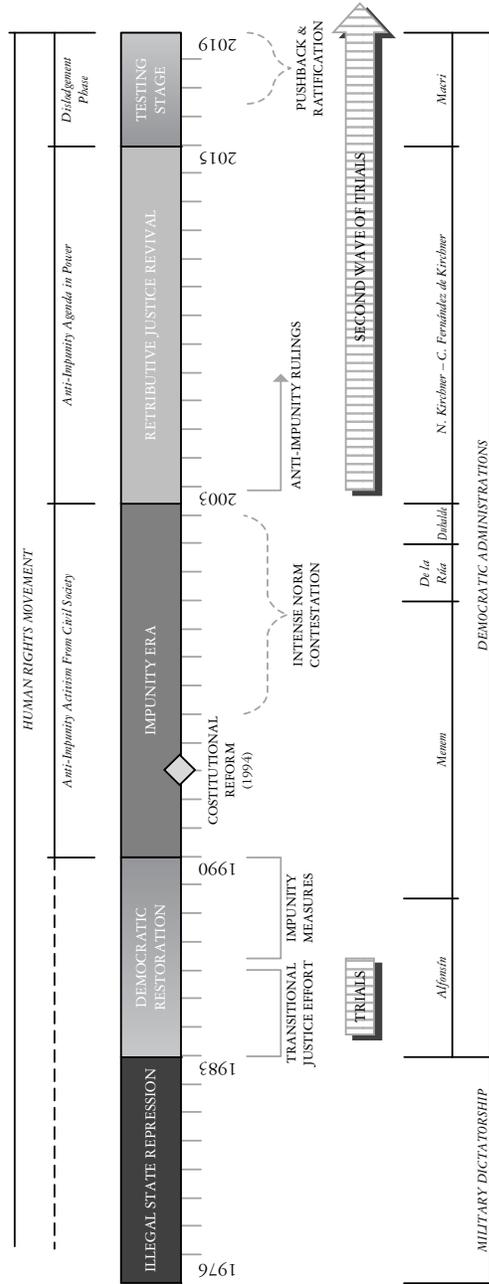
248. See BRYSK, *supra* note 50, at 6–9, 45–56.

249. *Id.* at 14–15.

HRM had been active since the dictatorship, and of course took a strong stance for prosecution and punishment throughout the democratic restoration.²⁵⁰ I will focus, however, on the process that spans from the early 1990s until today. This chain of events is best understood in phases, following the Movement's fluctuating capabilities for political action within contexts defined by different administrations in office and varying Supreme Court membership. There are three stages: (a) the years of anti-impunity activism from civil society, 1990–2003; (b) the period when the Movement entered into a political symbiosis with the government, 2003–2015; and (c) the post-dislodgement phase, 2015–2019.

250. See Mignone et al., *infra* note 270 (explaining the HRM had been initially supportive of the justice effort of the first democratic administration (1983-86), although not without reservations); MALAMUD GOTI, *GAME WITHOUT END* 168 (1996); RONIGER & SZNAJDER, *supra* note 80, at 67–76 (describing the strong stance against the amnesties and pardons that the HRM adopted since these enactments).

STAGES OF HUMAN RIGHTS ACTIVISM AND POLITICS IN ARGENTINA



References

ILLEGAL STATE REPRESSION, see notes 1–9, 290–293 and accompanying text.
 DEMOCRATIC RESTORATION, see Part I. Transitional Justice Effort, see notes 19–21, 65–83, 525–526 and accompanying text. Impunity Measures, see Part I §3; notes 23–24, 98–99, 527 and accompanying text.
 IMPUNITY ERA—*Anti-Impunity Activism from Civil Society*, see Section IV.A. Constitutional Reform, see notes 91–92, 215–244 and accompanying text; Intense Norm Contestation, see Section IV.A §§1–4.
 RETRIBUTIVE JUSTICE REVIVAL—*Anti-Impunity Agenda in Power*, see Section IV.B; notes 15–17 and accompanying text. Anti-Impunity Rulings, see Part II; Section III.A; cases cited in notes 103, 109, 110, 116–117, 125, 129, 146, 161, 198, 351, 431.
 TESTING STAGE—*Dislodgement Phase*, see Section IV.C. Pushback and Ratification, see notes 55–59, 156–161, 412–432 and accompanying text.
Government Timeline
 MILITARY DICTATORSHIP (Mar. 24, 1976 – Dec. 10, 1983).
 DEMOCRATIC ADMINISTRATIONS: Raúl R. Alfonsín (Dec. 10, 1983 – July 8, 1989); Carlos S. Menem (two terms: July 8, 1989 – Dec. 10, 1999); Fernando De la Rúa (Dec. 10, 1999 – Dec. 21, 2001); Eduardo A. Duhalde, *interim* (Jan. 2, 2002 – May 25, 2003); Néstor C. Kirchner (May 25, 2003 – Dec. 10, 2007); Cristina E. Fernández de Kirchner (two terms: Dec. 10, 2007 – Dec. 10, 2015); Mauricio Macri (Dec. 10, 2015 – Dec. 10, 2019).

A. Anti-Impunity Activism from Civil Society, 1990-2003

This section focuses on the Human Rights Movement and the courses of action it undertook after the end of the democratic restoration, for a period of over a decade that may aptly be labeled the “impunity era” (1990–2003). The context of this period was an unusual one for anti-impunity activism, given that any such program was severely constrained by both the impunity cluster and the fact that a justice-seeking agenda no longer held center stage like it had done years earlier, as society had come to have very different concerns.²⁵¹ As this phase evolved, the HRM itself experienced changes in its composition and size and developed more sophisticated organizational structures. It grew significantly due to a generational influx, especially as the end of the century approached.²⁵² Its agglomerative nature made it hard to identify with precision: it was (and is) composed of entities very diverse in nature, among which there were different degrees of involvement and multiple methods of engagement.²⁵³ The Movement could still be quickly identified, as it is today, by a few pro-trials-specific groups and organizations.²⁵⁴ However, a closer look reveals the complexity of the fabric surrounding this core. Among these other participants were quite a few more generally-oriented NGOs with a strong interest in this agenda, some small left-wing parties with little congressional representation (the Movement had virtually no pull with the major political parties during this era), and the national newspaper *Página 12*.²⁵⁵ The amorphousness that this illustrative listing of members suggests is probably the HRM’s most interesting feature, as it has shaped it into an activist social network with wide-ranging capabilities for action.

The HRM is a social reform movement, which can be further identified by its recourse to specific framing strategies in communication.²⁵⁶ Most notably, the Movement has always described the massacre at the hands of the dictatorship in terms of the disappearance of 30,000 people.²⁵⁷ This number attained a crucial symbolic status, distinctive of the HRM and its

251. See Karen Wilson, *Argentina's Human Rights: Crisis in Transition*, 20 HUM. RTS. 28, 28 (1993) (“Five years ago, hundreds of people would gather to support and rally with the Mothers, bringing placards and chanting along with their slogan ‘Truth, Justice, Memory;’ today, few give these marching women a glance.”).

252. See generally Fernando J. Bosco, *The Madres de Plaza de Mayo and Three Decades of Human Rights' Activism: Embeddedness, Emotions, and Social Movements*, 96 ANNALS ASS'N AM. GEOGRAPHERS 342 (2006) (analyzing the regional development and growth of the Madres de Plaza de Mayo).

253. See Elizabeth Jelin, *The Politics of Memory: The Human Rights Movement and the Construction of Democracy in Argentina*, 21 LAT. AM. PERSPECTIVES 38, 41–46 (1994); Sikkink, *supra* note 18, at 3–16.

254. BRYSK, *supra* note 50, at 45–46.

255. See SASKIA VAN DRUNEN, *STRUGGLING WITH THE PAST: THE HUMAN RIGHTS MOVEMENT AND THE POLITICS OF MEMORY IN POST-DICTATORSHIP ARGENTINA (1983-2006)* 86–93 (2010).

256. Framing strategies have been a frequent tool for Argentine social movements since the democratic restoration. See generally Kelsey M. Jost-Creegan, *Debts of Democracy: Framing Issues and Reimagining Democracy in Twenty-first Century Argentine Social Movements*, 30 HARV. HUM. RTS. J. 165 (2017).

257. See Alison Brysk, *The Politics of Measurement: The Contested Count of the Disappeared in Argentina*, 16 HUM. RTS. Q. 676, 685–88 (1994) (analyzing disputes regarding the size of the tragedy).

agenda, to the point that the sole mention of “30,000” to Argentines is enough to convey a certain view about the atrocities committed during those dreadful years and what should be done about it.²⁵⁸ On a similar note, the Movement justifies retributive justice in terms of fostering “human rights” (without further specification) in an attempt to suggest a positive program (as opposed to other slogans used, such as “trial and punishment”).²⁵⁹ As with all instances of framing, these narratives have been subject to standard criticisms: some point out that the number of fatal victims of the dictatorship is smaller than what the Movement claims,²⁶⁰ whereas others maintain that the retributive program involves a bias that works against other important “human rights” issues.²⁶¹

Over the years, the HRM defined its own vision of what an ideal project for retributive justice should look like. Make no mistake: the Movement supported the core of the transitional justice effort, which was directly aimed at having high-ranking members of the armed forces made accountable for their crimes.²⁶² Notwithstanding this support, as I will explain, the Movement did not fully endorse the plan implemented during the transitional period beyond this core goal. Two kinds of differences are worth considering.

On the one hand, the Movement had views of its own regarding *who* should be made accountable. The inaugural democratic administration aimed the transitional justice effort at two groups.²⁶³ In 1983, after only five days in office, then-President Raul Alfonsín signed “twin” executive decrees ordering prosecutions: one decree targeted the military commanders in the Juntas and provided some indications that lower-ranking officers

258. See ROBEN, *supra* note 9, at 11.

259. The human rights demand has been constitutive of the Movement since the dictatorship. See MERCEDES BARROS, HUMAN RIGHTS MOVEMENT AND DISCOURSE 212–234 (2011).

260. For authorized presentations from each camp see generally GRACIELA FERNÁNDEZ MEJIDE, LA HISTORIA ÍNTIMA DE LOS DERECHOS HUMANOS EN LA ARGENTINA (2009); Eduardo Luis Duhalde, *Carta de Eduardo Luis Duhalde a Fernández Meijide*, PERFIL (Aug. 4, 2009), <https://www.perfil.com/noticias/politica/carta-de-eduardo-luis-duhalde-a-fernandez-meijide-20090804-0037.phtml> [<https://perma.cc/DU2G-YGNL>].

261. See, e.g., *infra* note 280. This critique was most authoritatively presented by human rights activist Adolfo Pérez Esquivel, although it was aimed more at the Kirchner administration than at the HRM organizations that pursued the anti-impunity agenda. See, e.g., *Pérez Esquivel dijo que los Kirchner “violan los Derechos Humanos y son iguales al menemismo,”* PERFIL (Oct. 18, 2008), <https://www.perfil.com/noticias/politica/perez-esquivel-dijo-que-los-kirchner-violan-los-derechos-humanos-y-son-iguales-al-menemismo-20081018-0022.phtml> [<https://perma.cc/QX3U-HVV8>]. On how these criticisms allegedly inspired human rights policies after the HRM had been dislodged, see *infra* notes 405–06 and accompanying text.

262. See BRYSK, *supra* note 50, at 77–84 (describing the government’s actions pursuing accountability).

263. In a way, this targeting mimicked the *self*-amnesty enacted by the military, which also, though partially, exonerated guerrilla-related crimes. See Law [de facto] No. 22.924 (1983), Sep. 27, 1983, [25.266] B.O. 11, arts. 1–4. This enactment was quashed by the inaugural Congress as it first convened. See Law No. 23.040 (1983), *supra* note 67, arts. 1–2.

might be exonerated;²⁶⁴ the other decree was aimed at the guerrilla leaders, “mainly responsible for the establishment of violent forms of political action, whose presence disturbed Argentinian life.”²⁶⁵ Likewise, when the transitional justice project was abruptly ended by the next administration, the presidential pardons of 1989–1990 were issued in favor of both military officers and former guerrilla members,²⁶⁶ a scheme that was maintained even in the residual pardons of 2003.²⁶⁷ The HRM’s views strongly differed regarding this dual attribution of responsibility. (i) For one, the Movement had no interest in aiming any retroactive justice effort toward former members of the guerrilla organizations—their impunity was not found to be particularly problematic.²⁶⁸ The reasons behind this vary, ranging from the fact that the guerrilla crimes were considered to belong to a different moral category than those committed by the military to the shared political affiliation (and even family ties) between people in the Movement and former guerrilla members.²⁶⁹ (ii) Secondly, the Movement did not agree with views that advanced the possible exoneration of lower-ranking military and police personnel on the grounds that their responsibility was diluted by the strictness of military discipline and the peculiarities of the context.²⁷⁰ To them, everyone implicated in illegal state repression should be held accountable.²⁷¹ (iii) Finally, the Movement also disagreed with the transitional strategy’s exclusion of civilian accomplices of the military regime from prosecution. These were held to include state officials,²⁷² businessmen,²⁷³ judges,²⁷⁴ and members of the Catholic clergy (including the incumbent

264. See Decree No. 158 (1983), Dec. 15, 1983, [25.321] B.O. 5, ¶¶3, 5. See also Law No. 23.049 (1984), Feb. 15, 1984, [25.365] B.O. 1, art. 11 (establishing grounds for exoneration on the basis of having followed orders).

265. Decree No. 157 (1983), Dec. 15, 1983, [25.321] B.O. 4, ¶7.

266. See *supra* notes 87–88 and accompanying text.

267. See Decree No. 1228 (2003), May 22, 2003, [30.155] B.O. 4 (pardoning military officers); Decree No. 1229 (2003), May 22, 2003, [30.155] B.O. 3 (pardoning guerrilla members); Decree No. 1230 (2003), May 22, 2003, [30.155] B.O. 5 (same).

268. For this reason, I find misleading Nino’s characterization of the HRM’s views on punishment as “intransigently retributive” or “Kantian.” NINO, *supra* note 30, at 112. See ROBBERN, *supra* note 3, at 338 (noting how one of the effects of impunity was to have the Movement switching from a mere claim for justice to embracing the political project of the disappeared).

269. See ROBBERN, *supra* note 3 at 336–38.

270. See Emilio Mignone, Cynthia L. Estlund & Samuel Issacharoff, *Prosecution of Human Rights Violations in Argentina*, 10 YALE J. INT’L L. 118, 144–49 (1984); Carlos S. Nino, *The Human Rights Policy of the Argentine Constitutional Government*, 11 YALE J. INT’L L. 217, 227–29 (1985).

271. Mignone et al., *supra* note 270, at 144–49; Nino, *supra* note 270, at 227–29.

272. The topic made international headlines in 2001, when the Dutch Parliament requested a report on a dictatorship cabinet member, who ended up being the father of the Queen of the Netherlands. See MICHEL BAUD, *EL PADRE DE LA NOVIA*, 12–16 (2001).

273. See generally LAURA GARCÍA MARTÍN, *TRANSITIONAL JUSTICE, CORPORATE ACCOUNTABILITY, AND SOCIO-ECONOMIC RIGHTS: LESSONS FROM ARGENTINA* (2020); Juan Pablo Bohoslavsky & Veerle Opgenhaffen, *The Past and Present of Corporate Complicity: Financing the Argentine Dictatorship*, 23 HARV. HUM. RTS. J. 157 (2010).

274. See generally USTED TAMBIÉN DOCTOR? *COMPLICIDAD DE JUECES, FISCALES Y ABOGADOS DURANTE LA DICTADURA* (J.P. Bohoslavsky ed., 2015).

Roman Pontiff).²⁷⁵ This last idea is captured through yet another framing device, the reference to the dictatorial government of 1976–1983 as a *civilian-military dictatorship*.²⁷⁶

On the other hand, the manifestos of the democratic restoration had endorsed an account about the tragic events of the preceding decade that caused some controversy. When the President ordered in 1983 that the military high command be prosecuted, he summarized the commanders' main fault by alluding to the "develop[ment] and implement[ation] of a plan of operations against subversive and terrorist activity that was based on blatantly illegal methods and procedures."²⁷⁷ Similarly, the Argentine truth commission began its famous *Never Again* report with what became a canonical statement. It declared:

During the 1970s, Argentina was torn by terror from both the extreme right and the far left. This phenomenon was not unique to our country. Italy, for example, has suffered for many years from the heartless attacks of Fascist groups, the Red Brigades, and other similar organizations. Never at any time, however, did that country abandon the principles of law in its fight against these terrorists, and it managed to resolve the problem through the normal courts of law, guaranteeing the accused all their rights of a fair hearing. . . . The same cannot be said of our country. The armed forces responded to the terrorists' crimes with a [kind of] terrorism infinitely worse than the one they were combating[.].²⁷⁸

Important sectors of the Human Rights Movement took issue with this description.²⁷⁹ To them, these passages endorsed what came to be known as the infamous "theory of the two demons"—namely, an attempt to present illegal state repression as a reaction, however disproportionate, to the violence introduced by the guerrilla organizations.²⁸⁰ Notice that disagreements may operate at a couple of different levels. Most frequently, the criticism is directed at (i) a *justificatory* version of the "two demons," namely, one that intends to exculpate state-generated terror by contextually

275. See Simon Romero & William Neuman, *Starting a Papacy, Amid Echoes of a "Dirty War,"* N.Y. TIMES, Mar. 18, 2013, at A1. While then-father Jorge Mario Bergoglio, SJ, (today H.H. Francis, Pope of the Roman Catholic Church) was Provincial of the Society of Jesus, two Jesuit priests were kidnapped and tortured by Navy squads. His role in the episode has been subject to debate. These events were portrayed in the film *The Two Popes* (2019).

276. See HORACIO VERBITSKY & JUAN PABLO BOHOSLAVSKY, CUENTAS PENDIENTES 12 (2013) (noting the sub-inclusiveness of the label "military dictatorship").

277. Decree No. 158 (1983), *supra* note 264, at ¶1.

278. NEVER AGAIN REPORT, *supra* note 79, at 1 [Prologue, ¶¶1–2] (translation revised).

279. See ROBBEN, *supra* note 9, at 65–76 (quoting a leader of Mothers of Playa de Mayo protesting that "Our children were not demons. They were revolutionaries, guerrillas—wonderful and unique—who defended the Fatherland").

280. See ROBBEN, *supra* note 9, at 65–68 (reviewing disputes about the "theory of two demons").

interpreting it as a reaction against an also-terrible evil. Such a view was held by the military when defending its actions²⁸¹ and, arguably, may have inspired some of the impunity measures.²⁸² However, this version is unquestionably absent from the transitional justice manifestos. These only resemble the “two demons” as part of (ii) a *causal* explanation—as they note that the “infinitely worse” state repression was implemented *in order to* fight back against the violence of the guerrillas.²⁸³ But sections of the HRM also disagreed with this interpretation about motives. In their view, this gave way to considering that, because of their violent actions, the guerrilla-militants were in part to blame for the coup and the horrors that followed at the hands of the dictatorship.²⁸⁴

Throughout the era of impunity, the Movement undertook an interesting array of strategies of activism, displaying its already-proven capacity for mobilization.²⁸⁵ Each of its courses of action was highly visible, reported on by the media and accompanied by popular demonstrations when possible.²⁸⁶ This openness has been most clearly displayed at the anniversaries of the 1976 Coup, the main annual commemoration of human rights activism under the banner of “Truth, Justice, Memory.”²⁸⁷ This “celebration” exponentially increased in popular participation and media coverage throughout

281. See Junta Militar, *Documento Final de la Junta Militar sobre la Guerra Contra la Subversión y el Terrorismo*, April 1983 (highlighting the terrorist aggression and presenting human rights violations by the military as mistakes in the heat of the battle).

282. The amnesty laws excluded a handful of crimes from coverage, allowing prosecutions to continue for newborn kidnapping and child identity theft, rape, and real estate appropriation. See Law No. 23.492 (1986), *supra* note 86, art. 5; Law No. 23.521 (1987), *supra* note 86, art. 2; *infra* note 297. These exceptions may be revered for maintaining a core of intransigency in defense of moral decency in the midst of increasing pressure for a blanket solution. This may very well be true, and some good consequences came from it. See *infra* Section IV.A §1. However, by virtue of these exceptions, the amnesties may be interpreted as a double concession: to the perpetrators' wishes for impunity, and to their exculpatory version of the facts. Indeed, the exclusions convey a certain rationale for impunity: given that these few felonies could *not be justified* as part of counter-terrorist action, the amnesties seem to accept *a contrario* some justification for state repression along those lines, even if brutal or unnecessary. The rationales behind the pardons are even clearer, as they freed from punishment military officers and guerrilla members following a sort of symmetry. See *supra* notes 266–267 and accompanying text. See also GARZÓN VALDÉS, *supra* note 232, at 312–13 (criticizing the ideal of a “national reconciliation” that inspired the presidential pardons).

283. See RONIGER & SZNAJDER, *supra* note 80, at 58 (noting that this meant “adopt[ing] one of the main theses of the armed forces”).

284. See HUGO VEZZETTI, PASADO Y PRESENTE: GUERRA, DICTADURA Y SOCIEDAD EN LA ARGENTINA 123–28 (2009) (condemning the belligerent strategies and violent means left-wing militants employed back in the 1960s and 1970s, and their lack of self-criticism for it); Hobbsbaum *supra* note 1, at 52 (explaining that the “essential strategy of [revolutionary] groups was polarization: either by demonstrating that the enemy regime was no longer in control, or . . . by provoking it into general repression, they hoped to drive the hitherto passive masses to support the rebels. Both variants were dangerous. The second was an open invitation for a sort of mutual escalation of terror and counter-terror”).

285. See, e.g., Diana Taylor, *Making a Spectacle: The Mothers of the Plaza de Mayo*, in RADICAL STREET PERFORMANCE: AN INTERNATIONAL ANTHOLOGY (Jan Cohen-Cruz ed., 1998).

286. See BRYSK, *supra* note 50, at 16–19; Valeria Vegh Weis, *The Relevance of Victims Organizations in the Transitional Justice Process: The Case of the Grandmothers of Plaza de Mayo in Argentina*, 12 INTERCULTURAL HUM. L. REV. 1, 42–44 (2017).

287. See Wilson, *supra* note 251, at 28; Jelin, *supra* note 253, at 49.

the years, until the date was officially recognized in 2002.²⁸⁸ Such a communicative strategy made quite a difference for the pro-trials agenda. Although its advancement was the result of the actions of a singular social movement, with a varying amount of popular support, its forms of activism kept all of Argentine society well aware of its program and achievements.²⁸⁹ In this sense, it is important to picture the following tactics as eliciting a society-wide conversation among the citizenry—one triggered by the Movement through its open advocacy of its own aspirations for justice in defiance of the prevailing impunity.

1. *Newborn Identity Theft*. Some of the crimes perpetrated by the dictatorship had tragic ramifications. Most of the women targeted by the regime for interrogation and execution were in their late teens to early thirties.²⁹⁰ Quite a few were pregnant, and this seems to have made little to no difference as to their fates.²⁹¹ Sometimes, they were allowed to carry their pregnancies to term and give birth in captivity, then they were separated from their newborns and, in most cases, were later assassinated.²⁹² Generally, the babies were given to people with forged birth certificates as if they were their own offspring, or through irregular adoptions, although in some cases the adoptive parents were not aware of the children's tragic provenances.²⁹³ One of the high-profile human rights organizations, the "Grandmothers of the Plaza de Mayo," is mainly devoted to an agenda of identity recovery.²⁹⁴ Since the late '70s up through today, over 100 of these children of disappeared parents have been able to learn their stories and have reconnected with any remaining members of their biological families.²⁹⁵

As for accountability, the amnesties of 1986–1987 were technically designed to cover most of the atrocities perpetrated by the dictatorship and therefore had a devastating effect on criminal prosecutions.²⁹⁶ However,

288. See Law No. 25.633 (2002), Aug. 23, 2002, [29.968] B.O. 2 (instituting the "National Day of Remembrance for Truth and Justice" beginning in 2003). For further developments on this commemoration, see *infra* note 340.

289. For instance, due to this high public profile, the Movement was able to dwell upon the moving confessions of crimes by a military officer in the mid-1990s. See HORACIO VERBITSKY, *CONFESSIONS OF AN ARGENTINE DIRTY WARRIOR* (1996).

290. See Laura Oren, *Righting Child Custody Wrongs: The Children of the 'Disappeared' in Argentina*, 14 HARV. HUM. RTS. J. 123, 123–25 (2001).

291. *Id.*; see also NEVER AGAIN REPORT, *supra* note 79, at 285–318.

292. See Oren, *Righting Child Custody Wrongs*, *supra* note 290, at 123–25.

293. See NEVER AGAIN REPORT, *supra* note 79, at 286–318.

294. See generally RITA ARDITTI, *SEARCHING FOR LIFE: THE GRANDMOTHERS OF THE PLAZA DE MAYO AND THE DISAPPEARED CHILDREN OF ARGENTINA* (1999).

295. Rough calculations suggest that there could be 300 persons yet to be identified. See Estela de Carlotto: "Aún hay 300 nietos desaparecidos por la dictadura," LA NACIÓN (Aug. 10, 2016), <https://www.lanacion.com.ar/politica/estela-de-carlotto-aun-hay-300-nietos-desaparecidos-por-la-dictadura-nid1926761> [<https://perma.cc/DQ62-7JZE>]. A handful of these daughters and sons of the disappeared have made it to Congress and to cabinet positions in government.

296. See Andrew S. Brown, *Adiós Amnesty: Prosecutorial Discretion and Military Trials in Argentina*, 37 TEX. INT'L L.J. 203, 210–11 (2002) (describing the effect of each of the amnesty laws in terminating the justice program).

Congress did exclude a handful of crimes from their coverage—mainly, those related to newborn kidnapping and child identity theft.²⁹⁷ Due to the exception, identity recoveries did continue to give way to criminal charges for the illegal appropriation of newborns. These prosecutions, the only ones permitted during the impunity era, treated each crime as the result of an isolated action by individuals—the substitute parents, midwives, judges granting the adoptions, etc.—who had taken advantage of a context of lawlessness and official cover-ups.²⁹⁸ In the second half of the 1990s, however, the investigations experienced a shift in focus. Despite the fact that this set of cases was very restricted in scope when compared to the range of crimes perpetrated during state repression, human rights lawyers thought it could suffice to take high-ranking members of the dictatorship back to trial.²⁹⁹ The shift was to focus on individual appropriations not as isolated crimes but as part of a “systematic plan” orchestrated from above.³⁰⁰ This all-encompassing case for newborn identity theft was admitted and led to the detention of former junta members.³⁰¹ However, because of its limited scope and the slow pace of the proceedings,³⁰² the investigation was virtually superseded by the unrestricted prosecutions triggered by the later defeat of the impunity cluster. Still, the case was in fact taken to trial in 2011, and many high officers—including two former de facto presidents—did end up receiving major sentences.³⁰³

2. *Targeted Demonstrations (“Escrachas”).* The second half of the 1990s saw the Movement reinvigorated by the timely emergence of a new actor. During these years, the generation born during the second half of the 1970s, the offspring of victims of state repression, came of age and brought youthful energy to political activism. Most of this energy was channeled through their own organization, H.I.J.O.S. (the Spanish acronym for “Sons and Daughters of the disappeared, for Identity and Justice, against Oblivion and

297. See Law No. 23.492 (1986), *supra* note 86, art. 5; Law No. 23.521 (1987), *supra* note 86, art. 2. The second of these laws added rape and real estate appropriation as exceptions to the amnesty, but because the first law had annested most of these crimes (via setting a deadline for prosecutions), these exceptions made little to no difference.

298. See generally ARDITTI, *supra* note 294.

299. A technical difficulty arose regarding double jeopardy. See SKAAR, *supra* note 45, at 64–65.

300. See Oren, *supra* note 290, at 178–183.

301. The Movement was also capable of having international governments put pressure on the Argentine administration in this regard. See Kathryn Sikkink, *The Transnational Dimension of the Judicialization of Politics in Latin America*, in *THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA* 263, 263 (Rachel Sieder, Line Schjolden, & Alan Angell eds. 2005); Sikkink & Walling, *supra* note 69, at 314–16. Additionally, domestic prosecutions may be portrayed as a response to requests for extradition from foreign countries. See Ellen Lutz & Kathryn Sikkink, *The Justice Cascade*, 2 *CHI. J. INT’L L.* 1, 21 (2001).

302. The case began with a court filing by the Grandmothers of the Plaza de Mayo in 1996. After a complex procedure full of legal obstacles, the Supreme Court gave a final green light for the trial eight years later. See CSJN, *Videla* (2003).

303. See Tribunal Oral en lo Criminal Federal No. 6 de la Capital Federal [TOF6] [Federal Criminal Court of the Federal District], 17/9/2012, “Franco, Rubén O. y otros s/sustracción de menores de diez años—causas 1351, 1499, 1584, 1604, 1730, 1772” (2012).

Silence”), which rather quickly became a leading player within the Movement.³⁰⁴ The key to their conspicuousness was their unique *modus operandi* against impunity: they targeted suspects of state repression by carrying out high-profile demonstrations in front of the repressors’ own houses, a practice they referred to as an “*escrache*” (tarnish).³⁰⁵ These public demonstrations took place on set dates, lasted several hours, and involved hundreds of people occupying the entire street in front of the residence, chanting, playing drums, giving speeches, and even displaying some performance art.³⁰⁶ Many times, these demonstrations led to acts of vandalism, mainly consisting of painting walls with red paint to symbolize the blood taken by the perpetrator’s crimes.³⁰⁷ The media covered many of these demonstrations, and some were televised live.³⁰⁸

The significance of these rituals for justice has been the object of an interesting anthropological debate. Originally, the demonstrations were presented as an innovative challenge to prevailing impunity, which sought to make the people in a neighborhood aware of the terrible accusations pending against their neighbor, in the hope that these demonstrations would elicit forms of social condemnation.³⁰⁹ The idea was to have those living in the perpetrators’ daily environments turn against them so that they would “turn, before the eyes of the neighborhood, into the torturer that [they] never ceased to be.”³¹⁰ Ironically, this popular form of substitute justice is hard to reconcile with the demand that the perpetrators in fact be subject to a criminal trial.³¹¹ Once the possibility of trials became more than a distant aspiration, the symbolic dimension of the protests was adjusted accordingly in order to demand the standard criminal justice and accompany the justice endeavor.³¹²

304. See Sikkink, *supra* note 18, at 11; Noa Vaisman, *Variations on Justice, Argentina’s Pre- and Post-Transitional Justice and the Justice to Come*, 82 *ETHNOS* 366, 367–68 (2017).

305. *COLECTIVO SITUACIONES, LOS ESCRACHES* (Ediciones de Mano en Mano, 2000).

306. See Diana Taylor, “You Are Here”: *The DNA of Performance*, 46 *DRAMA REV.* 149, 151 (2002); Emily Klein, *Spectacular Citizenships: Staging Latina Resistance through Urban Performances of Pain*, 32 *FRONTIERS* 102, 105–09 (2011).

307. See Susana Kaiser, *Escraches: Demonstrations, Communication, and Political Memory in Post-Dictatorial Argentina*, 24 *MEDIA, CULTURE & SOC’Y* 499, 508–09 (2002) (noting how this made *escrache* vulnerable to its most severe criticism, namely, that mobs targeting individuals in a vulnerable position is reminiscent of fascist practices).

308. See *Conversación con la Mesa de Escrache*, 5 *SITUACIONES* at 76 (2002) (highlighting that “[i]f the *escrache* has as a goal ‘trial and punishment,’ then it [must] engage with the media . . . [in] looking precisely for effectiveness . . . the media there operates very effectively, fast, and reaching millions”).

309. See *Documento de la Comisión de escrache de HIJOS* (November 2001), 5 *SITUACIONES* at 58 (2002) (explaining that “[t]he idea was to increase the pressure on the repressor until his neighborhood would become unbearable for him to live in”); Diego Benegas, “If There’s No Justice. . .”: *Trauma and Identity in Post-Dictatorship Argentina*, 16 *PERFORMANCE RES.* 20, 20 (2011).

310. *Colectivo Situaciones, Discurso de H.I.J.O.S. en el escrache a Weber*, at 46–47 (Ediciones de Mano en Mano, 2002).

311. Sandrine Lefranc, *Reconocer à l’Ennemi?: Jeux de Piste dans l’Argentine Postdictatoriale*, 5 *RAISONS POLITIQUES* 127, 138 (2002) (characterizing *escrache* as a parody of the absent true justice).

312. See Vincent Druliolle, *H.I.J.O.S. and the Spectacular Denunciation of Impunity: The Struggle for Memory, Truth, and Justice and the (Re-)Construction of Democracy in Argentina*, 12(2) *JOURNAL OF HUMAN*

3. *Truth by Judgment.* Besides preventing punishment, amnesty laws continued to be an obstacle for justice in a further sense as well. Given that one of the functions of courts is to establish the truth about criminal allegations, judicial procedures involve a major fact-finding effort to support the accusations. By impeding criminal prosecutions, the amnesties, thus, collaterally put an end to official investigations aimed at finding out what had happened and at having an official account of the events established by judgment.³¹³ Although these are only intermediate steps in ordinary criminal procedures, they have an importance of their own. Fact-finding by the criminal justice apparatus is immensely more well-resourced than by any private party. Moreover, the official endorsement of a version of the facts by a court of law adds a vindictory component that in itself constitutes a form of reparation.³¹⁴

The main obstacles, however, were the norms determining that a valid criminal accusation was necessary to initiate an official investigation. This was either circumvented or contested in three episodes that demonstrate different paths to overcoming those rules. (i) One path pushed for a loose reading of the writ of habeas data, a recently incorporated constitutional remedy for persons to gain knowledge of information about them.³¹⁵ The sibling of a disappeared man requested in court that the Army provide all information on record concerning not him but his brother. Although the lower tribunals rejected the action, the Supreme Court in 1998 granted the request.³¹⁶ (ii) An alternative path to challenging the status quo was opened by affirming and implementing a fundamental right to the truth. The intention was to call for the opening of trials primarily directed at establishing facts instead of sustaining criminal accusations.³¹⁷ The first and most famous of these trials for truth began in 1998, when a Federal Court of Appeals admitted a plea by “assert[ing] the right of relatives of victims of State abuses that occurred during the past de facto government (1976/1983) to know the circumstances related to their disappearance and, even-

RIGHTS 259, 269–273 (2013); Francesca Lessa & Cara Levey, *From Blanket Impunity to Judicial Opening(s): H.I.J.O.S. and Memory Making in Postdictatorship Argentina (2005-2012)*, 42(3) *LATIN AMERICAN PERSPECTIVES* 207, 213–14 (2015) (identifying how the practice of demonstrations varied once the actual trials began); Vaisman, *supra* note 304, at 377–381 (explaining later stages of targeted demonstrations, directed to reluctant judges and to perpetrators who violated the terms of their house arrest).

313. See Elena Maculan, *Prosecuting International Crimes at National Level: Lessons from the Argentine “Truth-Finding Trials”*, 8 *UTRECHT L. REV.* 106, 107–110 (2012).

314. The Inter-American Court has noted this for human rights violations since its earliest cases. See *Neira Alegria et al. v. Perú*, *Reparations and Costs, Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 29, ¶ 56 (Sept. 19, 1996).

315. See generally Maxim Gakh, *Argentina’s Protection of Personal Data: Initiation and Response*, 2 *I/S: J.L. & POL’Y FOR INFO. SOC’Y* 781 (2006).

316. See Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 15/8/1998, “Urteaga, Facundo Raúl c/Estado Nacional—Estado Mayor Conjunto de las FF.AA. s/amparo ley 16.986,” *FALLOS* 321:2767 (1998) (discussing technicalities on how such a request should be framed—as an habeas corpus, a generic “amparo” writ, or an habeas data, yet unanimously accepting the request).

317. See Maculan, *supra* note 313, at 106.

tually, the final placement of their remains.”³¹⁸ These proceedings went on for months and produced a decent amount of evidence, which even ended up having some punitive implications.³¹⁹ (iii) The third case pursued the same strategy but before an international forum. It originated in a petition filed before the Inter-American Commission by one of the mothers of the Plaza de Mayo to establish the facts related to the disappearance of her daughter.³²⁰ After some negotiations between the plaintiff and the state, a friendly settlement was achieved in 2000, whereby the government formally stated that it “accepts and guarantees the right to the truth, which involves the exhaustion of all means to obtain information on the whereabouts of the disappeared persons” and committed itself to allow trials for truth to open throughout the country.³²¹

4. *Pro-Trials Litigation*. Although in the design of all of these strategies the impunity measures were taken as a given, the possibility of an open challenge was always on the horizon. Since early on, appeals were made to international forums, with moderate success.³²² In 1998, the Movement convinced Congress to abrogate the amnesties, if only for symbolic purposes.³²³ In an exercise of strategic litigation, a case was brought to a District Court to decide, yet again, on the constitutionality of these measures of impunity. In 2001, a judgment was issued granting the request for prosecution,³²⁴ which the Court of Appeals affirmed.³²⁵ Of course, given that this challenged Supreme Court precedent, the fate of this case ultimately depended on what the Court would decide. Over three years later, this was

318. Cámara Federal de Apelaciones de La Plata [CFed.] [Federal Court of Appeals], en banc, 21/4/1998, “Asamblea Permanente por los Derechos Humanos,” Res. 18/98 (1998), §2.

319. The most salient case was that of Catholic priest Christian von Wernich, who was accused and found guilty of being present and participating in sessions of interrogation under torture.

320. See *Carmen Aguiar de Lapaco v. Argentina*, Case 12.059, Inter-Am. Comm’n H.R., Report No. 20/99, OEA/Ser.L/V/II.106, doc. 6 rev. (1999).

321. *Carmen Aguiar de Lapaco v. Argentina*, Case 12.059, Inter-Am. Comm’n H.R., Report No. 21/00, OEA/Ser.L/V/II.106, doc. 6 rev. ¶ 17 §§1–2 (2000) (qualifying the state’s obligation as one “of means, not of results, which is valid as long as the results are not achieved, not subject to prescription,” and noting that the state would adopt laws so that these trials for truth remain exclusively in the jurisdiction of federal criminal and correctional courts, with the “exception of cases involving kidnapping of minors and theft of identity, which shall continue on the basis of their status”).

322. The Inter-American Commission issued a Report, in response to petitions by the Movement, concluding that the impunity measures contravened the ACHR, yet it did not submit the case to the Inter-American Court. See *Consuelo et al. v. Argentina*, Case 10.147, Inter-Am. Comm’n H.R., Report No. 28/92, OEA/Ser.L/V/II.83, doc. 14 at 41, ¶¶ 32, 37, 39, 41 (1992).

323. See Law No. 24.952 (1998), Apr. 17, 1998, [28.879] B.O. 1, voted in by an overwhelming majority in both houses, in commemoration of the 22nd anniversary of the coup.

324. See Juzgado Nacional en lo Criminal y Correccional Federal No. 4 de la Capital Federal [Juzg.Fed.4] [Federal District Court], 6/3/2001, “Simón, Julio, Del Cerro, Juan Antonio s/sustracción de menores de 10 años,” LA LEY (2001-D-510), *aff’d sub nom.* “Incidente de apelación de Simón, Julio,” *infra* note 325.

325. See Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal de la Capital Federal [CFed.] [Federal Court of Criminal Appeals], panel II, 9/11/2001, “Incidente de apelación de Simón, Julio,” *La Ley online* 35012364 (2001), *aff’d sub nom.* “Recurso de hecho deducido por la defensa de Julio Héctor Simón en la causa Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc.—causa N° 17.768,” *supra* note 109.

precisely the case that allowed the Court to overrule its previous decisions and strike down the amnesty laws.³²⁶ But that story belongs to another epoch.

B. *The Anti-Impunity Agenda in Power, 2003–2015*

Argentina went into a major economic and social crisis in 2001, after several years of recession resulting in very high rates of unemployment and a rising public debt.³²⁷ By the end of that year, social turmoil led to protests and riots that prompted the incumbent President to step down.³²⁸ Congress appointed an interim President to try to recover control of the economy and call for elections.³²⁹ With the reputation of the political class broadly questioned, the 2003 presidential elections were unusual in that they saw the emergence of new figures and the absence of clear frontrunners. Because no presidential candidate reached the required percentage of votes, the electoral rules mandated a second-round run-off election between the two tickets receiving the most votes.³³⁰ Neither of these two candidates had surpassed a quarter of the popular vote; hence, the second ballot seemed important to create electoral legitimacy. Yet it never took place. Anticipating a strong rejection of his candidacy, former President Carlos Menem (1989–1999) withdrew.³³¹ As a result, with scarce electoral support, the presidency went to the candidate backed by the interim government, the little-known but charismatic Néstor Kirchner.³³² This outcome opened a new era in Argentine politics. Kirchner and his wife Cristina Fernández de Kirchner, who succeeded him and was reelected, would end up ruling the country for over twelve years (2003–2015).³³³

For the purposes of this historical review, the “Kirchner Era” constitutes a discrete and critical phase, defined by an unbreakable political symbiosis between the administration and the HRM. In practice, this allowed the Movement to achieve its most sought after objective: for the trials for illegal state repression to be fully reopened.³³⁴ Indeed, this accomplishment was officially explained as “the result of the confluence between the Federal Government’s political decision to make human rights the cornerstone of public policy and the unrelenting requests for truth, justice and remem-

326. See CSJN, *Simón* (2005).

327. See Clifford Krauss, *Argentine Economy: Postponing the Inevitable*, N.Y. TIMES, Dec. 4, 2001, at A10.

328. See *Argentina Unraveling*, N.Y. TIMES, Dec. 21, 2001, at A38.

329. See Larry Rohter, *Crisis Incites More Protests And Discord In Argentina*, N.Y. TIMES, Jan. 27, 2002, at S1-8.

330. Omar Sanchez, *Argentina’s Landmark 2003 Presidential Election: Renewal and Continuity*, 24 BULL. LATIN AM. RES. 454, 465, 469 (2005).

331. *Id.* at 469–471.

332. *Id.*

333. Cristina Fernández de Kirchner was elected President in October 2007 (inaugurated on December 10th), and then reelected in October 2011. Her second term ended December 10th, 2015.

334. See *supra* Section IV.A.

brance sustained by our People [since the 1976 coup].”³³⁵ There are undoubtedly various reasons that explain the development of this strong synergy. Kirchner had neither a career record on human rights nor personal ties with the Movement³³⁶ and did not campaign on this plan during the 2003 electoral contest.³³⁷ It is generally speculated, judging from Kirchner’s savvy skill at constructing political alliances, that he saw in the HRM a powerful political force that could be a strategic ally for his administration in its rather weak beginnings.³³⁸ Be that as it may, this last point is indicative of the major political capacity that the Movement had developed as a non-conventional political actor during the preceding stage. Although the government’s strategists may have deemed the pro-trials agenda too divisive a proposal for the general electorate to consider, the Movement itself—with proven talents for public demonstration and for politically mobilizing the left—was a force to be reckoned with.

Kirchner began his contacts with the Movement and his consideration of the pro-trials agenda as President-elect. After ten months in office, he publicly took a strong stance on the matter, coming out in open support of the human rights agenda.³³⁹ The occasion was the first of the anniversaries of the 1976 military coup during his presidency—a date that would develop into a celebration of the communion between government and Movement.³⁴⁰ Kirchner appeared in the Military Academy, where he ordered the commander-in-chief of the Army himself to take down the portraits of two former dictators,³⁴¹ and went on to give a speech emphasizing that under no circumstances could illegal state repression be justified.³⁴² Later that day,

335. “Foreword,” NUNCA MÁS (CONADEP, 2006 edition) [hereinafter, 2006 *Foreword*]. For other editions of this *Never Again Report*, see *supra* note 79 (original edition) and *infra* note 404 (2016 edition).

336. See FRANCESCA LESSA, MEMORY AND TRANSITIONAL JUSTICE IN ARGENTINA AND URUGUAY 69–72 (Jonathan G. Allen & Maria Guadalupe Arenillas eds., 2013). Some Presidential advisors had close connections with Movement activists, most notably Miguel Bonasso (member of Congress, 2003–2011) and Eduardo Luis Duhalde (Secretary for Human Rights, 2003–2012).

337. Only in reply to a questionnaire sent by the HRM to all candidates (which was barely covered by the press), Kirchner stated that he “agree[d] with the request of the IACHR [sic] and with the incumbent government’s position to support the courts’ decisions on the nullity of [amnesty] laws.” Victoria Ginzberg, *Cada maestrillo con su propio librito*, PÁGINA 12 (Apr. 26, 2003), <https://www.pagina12.com.ar/diario/elpais/1-19359-2003-04-26.html> [<https://perma.cc/WU7L-RJLL>].

338. See Par Engstrom & Gabriel Pereira, *From Amnesty to Accountability*, in AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY 97, 115 (Francesca Lessa & Leigh A. Payne eds., 2012).

339. See THOMAS WRIGHT, STATE TERRORISM IN LATIN AMERICA 170–71 (2007).

340. Of course, it never lost its commemorative and mourning ingredients. Although the date was officially celebrated beginning in 2003, from 2006 onwards Congress elevated it to a national holiday. See Law No. 26.085 (2006), Mar. 21, 2006, [30.870] B.O. 1.

341. Two of the last dictatorship’s de-facto Presidents had, earlier in their careers, served as principals of the Military Academy. Although their portraits hung customarily in commemoration of this latter service only, this fact did imply some endorsement of their figures by the Armed Forces and, thus, the state.

342. See NC Kirchner, President of Arg., Speech before the Military Academy (Mar. 24, 2004) (stating that “State terrorism is one of the most bloody and unjustifiable [practices] that a society may have to endure. There is nothing, no matter how tragic, that may be occurring at a certain moment in the Argentine society, or any other society, which makes State terrorism permissible”).

the President addressed a crowd full of human rights activists at one of the most iconic illegal detention centers of the dictatorship, where he famously asked the audience for forgiveness in the name of the state for the horrors and the impunity that ensued.³⁴³

The political symbiosis that developed between the then-incumbent administration and the Human Rights Movement was peculiar in several ways. Although this may in some aspects be characterized within a standard pattern of cooptation, in many respects this symbiosis points beyond such a model. To begin with, the fluid interactions between the government and the organizations of the Movement took place directly, without any intermediaries.³⁴⁴ This direct liaison meant that neither the party in government, nor politicians, would become leading players for the human rights agenda. It also meant that some state agencies would have their powers curtailed, either receding from certain functions as the Movement's organizations began to exercise them directly or deferring to the Movement's positions on matters of public policy.³⁴⁵ Indeed, during this phase, some human rights NGOs were bestowed with the dress of officialdom.³⁴⁶ By the same token, this symbiosis also had notable effects on the behavior of the organizations that conformed to the HRM. Indeed, the allegiance these groups developed with the administration led them to take sides publicly and get involved in matters that did not necessarily pertain to the human rights agenda.³⁴⁷

The political symbiosis between the Movement and the government resulted in a new plan to reopen the trials for illegal state repression.³⁴⁸ Although the core of this plan resembled the policies pursued early in the transition, there were also important differences. Indeed, this second wave of trials corrected the transitional version of retributive justice to adopt the criticisms previously advanced by the Human Rights Movement. This consisted of three modifications. First, the pursuit of justice efforts were directed more extensively towards the then-members of the military and security forces; there was no room for exonerating, on grounds of following orders, the lower ranking personnel who had participated in the crimes.³⁴⁹ Second, former members of the guerrilla groups were left completely out of the picture: the high courts and prosecutors decided that these crimes were categorically different and thus were not exempt from statutory limitations

343. See NC Kirchner, President of Arg., Speech at the "ESMA" former detention center (Mar. 24, 2004).

344. See *id.* (explaining that the government's human rights agenda "should not be taken by the traditional corporations, which in general are more worried about electoral results or what people will say than in defending their conscience or their ideas").

345. See Vegh Weis, *supra* note 286, at 48–49.

346. This was captured by the press and in public discourse as they began to be referred to as human rights "organs" (instead of organizations).

347. An example is the *Programa Sueños Compartidos* [Shared Dreams program]. See *infra* note 388.

348. For the results of this plan to date, see *supra* notes 15 to 17 and accompanying text.

349. Defenses based on due obedience are routinely rejected by the courts.

and pardons.³⁵⁰ Third, a handful of purported civilian accomplices of the dictatorship were also subject to prosecution, primarily businessmen and judges.³⁵¹

The new plan sought to overrule the human rights policies implemented during the transitional period from an ideological point of view as well. Revealingly, it also did so with regard to precisely those aspects that the

350. This was the doctrine established by the Supreme Court. See Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 10/5/2005, “Lariz Iriondo, José María s/solicitud de extradición,” FALLOS 328:1268 (2005) (majority opinion, §26; J. Fayt concurring §27) (claiming that the development of international law by then did not include all crimes that treaties classify as “terrorism” under the umbrella of crimes against humanity). The Prosecutor General also interpreted that the crimes committed by terrorist organizations were “from a strictly legal point of view . . . not to be categorized as crimes against humanity or war crimes,” and instructed federal prosecutors to proceed accordingly. See Procuración General de la Nación [PGN] [Prosecutor General], 29/11/2007, “Resolución 158/07 (Informe sobre la causa ‘Larrabure, Argentino del Valle s/su muerte’)” (2007).

Finally, a request to extradite a foreign national sparked a controversy that may illustrate the centrality of this posture—and the fluctuations it experienced under different political cycles. See *infra* note 405. By the end of the 20th century, well into the impunity era, a new strategy for accountability had gained momentum: courts from foreign countries (mainly in Europe) had begun criminal proceedings to investigate crimes against their own nationals perpetrated by the Argentine dictatorship between 1976 and 1983 on Argentine soil. This caused a blast of requests for extradition presented to Argentine courts in defiance of the domestic impunity arrangement. See *supra* note 301. In 2001, the government responded to these demands by enacting a doctrine that basically refused international collaboration on the matter—thus stipulating in advance that Argentina would not extradite suspects of illegal state repression. See Decree No. 1581 (2001), Dec. 17, 2001, [29.797] B.O. 7, ¶38, art. 1. The first major measure that President Kirchner took in favor of criminal accountability was to abrogate this doctrine and state that his government would collaborate with criminal investigations from other nations to put an end to impunity, which included extraditing suspects. See Decree No. 420 (2003), Jul. 28, 2003, [30.200] B.O. 2. Ultimately, this pathway to accountability would not develop much due to the beginning of the second wave of trials before Argentine tribunals.

Yet a curious case took place concerning Mr. Galvarino Apablaza, a Chilean expatriate living in Argentina since the early 90s. He had been a member of a left-wing party and allegedly the leader of its armed wing, and as such was (and still is) being accused of having planned and ordered the assassination of a Senator in 1991, among other crimes. The Chilean government’s request for his extradition seemed to put the Kirchner administration in a difficult position. On one hand, the administration had not been shy about having a solid stance against impunity, part of which was the referred doctrine on international collaboration regarding extradition. On the other hand, the fact that the request concerned a former revolutionary militant had an impact on the government’s political allies: the HRM opposed the extradition, considering that Apablaza was nothing but a political refugee. To make matters worse, the Supreme Court later on authorized that Apablaza be extradited—unless the executive branch were to grant him political asylum—by ruling that the crimes he was being accused of were *not* “political” in nature. See Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/9/2010, “Apablaza Guerra, Galvarino Sergio s/arresto preventivo,” FALLOS 333:1735 (2010), §§11–18. Now, to grant asylum meant that the Argentine government had reason to believe that Apablaza would not have a fair trial in Chile. This was unprecedented: Argentina and Chile share one of the longest borders in the world and have had (and continue to have) fluid collaboration on extradition. In spite of social and diplomatic pressure, however, the Kirchner administration did grant Apablaza political asylum a couple of weeks after the Court’s judgment. For later developments, see *infra* note 405.

351. See ROBBEN, *supra* note 9, at 190–94 (reporting on these proceedings to date). For the most recent official presentation of this doctrine, see Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 18/9/2018, “Levin, Marcos Jacobo y otros s/imposición de tortura,” FALLOS 341:1207 (2018), [hereinafter, Levin (2018)] §10 (noting how the dictatorship’s rationale for targeting individuals was such that even what may appear like an ordinary police crime, i.e. the violent interrogation of workers to investigate a fraud against their employer, at the alleged request of the latter, may very well qualify as a crime against humanity).

Human Rights Movement had found disturbing. This occurred via a controversial move: the inclusion of a new *Foreword* to the historic *Never Again* report intended to refute the theory of two demons in both of its variants.³⁵² On the one hand, against views that suggested that the dictatorship's crimes might be justified in terms of a proportional response, the administration claimed "that it is unacceptable to attempt a justification for State terrorism in a sort of scheme of contrasting violence, as if it was possible to find in the conduct of private citizens [i.e. the guerrillas] a justificatory symmetry for the State to forego its own non-renounceable objectives."³⁵³ On the other hand, and even more interestingly, the new manifesto also contradicted the causal version of the "two demons" explanation, which had been endorsed during the transitional-justice plan.³⁵⁴ Regarding this second aspect, the new official claim was that

the Military Junta triggered State terrorism in a massive and systematic way since [the day of the coup d'état] of 1976, when the security of the status quo did not face tactical challenges, given that the guerrillas had already been militarily defeated. The dictatorship sought to impose a neoliberal economic system and to obliterate the social achievements of many decades, which were guarded by popular resistance . . . It was to avoid the resurgence of social and political movements while applying these policies that the dictatorship had 30,000 people disappeared, by applying the doctrine of national security, to the service of extra-national interests and privileges.³⁵⁵

The preceding passage reveals the deep involvement of the Human Rights Movement in delineating the new policies and official discourse. As one can see, the addendum now categorically endorses the distinctive count of 30,000 disappeared.³⁵⁶ Even more openly, it confronts the old transitional-justice account—not its core depiction of the horror, but its interpretation

352. See 2006 *Foreword*, *supra* note 335.

353. *Id.*

354. See *supra* notes 277 and 278.

355. 2006 *Foreword*, *supra* note 335.

356. It seems to me that the most interesting contrast between the manifestos of each of the two waves of trials is in this regard subtler and at the same time more radical than if it were just about numbers. At the beginning of the transitional justice era in 1984, the truth commission conveyed two things: (i) it *reported* that it had "discovered close to 9000" documented cases (in connection to the documents provided in the *Report*); and (ii) it *conjectured* that it had "reason to believe that the true figure is much higher" because of the still present chilling-effect over those who could provide information. NEVER AGAIN REPORT, *supra* note 79, at 5. In comparison, the new wave led by the administration seems to pursue a different objective, as it more emphatically *claims* that "the dictatorship had 30,000 people disappeared." See 2006 *Foreword*, *supra* note 335. In my view, the contrast among reporting, conjecturing, and claiming captures the dispute much better than its reduction to the dimension of truth by correspondence. Indeed, the latter version of the figures appears dominated by an *expressive* component, which is vindicatory of the decades-long political struggle of the Human Rights Movement.

regarding the reasons behind it. The shift to a revisited narrative illustrated by the contrast between the 1984 *Prologue* and the 2006 *Foreword* embodies the officialization of the Movement's views about retributive justice.³⁵⁷

The most central objective for reviving retributive justice was to overcome the impunity cluster that had halted the transitional justice effort. The official account portrays this accomplishment as the result of a coordinated effort by all three branches of government, as, “upon request of the Executive Branch, Congress nullified the impunity laws and a renewed Supreme Court struck them down and confirmed the non-applicability of statutory limitations to crimes against humanity.”³⁵⁸ Yet this should not have us overlook the crucial role played by presidential leadership. Indeed, the main effect of the alliance with the Kirchner administrations was to allow the HRM to channel its pro-trials activism through Executive action.

The administration faced two sets of challenges in its pro-trials agenda. (i) As a first-order matter, the most salient difficulty was the legal cluster of impunity that prevented prosecutions and trials from happening.³⁵⁹ (ii) As a second matter, once this was solved, several practical barriers remained: criminal investigations and trials take time, require resources, and are highly dependent on the willingness of agents of the criminal justice system to grant them priority.³⁶⁰ The administration confronted all of these matters. It even deployed a strategy against the reluctance of some judges, which included the successive presidents themselves chastising them publicly.³⁶¹ Regarding the legal barriers that established impunity, crucial steps were taken either by Congress or the Court in accordance with their respective constitutional authority. Nonetheless, as the passage quoted above suggests, this did occur “upon request” of the Executive Branch; indeed, the actions of the two other branches can be connected in an explanation that pivots on presidential leadership. With respect to Congress, the President rallied his party's Deputies and Senators behind two 2003 bills, which nullified the impunity laws and attempted to deactivate statutory

357. See LESSA, *supra* note 336, at 126–27 (analyzing the shift in narrative in the 2006 *Foreword*).

358. 2006 *Foreword*, *supra* note 335. The Supreme Court decision striking down the presidential pardons came in 2007. See *supra* note 110.

359. See *supra* Section II.A.

360. See Ezequiel González-Ocantos, *Persuade Them or Oust Them: Crafting Judicial Change and Transitional Justice in Argentina*, 46 COMP. POL. 479, 479–498 (2014); Engstrom & Pereira, *supra* note 338, at 119–121.

361. See President NC Kirchner, Speech at the “La Perla” (Mar. 24, 2007) (“I would like to say to the Argentine judiciary . . . Stop it, please, stop it! Trial and punishment, we need [for State terrorists]! . . . What happens in that Court of Cassation, for example, where trials that should be moving forward are interrupted for years? . . . We are not stepping into the powers of another branch, we are requesting for it to work properly.”). See also President CE Fernandez de Kirchner, State of the Nation Address to Congress (Mar. 1, 2008) (“I believe we, Argentineans, have the right to begin this new stage [i.e. her first administration] by requesting the judiciary to conclude the trials to those who committed crimes against humanity during the last dictatorship.”).

limitations, until both passed.³⁶² As for the judiciary, the quote hints at the kind of role played by the President in underscoring that this was a “renewed” Court.

The Argentine Supreme Court is composed of life-tenured justices appointed by the President and confirmed by the Senate, who may only be removed through impeachment.³⁶³ As in many countries, the system thus establishes judicial independence by limiting the opportunities for presidents to make appointments, as vacancies to the Court are sporadic.³⁶⁴ However, it has been a fact of Argentine history since the second half of the twentieth century that presidents have attempted to, usually successfully, create vacancies in order to appoint a majority of justices.³⁶⁵ In just the first twenty years after the democratic transition, this had been achieved twice and attempted a third time.³⁶⁶ Within ten days of his inauguration in 2003,

362. See *Diputados aprobó la nulidad de la Obediencia Debida y el Punto Final*, CLARÍN (Aug. 13, 2003), https://www.clarin.com/politica/diputados-aprobo-nulidad-obediencia-debida-punto-final_0_BJBWJqXgCte.html [<http://perma.cc/46N6-4AGB>]; Gustavo Ybarra, *Quedaron anuladas las leyes del perdón*, LA NACIÓN (Aug. 21, 2003), <https://www.lanacion.com.ar/politica/quedaron-anuladas-las-leyes-de-perdon-nid520924/> [<http://perma.cc/PFF3-EZSJ>].

The circumstances under which Congress simultaneously passed these two Acts, and the legal strategies they implemented, illustrate the drive and to some extent the impetuosity of Kirchner's leadership. On one hand, Law No. 25.779 (2003), *supra* note 108, sought to erase all legal effects of the amnesty laws. Both amnesties had been abrogated years ago, although only for symbolic reasons. See *supra* note 323 and accompanying text. This time, however, the President wanted Congress to move a step further, which led the bill's proponents to appeal to the same legal framework that Congress had implemented 20 years before on its first Act after the transition, when it “quashed” the self-amnesty that the dictatorship had passed months before. See *supra* notes 67, 263. From a technical standpoint, however, Congress had been able to do so in 1983 because the self-amnesty was merely a de facto law. See NINO, *supra* note 30, at 156–57. Come 2003, the scenario was very different, as the 1986–87 amnesties had been regularly enacted, meaning that there was no basis for quashing them under this doctrine. The Supreme Court only tangentially addressed the issue upon review of Law No. 25.779 (2003), because Congress' “Quashing Act” had become superfluous on the grounds that the justices ruled that the amnesty laws were unconstitutional anyway. See *supra* note 109.

On the other hand, Law No. 25.778 (2003), *supra* note 102, sought to address the problem of statutory limitations. The strategy involved the elevation to “constitutional hierarchy” of the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, see *supra* note 102. See *id.* for a technical analysis of this strategy. As for this other bill, President Kirchner's rush to move forward on the issue created some timing oddities. The legal status of this Convention in Argentine law was singular in 2003. The Argentine Congress had approved it back in 1995, see Law No. 24.584 (1995), Nov. 29, 1995, [28.281] B.O. 1, and yet, the executive branch had never deposited the instrument of accession. Still, President Kirchner pushed for Congress to elevate the treaty to constitutional rank, which Congress did through Law No. 25.778 (2003) on August 20th, 2003. As it turns out, Argentina formally acceded to the treaty only on August 26, 2003, which required a new publication of Congress' 1995 approval, to mark its entering into force nearly 8 years later. See [30.244] B.O. 9 (Sep. 29, 2003).

363. See Arts. 99.4, 110, CONST. NAC. The Constitution also requires judges to retire at age 75, unless there is a reappointment. *Id.* This rule has been recently upheld. See Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 28/3/2017, “Schiffrin, Leopoldo Héctor c/Poder Ejecutivo Nacional s/acción meramente declarativa,” FALLOS 340:257 (2017).

364. This design is defended in THE FEDERALIST NO. 51 (James Madison).

365. For an account of these episodes since 1946, see ANDREA CASTAGNOLA, MANIPULATING COURTS IN NEW DEMOCRACIES: FORCING JUDGES OFF THE BENCH IN ARGENTINA 35–53 (2018).

366. See GRETCHEN HELMKE, COURTS UNDER CONSTRAINTS 75–97 (2005) (studying judicial performance in relation to tenure security).

President Kirchner jumped on this bandwagon by triggering impeachment procedures against five justices.³⁶⁷ The low prestige of this group of justices, who had been (rightly) perceived as politically aligned to former administrations in the 1990s,³⁶⁸ led society to support the new President's push for renewal.³⁶⁹ Within two and a half years, following a succession of resignations under threat of impeachment and removals by the Senate, plus an additional retirement, six out of nine justices had left the old Court.³⁷⁰ Within the first year and a half of his mandate, President Kirchner had managed to appoint four new justices³⁷¹—a new majority in a Court now reduced to seven seats.³⁷²

The Kirchner Administration made it a point to nominate a different kind of justice than those they had targeted for congressional impeachment. The President announced that he would seek prestigious and non-politically-connected jurists instead of party politicians and that he would guarantee their independence by subjecting the nominations to a new process of public scrutiny.³⁷³ By and large, society perceived that this promise was kept and largely supported the renewal of the Court.³⁷⁴ Now, the fact that the new justices were seen as fairly independent does not mean that they were not chosen with some substantive issues in mind. Years later, President Kirchner's then-Chief of Staff Alberto A. Fernández (today, the incumbent President of Argentina) recounted how the interviews of nominees went:

I have *seen* Kirchner selecting those justices, and I have *seen* Kirchner meeting with them before their nomination. Nobody told me this—I was present in all of those meetings myself. Kirchner said to each: “You’ll be [on the bench] to decide with complete independence: no one will call you from the Houses of Government”—it was like *that*, I’m telling it as it was; you can go ask any of the Supreme Court justices—“I have two problems that for me are *State* problems: human rights and [the challenges

367. See Larry Rohter, *Argentine Leader Calls for Impeachment of the Supreme Court*, N.Y. TIMES, June 6, 2003, at A5.

368. See REBECCA BILL CHAVEZ, *THE RULE OF LAW IN NASCENT DEMOCRACIES* 46–52 (2004) (describing judicial appointments and behavior during the Menem presidency).

369. See CASTAGNOLA, *supra* note 365, at 53–56.

370. The sequence of justices vacating their seats was: CJ. Nazareno (June 2003), JJ. López and Moliné (December 2003), J. Vázquez (September 2004), and JJ. Boggiano and Belluscio (September 2005).

371. The sequence of new justices being sworn in was: J. Zaffaroni (October 2003), J. Highton (June 2004), J. Lorenzetti (December 2004), and J. Argibay (February 2005).

372. See Law No. 26.183 (2006), Dec. 18, 2006, [31.055] B.O. 1. The Act further reduced the Court to five seats in 2014.

373. See Decree No. 222 (2003), Jun. 20, 2003, [30.175] B.O. 2.

374. See *El 82% de la gente aprueba el juicio al presidente de la Corte*, LA NACIÓN (June 7, 2003), <https://www.lanacion.com.ar/politica/el-82-de-la-gente-aprueba-el-juicio-al-presidente-de-la-corte-nid501995/> [<http://perma.cc/TC88-XYKY>] (noting that polls show that 82% of Argentines supported the Court's renewal).

to the economic-crisis measures taken by the previous government]. With the exception of those two problems, which I'm very worried about because they are already before the courts, the truth is that we don't have an interest in any issue; and those [two] I'm worried about because they concern *State* policies."³⁷⁵

By "human rights," the President evidently meant the reopening of the trials for illegal state repression. Of course, it is perfectly legitimate for a President to survey candidates on issues that he deeply cares about.³⁷⁶ What this first-hand account shows is that this topic stood at the top of the administration's agenda, as it was a crucial criterion for screening the potential Supreme Court picks who would later decide on these matters. Ultimately, given that it was the Supreme Court that crystalized all of these changes, in each case the decisive votes cast by the justices of the renewed wing, it goes without saying that the renovation was crucially instrumental for the government's program.³⁷⁷

Now, this does not necessarily confirm that the reasons why the justices were in favor of the anti-impunity rulings were other than strictly legal. After all, Kirchner may have selected jurists because of their views on the connection between constitutional law and international law, knowing that this locked their votes into overturning impunity. Even if such a view on Argentine constitutional law was ultimately wrong,³⁷⁸ this does not completely refute an internal explanation like the one provided in the legal opinions. Nonetheless, there are further indications that the justices were primarily guided by factors beyond narrow legal considerations in deciding on the second wave of trials. Public opinion seems to have had a remarkable influence on the justices, insofar as some timely switched their own juris-

375. Alberto Fernandez (Chief of Cabinet of Ministers, 2003-08), Televised Interview with Nelson Castro (June 20, 2013). *See also* Interview by Alberto Fernandez with Beatriz Sarlo, (Sept. 28, 2019) (noting that, when the Kirchner administration took office, "the [amnesty] laws were before the [Supreme] Court to determine their constitutionality, and the justices were saying that they did not want to declare the unconstitutionality of these laws"). For a similar account of events, *see* Mario Wainfeld, *Suprema con Fritas*, PÁGINA 12 (Nov. 30, 2014), <https://www.pagina12.com.ar/diario/elpais/1-260958-2014-11-30.html> [<https://perma.cc/54C4-MLUZ>]. In addition, one of the justices who resigned under threat of impeachment narrated his version of the events in terms that, although expectedly biased, appear remarkably similar to the preceding accounts. *See* ADOLFO R. VÁZQUEZ, *ASALTO A LA JUSTICIA* (2016).

376. The subsequent voting record of some new appointees disproves that the President's remarks during the interview were part of some sort of quid-pro-quo negotiation. For instance, Justice Argibay had different views from the majority of the Court in some human rights cases, *see, e.g.*, CSJN, *Mazzeo* (2007) (J. Argibay partial dissent), and in some cases concerning economic measures. Furthermore, three justices who voted steadily in favor of the anti-impunity agenda—Justices Petracchi, Boggiano, and Maqueda—were not Kirchner appointees.

377. For this reason, Argentina seems like an odd case to test Skaar's hypothesis that what explains human rights prosecutions is an increase in judicial independence from the executive. *See* SKAAR, *supra* note 45, at 19–39.

378. *See supra* section III.B.

prudence on issues related to impunity at critical turns of the tide.³⁷⁹ Moreover, the technical explanation provided in the legal opinions³⁸⁰ was not the only narrative ever put forward. At a 2010 judicial conference that gathered all the justices, the heads of the Public Ministry, and federal judges and prosecutors to discuss the progress of these trials, the Chief Justice advanced a different take.³⁸¹ In his closing remarks, he seemed pressed to convey an optimistic view about the stability of the legal framework supporting the trials. He could have underscored the soundness of the Court's constitutional construction in the anti-impunity rulings, and yet he chose to articulate more candid views:

Why are we before this phenomenon on the judiciary taking upon the investigation and trial [of crimes] against humanity across the country? I would like to be clear in this regard: we have seen the Mothers of the Plaza de Mayo, the Grandmothers of the Plaza de Mayo, the HIJOS group, all of them, all of the human rights [movement] claiming for justice when it lacked. . . . And then we had some progress—because much progress was made [throughout the impunity era (1990-2003)], and everyone contributed, one way or the other, and here we could see politicians, union leaders, journalists, writers, artists, a whole community that started talking about this issue and culturally installed it in society. Hence, this societal process, this cultural process, had its repercussion in the institutional process [of trials] that we are seeing. It is not the other way around. In Argentina it hasn't been the other way around . . . This has been [due to] a societal development that has had institutional consequences, which in turn were progressive and multiple. The first trials started together with democracy, the Juntas Trial, [then] the trials for truth, and now these trials that we see today [i.e. the “second wave”].³⁸²

379. The trajectory of Justice Petracchi (on the Court from 1983 to 2014) is revealing. At the beginning of the impunity era, he voted for upholding the amnesty laws and presidential pardons, which he called “a symbol of concord and fraternity.” See CSJN, *Camps* (1987) (J. Petracchi partially dissenting §§34–36); CSJN, *Riveros* (1990) (JJ. Petracchi & Oyhanarte concurring §23). Later on, Petracchi emphatically rejected that international law could have any influence of these matters. See Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 2/11/1995, “Priebke, Erich s/solicitud de extradición—causa 16.063/94,” FALLOS 318:2148 (1995) (J. Petracchi dissenting, §§4–8). Finally, at the end of the impunity era, the justice voted for striking down the amnesties because of international law norms. See CSJN, *Simón* (2005) (CJ. Petracchi concurring, §§23–31). For similar findings regarding other justices, see *infra* notes 429–432 and accompanying text.

380. To recall, the judicial opinions justified the anti-impunity rulings on the basis of the changes that constitutional law had allegedly experienced due to the evolving influx of international law. See *supra* section III.A.

381. Chief Justice Lorenzetti, Keynote Speech before the Judiciary and Public Ministry (Aug. 11, 2010).

382. *Id.* See also RICARDO LORENZETTI, *THE ART OF MAKING JUSTICE* 214 (2015) (explaining that impunity “did not produce the expected results because the tragedy was undeniable, and the social

It is curious that the Court itself would explain that, technicalities aside, retributive justice came to be in response to societal demands. But the underlying point was, precisely, that the second wave of trials stood on firmer ground than the transitory incumbency of a majority of justices who held certain views about the Constitution.³⁸³ That at the heyday of the retributive justice enterprise the Chief Justice himself—and presumably most sitting justices—saw it this way is revealing of how fitting it is to consider these constitutional changes from an external point of view.

Kirchner did not seek electoral validation for the pro-trials plan in the 2003 election. Nonetheless, his administration pushed for the Movement's program early on through the bold moves just described. What prevents us from seeing the whole episode as a large-scale hijacking of the system by an interest group to foster its particular agenda? One possible response draws on the electoral results.³⁸⁴ The Kirchners won two presidential reelections in a row and did well in two of their three mid-term legislative polls.³⁸⁵ Is this enough proof that the program and its constitutional implications were politically legitimized? In truth, it is very hard to tell how much weight the pro-trials policy carried for the voters. It was barely mentioned in the 2007 campaign, and although it did appear in the 2011 platform, competing candidates never contested the issue. It was only in the 2015 presidential elections that the human rights agenda did come up as a conflicting issue, especially as a bashing point against the leading opposition figure, Mauricio Macri.³⁸⁶ His political coalition had no connections whatsoever with the Movement; to the contrary, human-rights persons campaigned harshly against him.³⁸⁷ Macri himself criticized the Kirchner Era's administration–Movement political consortium, referring to the 2011 major corruption scandal that had severely compromised its public image—the

claim, unstoppable. Thus the three branches of government took decisions that responded to the situation”).

383. That is, the view that the Argentine Constitution is subjected to the dictates of international law. See *supra* Section III.A.

384. Ackerman has put forward the view about validation for constitutional change through processes that involve successive electoral victories. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 266–290 (1991); BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 12–29 (1998).

385. Cristina Kirchner was elected in 2007 and then reelected in 2011, both times with an overwhelming majority of the vote. Legislative bids were also successful in the 2005 mid-term elections and in 2007; the government lost its majority in the House in the 2009 mid-terms but then recovered it in 2011 and the 2013 mid-terms. See *Resultados y estadísticas*, ARGENTINA.GOB.AR, <https://www.argentina.gob.ar/interior/dine/resultadosyestadisticas> [<https://perma.cc/9HDC-BFLJ>].

386. See *Mauricio Macri: “Los derechos humanos no pueden ser en términos revanchistas”*, LA NACIÓN (Dec. 23, 2014), <https://www.lanacion.com.ar/politica/mauricio-macri-los-derechos-humanos-no-pueden-ser-en-terminos-revanchistas-nid1754937> [<http://perma.cc/68WZ-DDXE>] (noting criticisms of Macri's positions on human rights by officers of the Kirchner Administration).

387. See *Abuelas y Madres de Plaza de Mayo llaman a votar por Daniel Scioli: “Pongamos memoria en las urnas”*, LA NACIÓN (Nov. 18, 2015), <https://www.lanacion.com.ar/politica/abuelas-y-madres-de-plaza-de-mayo-llaman-a-votar-por-daniel-scioli-pongamos-memoria-en-las-urnas-nid1846642> [<http://perma.cc/3GDM-36BG>] (noting that members of the HRM called for votes against Macri).

“Programa Sueños Compartidos” [*Shared Dreams Program*].³⁸⁸ When questioned about the HRM’s fear that a Macri Presidency could cause a regression on these topics to a pre-Kirchner Era, he replied:

My government [as city mayor] has defended human rights, freedom of press, access to health and education. Now, human rights are *not* Shared Dreams and those “scams” they have invented: With us [in office], all those scams will be over.³⁸⁹

Macri won the 2015 election against the Kirchner-backed candidate in the second round.³⁹⁰ It is hard to draw conclusions from this outcome. As a more general matter, it does not seem that one can claim that the elections provide conclusive democratic validation for this sort of policy; elections are about several topics at the same time, and less urgent issues tend to be eclipsed, especially in countries where fluctuating economic cycles run the show. Luckily, however, we will find further clues about democratic validation as this story progresses.

C. *The Dislodgement Phase, 2015–2019*

The 2015 presidential inauguration of Mauricio Macri marked the end of the Kirchner Era, after twelve-and-a-half years in power. This effectively dissolved the alliance between government and Movement and left the HRM straddling its pre-2003 role as a civil-society actor and a possible new role as part of the political opposition.³⁹¹ In any case, the Movement put itself forth as the guardian of the progress made on retributive justice during the previous stages against future policy shifts that could undermine it.³⁹² This change of epoch ended up being crucially important as a test of the firmness of those achievements.

The feats of the Kirchner Era left open some major questions. There was little doubt that the second wave of trials was made possible by the steady commitment of the strong Kirchner presidencies. What would happen when these policies no longer had support with that kind of muscle? Also, twelve years of profound political symbiosis had left the HRM perhaps too involved in party politics. Could it still advocate effectively for the pro-trials agenda outside of this intense political alignment? Both aspects had been the source of some understandable anxiety within the HRM, especially

388. See *The Mother of All Scandals?*, *ECONOMIST*, June 16, 2011.

389. Jaime Rosemberg, *Mauricio Macri: “Conmigo se acaban los curros en derechos humanos”*, *LA NACIÓN* (Dec. 8, 2014), <https://www.lanacion.com.ar/politica/mauricio-macri-conmigo-se-acaban-los-curros-en-derechos-humanos-nid1750419> [http://perma.cc/D227-LQ3U].

390. See Simon Romero & Jonathan Gilbert, *In Rebuke to Kirchner, Argentines Elect Opposition Figure as President*, *N.Y. TIMES*, Nov. 23, 2015, at A8.

391. See Vegh Weis, *supra* note 286, at 59–62. See also Alejandra Dandan, “*Le pedimos que nos garantice la marcha*”, *PÁGINA 12* (Feb. 24, 2016), <https://www.pagina12.com.ar/diario/elpais/1-293165-2016-02-24.html> [http://perma.cc/BH6V-NYRB].

392. See Vegh Weis, *supra* note 286, at 59–62.

once a possible change in government appeared on the horizon.³⁹³ Interestingly, the Supreme Court itself had felt the need to publicly announce that the ongoing trials would not be jeopardized by a different administration in office or by changes in the Court's composition. This happened twice, once as the 2011 presidential elections approached and the prospects for the Kirchner-led coalition dimmed³⁹⁴ and then a second time before the transfer of power to the new administration in 2015.³⁹⁵ Congress as well saw the need to respond to some uneasiness regarding the fate of the trials as the end of the Kirchner Era approached, and it did so by passing an Act banning amnesties and pardons for crimes against humanity.³⁹⁶ Of course, acts of Congress cannot modify the Constitution,³⁹⁷ but this just goes to show the perception of fragility surrounding these achievements. At the same time, and especially after the new administration had been inaugurated, social actors who had viewed the second wave of trials as basically an act of vengeance—like mainstream media along the center-right spectrum³⁹⁸ and the still-influential Catholic Church hierarchy³⁹⁹—considered that the time had come to return to what they believed to be a more “balanced” approach.

393. HRM frontwoman Estela de Carlotto claimed that if Macri were to win the election “some repressors would recover their freedom.” *Según Carlotto, si gana Macri “algunos represores van a recuperar su libertad.”* PERFIL (Oct. 30, 2015), <https://www.perfil.com/noticias/politica/segun-carlotto-si-gana-macri-algunos-represores-van-a-recuperar-su-libertad-20151030-0014.phtml> [http://perma.cc/94CN-KSSG].

394. See Lorenzetti, *supra* note 381 (“[T]he decision to undertake the trials for [crimes] against humanity is a decision that was made by all of society, and there is no way back, because it is an idea that has matured, and there is nothing more powerful than an idea that has come of age. The trials for [crimes] against humanity don’t depend on a conjunction, don’t depend on an election, don’t depend on a decision by one person who is in government or another person who isn’t.”).

395. See Chief Justice Ricardo Luis Lorenzetti, Supreme Court of Argentina, Speech at the Brindis de Fin de Año para Periodistas [Supreme Court Correspondents’ Cocktail] (Nov. 24, 2015) (stating that, regarding the trials for crimes against humanity, “as we said, it’s a State policy; it is something that is within the Argentine social contract, and we will continue doing it because it does not depend on a change of government”).

396. See Law No. 27.156 (2015), Jul. 31, 2015, [33.183] B.O. 1.

397. See Art. 28, CONST. NAC.; Law No. 27 (1862), Oct. 16, 1862, [IV:1857-1862] Registro Nacional 496, art. 3.

398. See *Reconciliación, indultos y amnistías*, LA NACIÓN (Aug. 21, 2015), <https://www.lanacion.com.ar/editoriales/reconciliacion-indultos-y-amnistias-nid1820882> [https://perma.cc/V5Y5-C2XP]; *No más venganza*, LA NACIÓN (Nov. 23, 2015), <https://www.lanacion.com.ar/opinion/no-mas-venganza-nid1847930> [https://perma.cc/PPU4-WHTX] (arguing that with “the election of a new government, the desire for vengeance must be buried once and for all”).

399. The Argentine Episcopal Conference timidly proposed the idea of social reconciliation among Argentines, by announcing that the bishops would “start a time of reflection about the events which occurred during the last military dictatorship . . . This long process will continue over the assemblies over the next years when it will aim, ahead in time, at moving through a path of dialogue between the bishops within the frame of a culture of encounter and social friendship.” Press Release, Conferencia Episcopal Argentina [Argentine Episcopal Conference], *Precisiones sobre temas de la 113^o Asamblea Plenaria* [Clarifications about Issues of the 113th Plenary Assembly] (May 2nd, 2017), <https://www.celam.org/comunicado-de-prensa---precisiones-sobre-temas-de-la-113o-asamblea-plenaria-2175.html> [https://perma.cc/P7F5-Z2V2].

As a candidate, President Macri had sought to get across the point that sound policy on human rights did not depend on, but was negatively affected by, political alliances like the one between the Kirchner administrations and the HRM.⁴⁰⁰ Once in office, the new government distanced itself from the previous era. One point of divergence was the 30,000-figure,⁴⁰¹ highly revered by the Movement. Although the new administration avoided committing to an official endorsement of any number, a couple of officials controversially questioned the figure in public.⁴⁰² More moderately, the President himself dismissed the issue as irrelevant for an adequate understanding of the dimensions of the tragedy, as he explained:

What took place *already has* a dimension: it's the worst thing that happened to us in history—a number doesn't make a difference . . . I have no idea [what the exact number is]. It's a debate I won't get into: 9,000 or 30,000; whether they are those written on a wall or many more. It's a senseless debate.⁴⁰³

Similarly, although the government did not take up the old dispute regarding the “theory of two demons,” it did reissue the *Never Again* report in 2016, deleting the controversial Kirchner-added 2006 *Foreword*.⁴⁰⁴

The new official human rights policies were also defined in contrast to those of the preceding era. The government's criticism of the Kirchner administration and the Movement was that they had promoted a biased understanding of “human rights”—as something obsessively focused on the pro-trials agenda. The President explained:

The policies of remembrance, truth and justice . . . are guaranteed and are a distinctive seal of public policy of the Argentine State. These are human rights that we must support and protect, but we know these are not the only ones.⁴⁰⁵

400. *Supra* note 391.

401. *See supra* note 257.

402. *See Darío Lopérfido: “En Argentina no hubo 30 mil desaparecidos,”* INFOBAE (Jan. 26, 2016), <https://www.infobae.com/2016/01/26/1785606-dario-loperfido-en-argentina-no-hubo-30-mil-desaparecidos/> [https://perma.cc/7UBF-74HY] (reporting Darío Lopérfido's comments that “in Argentina there were not 30,000 disappeared people. That was a lie made up in a meeting in order to apply for State subsidies”). One can also see this in statements made by Head of the Argentine Customs Agency Centurión on the *Debo Decir* television show, aired January 30, 2017. *Debo Decir* (Jotax Producciones Jan. 30, 2017) (claiming that “from the historical point of view 8,000 truths isn't the same as 22,000 lies”).

403. Interview by Karla Zabudovsky with Mauricio Macri, President, Argentina, BuzzFeed (Aug. 10, 2016).

404. *See* NUNCA MÁS (CONADEP, 2016 edition). For earlier editions, *see supra* note 79 (original edition) and 335 (2006 edition).

405. President Mauricio Macri, Remarks at the Presentation of the Plan Nacional de Acciones sobre Derechos Humanos [National Plan of Human Rights Actions] (Dec. 12, 2017). On a related note, the members of the Macri administration seem to have thought that the justice program motorized by the Kirchner administrations (in close symbiosis with the HRM) was too one-sided, in that former members of terrorist organizations were completely off the hook for their crimes. The Apablaza affair seemed to be the only one case of this kind where the decision was up to the government. *See supra* note

To press this point, the new administration put forward a plan deliberately arranged to look more all-encompassing, where justice issues represented just one dimension among five. The difference in focus between the two policies was also expressed by the argument that the new plan “advance[d] a policy of human rights that look[ed] not only toward the past, but also toward the present and the future.”⁴⁰⁶

Due to a couple of retirements and the inability of the lame-duck Kirchner administration to secure confirmation for its nominees, the new President entered into office with two Supreme Court vacancies.⁴⁰⁷ After negotiations with the opposition controlling the Senate, by mid-2016 President Macri had successfully appointed two new justices.⁴⁰⁸ This was not a new majority, but it did constitute a significant change to a Court consisting of only five seats. As we will see, both new justices had seemingly different views about (at least some of) the Supreme Court doctrines that had resulted in the constitutional changes reviewed in Part II. By contrast, the three senior justices, who had served throughout the Kirchner Era, had solidly voted with the majority on each of those precedents.⁴⁰⁹ This gave way to an interesting voting dynamic during early months of the new Court. Although there were no decisions ratifying the Court’s anti-impunity jurisprudence, the three senior justices seem to have prevented changes to these doctrines.⁴¹⁰ Indeed, in cases where at least one of the senior justices provided a vote for a change of direction, the Court decided so with a narrow majority.⁴¹¹

350. The Macri administration did revoke Apablaza’s condition of political refugee in late 2017, though extradition has not taken place until today. See Juan Bautista Yofre, *Quién es Galvarino Apablaza, el chileno por quien reclaman que Alberto Fernández le devuelva el status de “refugiado político,”* INFOBAE (Feb. 9, 2020), <https://www.infobae.com/sociedad/2020/02/09/quien-es-galvarino-apablaza-el-chileno-por-quien-reclaman-que-alberto-fernandez-le-devuelva-el-status-de-refugiado-politico/> [<https://perma.cc/76EB-5J9W>].

406. *Con Gils Carbó en la mira*, PÁGINA 12 (Oct. 30, 2017), <https://www.pagina12.com.ar/72567-con-gils-carbo-en-la-mira> [<https://perma.cc/97U5-U5G7>] (quoting Minister of Justice Germán Garavano).

407. See Decree No. 83 (2015), Dec. 15, 2015, [33.276] B.O. 4, art. 2 (nominating two new justices). J. Zaffaroni retired effective December 31, 2014. The Kirchner administration was unable to secure confirmation for a nominee throughout 2015. J. Fayt retired effective December 11, 2015 (resignation dated September 15, 2015). This prompted President Fernandez de Kirchner to withdraw her first pick and appoint two more moderate nominees, yet these nominations did not even reach the Senate.

408. See *Aprueban los pliegos de Rosatti y Rosenkrantz para que sean miembros de la Corte*, TÉLAM (June 15, 2016), <https://www.telam.com.ar/notas/201606/151549-senado-pliegos-corte-suprema.html> [<https://perma.cc/PZ62-3VJJ>]. J. Rosatti was sworn in on June 29, 2016. J. Rosenkrantz was sworn in on August 22, 2016.

409. See CSJN, *Arancibia* (2004); CSJN, *Simón* (2005); CSJN, *Mazzeo* (2007); CSJN, *Vigo* (2010); CSJN, *Acosta* (2012); CSJN, *Olivera Róvere* (2013).

410. Denials of review were decided solely with the three votes of the old justices.

411. See CSJN, *Alespeiti* (2017) (J. Maqueda concurring, §§ 9, 25) (granting a request for domiciliary detention, although on grounds narrow enough to ratify the Vigo Doctrine); CSJN, *Muiña* (2017) (conceding the benefit of the double-count rule).

But it was one of these cases that became (in)famous.⁴¹² The technical legal issue was examined earlier.⁴¹³ What is relevant here is that the whole enterprise of trying and punishing these human rights violations, as conceived and implemented during previous administrations, was perceived to be under threat. This did not occur by way of amnesties, pardons, exonerations, or legal impediments for trials to take place. All of that was secure. Nonetheless, some of the legal innovations had left issues open. The new standards on preventive imprisonment had accommodated the Movement's unease regarding delays with the trials, but at the expense of excessively extending preventive detentions in time.⁴¹⁴ In this context, to apply the double-count rule—socially despised in its own right—would imply a major shortening of the sentences for illegal state repression.

The Court released its decision to allow the double-count rule on May 3rd, 2017.⁴¹⁵ The chain reaction this elicited was of such magnitude and speed that the judgment ended up being politically dead in a matter of days. (i) In the political realm, the administration had to maneuver a sharp shift overnight. Because its position on the trials had never been very clear, and because both of the Macri-appointed justices were part of the tight majority, the government was immediately cornered into taking sides. It went from demonstrating moderate support for the decision the day it was announced⁴¹⁶ to open criticism by its highest officials only days later.⁴¹⁷ (ii) The institutional reaction also occurred with noticeable velocity. The judgment was only one week old when a near-unanimous Congress came up with legislation to overrule the Court, although it was technically unclear whether it actually could. As I referenced earlier, this “Backlash Act” sought to ban the double-count benefit for these kind of crimes.⁴¹⁸ (iii) Even more importantly, all of this can be explained by the grassroots societal reaction the judgment provoked. Polling showed that about 85% of the general public rejected the Court's decision.⁴¹⁹ On May 10, 2017, a massive public demonstration took place in downtown Buenos Aires, which was

412. See CSJN, *Muñia* (2017).

413. *Supra* Part II.B.

414. See Bishop Olivera, *supra* note 151.

415. See CSJN, *Muñia* (2017).

416. See *Detrás de lo que vemos* (AM750 May 3, 2017) (interviewing Human Rights Secretary Claudio Avruj who valued the rule of law virtues of the judgment and highlighted the Court's independence on a separation-of-powers argument).

417. See President Mauricio Macri, Press Conference (May 10, 2017) (“I was always against [the double-count rule], because I'm against any tool that is in favor of impunity, and even more so when this tool is applied to crimes against humanity.”). Days earlier, Chief of Cabinet Marcos Peña had expressed similar views, see *Radio Nacional* (May 6, 2017), and even prior to that, Minister of Justice Germán Garavano had criticized the pro-impunity stance intrinsic in every “double-count” decision, see *La Red* (May 4, 2017).

418. See Law No. 27.362, (2017), *supra* note 160.

419. See ANALOGÍAS CONSULTORA, POSICIONAMIENTO SOCIAL ANTE FALLO DE LA CORTE SUPREMA POR 2X1 EN DELITOS DE LESA HUMANIDAD (2017) (finding that 85.7 percent of the 3,121 surveyed “disagreed” or “strongly disagreed” with the double-count rule); D'ALESSIO IROL AND BERENSSZTEIN (2017) (finding that 85 percent of the 1,069 surveyed disagreed with the double-count rule); CON-

replicated in cities across the country.⁴²⁰ Social outrage and mobilization against judicial decisions is not unheard of in Argentina, yet this backlash was singular in its decisiveness and velocity. Within a week, the judgment was virtually left without supporters in the media, let alone among public figures.⁴²¹ The ubiquity of this societal reaction confirmed beyond doubt that societal support of the second wave of trials was indeed very high—too powerful for any political leadership or court to overlook.

However, as noted earlier, the general sentiment on retributive justice moving out of the Kirchner era seemed difficult to assess, probably because up until then it had been hard to discern the actual amount of popular support independent from governmental “interference.” The Supreme Court’s ruling provided the ideal opportunity for the level of support to become clear. Rather than embodying the culmination of an institutional route for constitutional decision-making, the Court served the polity by offering an opportunity for popular reflection and decision-making.⁴²² Although the HRM was expected to lead the charge, the key was to gain social adherence to the cause. The backlash went from sectorial to general with surprising speed. The Movement seemed to quickly dislodge from party politics and recapture a more modest, but eminently representative, role in defense of the pro-trials agenda. This new role was well captured in the speech by Ms. Carlotto, the Movement’s main spokesperson at the demonstration:

Fortunately, society has reacted firmly . . . We need for the representatives of the three branches of government to adopt the demands of the people convened in this plaza . . . [T]his protest has gathered all of us: the human rights [movement] is not alone like we used to be in dark times. We are here joined by . . . The People. A people that is wiser, more committed, and stronger to withstand these assaults.⁴²³

The reverberations of this backlash lasted for a couple of months in the media and then abruptly decreased in intensity. There was simply not much left to say.

The societal reaction to the Court’s judgment ought to be seen as the culmination of a complex process of constitutional decision-making span-

SULTORA DE IMAGEN Y GESTIÓN POLÍTICA (2017) (finding that 88 percent of individuals surveyed disagreed with the double-count rule).

420. See Daniel Politi, *Argentines Fight Court’s Leniency for Human Rights Crimes*, N.Y. TIMES (May 13, 2017), <https://www.nytimes.com/2017/05/13/world/americas/argentina-mauricio-macri-luis-muia.html> [<https://perma.cc/V4WD-WBBH>].

421. *Id.*

422. See ALEXANDER BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 90 (1970) (elaborating on constitutional decision-making by the Court as part of a social-scale dialogue with the citizenry).

423. Estela de Carlotto, President, Abuelas de Plaza de Mayo, Speech at Protest Against the Double-Count Rule Supreme Court Judgment (May 10, 2017).

ning a quarter century. Indeed, popular expression was more decisive in ratifying the retributive justice enterprise than any of the pronouncements ever made on the subject by officials, courts, or other institutionalized actors.⁴²⁴ It basically erased from the public arena any attempt to repeal or even slightly alter this policy.⁴²⁵ Moreover, due to the fact that there is no strict stare decisis rule in Argentina,⁴²⁶ lower courts were able to follow suit. Although judges ordinarily follow Supreme Court precedent in order to avoid reversals, in this case all tribunals in the country immediately began to decide against the application of the double-count rule.⁴²⁷ The absence of mandatory precedent observance is thus to be appreciated as a powerful institutional feature with regard to judicial responsiveness to popular demands.⁴²⁸ Lastly, the Supreme Court itself reacted in late 2018, overruling its (barely one-year-and-a-half-old) 2017 precedent.⁴²⁹ This was the result of two justices switching their votes on the basis of the 2017 “Back-

424. See, e.g., Robert Post & Reva Siegel, *Roe Rage: Democratic constitutionalism and backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 379 (2007) (arguing that “[p]opular resistance signifies that [citizens] desire officials to enforce the Constitution in ways that reflect their understanding of constitutional ideals,” a “desire [which] cannot be ignored”).

425. Some consequences were quite radical. The legislature of Argentina’s most populated province passed a statute requiring that references to the 1976–83 dictatorship and to the disappeared in all official documents must, respectively, express the formula “civilian-military dictatorship” and report their quantity as being 30,000. See Provincial Law No. 14.910 (BAs.), May 19, 2017, [28.032] B.O. Pcia. Buenos Aires 3800.

426. See generally Alberto Garay, *A Doctrine of Precedent in the Making: The Case of the Argentine Supreme Court’s Case Law*, 25 SW. J. INT’L L. 258 (2019).

427. See PROCURADURÍA DE CRÍMENES CONTRA LA HUMANIDAD, INFORME ESTADÍSTICO: PLANTEOS DE IMPUTADOS EN CRÍMENES DE LESA HUMANIDAD INVOCANDO LA APLICACIÓN DE LA LEY 24.390 (2X1) 7 (2017).

428. It seems to curtail the institutional platform of “judicial supremacy” in the Supreme Court as a final decision-maker on constitutional matters. See LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 233–35, 247–48, 253 (2004).

429. See CSJN, *Muiña* (2017), overruled in *Batalla* (2018). The renewed Court’s initial voting pattern in cases of illegal state repression, described *supra* notes 410–411, changed noticeably after the events of mid-2017. For one, the three senior justices backed away from the sporadic concessions they made over the first months of 2017 and resumed a solid anti-impunity stance. Indeed, a couple of cases further developed the Court’s anti-impunity jurisprudence, with the three votes of the senior wing of the Court alone (the two new justices chose not to take part in these decisions). See CSJN, *Fracassi* (2018), *supra* note 198; *Levin* (2018), *supra* note 351. Simultaneously, Justice Rosatti—a Macri-appointee—became part of this bloc. He seemed to do so cautiously at first: he did not join the senior justices in the two mentioned cases, but also avoided dissenting (by not taking part in those decisions), and when he did vote with the majority it was to reverse lower court rulings through the application of Supreme Court precedent. See Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 10/4/2018, “Videla, Jorge Rafael y otros s/recurso extraordinario,” FALLOS 341:336 (2018), §§3–8 (ratifying the precedents on non-applicability of statutory limitations in dicta); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 27/9/2018, “Aguilera, Omar y otros s/asociación ilícita” (PGN Opinion 21/9/2016, adopted), FALLOS 341:1263 (2018) (J. Rosatti concurring on narrowed grounds); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 18/12/2018, “Zaccaría, Juan Antonio y otros s/sustracción de menores de 10 años,” FALLOS 341:1988 (2018) (reversing an absolution by applying the standard held in case cited *supra* note 196). Later on, however, the justice started joining the majority in anti-impunity rulings that implied some changes to his own jurisprudence; see *infra* notes 430–432. Lastly, the remaining Macri-appointee, CJ. Rosenkrantz, has since never taken part again in the decision of an illegal state repression criminal-law case, with the exception of CSJN, *Batalla* (2018) (CJ. Rosenkrantz dissenting).

lash” Act, notwithstanding the constitutional difficulty posed by what could be viewed as a retroactive worsening of criminal-law conditions.⁴³⁰ Come 2019, further vote switching realigned a solid majority to reaffirm the Vigo Doctrine in full force,⁴³¹ virtually vanishing the criticisms that the Macri-appointed justices had articulated in separate opinions before the 2017 backlash episode.⁴³²

The inauguration of Alberto A. Fernández—who had served for five years as Chief of Staff under both of the Kirchners—as President on December 10th, 2019 has put an end to the “dislodgement phase.” The winning ticket, also joined by Cristina Fernández de Kirchner as the Vice-Presidential candidate, beat Macri in his bid for reelection.⁴³³ Although neither the HRM’s figures, nor issues pertaining to its agenda, seemed to play a part in the campaign, representatives of the Movement were given the honor of a front-row spot on the stage as Fernández and Kirchner celebrated their victory.

V. DEMOCRATIC DECISION-MAKING AND RULE OF LAW: LEGALITY, LEGITIMACY, AND CRAFT

Let me summarize the argument so far. The Supreme Court’s anti-impunity rulings sparked and then shaped the second wave of trials by implementing a core of constitutional transformations. The central question is, what prompted the Court to decide this way, departing so drastically from established doctrine? This Article has examined two complementary perspectives. One is *internal* to the legal practice: the judicial opinions pro-

I must add one detail to this mapping. The justices voting record in a connected issue, the victims’ right to claim damages for illegal state repression, neither conforms to the preceding patterns nor has been altered in the aftermath of the mid-2017 affair. Indeed, the Court has consistently upheld limitations periods for *civil* claims based on illegal state repression, although the majority behind this holding got narrower since the tribunal’s 2016 renewal. Aside from the fact that this is not a criminal law issue, the justices have traditionally split differently on this question. *Compare* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 30/10/2007, “Larrabeiti Yañez, Anatole Alejandro y otro c/Estado Nacional,” FALLOS 330:4592 (2007) (JJ. Lorenzetti & Highton concurring, §5; JJ. Petracchi & Argibay concurring, §5; J. Fayt concurring) *with* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 28/5/2017, “Villamil, Amelia Ana c/Estado Nacional s/daños y perjuicios,” FALLOS 340:345 (2017) (JJ. Lorenzetti, Highton & Rosenkrantz concurring, §§9–12; J. Maqueda dissenting, §§8–24; J. Rosatti dissenting, §11–16) *and* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 9/5/2019, “Ingenieros, María Gimena c/ Techint SACTI s/accidente,” FALLOS 342:761 (2019) (CJ. Rosenkrantz concurring, §5; J. Highton concurring; J. Lorenzetti concurring, §8; JJ. Maqueda & Rosatti dissenting, §8).

430. *See* CSJN, *Batalla* (2018) (JJ. Highton & Rosatti concurring opinion).

431. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 4/4/2019, “Cacivio, Gustavo Adolfo s/legajo de casación” (PGN Opinion 10/11/2017, adopted), FALLOS 342:575 (2019) (endorsing the Vigo Doctrine in full with the vote of Justice Rosatti, who two years earlier had severely criticized this doctrine). *Compare with infra* note 432.

432. *See* CSJN, *Alespeiti* (2017) (J. Rosatti concurring, §§9–11) (criticizing Supreme Court precedent on preventive detention for crimes against humanity).

433. *See* Ernesto Londoño & Daniel Politi, *In Argentina, Voters Drive Peronists Back into Power*, N.Y. TIMES, Oct. 28, 2019, at A14.

claimed that it was constitutional law—by adopting international norms against impunity—that dictated the anti-impunity holdings. However, an assessment of this justification based on the canons of professional reason casts doubt on its veracity. Neither the arrangement of subjection to international law nor the anti-impunity norms themselves fit with Argentine constitutional practice. This circumstance encourages a continued search for an explanation in a realm other than—i.e. *external* to—that of legal argument. The story developed in the preceding Part IV seeks to provide such an explanation: it argues that officials and judges launched and then maintained the second wave of trials in response to societal demands that gradually arose and spread in connection to the HRM’s activism for over a quarter century.

The contrast between these two accounts reveals the complexities of the Argentine anti-impunity shift. On the one hand, to the comfort of professional and scholarly legal communities, the Supreme Court explained its reasoning using strict legalistic discourse, yet intense technical scrutiny reveals how unpersuasive this account actually is.⁴³⁴ On the other hand, taking into account the broader political processes connected to these rulings seems to render a very compelling account of why they were so decided, yet this understanding comes at the cost of ignoring the legal opinions’ face-value assertions. These difficulties are ultimately connected. Both arise from one fundamental tension that pervades the entire episode, between the political legitimacy of the justice program and the legal obstacles against it. Absent a constitutional amendment to accommodate this program, the predicament for judges deciding on whether to overturn impunity seems to embody an acute version of the “legality versus justice” dilemma.⁴³⁵

The present Part will tackle the two most interesting questions that these findings pose. I began this study by noting that the appeal to international law is a core feature of the Argentine anti-impunity shift, which the justices presented as key to overcoming the legal obstacles that impeded reopening the trials. However, closer examination of the mechanism through which international sources are supposed to perform such a function revealed that this device is problematic on its own. Now that we grasp the dilemma that the Court faced, it is time to (a) return to the judicial arguments for a more comprehensive assessment of the role of international law. The idea is that taking into account the tensions between the legal obstacles and the political legitimacy of the anti-impunity shift will allow for a better understanding of the Court’s narrative. Of course, this will not dissipate the legality concerns raised by the second wave of trials. However, in light of what we know of the political processes concerning the episode

434. See *supra* Section III.B.

435. The justices who voted against the second wave of trials or to curtail it in some way framed their predicaments in precisely this way. I will analyze this strategic framing *infra* in Section V.B(1).

in its entirety, it is appropriate to (b) wonder whether there are any bases to believe that these decisions are correct regardless of what legality may have required.

A. *Two Rival Views on Legal Discourse (and the Appeal to International Law)*

The Argentine anti-impunity shift is far from unique in one respect. Most courts around the globe have faced similar legal difficulties when considering criminal prosecutions after political transitions.⁴³⁶ Settling accounts for atrocities perpetrated by previous regimes has no doubt been morally and politically compelling, yet, at the same time, it has encountered formidable legal barriers pivoting on constitutional bans on retroactive punishment—thus configuring a dilemma between justice and legality.⁴³⁷ A most interesting phenomenon, nonetheless, is that such legal obstacles have in many occasions *not* dissuaded courts worldwide from allowing the prosecutions.⁴³⁸ This brings us to the central question of this Section: how do judges, being legally bound decision-makers, cope with the legal challenges that such a course of action poses?

The trappings of the judicial process are well known. The way in which decisions are reached in legal settings is singular because the process unfolds in a discursive medium.⁴³⁹ Judges find themselves limited by the argumentative practices that bind them, precisely intended (and for good reason) to restrict their choices. Indeed, even if courts may sometimes be inclined to decide cases one way or the other for not-strictly-legal considerations, they remain obliged to justify their decisions through legal reasoning.⁴⁴⁰ The underlying logic is that professional reason enforces legal constraints upon judges by preventing them from opting for outcomes they cannot justify based on the applicable materials.⁴⁴¹ This takes into consideration the fact that courts perhaps enjoy wide margins of maneuver; however, as they step beyond this range of action, legal constraints begin to increase, eventually to the point where they become too much of a burden to articulate a defensible ruling. One would therefore expect that deciding in favor of prosecutions under seemingly adverse legal conditions would put a strain, first and foremost, on judicial discourse. Of course, whether judges worldwide were able to conclusively justify their rulings in each occasion is

436. See ELSTER, *supra* note 12, at 79–93, 116–135.

437. See *id.* See also *supra* notes 18–30 and accompanying text.

438. See ELSTER, *supra* note 12, at 235–240. See also cases cited *supra* note 203.

439. See DWORKIN, *supra* note 227, at 63–64.

440. See Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 29/2/1956, “Delsoglio, Osvaldo Francisco c/ S.A. Pablo Casale Ltda.,” FALLOS 234:82, 87–91 (1956) (establishing that judicial opinions must develop the reasoning that shows how the ruling follows from applicable law).

441. This is what is meant when judges feel that a decision “won’t write.” SCHAUER, *supra* note 239, at 73–74.

a question specific to the case and legal framework. My conclusions in this Article are only applicably to the Argentine second wave of trials. Still, there are signs of the development of a tendency in comparative law, where domestic courts in different countries appeal to international norms in order to smooth over these persistent concerns about legality (paired with a tendency by some international tribunals to require that national justice systems punish perpetrators disregarding the obstacles that domestic law may pose).⁴⁴² The Argentine anti-impunity rulings present a conspicuous recent example of this trend; thus, the following analysis may shed some light on the implications of this increasingly popular strategy.

Parts III and IV explored the legal transformations that overturned impunity from two different perspectives. Each of these inquiries has produced valuable insights, yet this information may be interpreted very differently according to the framework each analyst endorses. In what follows I will consider the role of legal discourse and the appeal to international law from two views that rival one another on precisely this point. (I) One of these is the “orthodox” view conventionally held by lawyers, while (II) the other approach is “skeptical” in that it is cautious to take judicial discourse at face value. A main reason why the Argentine anti-impunity shift is so interesting is that, as I will try to show, its judgments make far more sense when we analyze their arguments from the skeptical standpoint rather than from the orthodox one.

I. *Orthodoxy*

Orthodox legal analysis characteristically takes judicial opinions at face value, according to the precept that judicial decisions must be justified on legal reasoning alone.⁴⁴³ This confines the orthodox inquiry to the internal point of view; events found through an external perspective are only relevant insofar as they have produced a valid legal input. All other external insights are discarded.⁴⁴⁴ Analysts of the Argentine anti-impunity shift who highlight the importance of the role of international law more or less consciously subscribe to this view. However, as I will now show, orthodoxy faces three difficulties that severely undermine its ability to account for this episode.

442. For domestic court judgments following this pattern, see cases cited *supra* note 203. The discussion of this issue in the context of the Border Wall Guards trials is, so far, the most developed. See, e.g., Rudolf Geiger, *The German Border Guard Cases and International Human Rights*, 9 EUR. J. INT'L L. 540 (1998). For judgments by international tribunals requiring that domestic courts take perpetrators to trial, see cases cited *supra* note 188.

443. This is, of course, a normative claim in itself. For an overview, see generally Richard S. Markovits, *Legitimate Legal Argument and Internally-Right Answers to Legal-Rights Questions*, 74 CHI.-KENT L. REV. 415 (1999).

444. See BRUCE ANDERSON, “DISCOVERY” IN LEGAL DECISION-MAKING 37–46 (Aulis Aarnio & Frederick Schauer eds., Kluwer Academic Publishers 1996) (distinguishing between what merely explains how a judge reaches a decision from whether that decision is duly justified in law).

1. *Taking Legal Reasoning Seriously.* The most distinctive feature of the orthodox view is its true-blue commitment to legal argumentation. To the orthodox analyst, judicial decisions can only be accounted for through professional reason, the account's litmus test being whether it does actually justify the judicial outcomes according to that canon. Now, throughout the second wave of trials, the judges encountered severe legal obstacles to overturning impunity and sought to argue their way around these by relying heavily on international law. Some legal scholars have been optimistic about argumentative strategies like this. Professors Ruti Teitel,⁴⁴⁵ Eric Posner, and Adrian Vermeule,⁴⁴⁶ most prominently, have claimed that international law allows courts in transitional scenarios to overcome the legal barriers that prevent the prosecution of the crimes of past regimes. Nonetheless, whether invoking international norms truly sweeps domestic legal obstacles aside is a question specific to each legal system insofar as it can only be settled by domestic rules. Case in point: as shown earlier, the Argentine second wave of trials disproves such abstract optimism. The Supreme Court's appeal to international norms in the anti-impunity rulings simply failed to dilute legality concerns.⁴⁴⁷ The first and main difficulty for the orthodox analyst is that there is only one way out from here: she must show that, despite the judicial opinions' failure to justify the prosecutions in law, there are alternative arguments that can do the job. Otherwise, she may only conclude that the anti-impunity shift was mistaken. This assessment is no doubt important. But does this encompass everything worth knowing about the second wave of trials? Absent a sound internal justification, and given its reluctance to draw on data other than from an internal perspective, the orthodox view just leads to a dead end.

2. *The Extravagance of Constitutional Subjection to International Law.* Despite the problems noted above, let us assume that the first difficulty may be overcome. Still, taking the anti-impunity rulings at face value entails certain doctrinal commitments—first and foremost to the structural construction that these decisions advance: the International-Law-Bound Constitution.⁴⁴⁸ This brings in a second difficulty. The structural arrangement of subjection to international law has implications that are not only vast in scope but also rather extravagant in design. Indeed, subjection to international law involves structural transformations to constitutional law that compromise no less than its two core foundations: (1) self-governance and (2) fundamental rights. Therefore, signing up for an orthodox take of the anti-impunity shift is problematic in that it pins the analyst to endorsing the following two oddities:

445. See TEITEL, *supra* note 42.

446. See Posner & Vermeule, *supra* note 42.

447. See *supra* Section III.B.

448. See *supra* Section III.A.

2.1. *Exogenously-Induced Constitutional Change.* One curious feature of the ILB Constitution is that Argentine law (even constitutional law) may experience changes regardless of the wishes of the Argentine political community. The Supreme Court's argument crucially relies on transformations in international law—in particular, on the consequences for crimes against humanity and serious human rights violations.⁴⁴⁹ While some international obligations do arise for states voluntarily (mainly by ratifying treaties), others develop spontaneously, out of their control (like international custom or peremptory norms). Even the former frequently mutate through the “authentic” interpretation of treaty-specific international bodies with advisory or jurisdictional functions, sometimes taking unpredictable directions.⁴⁵⁰ When these obligations are incorporated according to the guidelines of the ILB Constitution, a remarkable peculiarity results. To recall, the model holds that international law is capable of having the deepest of impacts on domestic law, reaching the Constitution itself and trickling down from there.⁴⁵¹ Now, by building on a conception of “international obligations” that lacks nuance as to the obligations' different pedigrees, the ILB Constitution conflates scenarios that merit distinction. On one end of the spectrum, the ILB Constitution's understanding of treaties' impact on the Constitution does not seem that far off from a traditional process of amendment.⁴⁵² By contrast, although the opinions of international committees and courts normally do carry weight for national authorities,⁴⁵³ the blunt subjection of a country's higher law to these (or to *jus cogens*) may have the Constitution varying regardless of—and in contradiction to—the national polity's will.⁴⁵⁴ It is not hard to see the resemblance to the challenges posed by Bickel's “[c]ounter-[m]ajoritarian [d]ifficulty”⁴⁵⁵ in this lack of connection between democratic politics and constitutional change.⁴⁵⁶

449. See *supra* Section III.A §2.

450. See Gerald Neumann, *Import, Export and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT'L L. 101, 101–02 (2008) (criticizing the Inter-American Court for exceeding its mandate as accorded in the ACHR).

451. See *supra* Section III.A §3.

452. It is not unlikely that this is what the 1994 Reformers of the Argentinian Constitution had in mind (though with prospective effects). See Art. 75.22, CONST. NAC.

453. For Argentina, see CSJN, *Giraldi* (1995), *supra* note 190, at §11 (establishing that the incorporation of the ACHR into the Constitution should be taken to include the treaty's authentic interpretation by the Inter-American Court).

454. See, e.g., CSJN, *Simón* (2005) (CJ. Petracchi concurring, §§23–26) (arguing that case law by the Inter-American Court ruling that amnesties infringe the ACHR has “clarified the duties of the Argentine State” and thus should be taken to “establish[] severe limits upon Congress' power to grant amnesties”).

455. See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 16–23 (2d ed. 1962).

456. See Roger Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 59 (2004) (characterizing the “international counter-majoritarian difficulty”); Carlos Rosenkrantz, *Against Borrowing and Other Nonauthoritarian Uses of Foreign Law*, 1 INT'L J. CONST. L. 269, 285–86 (2003) (arguing that reliance on international legal sources undermines judicial legitimacy, yet in a way that collapses this problem with that of ordinary judicial counter-majoritarianism).

2.2. *The Denaturalization of Fundamental Rights.* Conflicts involving fundamental rights have been dealt with in a rather unusual manner under the ILB Constitution. It is standard practice to adjudicate disputes of this sort through balancing techniques, scrutiny-based tests, and the like.⁴⁵⁷ In cases of illegal state repression, by contrast, courts have held that the rights that suspects and convicts enjoy on a purely constitutional basis are trumped by the state's duty to punish crimes against humanity, on the grounds that the latter is an *internationally compelled* state interest/human right.⁴⁵⁸ In other words, the obligation to punish these crimes must be complied with regardless of conflicts with domestic criminal-law guarantees. The most notable promoter of this principle has been the Inter-American Court in categorizing the punishment of human rights violators within forms of reparation.⁴⁵⁹ Still, these awkward effects on constitutional adjudication are due to the way in which the ILB Constitution acknowledges that obligation.⁴⁶⁰ Indeed, whenever judges have a reason to believe that the issue at stake *may* compromise the international responsibility of the state, this note is not factored in as an input to be balanced among others but heeded with decisive force.⁴⁶¹ Balancing techniques and scrutiny testing perform an important function: through the weighing of all entitlements involved, they allow courts to decide disputes in ways that acknowledge them as *constitutional* entitlements. Conversely, subjection to international law effectively demotes fundamental rights by displacing the decisional technology that properly suits their status.

457. See generally ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* (Julian Rivers trans., 2002).

458. See, e.g., CSJN, *Videla* (2003) (J. Petracchi concurring, §12; J. Maqueda concurring, §§15–16) (claiming that the constitutional double-jeopardy guarantee should be restricted in cases of crimes where there is an international-law obligation to prosecute).

459. See Huneeus, *supra* note 33, at 1–6. For a critical review, see generally Ezequiel Malarino, *Judicial Activism, Punitivism, and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights*, 12 INT'L CRIM. L. REV. 665 (2012); Frédéric Mégret & Jean-Paul S. Calderón, *The Move Towards a Victim-Centred Concept of Criminal Law and the "Criminalization" of Inter-American Human Rights Law*, in *THE INTER-AMERICAN COURT OF HUMAN RIGHTS: THEORY AND PRACTICE, PRESENT AND FUTURE* 419 (Yves Haeck, Oswaldo Ruiz-Chiriboga, & Clara Burbano-Herrera eds., 2015).

460. This awkwardness derives from the conflation of two tests under the ILB Constitution: the judicial enforcement of constitutional supremacy and the monitoring of compliance with international law. In the Americas, the Inter-American Court has established the latter test as a duty of domestic tribunals. See Inter-Am Ct. H.R., *Almonacid-Arellano et al.*, *supra* note 188, at ¶ 124. Yet, this tribunal has also distinguished such scrutiny from judicial review. See *Boyce et al. v. Barbados*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 169, ¶¶ 77–78 (Nov. 20, 2007).

461. This is the rationale behind all decisions on preventive imprisonment under the Vigo Doctrine. See CSJN, *Vigo* (2010), *Otero* (2011), *Daer* (2011), *Acosta* (2012), *Olivera Róvere* (2013). For a later rephrasing in less conflictive terms, see CSJN, *Muiña* (2017) (CJ. Lorenzetti dissenting, §§6–7; J. Maqueda, dissenting, §§9–13). Such rationale was ephemerally called into question in CSJN, *Alespeiti* (2017) (JJ. Rosatti & Rosenkrantz concurring, §12) (reclaiming the Court's duty to balance the rights and state interests in conflict).

3. *Political Outsourcing.* A general phenomenon encompasses both of the distortions just described to self-governance and fundamental rights. Call it the “outsourcing” of the polity’s own decision-making over issues as crucial as constitutional content, either to the (fictional) international community or to distant, unresponsive agents such as international committees and courts. This brings about one last major difficulty for the orthodox view. In order to recount the second wave of trials in a manner consistent with the judicial argument, orthodox analysts are committed to explaining the episode in a strange fashion—namely, they must claim that it was *not* the Argentine polity who actually decided to punish the perpetrators. Allegedly, Argentine courts merely enforced the existing constitutional norms outlawing impunity, which had been established decades ago as a result of political outsourcing. Surely, to anyone familiar with the story developed in Part IV, this notion is preposterous. Such a narrative is hard to reconcile with the lengthy *Argentinian* struggles to have impunity reconsidered, made up of the HRM’s resourceful activism and governmental policies, which are universally recognized as a crucial factor in the anti-impunity shift.⁴⁶² Put bluntly, orthodox accounts are challenged by the mismatch between the narrative based on the technicalities of judicial opinions and the hard facts of anti-impunity activism and politics⁴⁶³—while one assumes political outsourcing, the other repels it. Bridging this gap is still an unresolved requirement for any comprehensive explanation.⁴⁶⁴ So far, only political scientist Ezequiel Gonzalez-Ocantos has confronted the issue.⁴⁶⁵ Alongside orthodox analysts, he believes that the second wave of trials came as a result of Argentine judges internalizing the requirements of international law.⁴⁶⁶ He daringly innovates, however, in crediting this “juristic awakening” to a strategy of activism implemented by the HRM—the pedagogic lobbying of judges to instruct them on the content and applicability of those international norms.⁴⁶⁷ This view responds to the outsourcing difficulty with a twist. While the Argentine polity did outsource the decision about what to do with illegal state repressors, the choice on whether or not *to enforce* that decision caused major internal struggles. Now, this explanation seems to achieve consistency between internal and external data at the cost of major

462. See, e.g., *supra* note 382 and accompanying text; the literature cited *supra* notes 9, 18, 45.

463. Bruce Ackerman’s words come to mind, in noting how the professional narrative of lawyers severely distorts our understanding of complex political processes of constitutional change. See ACKERMAN, *TRANSFORMATIONS*, *supra* note 384, at 7 (“Americans know their constitution has changed fundamentally over two centuries. Only they have been taught to conceptualize these changes in ways that trivialize them. Lawyers are most to blame for this. . . . It is their professional narrative . . . that blocks insight into the distinctive character of our historical experience”).

464. See, e.g., SIKKINK *supra* note 45; Gil Lavedra, *supra* note 45 (pointing out that the anti-impunity shift was a result of both the incorporation of international law and social movement activism, without attempting to reconcile both factors).

465. See generally GONZÁLEZ-OCANTOS, *supra* note 45.

466. See *id.* at 73–74, 117, 139–140. Of course, this means that González-Ocantos’ account is also affected by the problems of the orthodox view identified so far.

467. See *id.* at 54–63, 91–113.

adjustments. For one, it endorses a conception of the legal point of view that lawyers may find hard to recognize as their own. That aside, Gonzalez-Ocantos' argument comes in handy to corroborate the severe biases that the orthodox reading of judicial discourse imposes on the consideration of external factors. Notice how, in structuring the whole explanation of the anti-impunity shift as an effect of pedagogic lobbying, the account neglects as superfluous all main strategies of activism implemented by the HRM documented earlier (which further contradict the thesis, insofar as all of these were designed on the premise that impunity was legally valid). Even more vitally, taking judicial discourse as a complete and truthful statement of motives leads to overlooking the impact of other factors that most definitely had an influence on judges, like presidential politics and the pressure of public opinion and outrage.⁴⁶⁸ Make no mistake—it is indeed problematic that no single account is able to explain the anti-impunity turn from both angles, internal and external. Still, it is curious that this challenge led to tweaking societal and political processes to fit the orthodox template rather than questioning the latter. In what follows, I will lay the grounds for pursuing this last approach.

II. *Skepticism*

We must now tackle the anti-impunity rulings from a skeptical framework, but first, let me characterize this approach. Unlike orthodox analysts, skeptics view judicial discourse from a multifocal perspective. Skepticism surmises that, for the most part, judicial argumentative constructions genuinely seek to justify court rulings through professional legal reasoning, and that they often succeed in this task. But skeptics are *not entirely* committed to understanding judicial narratives under this ideal template. In fact, skepticism is open to the possibility that legal discourse may occasionally be drawn on to provide legalistic window-dressing for decisions reached on different grounds (that is, decisions that, despite the legal arguments provided in their support, have not actually been, and could not ultimately be, justified based on law). There are at least two alternative, unorthodox ways in which to use judicial argument. The first way should be familiar, insofar as the skeptical challenge is reminiscent of the views on legal reasoning put

468. Take, for instance, anti-impunity presidential politics during the Kirchner Era (2003–15). See *supra* Section IV.B. Once this is factored in, González-Ocantos' hypothesis about shifting visions in the judiciary becomes too difficult to isolate as a self-standing factor for explaining the second wave of trials. For one, a Supreme Court that had been renewed with overturning impunity in mind was the one who decided on the key legal transformations that made this possible. Later on, recalcitrance by lower courts was dealt with by pressure and few removals. See GONZÁLEZ-OCANTOS, *supra* note 45, at 129–138. To me, these policies seem to crowd out the impact of (pure) technical instruction and persuasion. (A similar assessment can be made about backlash after the events of 2017, which of course his book could not cover). Given that judicial opinions cannot acknowledge the weight of factors like presidential politics and societal backlash, the fact that judges only elaborate on technical reasons (like the binding status of international anti-impunity norms) cannot be taken as an indicator of which of these factors were truly determinant.

forward by American Legal Realism. Roughly, the Realists called our attention to the fact that judges are able to craft opinions that make it seem that the law narrowly determines their rulings, when in reality courts decide cases with ample freedom.⁴⁶⁹ Ever since the advent of Realism, this judicial quirk, to which Anglo-American scholars commonly refer as “the pretense,”⁴⁷⁰ has stood at the center of vivid legal theory disputes—most prominently, the Hart-Dworkin debate.⁴⁷¹ Skepticism first departs from orthodoxy in acknowledging that judges at times engage in this type of pretense, which may be referred to as *mild*, given that it is only moderately threatening to conventional views.⁴⁷² But skeptics also acknowledge a second alternative use of judicial discourse. This comes again in the form of a pretense, although one that has been scorned rather than studied. The claim is that judges occasionally craft opinions to make it seem as though court rulings follow the law despite the fact that their decision actually departs from the legally required outcome. I will use the label *strong* to refer to this more controversial variant.

469. See, e.g., Holmes, *supra* note 247, at 234; KARL LLEWELLYN, *THE BRAMBLE BUSH* 77 (1960) (noting the discretion that judges—especially those who are “skillful”—enjoy “thanks to the leeway offered by the ambiguities of [legal] material”); JEROME FRANK, *LAW AND THE MODERN MIND* 72 (Transaction Publishers 2009) (1930) (arguing that judges are unconstrained by legal materials and reasoning, given that a “court can decide one way or the other and in either case can make its reasoning appear equally flawless”).

470. See, e.g., EDWARD LEVI, *AN INTRODUCTION TO LEGAL REASONING* 1 (1949).

471. HLA Hart criticized Legal Realism (under the label of “rule-skepticism”) by noting that, although the law is structurally bound to be indeterminate, it is only partially so. Still, if courts are required to decide cases even when legal rules provide no guidance (i.e., hard cases), all that judges can and actually do in such a circumstance is to exercise discretion. HART, *supra* note 226, at 124–141. Now, Hart also observed that “this fact is often obscured by forms: for the courts often disclaim any such creative function and insist that the proper task of statutory interpretation and the use of precedent is, respectively, to search for the ‘intention of the legislator’ and the law that already exists.” *Id.* at 135–36 (referring to England). In other words, Hart actually conceded to Realism that judges engage in a pretense, although he denied that this occurs as pervasively as the Realists claimed it does. Years later, as part of his criticism of legal positivism, Ronald Dworkin took issue with precisely this point. At the heart of the matter lies a dispute about what it is that judges actually do in hard cases. Against Hart (and the Realists, for that matter), Dworkin’s contention is that judges do not exercise discretion when legal rules run out but continue to search for the *legally* right solution instead. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 31–39 (1977). For a neat presentation and reassessment of this dispute, see SCOTT SHAPIRO, *LEGALITY* 241–259 (2011). For what is of interest here, a significant portion of the controversy drew on different interpretations of judicial practice data. Both Hart and Dworkin agree that in deciding hard cases judges argue as if the law provided them guidance, yet each one reads this very differently. Hart claims that judicial discourse along these lines cannot be but a pretense, given that legal rules have effectively run out. See HART, *supra* note 226, at 153, 273–75. Dworkin criticizes this idea and advocates for interpreting judicial discourse in hard cases under the same orthodox framework that accounts for legal argument in general. See DWORKIN, *supra*, at 81; DWORKIN, *LAW’S EMPIRE*, *supra* note 227, at 37–39.

472. No doubt the fact that judges recur to this mild pretense challenges orthodox understandings of judicial discourse. Suddenly, there is something else that judges do with their arguments routinely *besides* justifying decisions. Part of the appeal of Dworkin’s argument is precisely to outline this awkwardness. See DWORKIN, *supra* note 227, at 37–39. However, the recourse to pretenses of the mild type does not seem to be a source of discomfort regarding the political foundations of the judicial role. See HART, *supra* note 226, at 275–76.

These two types of pretense, mild and strong, share an important family resemblance in that both use legal argumentation in unorthodox ways. Still, there are significant differences in the details that warrant comparison along three concatenated dimensions. (i) Judges employ both of these techniques while deciding cases in order to disguise the predicaments they encounter due to the manner in which legal materials regulate the issue in question. Now, these difficulties come in two differing kinds, each of which may eventually trigger a different type of pretense. Mild pretenses come up only when the law is indeterminate;⁴⁷³ in contrast, strong pretenses develop when the legal materials stipulate an outcome (that the court deems undesirable) firmly enough as to preclude judges from getting around it lawfully.⁴⁷⁴ (ii) Furthermore, both mild and strong varieties of pretense entail putting forward arguments that may look convincing *prima facie* yet cannot truly withstand intense scrutiny under a professional reasoning analysis. Now, each type falls short for defects that are specific to its kind. Exposing a mild pretense requires proving that alternative outcomes for the case can be equally justified, which could be challenging.⁴⁷⁵ By contrast, unmasking strong pretenses seems more straightforward, given that their justifications simply neglect—and ultimately contradict—crucial landmarks of the legal practice they interpret. (iii) Lastly, both maneuvers described share the same purpose: to camouflage judicial activity that courts anticipate will be socially or professionally intolerable in raw form (which would thus expose judicial rulings to criticism because of the ways in which they were reached). Still, each type is unique as to the kind of deeds it aims to hide from public perception. While mild pretenses conceal the exercise of legally-granted judicial discretion,⁴⁷⁶ strong pretenses provide cover for judges subverting the rule of law. That is, unlike the decisions that mild pretenses obscure, which are, legally speaking, unobjectionable, strong pretenses disguise the infringement of legal norms.⁴⁷⁷

473. With respect to the Legal Realists, the (mild) pretense comes as a natural consequence of their strong views about legal indeterminacy. For an overview, see Brian Leiter, *American Legal Realism*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 50, 51–52 (Martin Golding & William Edmundson eds., 2005).

474. Insofar as none of these two conceptions about indeterminacy is so extreme as to rule out the opposite phenomenon, there is room for both types of pretense to coexist.

475. See DWORKIN *supra* note 227, at 38 (suggesting that mild pretenses are difficult to expose precisely because these are no pretenses at all).

476. For a sharp characterization, see HLA Hart, *Discretion*, 127 HARV. L. REV. 652 (2013) [written in 1956].

477. It might be hard for skeptics to distinguish an ordinary judicial mistake from the engagement in a strong pretense. Perhaps the best way to tackle the issue is to distinguish between two guidelines that judges may follow in their job. Orthodox views—or for that matter most theorizing on judicial decision-making—assume that judges work under the guideline of what may be called a *Correctness Ceiling*. This means that the judges' only aspiration is to reach the right decisions for cases, whatever it costs, and that the aim of their opinion writing is to demonstrate that their rulings are correct in light of what the law requires. Of course, this presumes that judges may eventually get the law wrong, but, assuming these missteps are in good faith, it is appropriate to conceptualize them as mistakes. For the most famous presentation of this model, see DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 471, at

As this depiction shows, strong pretenses are intrinsically problematic in terms of illegality and illegitimacy, and we will get to that eventually. But for now, it suffices to grasp that judicial-discourse skeptics—of the brand portrayed here—account for both types of pretense. Skepticism thus endorses a richer view of judicial discourse, encompassing the possibility that it may be called upon to play unorthodox roles, besides providing conventional justifications.⁴⁷⁸ Let us now return to the anti-impunity rulings. Orthodox analysts can only see these decisions as judicial mistakes, given their technical flaws. But skeptics are equipped to reach further conclusions. A famous passage by H.L.A. Hart addressing the predicaments that courts often face in transitional justice cases will serve to explore this contrast.⁴⁷⁹ The debate in question sprung from a difficulty that political communities often encounter after emerging from oppressive rule: punishing the atrocities committed under past despotic regimes seems sound policy for many reasons, and yet there is a compelling argument against it based on the constitutional ban on retroactive punishment.⁴⁸⁰ Hart understood that this scenario presented judges with a dilemma between “two evils”:

- (a) strict adherence to legality at the expense of leaving perpetrators unpunished; or
- (b) the legal “inconsistency” of prosecuting perpetrators at the cost of a legality breach.⁴⁸¹

Yet judges were reluctant to accept this framing and for the most part opted to escape the predicament by claiming it was based on a false dilemma.⁴⁸² Thus, courts chose to

105–130. By contrast, one may also think of judges working under the guideline of a *Persuasion Threshold*. This assumes judges seek to reach the best possible decisions taking into account that the judicial docket is heavy and complex, that there are time constraints to decide, and that the judge’s knowledge on the particular issue may be limited. In this scenario, judicial opinions may be pitched to satisfy the average shallow reading these typically get, and their aspiration may be as modest as to go unnoticed and/or to minimize the chances of reversal. In other words, judges in a second-best world perhaps content themselves with getting away with rulings that they know fall short of the correctness ideal. In my view, by working under this persuasion-threshold guideline, strong pretenses should come up more frequently than expected even if not intentionally looked for.

478. The Hart-Dworkin debate dwelled upon a more limited phenomenology of judicial decision-making (considering mild pretenses alone). It is beyond my scope here to determine whether the more complex version of judicial discourse rendered by adding strong pretenses to the mix contributes to that philosophical inquiry.

479. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 618–620 (1958) (considering the prosecution during the German post-Nazi restoration of ordinary crimes committed under the umbrella of Nazi legislation).

480. See *id.* at 619 (explaining how the difficulty is set in such a way that, “if the [perpetrators] were to be punished it must be pursuant to the introduction of a frankly retrospective law”).

481. See *id.* (describing how “a choice had to be made between two evils, that of leaving [the perpetrators] unpunished and that of sacrificing [the] very precious principle [that bans retroactive punishment]”).

482. See *id.* at 618–19.

(c₁) authorize the prosecutions by refuting that they raised legality issues.⁴⁸³

To Hart, however, the arguments advanced in support of this position were so farfetched that such a move could only be understood in terms of

(c₂) a pretense of the type I just called “strong”: courts decide for prosecution and *present* this outcome *as if* it were legally permitted when in reality it is banned.⁴⁸⁴

Indeed, Hart noted how this judicial strategy is problematic in itself—namely, it still fails to abide by the legal norms it proclaims to preserve and, on top of that, such a loss in candor embodies a decay in judicial decision-making overall.⁴⁸⁵ In short, his point is that the addition of this third choice merely converts the original difficulty into a trilemma, where each of the options has downsides (a, b, c₂).⁴⁸⁶

Hart’s reconstruction is unmistakably skeptical and thus is controversial for orthodox analysts. Let us examine how. Both camps recognize that at the core of the problem lies a *strictly legal* dispute about whether the law permits the punishment of past atrocities. (One common form of this dispute focuses on whether the transitional-justice dilemma between justice and legality is genuine or false, given that the answer depends on that legal assessment). Aside from that, however, orthodox and skeptical approaches diverge in method because of the different understanding each one pursues. Orthodox analysis is solely concerned with assessing whether the dispute between (a) impunity and (c₁) punishment has been correctly adjudicated, for which it restricts its inquiry to the internal dimension on the premise that the legal practice should be self-sufficient to this effect. Skeptics, instead, seek to understand judicial discourse and the practice of law on a more encompassing framework, according to their belief that judicial decision-making in complex cases is rarely isolated from external factors. This by no means leads skeptics to neglect internal inquiries: the information these provide is crucial for their analysis. The skeptic’s distinctive (and per-

483. What is known as “the Radbruch formula” became a useful tool for this purpose, as it allowed courts to cherry-pick pieces of Nazi legislation to which not to attribute the effects of valid laws. See Radbruch, *supra* note 28.

484. See Hart, *supra* note 479, at 618–19. Of course, a crucial step in Hart’s argument is whether it truly is impossible to justify the decisions to prosecute in law. The main line in Professor Fuller’s reply to Hart is precisely to dispute this point. See Fuller, *supra* note 28, at 648–657.

485. See Hart, *supra* note 479, at 618–19 (criticizing decisions to “punish [perpetrators] under a new retrospective law” where courts “do not point out precisely where we sacrifice such a principle [i.e., the ban on retroactive punishment],” because “candour is not just one among many minor virtues of the administration of law, just as it is not merely a minor virtue of morality”).

486. Option (a) preserves legality (and candor) but fails in achieving the sought-after punishment; option (b) achieves punishment and preserves candor but sacrifices legality; option (c₂) achieves punishment but sacrifices legality and candor. Hart’s reconstruction strikes me as correct in identifying these options, although we may certainly disagree with his assessment of the issues at stake behind each alternative.

haps controversial) move is rather to widen the scope of analysis in order to *supplement* the internal viewpoint. This exploration will bring to the fore the circumstances surrounding this set of cases, which are fairly clear: aside from whatever the law actually requires, political and moral considerations mark an overwhelming preference for one particular outcome—to punish. Given these stakes, skeptics will be understandably wary of legal argumentation.⁴⁸⁷ In the face of formidable legal obstacles, they foresee that professional legal reasoning might be twisted in order to achieve this coveted outcome, leading to alternative uses of legalistic discourse. Remaining open to this possibility is the defining trait of the skeptical attitude.

Indeed, the skeptic's aim is to understand these cases adequately by considering all the relevant factors, not just the assessment about what the law requires. The trilemma is thus a distinctively skeptical framework because it attempts to accommodate all relevant circumstances. Let us identify these. Hart sought to account for two competing concerns—namely, the legal barriers to justice and the singular context of political transitions, where the consequences of (a) strictly adhering to legality (i.e., that perpetrators remain unpunished) may be outright intolerable.⁴⁸⁸ This is evident from Hart's framing of the difficulty as a tension between “two evils” and from the fact that he advocated for a rare compromise: he thought that courts should (b) punish the perpetrators in candid acknowledgement of the legal “inconsisten[cies]” involved.⁴⁸⁹ Now, such a suggestion seems to grossly misinterpret the professional restraints that burden the judicial role.⁴⁹⁰ Indeed, Hart inexplicably misses one crucial dimension.⁴⁹¹ It seems

487. By the same token, skeptics would also advance a contextualized reading of the set of cases that confirmed the impunity measures that brought about the impunity era: CSJN, *Camps* (1987); *Riveros* (1990); *Aquino* (1992). See *supra* Part I §3; Section II.A §2.

488. See Hart, *supra* note 479, at 619 (reckoning that “one can sympathize with and endorse the view that [leaving perpetrators unpunished] might have been a bad thing to do”).

489. See *id.* (advocating that courts deciding to prosecute under such conditions should “declare overtly that [they are] doing something inconsistent with [rule-of-law] principles,” given that, “[o]ldious as retrospective criminal legislation and punishment may be, to have pursued it openly in this case would at least have had the merits of candour”). Recall that Hart actually disparaged the idea of a trilemma—he thought that the difficulty was better captured in the form of a dilemma. See *supra* notes 481, 484.

490. Fuller only tangentially criticizes Hart on the grounds that “moral confusion reaches its height when a court refuses to apply something it admits to be law.” Fuller, *supra* note 28, at 655.

491. Hart's failure to account for the weight of the fidelity norm as part of the trilemma's equation is puzzling in light of his own ideas. Let me pause over this briefly. Hart finds fascinating how courts at times decide on the most fundamental questions in the legal system without legal guidance or authorization (due to gaps in the law) and, still, society accepts those rulings. See HART, *supra* note 226, at 153–54. He claims that “what makes possible these striking developments by courts . . . is, in great measure, the prestige gathered by courts from their unquestionably rule-governed operations over the vast, central areas of the law.” *Id.* In other words, Hart believes that citizens hold courts in high regard because judges act as legally bound decision-makers, which is by and large a correct perception. It is such prestige that “makes [it] possible” for courts to occasionally slip away and decide unrestricted by law—yet still authoritatively—on major issues. Now, given what is the foundation of the courts' prestige and political authority, why would judges undermine this by exercising such discretion openly? Hart himself recognizes that courts frequently use legal argument in unorthodox ways to disguise their legally unbound decision-making through mild pretenses. See *supra* note 471. Against this backdrop, it

that (c₂) strong pretenses come about precisely because judges believe it is unacceptable for courts to (b) decide cases in ways that are (openly) inconsistent with what the law requires. No one can be oblivious to the fact that “the issue of fidelity [to law] is almost never a live one [before the] courts; our judges rarely consider whether they should follow the law once they have settled what it really is.”⁴⁹² Hart’s mistake aside, skeptics are well aware of the major pull that the fidelity norm has over legal actors; in fact, this is precisely why they believe pretenses develop.⁴⁹³ As we can see, the trilemma aptly captures how the judges’ predicament comes as a consequence of the overlapping requirements of the rule of law, political circumstance, and the norms of the judicial forum. (The first rules out (c₁), the second makes (a) unacceptable, and the third does not tolerate (b)).

Let us now turn to how the orthodoxy-skepticism divide unfolds. Given the tensions between legality and justice, criminal prosecutions after political transitions seem fertile territory for alternative uses of judicial discourse. Jon Elster reviews a number of these cases worldwide and instinctively analyzes them under what I call here a skeptical approach.⁴⁹⁴ This leads him to classify decisions following the courses of action identified in the skeptic’s trilemma, which results in interesting findings.⁴⁹⁵ Elster reports that, in fact, decision-makers in transitional crossroads have rarely opted for (a) respecting the ban on retroactive punishment in spite of subsequent impunity or for (b) punishing in candid inobservance of the legal obstacles,⁴⁹⁶ as Hart suggested they should. Rather, it seems that the most “common response to this tension is [(c₂)] to try to have it both ways, by using subterfuge to

is hard to understand Hart’s outrage at courts for attempting to maintain appearances in transitional justice cases and, even more so, his belief that judicial candor may be socially welcomed. (One may speculate that Hart thought the strong pretense was too obvious to work as a disguise of judicial discretion, yet this is implausible given that intelligent lawyers at the time disagreed precisely on whether it was actually a pretense).

492. DWORKIN, *supra* note 227, at 5–6 (referring to Anglo-American courts).

493. Fidelity to law is a complex array of norms that overlap professional and lay expectations about how judges are supposed to carry their duties of office (as to deciding and articulating their decisions). What separates skepticism from orthodoxy on fidelity to law is not quite that they assign it different relevance, but that they see these norms from a different perspective. To orthodox analysts, fidelity demands that lawyers and judges discern what the law requires; thus they must remain entangled between options (a) and (c₁). While skeptics accept this internal characterization, they believe there is more to it: an adequate understanding of fidelity should be able to explain why pretenses in general develop.

494. See ELSTER, *supra* note 12, at 116–135. Some of the critiques Elster received seem to be ignited by his skeptical leanings. See Posner & Vermeule, *supra* note 42, at 796–99.

495. See ELSTER, *supra* note 12, at 237–240. Elster does not seem to have been inspired by Hart’s piece in this regard. His analysis is not restricted to judicial decisions, and may perhaps be considered somewhat superficial, but it still provides an interesting hint.

496. See *id.* at 237. Elster reports one case of the former (a), and one of the latter (b). However, he adds two more cases of explicit adoption of retroactive legislation, yet by countries that did *not* have a constitutional ban on it. *Id.* If that were the case, these would actually be instances of option (c₁) that do not spark a dispute between orthodoxy and skepticism.

disguise the retroactive character of punitive legislation.”⁴⁹⁷ Now, is Elster reading what judges did correctly?

Disputes over these interpretations will emerge at two different levels. As a first-order controversy, lawyers may have different views about what the law requires in each individual case. Hart and Elster understood that these courts had infringed on bans on retroactive punishment, but perhaps they were wrong in this regard.⁴⁹⁸ Indeed, there may be disagreement on whether the punishment of perpetrators is permitted or banned by law, which will affect how analysts interpret what the courts have done when deciding for one of these outcomes. In any case, this first-order controversy is *not* well characterized as a dispute between orthodox and skeptical analysts—it is just an ordinary debate among lawyers.⁴⁹⁹ The orthodox-skeptical divide is rather a second-order controversy, which begins with the question of whether legal analysis should even move beyond first-order inquiries. Imagine a standard scenario of legally entrenched impunity where lawyers have debated the first-order question extensively and have roughly arrived at the conclusion that prosecutions cannot overcome legal obstacles. Later on, however, courts decide to prosecute perpetrators under the claim that this is what the law requires. Of course, this will prompt observers to reconsider the first-order issue, and here is where approaches will diverge. Orthodox analysts—especially those who believe impunity to be unacceptable—will remain entangled in the first-order inquiry, which is the one they have the proper tools to handle. Skeptics join this endeavor and are attentive to its results; however, they will soon pose a question that takes the inquiry to a further plane: is it better to interpret what the courts have done in terms of a mistake or a strong pretense?⁵⁰⁰ These categorizations compete to provide a better understanding of a specific case, taking into account all of the information collected on both the internal and external fronts. The Argentine anti-impunity shift provides a suitable opportunity to test these hypotheses. As we will see, the skeptical approach overcomes

⁴⁹⁷ *Id.* at 83.

⁴⁹⁸ This is precisely what Fuller, and Posner & Vermeule think. See Fuller, *supra* note 28 (criticizing Hart); Posner & Vermeule, *supra* note 42 (criticizing Elster).

⁴⁹⁹ It is important to understand that legal-discourse skeptics, of the brand I present here, are not committed to any view that may condition their response to this first-order question. These skeptics do not believe that the law is radically indeterminate, so that pretenses, however mild, are all that judicial arguments can aspire to be. (In fact, skepticism is compatible with views that range up to total determinacy). Radical indeterminacy, which basically collapses both levels of controversy, has been generally (though wrongly) attributed to the American Legal Realists.

⁵⁰⁰ We should avoid misunderstanding the orthodox-skeptical divide in one way. This is not a (second-order) controversy about the characterization of specific decisions, which orthodox analysts consider “judicial mistakes” and skeptics believe embody “pretenses” of the “strong” type. Such a reading of the dispute would be misleading in two important senses. First, orthodox analysts lack the tools to tackle this subtler question (which requires exploring the external dimension)—to them, judicial decisions are either correct or mistaken, and that is it. Second, the fact that skeptics are intrigued about how to better understand these decisions, which entails exploring the possibility of strong pretenses, does not mean that they will always incline for this alternative (i.e., it is perfectly admissible for a skeptic to conclude that a certain decision is better understood as a judicial mistake).

the three difficulties that undermine orthodox accounts to render better insights into the role of judicial discourse and the appeal to international law.

1. *An Alternative Function for Judicial Discourse.* As a reminder, my analysis of the internal point of view showed that the Court's most central theses appear impossible to reconcile with Argentine legal materials and practice.⁵⁰¹ To judicial-discourse skeptics, that the justices were actually unable to justify the anti-impunity holdings opens up the possibility that legal opinions may be playing an alternative role. Now, if this is what is going on, there will be other, perhaps subtler, indicators as well—for example, the way in which these opinions were crafted. Even more remarkable than the flaws in argumentation is that none of the justices who voted for overturning impunity even bothered to address the potentially-lethal objections to their decisions.⁵⁰² This outright avoidance of key issues reveals the true aim of the opinions' arguments: to provide only a *prima facie justification*. The Court's appeal to international law looks like an ingredient of this general strategy. Even if international law appears technically incapable of solving the legal obstacles faced by the second wave of trials, one can imagine that an invocation of international legal materials may contribute to the creation of a professionally respectable argumentative patina. All of these are markers of a strong pretense. On top of that, this reading of the anti-impunity opinions matches the skeptic's conjectures about how the justices themselves may have experienced the situation, given our knowledge of the circumstances surrounding these decisions. Indeed, the skeptical thesis of an alternative use of legal argument is compatible with two highly plausible assumptions embedded in the template of the trilemma. One is that Argentine judges were well aware of the formidable legal obstacles to prosecution and it is highly likely they thought these to be insuperable. The other is that many of the judges had reasons to believe that justice outbalanced legality and—irrespective of whether this circumstance should be in any way relevant—therefore decided for overturning impunity.

2. *The Inner Workings of the Judicial Argument.* Skepticism has further advantages over orthodoxy; it also allows for a better comprehension of the inner workings of the judicial argument. Consider the claim that the Argentine polity has “outsourced” its decision making on whether to punish illegal state repressors.⁵⁰³ This awkward explanation of the political process that led to the trials comes as a consequence of believing that, in passing judgment on the anti-impunity rulings, domestic courts have been tightly

501. Namely, there seem to be no grounds on which to claim that the Constitution has been international-law bound since the mid-1800s, *see supra* Section III.B(1), nor it seems possible to interpret that constitutional law has long ruled out impunity measures for crimes against humanity, *see supra* Section III.B(II).

502. The difficulties presented *supra* Section III.B. were not addressed by the justices. For particularly remarkable example, given the contrast with the Court's earlier opinions, *see supra* note 217.

503. *See supra* Section V.A.(1) §3.

conditioned by international norms under the scheme of subjection. However, this impression is merely an illusion due to the orthodox spell. The antidote of skepticism reveals that, at least with regard to these cases, the effect of the addition of international law has actually been the opposite. (I will not get into the more general issue, which is that judges may sometimes swing from case to case on how much deference they owe to international law). The structural scheme of subjection to international law can sometimes *empower* judges by increasing their margins of maneuver regarding certain issues, the regulation of which may have been tighter under domestic legal sources alone. Consider how courts had construed the Argentine legal framework prior to international sources being deemed applicable: overturning impunity was thought to be obstructed by norms derived from textually rigid constitutional provisions (e.g., the amnesties and pardons clauses), and the results of the justice program were thought to be limited by well-established constitutional doctrines (e.g., the standards governing preventive detention and punishment).⁵⁰⁴ Later on, once the international materials had entered the scene through the second wave of trials, Argentine judges had the resources they needed to validate a range of decisional outcomes that had seemed precluded under a different constitutional structure. Hence, courts were able to do away with the obstructions to the justice program by reshaping the law in a way that increased leeway.⁵⁰⁵ A couple of features of international law have contributed to this state of affairs: international materials seem, for the most part, more indeterminate than domestic ones,⁵⁰⁶ and, on top of that, domestic courts in the Americas are generally able to interpret international sources free from the oversight of supranational bodies.⁵⁰⁷ Of course, revealing how “subjection” to international law actually increased judicial latitude to decide on impu-

504. See *supra* Part II.

505. Take for example the issue of preventive imprisonment. Established constitutional doctrines stipulated strict rules to scrutinize detention. See *supra* Section II.B. Now, the addition of international sources to the mix has introduced the principle that the international responsibility of the state should be avoided. See *supra* Section III.A. The fact that, under the ILB Constitution, this is a norm of the highest rank has allowed the Court to have the standard constitutional doctrines on imprisonment trumped and retailored for illegal state repressors, as described *supra* in Section II.B. However, there is little doubt that the international-responsibility-avoidance norm is indeterminate as to its requirements regarding preventive imprisonment. See CSJN, *Alespeiti* (2017) (J. Maqueda concurring, §19; JJ. Rosatti & Rosenkrantz concurring, §12) (acknowledging that the state may be internationally responsible both for failing to trial and punish perpetrators, and for maintaining suspects imprisoned without trial or under inhumane conditions). See also my criticisms *supra* note 197.

506. See generally MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (2006).

507. Argentina has been dealing with a justice project concerning criminal accountability for the crimes perpetrated during the dictatorship for over thirty years now. So far, however, international organs have issued recommendations about this enterprise only three times: in 1992, to recommend that impunity be revised as it seemed to infringe the rights of victims, see *Consuelo et al. v. Argentina*, *supra* note 322; in 2000, to support the already acknowledged right to the truth, see *Aguar de Lapacó v. Argentina*, *supra* notes 320–21; and in 2012, to note a human rights violation concerning the conditions of detention of a repressor with health issues, see CRPD, *Communication No 8/2012*, *supra* note 112.

nity says nothing about whose wishes the courts were implementing. But it does allow us to delve into this question (as I will in Section V.B) without imposing an artificial answer.

3. *Legalistic Residue*. Lastly, skeptics are able to identify a problem that arises with some judicial doctrinal constructions. As discussed previously, the Court justified the anti-impunity principle's inclusion in the Constitution's content by appealing to a deeper structural layer: the doctrine of the ILB Constitution, which establishes the scheme of subjection to international law.⁵⁰⁸ The difficulty for orthodox analysts is that this reconfigured constitutional structure is in itself hard to fit in the legal universe in order to preserve integrity in law.⁵⁰⁹ By contrast, the skeptic will see this doctrine as little more than ad hoc prosthetics to rationalize the anti-impunity holdings.⁵¹⁰ Because it was not intended for other applications, the justices seemingly envisioned that its doctrinal extravagances would not spread beyond this issue.⁵¹¹ But doctrinal elaborations by high courts tend to develop lives of their own,⁵¹² potentially causing collateral effects. Indeed, most of the reverberations that the anti-impunity rulings have produced, both domestically and internationally, are linked to these doctrinal premises that the Court articulated to "justify" its holdings. Two examples are illustrative. The structure of the ILB Constitution itself has a latent presence in Argentine law: a possibility always remains that courts down the road will apply this doctrinal apparatus to decide on new issues, which, if done consistently, could in fact outsource political governance.⁵¹³ Moreover, on the international plane, the fact that the Argentine Court *portrayed* the country

508. See *supra* Section III.A.

509. See *supra* Sections III.B(1) and V.A(1) §2.

510. From a sociological standpoint, this sophisticated pirouette seems directed at maintaining the autonomy of the legal system from politics. See NIKLAS LUHMANN, *LAW AS A SOCIAL SYSTEM* 70, 81–90, 378 (2004) (developing the notion of autopoietic reproduction in legal systems).

511. See LORENZETTI, *THE ART OF MAKING JUSTICE*, *supra* note 382, at 215 (reporting that “[a]ll justices agreed that [the rationale to overturn impunity] was an exceptional measure . . . only applicable to this case”). This idea resembles the narrow holding in *Bush v. Gore*, 531 U.S. 98, 109 (2000) (“Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”).

512. See Garay, *supra* note 426.

513. Take one example. The *Convention on the Elimination of All Forms of Discrimination against Women*, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW], to which Argentina is a party, does not address abortion upfront. See *id.* arts. 12.1, 16.1(e). However, an Optional Protocol to CEDAW created a Committee competent to monitor compliance with the Convention and to develop its own “views” on particular cases. See G.A. Res. A/54/4, *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, Oct. 6, 1999 (entered into force Dec. 22, 2000), arts. 1, 7.3. Despite the lack of direct textual basis in the CEDAW, the Committee took the stance that the Convention requires the decriminalization of abortion in certain respects. See, e.g., Comm. on the Elimination of Discrimination against Women, *Inquiry concerning the United Kingdom of Great Britain and Northern Ireland*, U.N. Doc. CEDAW/C/OP.8/GBR/1 (Mar. 6, 2018), §§54–63. This raised concerns and hope, depending on the side, at the time the Argentine Congress discussed the ratification of the Optional Protocol given that, on the basis of the Supreme Court’s ILB-Constitution doctrine, such ratification would imply a decriminalization of abortion via political outsourcing. See Mariana Carbajal, *El voto que venció al lobby de la Iglesia*, PÁGINA 12 (Nov. 17, 2006), <https://www.pagina12.com.ar/diario/elpais/1-76299-2006-11-17.html> [<https://perma.cc/QJ5E-6DG2>].

as bound by certain international norms⁵¹⁴ has been taken by some in the international community—including the Inter-American Court—to confirm the existence and binding force of these norms.⁵¹⁵ Skeptics conceive of this phenomenon in terms of *legalistic residue*—a side effect intrinsic to the judicial platform when it produces outputs for which the legal materials did not provide in advance. Needless to say, what causes this is the hold that the fidelity norm has over judicial decision-makers.

The contrast between orthodoxy and skepticism has important implications. Clearly enough, to adopt a skeptical approach toward judicial argument results in a much-improved understanding of the Argentine anti-impunity shift. Skepticism allows a reasonable explanation of Argentina's passage from the impunity era to a second wave of trials by presenting an internal reading that is compatible with the external story. Furthermore, the fact that the judges make use of certain rhetorical resources, like the appeal to international law or their silence about weak links in the argument, makes more sense once we adopt the skeptic's view. But from here on things get complicated. While the points made so far do seem sufficient to drop the orthodox view altogether, its inadequacy actually exposes an acute problem. There is a reason behind orthodoxy's seemingly stubborn slant toward internal reasons: namely, its primary concern is not to explain how decisions are reached but to assess whether they are correct.⁵¹⁶ By contrast, the approach I have labeled "skeptical" lacks such a normative drive: no matter how persuasive, its refined account of judicial discourse in the anti-impunity shift simply cannot procure an alternative justification for these rulings. As far as legitimacy goes, therefore, we seem resigned to the orthodox verdict that shortcomings in legality render these decisions unjustified. But what, exactly, does this mean? Two points are important to underscore. First, the orthodox claim as to what legitimizes judicial decisions (i.e., their being argumentatively justified) does not monopolize the attribution of legitimacy but rather coexists with other valid notions of what makes decisional outcomes politically legitimate.⁵¹⁷ Second, the way in which lawyers conceive of legitimacy is, in fact, rather slim: it contents itself with verifying that courts have not overstepped their mandate but merely enforced political decisions made by others who—this view *assumes*—wield legitimating authority. Yet I believe the episode calls for a reassessment of this dimension as well.

514. See *supra* Section III.A.

515. See KOK, *supra* note 43, at 215–223; Gelman v. Uruguay, *supra* note 188.

516. Nowhere is this better presented than in Dworkin's project. See generally DWORKIN, *supra* note 227.

517. See Richard Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1790–91 (2005) (distinguishing legitimacy "as a legal concept . . . gauged by legal norms" from legitimacy "measured by sociological criteria," which renders claims of legal authority legitimate when "acquiesced in").

B. *Legality versus Justice*

The Argentine second wave of trials presents a most interesting difficulty. As my examination from the internal point of view showed, the Court's failure to justify the anti-impunity rulings, combined with careful consideration of constitutional law on the subject, makes it seem that the legal obstacles to justice are far too severe to overcome by way of judicial reinterpretation. Indeed, we may safely suppose it is impossible to retrofit the second wave of trials into legal compliance absent a constitutional amendment. Regardless, few doubts remain about the appeal of the justice program, especially in light of the events recounted in the external account. If the Argentine anti-impunity shift boils down to this tension between legality and justice, then it poses one core question: is it acceptable for officials or judges⁵¹⁸ to decide that legal requirements must be disregarded in light of extraordinary circumstances? In other words, assuming that the overturn of impunity was contrary to what the law demanded, are there any bases on which to consider that these decisions were nevertheless correct?

Put succinctly, the difficulty arises from a conflict between two values. On the one hand, every now and then a case comes up where the solution determined by law appears objectionable beyond dispute; hence, ignoring what legality requires would allow for an unquestionably better outcome.⁵¹⁹ On the other hand, this does not erase the fact that trumping legality is detrimental to the legal system overall.⁵²⁰ Of course, this puzzle is not new, and neither are the several tentative responses that have developed. Although the general intuition seems to be that legality must stand, the fact that other values also central to the legal/political system are crucially affected may exceptionally justify its retreat. In my view, this framework aptly captures the difficulties that the legality-versus-justice dilemma presents in the aftermath of oppressive regimes. What we need, then, is a rationale that justifies moving forward with the prosecutions in spite of formidable legal obstacles. The Argentine anti-impunity episode provides a

518. In my view, the fact that judges—as distinct from non-judicial officials—may be the ones making the calls has no bearing on *this* particular question. (The significant idiosyncrasies that the judicial arena does contribute to the puzzle I explored in the preceding Section V.A.) The underlying idea is that judges have duties toward the polity that most prominently include, but must not to be reduced to, fidelity to law as orthodoxy conceives of it. This more general set of virtues has been interestingly tackled under the label of “judicial statesmanship.” See Neil Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 979–1002 (2008); Robert Post, *Theorizing Disagreement: Reconciling the Relationship Between Law and Politics*, 89 CALIF. L. REV. 1319 (2010).

519. To my knowledge, Aristotle pointed out the earliest version of this puzzle. See ARISTOTLE, NICOMACHEAN ETHICS, Bk. V §10 (WD Ross trans., 1999) (noting that, when the law is “defective owing to its universality” and commands unjust solutions to particular cases, “it is right, where the legislator fails us and has erred by oversimplicity, to correct the omission”).

520. This is a perennial theme in legal and political thought. See, e.g., PLATO, CRITO 50a–54e (discussing reasons why laws must be obeyed even when they command terribly unjust results); WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Bk. 1, §2 (claiming that “law, without equity, tho’ hard and disagreeable, is much more desirable for the public good, than equity without law; which would make every judge a legislator, and introduce most infinite confusion”).

suitable platform to search for one. From the story told in Part IV, one would think that there might be a widespread intuition (among those who remain unconvinced by the legal reasons advanced by the Court) that the overturn of impunity did justify trumping legality. Be that as it may, the scholarly challenge is to account for why this intuition may be correct. I will develop two lines of argument to this effect. One builds on the understanding of human rights in our political culture and (I) equates justice with morality; the other draws on influential approaches to constitutional change in order to (II) connect justice with legitimacy. The quest, thus, is for the strongest possible case for justice.

I. *Legality versus Morality: Doing the Right Thing*

An argument based on human rights seems the most naturally available.⁵²¹ Human rights are relevant in our political culture in two different ways. One of these is the notion of human rights as legal claims, that is, as statements about what persons are entitled to receive that the courts can enforce against the state. In contrast to this conception, Owen Fiss explains how human rights frequently work under a different dynamic (which, suitably, he notes to have observed in the transitional justice effort in Argentina in the 1980s and 1990s).⁵²² According to this alternative understanding, human rights transcend any existing legal order, domestic and international, to function “as social ideals,” namely, as “independent standard[s] by which to judge all social practices, including the law.”⁵²³ This means that human rights as *social ideals* and as *legal claims* often coexist:

As social ideals, human rights can move the law toward the creation or recognition of certain claims as a matter of positive law, both international and domestic, yet they will always stand apart from the world as it is presently constituted. . . . In the best of times, human rights . . . as social ideals, may give rise to legal claims in either the domestic system or in the international sphere . . . but even when that occurs they should not be reduced to or confused with their legal embodiments. In these situations, human rights retain their separate existence—they persist as social ideals—and provide the moral energy needed to enforce or otherwise to actualize the claims to which they have given rise.⁵²⁴

Human rights as social ideals became crucial during the Argentine democratic restoration and throughout the impunity era (1983–2003). They be-

521. See Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 NYU L. REV. 1971, 1987, 1991–2021 (2004) (noting the common foundation on a notion of rights shared by the fundamental-rights-based constitutional tradition and the international law of human rights).

522. See Owen Fiss, *Human Rights as Social Ideals*, in HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA 263, 265–66, 273 (Carla Hesse & Robert Post eds., 1999).

523. *Id.* at 267.

524. *Id.* at 266–67.

gun as a conspicuous topic in the presidential campaign and thus became a map for the transitional justice program. Congress quashed the dictatorships' self-amnesty on the grounds that this enactment had interfered with its own constitutional powers, but the reason for pushing this envelope was that the people had made it clear that human rights violations could not go unpunished.⁵²⁵ Similarly, the courts prosecuted perpetrators on the grounds that they were responsible for Criminal Code felonies, but the reason for enforcing the positive law against intimidating resistance was that these individuals had violated human rights.⁵²⁶ Lastly, the long struggle to overturn impunity was not primarily focused on challenging the amnesties and pardons for being illegal but was rather driven by the fact that, legal or not, impunity was unacceptable from the standpoint of human rights.⁵²⁷

In more recent times, the rationale for overturning impunity overshadowed human rights as social ideals. The central thesis of the anti-impunity rulings (2004–today) is that the incorporation of international law granted human rights the (highest) status of actionable legal claims.⁵²⁸ Now, the fact that the Supreme Court failed to justify this premise does not leave us empty-handed—the ideal of human rights has remained latent. Proof of this is that this ideal resurfaced briefly but decisively in the overwhelming reaction against the Supreme Court's partial repeal of the second wave of trials in mid-2017.⁵²⁹ This first argument reverts to that fundamental human rights ideal to reassert that prosecuting and punishing the perpetrators is the *morally* correct thing to do.⁵³⁰ Along these lines, when we say that the legally entrenched impunity undermines human rights what we stress is, at the core, a moral problem (which has been precisely the main claim throughout the impunity era). Framed this way, the one pressing issue that demands a solution is the tension between legality and morality.

525. *See id.* at 267 (arguing that human rights “did not nullify the junta’s self-conferred amnesty law; that law was repealed by the newly elected Congress” on the basis of “conventional constitutional analysis.” Still, human rights as social ideals “mobilized people to oppose the self-amnesty law, and gave the Argentine Congress a reason to reexamine the self-amnesty law”).

526. *See id.* at 268 (“To the Argentine people, the military had violated not only their own laws and edicts, but also basic human rights, and for that reason had to be prosecuted. Human rights were reasons for enforcing positive law.”). The influential Argentine Truth Commission used the yardstick of human rights to assess what had been done (instead of the criminal law, which of course fell outside of its jurisdiction). *See NEVER AGAIN REPORT*, *supra* note 79, at 2 [*Prologue*, ¶5] (“From the huge amount of documentation we have gathered, it can be seen that these human rights were violated at all levels by the Argentine state during the repression carried out by its armed forces.”).

527. Fiss, *supra* note 522, at 270, 273 (arguing that the criticisms of the impunity measures were not based on the claim that amnesties and pardons were illegal, as if human rights were legal claims, but that they betrayed the ideal of human rights).

528. *See supra* Section III.A.

529. The reaction to CSJN, *Muiña* (2017) did involve lawyers criticizing the Court for wrongly construing the law, but this was mostly overshadowed by the popular criticism that the judgment sought to reverse achievements on human rights. *See supra* notes 157–161, 411–421 and accompanying text. For a brief review of the technical criticisms *see* CSJN, *Batalla* (2018) (JJ. Highton & Rosatti concurring, §8 fn.1).

530. This view may be traced to Kant’s retributivism. *See* IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 102–112 (J. Ladd trans. 1999).

Now, undoubtedly, this tension exists; but can morality justify moving forward with the prosecutions? The claim is that human rights as social ideals should provide enough of a reason to trump legality because a rule of law that does not conform to human rights is not worth respecting. In other words, even in recognizing the moral importance of legality, when confronted with a tragic choice between the betrayal of the human rights ideal (through impunity) and a breach of legality, morality still calls decisively for prosecution.

To present the challenges of impunity in terms of a dilemma between legality and morality is somewhat appealing. For one, this is exactly how the dissenting justices in the Argentine anti-impunity rulings framed the issue (which many see as a more truthful portrayal than what the majority articulated⁵³¹). Dissenters claimed they found themselves in a predicament: moral reasons inclined them toward punishment, but the law simply stood in the way.⁵³² Beyond the Argentine episode, this version of the dilemma also brings to light a plausible understanding of the Inter-American Court's relentless demands that perpetrators be punished with no exceptions, which can account for their weight in spite of legal obstacles to their application.⁵³³ These cases purport to establish what *international law* requires on the subject and consequently request that domestic authorities act accordingly.⁵³⁴ From a technical-legal standpoint, however, this pronouncement may not be sufficient to tip the scales as to what *the law*, all sources considered, requires of domestic judges regarding impunity.⁵³⁵ However, even in such a scenario, the Inter-American decisions may still be taken (more modestly) as authoritative determinations of where the human rights *ideal* stands on these matters.⁵³⁶ Authoritative statements such as these are indeed relevant because they provide an input for local communities and their

531. See, e.g., Elías *supra* note 66; Legarre, *supra* note 210.

532. See CSJN, *Mazzeo* (2007) (J. Fayt dissenting, §61; J. Argibay dissenting in part, §7); CSJN, *Muñña* (2017) (J. Rosatti concurring, §§11–12); CSJN, *Batalla* (2018) (CJ. Rosenkrantz dissenting, §§9, 32).

533. See cases cited *supra* note 188.

534. Of course, the Inter-American Court has been criticized for interpreting international law wrong and exceeding its mandate. See, e.g., Neumann, *supra* note 450; Malarino, *supra* note 459, at 668–673, 684–695.

535. This assessment will of course be country-specific. For an analogous argument for Argentina, see *supra* Section III.B(1). I collapse here what may be a relevant distinction, between the weight that a state-party may assign (i) to the Inter-American *case law* (i.e., judicial doctrine) requiring punishment for those who perpetrated human rights violations, and (ii) to Inter-American *cases* in which that state-party has been the losing side where the Court has ordered the criminal investigation of a particular human rights violation leading to the punishment of those responsible for it. Although the anti-impunity Argentine cases cited throughout this Article belong to the first category, a couple of cases that are key to understanding the ILB-Constitution doctrine belong into the second group: CSJN, *Espósito* (2004); *Derecho* (2011), *supra* note 194. Nonetheless, the Argentine Court's jurisprudence does not seem to account for this distinction.

536. Let me phrase my point with the help of ancient Roman concepts: even in denying that the international tribunal has *potestas*, a convincing case can still be made that it has *autoritas*. See CARL SCHMITT, *CONSTITUTIONAL THEORY* 459 (Jeffrey Seitzer ed. trans., 2008).

officials to consider and eventually to balance against other values, like democratic stabilization (i.e., “peace”), social healing through honest debate and comprehension (i.e., “truth”), or the preservation of the rule of law.

Still, I do not believe that the best case for justice can be built on top of this version of the dilemma. Moral deliberation is indeed a crucial dimension of these episodes, as we will see. Yet this should not mislead us into thinking that moral rightness, which appears unachievable in light of pervasive moral disagreement among us,⁵³⁷ can be a workable standard of justification to trump the rule of law. The undeniable moral appeal of holding accountable the perpetrators of the most horrific crimes, which this Article refers to as “justice,” should not obscure the presence of significant disagreement as to the fine-print details on how this should be done.⁵³⁸ Over the last forty years, Argentina implemented two successive justice programs that showed significant differences.⁵³⁹ Both have been criticized from the standpoint of human rights.⁵⁴⁰ In particular, several of the specific features of the second wave of trials have been controversial and remain so today—for example, time-unrestricted preventive detentions, the imprisonment of elderly and disabled defendants, or the validity of impunity measures for former guerrilla leaders. The same difficulty undermines the authoritative-ness of Inter-American cases when they are thought of as providing guidance for action by way of clarifying what human rights require.⁵⁴¹ The profound disagreements about how these rulings construe human rights can surely prevent local judges from taking this Court’s advice as authoritative

537. See generally JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

538. The structure of social disagreements over justice increases as the policy is considered in greater detail. See *id.* at 105.

539. Part IV described the details of the two justice programs subsequently implemented in Argentina: the justice effort during the democratic restoration in the 1980s, see *supra* notes 263–65 and accompanying text, and the second wave of trials since the 2000s, see *supra* notes 348–351 and accompanying text. Each of these programs advanced a particular, competing conception of the same concept—justice. For a presentation of this structure of concept and conceptions, see DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 471, at 103, 134–36; DWORKIN, *LAW’S EMPIRE*, *supra* note 227, at 70–72.

540. The Human Rights Movement criticized the program of prosecutions implemented as part of the transitional justice effort, see *supra* notes 268–284 and accompanying text, and these criticisms later on went to inspire the program of the second wave of trials, see *supra* notes 352–357 and accompanying text. In turn, the Macri presidential campaign and later administration criticized the human rights policies connected to the second wave of trials and sought to make some adjustments that did not end up materializing. See *supra* notes 401–406 and accompanying text. Of course, I do not take into account here criticism that does not purport to interpret what human rights as social ideals truly require.

541. Say we take the Inter-American Court’s determinations as claims to legitimate authority. What, exactly, does this entail? I believe Raz’s normal justification thesis can provide a good sense of the sort of argument the international tribunal advances under this interpretation and what would it take for its rulings to be authoritative. Let me adapt Raz’ thesis with a few additions: the “way to establish that [the I-A Court] has authority over [a domestic court] involves showing that [the domestic court’s decision] is likely better to comply with [international human rights] (other than the alleged[ly] authoritative [Inter-American rulings]) if [the domestic court] accepts the [judgments] of the [I-A Court] as authoritatively binding and tries to follow them, rather than by trying to follow the [human rights treaties] directly.” JOSEPH RAZ, *THE MORALITY OF FREEDOM* 53 (1986).

in this sense.⁵⁴² Moreover, persistent moral disagreement has a powerful impact on how the legal practice deals with morality. Lawyers typically consider that the moral appeal a certain outcome may have (to some), no matter how extraordinary, is in itself irrelevant to overcoming legal obstacles to it.⁵⁴³ This is simply how the law works.⁵⁴⁴ Indeed, dissenting justices may have *personally* felt the predicament between legality and morality, as they stated; however, in their official capacity *as judges*, this dilemma did not seem to present that much of a difficulty. Nobody expects a court that just framed a case in this way to subsequently work things out so that morality prevails. The standard expectation is rather for judges to uphold legality. As Justice Holmes supposedly once stated: “[to ‘do justice’] is not my job. It is my job to apply the law.”⁵⁴⁵

II. *Legality versus Legitimacy: Responsiveness to Societal Demands*

Public deliberation on impunity has been naturally centered on how unacceptable this arrangement is and what would be the right thing to do about it. Yet the reason for moving forward with the trials in spite of legal obstacles cannot ultimately rest on moral rightness. We are thus prompted to explore an alternative argument, which posits that the anti-impunity cases may have been correctly decided not because of the justice program’s moral appeal but due to the fact that pursuing it was politically compelling. This calls for a reappraisal of the second wave of trials that emphasizes the popular support that gathered behind the program—which, as seen from the narration in Part IV, was quite overwhelming. The legitimacy-centered reading surpasses the previous argument in two respects that are directly connected to morality. First, by switching the focus from moral correctness to social persuasion, it better stresses the importance of extensive moral deliberation as a stepping-stone to achieving legitimacy.⁵⁴⁶ Both

542. Domestic judges and scholars have criticized the Inter-American Court’s anti-impunity case law for pushing for criminal punishment in ways that seem to compromise the alleged perpetrators’ own human rights. See, e.g., CSJN, *Espósito* (2004), *supra* note 194 (JJ. Petracchi & Zaffaroni concurring, §§12–16); *Derecho* (2011), *supra* note 194 (JJ. Fayt & Argibay dissenting, §§8–9); Malarino, *supra* note 459, at 681–84; Engle, *supra* note 185, at 1124–26; Mégret & Calderón, *supra* note 459, at 437–441. These challenges seem to go beyond a marginal disagreement, especially when compared to an earlier line of Inter-American precedent that was similarly innovative, yet not even remotely as controversial. See case cited *supra* note 187 and accompanying text.

543. See, e.g., DWORKIN, *LAW’S EMPIRE*, *supra* note 227, at 52, 66–68 (distinguishing the interpretation of an existing practice from the invention of something new).

544. Legal norms provide reasons for action independently of their actual content. See H.L.A. HART, *ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL THEORY* 261–66 (1982). See also Frederick Schauer, *Formalism*, 97 *YALE L.J.* 509, 534–35 (1988) (noting how it is in the nature of rules that their language cannot be trumped when the results of its application appear to be suboptimal).

545. ROBERT BORK, *THE TEMPTING OF AMERICA* 6 (1990).

546. Nino has defended transitional justice endeavors in connection to the promotion of public debate. See NINO, *supra* note 30, at 127–134. However, Nino’s argument and mine are quite different. While Nino argues that transitional justice measures are valuable because they *trigger* public deliberation, I see trials for human rights violations as particularly interesting when they *result from* social deliberative processes.

arguments claim that what the Court ultimately decided to enforce was a human rights ideal, yet the key question under the present view is how this ideal came to be so that it could be legitimately enforced.⁵⁴⁷ Second, the focus on legitimacy allows for a distinction between someone's recognition that certain measures are politically compelling and her own agreement (or lack thereof) with that program's substance or with some of its features.⁵⁴⁸ This accounts for the possibility that public officials and judges decide to enforce a program they may personally not support, which highlights the same virtuous detachment for which judges are praised when they strictly "apply the law."⁵⁴⁹

Now, framing the difficulty as a dilemma between legality and legitimacy does bring in other challenges. At the core of democratic governance lies the system of institutional channels that turn majoritarian preferences into legal outcomes. The claim that the overwhelming legitimacy of a given policy, in nothing but crude form, may justify sidestepping these channels is problematic for obvious reasons. The fact that the alleged "anti-impunity consensus" is yet to be embodied in a proper legislative outcome (like a constitutional amendment⁵⁵⁰) may lead to presumptions that its legitimacy may be overstated. Conversely, there is a *prima facie* case for the legitimacy of the legal obstacles to justice due to their regular enactment. This last point turns out to be particularly challenging here. Unlike in cases of dated constitutional texts or close-to-unattainable amendment requirements, Argentina did amend its Constitution only a few years prior to the anti-impunity rulings.⁵⁵¹ The fact that the 1994 Reformers touched upon these issues certainly raises the bar for a democratic defense of the second wave of trials. Last but certainly not least, even if we concede that overturning impunity was extraordinarily legitimate, this does not make the case that legality must retreat. What we need is an explanation for why (and how) certain levels of legitimacy undermine the rule of law.

547. Benhabib sees countries adopting international human rights through complex iterations, which "explain[s] how legal cosmopolitanism can be reconciled with the right to self-government of individual polities." Seyla Benhabib, *The Legitimacy of Human Rights*, 137(3) *DAEDALUS: ON COSMOPOLITANISM* 94, 101 (2008). She portrays these processes as communities asking themselves: "In view of our moral, political, and constitutional commitments as a people, and our international obligations to human rights treaties and documents, what decisions can we reach that would be deemed both just and legitimate?" *Id.* at 99.

548. *Cf.* WALDRON, *supra* note 537, at 100–06, 111–12 (pointing out this advantage as a reason for respecting legislation enacted by majority vote).

549. This brings some of the justices' "switches in time" to a new light. *See supra* notes 161, 379, 410–411, 429–432 and accompanying text.

550. The Polish Constitution provides a relevant example of this solution. *See* arts. 42.1, 43, KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION OF THE REPUBLIC OF POLAND], April 2nd, 1997, 78(483) *Dziennik Ustaw* 2413, 2421 (1997) (Pol.).

551. *See supra* Section III.B(1)-§2.

A few theories have responded to these challenges by conceptualizing the tensions between legitimacy and legality in ways that I find convincing.⁵⁵² Still, the Argentine episode presents particularities that require some consideration. I will test two influential arguments that will help reveal the kind of tension that this case presents, and later on move to the alternative I believe better accounts for the episode.

1. *Re-Foundational Mystiques*. One influential argument points to peculiarities of context, by drawing on extraordinary instances where political communities transition into liberating new institutional frameworks. Hannah Arendt coined these episodes “new beginning[s],”⁵⁵³ and Bruce Ackerman masterfully developed the notion for constitutional applications.⁵⁵⁴ These pivotal moments do not necessarily represent a complete rupture with the chain of legal validation, as they tend to place value in continuity; still, they evoke a re-foundational sense that may authorize some selective superseding of that legality.⁵⁵⁵ On top of this platform, legality works mainly as a proxy for political legitimacy. Legal analysis is the ordinary, everyday method for judges to identify which outcomes are politically legitimate.⁵⁵⁶ Under extraordinary circumstances, however, courts must forgo strict legal analysis because legitimacy is located elsewhere—in the political mobilizations that have contested old legal interpretations and the electoral results that have validated these transformations.⁵⁵⁷ The outcomes of such political events crystallize (often unwritten) constitutional changes that judges are politically bound to enforce over the old understandings.⁵⁵⁸ The epochal aura of transitions to democracy, characterized by intense political involvement and overwhelming consensus, seems the typical context for such a boost of legitimation to emerge in support of re-foundational measures, which may include criminal prosecutions.⁵⁵⁹ In this way, legitimacy may indeed compensate for the justice program’s lack of strict adherence to legality.⁵⁶⁰ Now, the difficulty with this argument with regard to the Argentine second wave of trials is that these prosecutions did not develop in connection to any re-foundational moment. They were, in this sense, a more *ordinary* political event.

552. Works by Bruce Ackerman, Robert Post, and Reva Siegel cited from here on have been immensely influential on my views on this issue.

553. See HANNAH ARENDT, *ON REVOLUTION* 35–38, 205–211 (1963).

554. See Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 778–784 (1997).

555. See generally ACKERMAN, *WE THE PEOPLE*, *supra* note 384.

556. See ACKERMAN, *FOUNDATIONS*, *supra* note 384, at 262–65.

557. See *id.* at 267–68, 286–88.

558. See *id.* at 288–290.

559. Ackerman himself believes that Argentina had a “new beginning” moment during the democratic restoration of the 1980s, during which most of the energy was devoted to the transitional justice program. However, he also thinks that it would have been much wiser to take advantage of the moment to enact a new constitution. See BRUCE ACKERMAN, *THE FUTURE OF THE LIBERAL REVOLUTION* 5, 78–80 (1992).

560. See TEITEL, *supra* note 42, at 6–7, 25.

2. *Legality Reinforcement.* A different argument justifies judicial decisions that disregard strictly legal reasons on the basis of their pursuance of goals dear to legality itself. Judith Shklar defended the political trials held in Nuremberg and Tokyo after the war by arguing that, despite their huge legal shortcomings, these succeeded in restoring a culture of legality.⁵⁶¹ Within legitimacy-oriented theories of adjudication, Robert Post, Neil Siegel, and Reva Siegel have highlighted the values of judicial decision-making in ways that are more mindful of—and thus responsive to—the political environment on which the legal practice flourishes.⁵⁶² The critical point here is that these other stimuli may sometimes push judges to decide cases according to criteria that “will not be derived from the ordinary norms of judicial craft.”⁵⁶³ Indeed, the argument continues, it is legality’s own preservation that compels courts to proceed this way in order to contribute to the intrinsic values of constitutional legitimacy and the rule of law.⁵⁶⁴ The fact that reinforcing the rule of law may occasionally require sidestepping professional legal reasoning reveals a paradox inherent to both political trials and, even more remarkably, ordinary judicial practice. However, there are important caveats for this to be the case. The context that Shklar imagines for political trials is one “[w]here there is no established law and order, . . . a political vacuum;”⁵⁶⁵ whereas Post and Siegel claim that the reinforcement of legality produced by judicial engagement in “democratic constitutionalism” works mainly when the legal text is ambiguous or open-ended.⁵⁶⁶ It is thus hard to imagine how the Argentine anti-impunity shift could have reinforced legality, given the firmness of the legal constraints there in force. The friction with legality that this case embodies strikes me as *too stark* to fit this argument. Of course, judges have resources to dampen the stridency of trumping legality, which I have called

561. See JUDITH SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* 143–170 (1986).

562. See the literature cited *supra* notes 424, 518, and in the remainder of this paragraph.

563. Post, *supra* note 518, at 1347 (asking “whether, from the internal perspective of the law, the preservation of fundamental values should count as proper ‘legal’ criteria for judicial decision making,” given that the legal principles on which “judges must base their decision[s] . . . inevitably and appropriately define themselves in opposition to criteria that are defined as ‘non-legal’ or political”). See also SHKLAR, *supra* note 558, at 149 (noting that “[w]hat distinguishes most, though not all, political trials is that they scorn the principle of legality, which, ideally, renders criminal law just”).

564. See SHKLAR, *supra* note 558, at 145 (postulating that “[t]here are occasions when political trials may actually serve liberal ends, where they promote legalistic values in such a way as to contribute to constitutional politics and to a decent legal system”); Reva Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323, 1325 (2006) (valuing norm contestation by citizens as a form of sustaining the legitimacy of the constitutional order, rather than undermining it). See also Robert Post & Neil Siegel, *Theorizing the Law/Politics Distinction*, 95 CALIF. L. REV. 1473, 1507 (2007); Post, *Theorizing Disagreement*, *supra* note 518, at 1347.

565. SHKLAR, *supra* note 558, at 220 (claiming that in such context “political trials may be both unavoidable and constructive” in order to “promote some legalistic values”).

566. See Post & Reva Siegel, *Roe Rage*, *supra* note 424, at 378 (focusing on the interpretation of open-ended constitutional provisions); Post & Neil Siegel, *Theorizing the Law/Politics Distinction*, *supra* note 561, at 1497–1511 (distinguishing between tensions that arise “in weak form” when the law is indeterminate, from those “in strong form” when it is not).

strong pretenses, but these might unpredictably backfire, and they always have collateral effects in the form of legalistic residue.⁵⁶⁷

The preceding arguments do not fit the Argentine anti-impunity shift because of a common issue. Both minimize the dilemma between legality and legitimacy: the tension that lawyers perceive comes up as an illusion. In the first argument, the illusion is explained because lawyers are too focused on doctrinal details and miss epochal perspective: legality concerns wash away once we realize that we are immersed in a higher-lawmaking moment, which demands that we put aside working tools like legal reasoning that are suited for ordinary times only. As lawyers, we are relieved when we are informed that moments like this come about very sporadically and that everything subsequently goes back to normal. In the second argument, the illusion is the result of the narrow understanding that formalist lawyers typically have of the structural conditions for legality. From up close, they may see legality reinforcement as a paradox, but this view is diluted as we gain perspective.⁵⁶⁸ The contrast with these frameworks puts in perspective what is distinctive about the Argentine case. Indeed, the kind of legal constraints that the justice program encountered here seem too strong to be diluted. The argument we need must be set to account for this feature.

3. *Alternative Democratic Pathways.* We are now in a position to better assess the tension between legality and legitimacy in the second wave of trials. If there is something to the intuition that legality must retreat then we must be able to account for why it is the case that upholding the rule of law does not seem particularly compelling when it collides with a program backed by an extraordinary level of social support, like the anti-impunity shift. Given that legality retreats are exceptional, this entails explaining how come the rule of law is (atypically) at its weakest here and, correspondingly, what makes overturning impunity so politically valuable. Let us begin with the former. The second wave of trials is singular in that it poses a dilemma that frontally challenges the rule of law as a social value (given that, as we saw, legality concerns cannot be diluted here). Now, the rule of law is of course a complex institution, which some believe must be understood as a virtue entirely separate from that of democratic legitimacy.⁵⁶⁹ In other words, legality is socially valuable for reasons not necessarily connected to self-governance—a sort of bureaucratic virtue. However, it is unlikely that we believe that legality, separated from legitimacy, ranks

567. See *supra* Section V.A(II) (on strong pretenses) and V.A(II) §3 (on legalistic residue).

568. See SHKLAR, *supra* note 558, at 148 (arguing that “the analytical equipment of the legal mind, accustomed to working within a system of positive law, induces lawyers to think of law as there or not there at all times and in all places, rather than in terms of degrees of legalism in the politics of complex social orders”); Post & Neil Siegel, *Theorizing the Law/Politics Distinction*, *supra* note 561, at 1510–11 (suggesting that norms of professional reason might be defined differently).

569. See JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210–11, 214 (1979) (arguing that the rule of law is better understood as a distinct virtue from human rights or democracy).

particularly highly as a social value.⁵⁷⁰ Put differently, when we speak highly of the rule of law, we seem to assume that the content it embodies is the product of democratic governance (or, at least, that we have no reasons to believe it contradicts what the demos favors). One may venture, thus, that the reason why upholding legality appears less compelling in the anti-impunity shift is that this episode has revealed the *political* shortcomings of the rule of law. There seems to be a sense in which a legally banned yet extraordinarily legitimate program calls into question legality itself.

Let us now move to the other side of the coin. Nobody doubts that the anti-impunity shift is by all means a remarkable political achievement; yet there is one sense in which it is especially interesting—several of its features allow interpreting it as a process of political legitimation. Argentines have collectively decided on whether to overturn impunity through an intricate process in the likes of what Seyla Benhabib calls “democratic iterations.” These iterations refer to

complex processes of public argument, deliberation, and exchange—through which universalist rights claims are contested and contextualized, invoked and revoked, posited and positioned—throughout legal and political institutions as well as in the associations of civil society. . . . Through such iterative acts a democratic people who consider themselves bound by certain guiding norms and principles reappropriate and reinterpret these, thus showing themselves to be not only the subjects but also the authors of the laws.⁵⁷¹

Part IV explained how the HRM, and later on the Kirchner administration, combined two kinds of strategic action to overturn impunity. One kind was directly *instrumental*, which included litigation against impunity, impeachment of justices and replacement picks, and pressuring judges and prosecutors to speed up proceedings. These actions may be hard to read as part of a legitimation-seeking engagement. Not only were these, for the most part, top-down measures by which the government tried to make things happen, but they also ensued prior to any major measure of societal approval. (Bear in mind that because the plan directly concerned judicial activity, then legally impeded, a green light from the Supreme Court was required from the start). Still, these moves may very well be understood as constitutive of a proposal put forward by the administration-Movement alliance for general consideration.

The other kind of strategies were predominantly *communicative*—e.g., publicizing the identity-recoveries of abducted newborns, demonstrations

570. See Jeremy Waldron, *The Rule of Law*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY §5.3 (Edward Zalta ed., 2016) (reviewing theoretical approaches to the rule of law that enhance its content beyond purely formal attributes).

571. See Benhabib, *supra* note 547, at 98–99.

targeting perpetrators, trials for truth and their coverage, human rights rallies and commemorations, public speeches and symbolic gestures by presidents, erection of memorials, and so on.⁵⁷² By emphasizing these events, my account has invited a different approach to the episode, namely, a search for democratic validation for the program. The consolidation of the second wave of trials by 2017–2019 may be seen as the result of an extended societal backlash against the impunity in place since the late 1980s, which ultimately succeeded in obtaining a high level of social adherence. Of course, this does raise an initial caveat about the level of detail in which a proposal may be considered in a society-wide forum. Clearly enough, plenty of aspects of the second wave of trials were far beyond any evaluation by the citizenry (for instance, technicalities related to preventive detention).⁵⁷³ This is a persistent difficulty for which, at least, the scheme of social-movement-elicited change can account fairly well. As reported, although the HRM did tailor the specifics of the plan to its own ideological leanings,⁵⁷⁴ it persistently struggled with securing societal legitimation for the project. The framing strategies to which the Movement resorted were precisely designed to perform this mediating function. This transpired through the multiple instances of public norm contestation described⁵⁷⁵ and then in the remarkable degree of symbolism that accompanied these policies during the Kirchner Era.⁵⁷⁶

Lastly, one must concede that institutionalized democracy is too imperfect for anyone to believe that compliance with legal form guarantees political legitimation in more than a *prima facie* sense.⁵⁷⁷ Bear in mind that lawmaking—constitutional reforms included—is just one instance of representative party politics. By contrast, the present study has allowed us to appreciate how lengthy society-wide processes of deliberation and decision-making may in specific cases disregard institutionally established mechanisms of political legitimation. One possible answer is that overwhelming societal reactions (like the one in response to the Supreme Court ruling in mid-2017) make regular procedures unnecessarily redundant. But perhaps a more plausible interpretation is that, contrary to the framers' aspirations, regular procedures fail to frame the lengthy processes of deliberation that these issues require. Yet even in the midst of exceptionality, political communities continue to entrust governance to one standard set of institutions, thus compelling citizens and officials to engage through alternative democratic pathways. Responsiveness to societal demands is what such pathways require.

572. See *supra* Sections IV.A and IV.B.

573. See *supra* Section II.B.

574. See *supra* notes 256–259, 349–351, and accompanying text.

575. See *supra* Section IV.A §§1–3.

576. See *supra* Section IV.B.

577. See ACKERMAN, TRANSFORMATIONS, *supra* note 384, at 28–30.