A Break with the Past or Justice in Pieces: Divergent Paths on the Question of Amnesty in Argentina and Colombia

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On November 28, 1978, at the height of Argentina’s “Dirty War,” a young married couple and their eight-month-old daughter disappeared in Buenos Aires.\(^1\) Jose Poblete, a Chilean national, and his Argentine wife, Gertrudis Hlaczik, had been participating in a Christian Liberation group, and, along with their baby, Claudia, were abducted by a group of officers working for the Buenos Aires provincial police.\(^2\) The captors took the young family to a detention camp where Poblete, who had lost both legs in an accident, and Hlaczik, also disabled, were tortured before eventually being killed.\(^3\) Two survivors reported seeing Poblete’s wheelchair “abandoned in a corner of [a] parking lot.”\(^4\) Twenty-two years later, activists found the couple’s daughter living with one of the retired police officials responsible for the kidnapping.\(^5\) After her identity was confirmed, Claudia Poblete returned to her maternal grandmother.\(^6\)

While horrific, experiences similar to those of the Poblete family have been shared by thousands of Argentines who suffered through the human rights abuses of the right-wing military dictatorship from 1976 to 1983.\(^7\) Even though the gross human rights abuses ended with the demise of the junta,\(^8\) victims have been forced to wait for justice as Argentina slowly comes to terms with its past.

On the other end of the continent in January 2001, eighty members of right-wing paramilitary forces descended upon Chengue, a small village in the

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\(^1\) *Nunca Mas*, Report of CONADEP, Part II: The Victims (1984), available at http://www.nuncamas.org/english/library/nevagain/nevagain_213.htm. CONADEP, the National Commission on the Disappearance of Persons, was created in 1984 by the government of President Raul Alfonsin, the first president elected after the fall of the military junta which ruled Argentina from 1976 to 1983. The Commission’s goals extended only to uncovering the truth about what happened to those who had disappeared, not establishing guilt.


\(^3\) Id.

\(^4\) *Nunca Mas*, supra note 1.

\(^5\) Tobar, supra note 2.

\(^6\) Id.

\(^7\) See generally *Nunca Mas*, supra note 1.

\(^8\) Argentina is one of many Latin American countries to have been ruled at one time by a junta, a small group of military officers. Key figures in Argentina’s junta included General Jorge Rafael Videla, General Carlos Suarez Mason, and General Leopoldo Galtieri, who resigned after Argentina’s defeat in the Falkland Islands War. See David Weissbrodt & Maria Luisa Bartolomei, *The Effectiveness of International Human Rights Pressures: The Case of Argentina, 1976-1983*, 75 MINN. L. REV. 1009, 1031 (1991).
mountains of Colombia. As opposed to the organs of the Argentine state twenty-five years earlier, the Colombian paramilitaries were not searching for alleged subversives. They had simply come to destroy the town. By the end of the night, members of the Autodefensas Unidas de Colombia (Self-Defense Forces of Colombia) had executed all twenty-three of the town’s men with clubs made for breaking stones, and then set the town on fire. Four years later, only seven families of the original 120 had returned to the ruins and desolation, and those responsible, reacting to a law passed by Colombia’s Congress in 2005, surrendered their arms to await a maximum of eight years incarceration. However, due to the shortcomings of the law, it remains unlikely that any of the perpetrators will actually serve time for the atrocities committed at Chengue.

While Colombia and Argentina have reached different stages in their struggles against human rights violations, and their general political situations are by no means identical, the two countries share one similarity. The public in both states deserves a legal solution to abuses from state actors, whether the now-removed Argentine junta of the late 1970s and early 1980s, or the still-existing, quasi-state-supported paramilitary groups of Colombia. However, the states seem to be moving in different directions concerning victims’ rights and bringing human rights offenders to justice. While Colombia’s new legislation seems to advance the goal of avoiding prosecution while leaving the public without answers, the decision of Argentina’s highest court opens the gates for the prosecution of culpable military officers and other personnel. The Colombian law effectively grants amnesties by allowing former paramilitary members to receive minimal criminal sentences for crimes for

10 Id.
12 Id.
13 The Law of the Fraud, supra note 9.
which they "accept" responsibility, while the Argentine Supreme Court, in the case of Julio Hector Simon, struck down that country's amnesty laws.\footnote{See Justice and Peace Law, supra note 11; Hector Simon, supra note 14.} Certainly, this discrepancy reflects Argentina's progress in the last decade, progress necessary in order to come to terms with the past.\footnote{Raquel Aldana, Steps Closer to Justice for Past Crimes in Argentina and Chile: A Story of Judicial Boldness, Nov. 17, 2004, http://www.law.case.edu/war-crimes-research-portal/instant_analysis.asp?id=12.} However, as long as Colombia's insurgency lingers, the Justice and Peace Law will most likely not be successful in healing the wounds caused by years of human rights abuses.

This Note discusses the progress (or lack thereof) recently made in Colombia and Argentina regarding both countries' histories of struggles with human rights abuses and the investigation and punishment of those responsible for these crimes. Following this introduction, Part II provides an overview of recent actions taken by the legislature of Colombia and the Supreme Court of Argentina regarding amnesty or pseudo-amnesty legislation. Part III.A discusses Colombia's Justice and Peace Law,\footnote{Justice and Peace Law, supra note 11.} passed in 2005 and reviled as little more than amnesty legislation by many within and without the country. Part III.B addresses the effects of the Colombian legislation through summer 2006. Part IV describes Argentina's amnesty laws and the atmosphere surrounding their passage in the early 1980s. Part V introduces the relevance of the Inter-American Court to the discussion of South American amnesty laws, while Part VI addresses the constitutional basis of Argentina's Supreme Court decision. Part VII discusses the 2005 Argentine Supreme Court decision which declared unconstitutional that nation's express amnesty legislation.\footnote{Hector Simon, supra note 14.} Special attention will be paid to the case that made the Argentine Court's ruling possible, the Inter-American Court decision in the case of Barrios Altos, a case in which Peru's amnesty laws, very similar to those of Argentina, were ruled without legal effect.\footnote{Barrios Altos Case, 2001 Inter-Am. Ct. H.R. (ser. C) No. 8, at para. 44 (Mar. 14, 2001) [hereinafter Barrios Altos], available at http://www.worldlii.org/int/cases/IACHR/2001/5.html.} Finally, the analysis focuses on the current and possible future repercussions of Colombia's and Argentina's legislative and judicial decisions, concluding that Argentina has laid the groundwork for a complete consolidation of democracy by basing the unconstitutionality of its prior amnesty laws on the principles of international human rights jurisprudence. On the other hand, Colombia will continue to experience unrest...
and further human rights abuses, as its recent pseudo-amnesty legislation runs
directly contrary to international human rights principles.

II. BACKGROUND: PSEUDO-AMNESTY V. A BREAK WITH THE PAST

On June 21, 2005, the Congress of Colombia passed the Justice and Peace
Law, a long-awaited and controversial piece of legislation, which President
Alvaro Uribe approved the following month. With the goal of facilitating the
peace process and reincorporating members of armed groups into civil life, the
law provides incentives to domestic terrorists and human rights violators who
committed such abuses as members of Colombia’s extralegal paramilitary
organizations in the form of relatively light sentences, in return for
demobilization and a promise not to return to prior lawless behavior. In the
wake of more than a half century of insurgencies and counterinsurgencies in
the country, the government sought to reach a compromise among the ruling
elites, the guerrilla leaders, and the victims of human rights abuses on the
domestic level. On an international level, Uribe’s conservative government
intended to demonstrate a combination of strength to end the conflict and a
willingness to set a precedent for conflict resolution in South America and
elsewhere. However, criticism from human rights organizations both in
Colombia and overseas had reached deafening proportions. These
organizations see Colombia’s administration as simply granting a new form of
amnesty to human rights violators. In an age of Latin American democracies
squarely facing their international obligations, Colombia appears to be
acquiescing to terrorists and taking a major step backward through the
promulgation of such legislation.

In contrast, in the same month, Argentina’s Supreme Court struck down its
own amnesty laws passed almost twenty years earlier by the first

21 See Justice and Peace Law, supra note 11.
22 Id. arts. 1, 17, 29.
23 Colombia: Between Peace and Justice, ECONOMIST, July 3, 2005.
24 Id.
25 See ADAM ISACSON, CTR. FOR INT’L POL’Y, INTERNATIONAL POLICY REPORT, PEACE OR
Rights Abusers (Sept. 12, 2005), available at http://www.amnestyusa.org/countries/colombia/
document.do?id=ENGAMR230302005.
26 See HUMAN RIGHTS WATCH, supra note 15.
27 Id.
democratically elected government after the fall of the military junta that ruled from 1976 to 1983.\textsuperscript{28} The culmination of a long chain of events, including various federal courts ruling the laws unconstitutional and Congress’ annulment and invalidation of the legislation, the 2005 Supreme Court decision will likely be characterized in the future as one of the final steps in Argentina’s transition to a democracy in substance as well as form. Specifically, the Court found unconstitutional the “Punto Final” (Full Stop law of 1986) and “Obediencia Debida” laws (Due Obedience law of 1987).\textsuperscript{29} The latter spared all military personnel except commanders from prosecution, while the former set a sixty-day deadline from the law’s enactment for commencing prosecutions for human rights offenses during Argentina’s military dictatorship.\textsuperscript{30} The Supreme Court’s decision has been praised by international organizations such as the International Commission of Jurists as a step toward justice for Argentina’s victims.\textsuperscript{31}

III. COLOMBIA’S JUSTICE AND PEACE LAW

A. An Overview of the Legislation

Since the passage of the law by Colombia’s Congress, debate has raged regarding its possible application and effects.\textsuperscript{32} In May 2006, challenges to the legislation even reached the country’s Constitutional Court, which upheld the law’s constitutionality by a 6–3 majority.\textsuperscript{33} Under the terms of the statute, a paramilitary member who confesses to crimes and agrees to renounce his membership in an “armed group organized outside the boundaries of the law”

\begin{itemize}
\item \textsuperscript{28} Hector Simon, supra note 14.
\item \textsuperscript{30} Id.
\item \textsuperscript{32} See ISACSON, supra note 25; HUMAN RIGHTS WATCH, supra note 15.
\item \textsuperscript{33} However, the Court struck down some of the most troubling provisions, and the three dissenting magistrates were in favor of invalidating the entire law. Human Rights Watch, Court Fixes Flaws in Demobilization Law (May 19, 2006), \textit{available at} \url{http://hrw.org/english/docs/2006/05/19/colomb13430_txt.htm}. This Note will mention the differences between the original provisions of the law and the changes made by the Constitutional court during the course of the discussion.
\end{itemize}
may receive preferential treatment. On the one hand, proponents of the legislation stress the possible benefits. Presumably, the law provides the former paramilitary member with an incentive to confess since the government retains the right to prosecute him or her under previous law for crimes to which he does not admit guilt or if he retracts his "free declaration." In addition, the legislation does not apply to crimes committed before joining a paramilitary organization, thereby eliminating the possibility of a beneficiary's claim of ex post facto membership solely for the purpose of taking advantage of the law. Furthermore, the law sets out the provision that the sentence may be served abroad, theoretically maintaining the possibility of extradition to the United States or another country in which the accused may be sought. Finally, the law provides the framework for demobilization, disarmament, the identification of ex-terrorists, their renunciation of past terrorist acts, and even future job training to reincorporate human rights violators into society. However, anyone who benefits from the law's preferential treatment and then returns to terrorism theoretically will be subject to harsher criminal penalties already on the books.

On the other hand, human rights organizations remain skeptical about any trace of justice or peace that might arise from the legislation. The possibility of human rights violators exposing their financial supporters leaves the country's elites in a precarious position, and the influence of the wealthy may have contributed to the defeat of a tougher approach favored by a powerful

34 Demobilized combatants who accept the charges brought by the state prosecutor and comply with all further requirements will receive a maximum sentence of between five and eight years. Justice and Peace Law, supra note 11, art. 29.

35 Carolina Barco, Colombia Minister of Foreign Affairs, Address at the Woodrow Wilson International Center (July 20, 2005), http://www.wilsoncenter.org/events/docs/Barco%20remarks%2007-20-05.doc.

36 Justice and Peace Law, supra note 11, art. 19, para. 1.

37 Id. art. 2. Upon the original passage of the law, however, this was debatable. While the law provides its benefits only to those who committed their crimes during membership in a paramilitary group, prosecutors originally would have had to prove the date of entry into the group within the sixty-day window for investigation provided in the legislation, which would certainly have proved to be a daunting task. HUMAN RIGHTS WATCH, supra note 15, at 57 n.152. After the Constitutional Court's May 2006 ruling, investigators now have more time to perform their duties. See Human Rights Watch, supra note 33. How much time, however, still remains unclear.

38 Justice and Peace Law, supra note 11, art. 30.

39 Id. arts. 1-8.

40 Id. art. 25.

41 ISACSON, supra note 25; HUMAN RIGHTS WATCH, supra note 15.
Questions also remain as to whether the law will leave the paramilitary command and support networks in place. Furthermore, doubt exists as to whether those who confess and subsequently face criminal punishment will actually serve any hard time. The law requires confinement in a “secure and austere establishment,” not necessarily a prison. Moreover, political crimes are not extraditable under Colombian law, so attorneys for the ex-paramilitary members will certainly argue that funding their political cause necessitated involvement in the drug trade, making the crime political and therefore not extraditable. Most important, for many the legislation leaves an impression that while both the government and the paramilitaries will reap the advantages of a general amnesty, the victims gain little.

While promising justice and satisfaction, the Justice and Peace Law originally allowed prosecutors remarkably little time to make their cases and remains nebulous about how scarce resources will be channeled to victims of human rights abuses. After the demobilized member’s free declaration

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42 Senator Rafael Pardo, formerly minister of defense, introduced a bill calling for five to ten years in prison for beneficiaries and requiring an exit interview revealing all crimes in which they were involved, illegally obtained assets, and names of commanders and financial supporters. The final version of the law required none of this until the Constitutional Court’s ruling. The Court ruled that the Law implicitly required full disclosure of the truth in order to reap the benefits of the legislation. ISACSON, supra note 25; Human Rights Watch, supra note 33.

43 In fact, the law only requires that the demobilizer “deliver information or collaborate with the dismantling of the group” as a requirement for eligibility for the lighter sentence. HUMAN RIGHTS WATCH, supra note 15, at 59, 60 (quoting Justice and Peace, art. 11). The original text of the legislation does not provide a penalty for perjury (since the statement is not taken under oath) or for lying about the group’s operations. Id. However, the May 2006 decision of the Constitutional Court mandates that offenders tell the truth during their interrogation, since demobilizers will lose the benefits of the law should they later be found to have lied or omitted details of their crimes. Indira A.R. Lakshmanan, Ruling Threatens Peace for Colombia, BOSTON GLOBE, May 20, 2006.

44 Assuming a maximum eight-year penalty for criminal charges that the paramilitary member accepts and the addition of a 20% increase for charges brought and accepted after the initial sentencing, the longest term of incarceration would be nine and one-half years. Justice and Peace Law, supra note 11, arts. 20, 25. This incarceration would only take place if the defendant offered a full confession or if the prosecution already had uncovered solid evidence, situations which are unlikely to occur. See HUMAN RIGHTS WATCH, supra note 15, at 53.

45 Justice and Peace Law, supra note 11, art. 30.

46 ISACSON, supra note 25.

47 Id.

48 Colombian authorities seem to be relying on applying existing asset forfeiture laws to provide reparations, but this will only be effective if prosecutors know what assets are available to be forfeited. Since 2002, the government has only secured the forfeiture of approximately 200 paramilitary assets. See HUMAN RIGHTS WATCH, supra note 15, at 60 n.165. However, the May
(version libre) of his past crimes, prosecutors would have had only thirty-six hours to decide whether to initiate a sixty-day investigation period. This time frame would have allowed for little more than the verification of matters to which the accused had already confessed. At the end of these two months, an expedited trial begins at which victims may testify, but Colombia faces a challenge in convincing victims to overcome their fear of the state apparatus in order to appear at a trial. While the law provides for witness protection to assuage such trepidation, no one knows from where the funds will be drawn in order to guarantee witness safety.

The government expects the public to accept reparations and demobilization rather than long prison sentences for those responsible for human rights violations. Those who accept the charges brought against them face a maximum eight-year sentence for their crimes, regardless of the heinousness of the offense, without the possibility of cumulative sentences, which are not possible under Colombian law. In other words, an ex-paramilitary member responsible for massacring an entire village could still possibly receive a sentence of as little as five years in a secure and austere country hacienda.

While the law guarantees the right to complete reparations including psychological assistance and a public apology, the government rests its hopes on funding victims' material recourse from foreign donations and the ex-

2006 ruling of the Constitutional Court paves the way for offenders to be forced to pay reparations out of their own pockets, not just from illegally acquired assets. See Human Rights Watch, supra note 33.

Originally, investigators would have had only thirty-six hours to decide whether to press charges. Justice and Peace Law, supra note 11, arts. 17-18. The Constitutional Court struck down this particular provision in its May 2006 ruling, but the exact amount of time prosecutors will have for investigations remains uncertain. Human Rights Watch, supra note 33.

The Law of the Fraud, supra note 9.


See id. arts. 19-21.

Id. art. 20. Originally, paramilitaries would have also received credit for time served while leaders negotiated with the government, but the Constitutional Court disallowed this provision. Human Rights Watch, supra note 33.

HUMAN RIGHTS WATCH, supra note 15. Congress determined that violators should be held in facilities that “meet the conditions of security and austerity typical of the centers run by the National Penitentiary and Prison Institute.” Justice and Peace Law, supra note 11, art. 30. However, paramilitary leaders more often tend to negotiate with the government while being “held” in the demilitarized zone of Santa Fe de Ralito. See ISACSON, supra note 25.

paramilitary members' forfeited assets.\textsuperscript{56} This may be wishful thinking. Those who demobilize are unlikely to possess anything of value under their own name, and the law provides neither penalties for hiding property nor funds for detecting money laundering operations.\textsuperscript{57} At the same time, skepticism from the international community, including even the United States, a typically dependable ally, has been expected to complicate the collection of earmarked aid from abroad.\textsuperscript{58} In fact, the U.S. Congress' approval of $483.5 million through the Andean Counterdrug Initiative and an additional $250 million in military aid for Colombia in 2006 would leave the Uribe Administration somewhat nonplused.\textsuperscript{59} The U.S. Congress approved only $20 million (the cost of one and one half Black Hawk helicopters) to aid demobilization, far below the $80 million desired by Colombia.\textsuperscript{60} In addition, Congress imposed stricter conditions on the aid money, including requirements of State Department certification that the demobilizers have renounced any affiliation with their paramilitary groups, a more complete confession than required by the Colombian legislation, and a prohibition on use of the money until the State Department certifies that Colombia is cooperating with extradition of drug lords facing trial in the United States.\textsuperscript{61}

\textsuperscript{56} A more likely scenario would be the continued use of these ill-gotten assets by ex-paramilitary members attempting to muscle their way into local politics. See Colombia: Between Peace and Justice, supra note 23.


\textsuperscript{58} Although a "secret legal opinion" from the U.S. Justice Department apparently allows the United States to provide funds for the demobilization, at least one prominent member of Congress expressed serious doubts concerning the law's effectiveness. Legal Opinion Paves Way for U.S. to Support Colombia Demobilization, LATIN AMERICA ADVISOR (Inter-American Dialogue, Washington, D.C.), Aug. 10, 2005, at 2, available at http://www.maxwell.syr.edu/inside/LAA050810.pdf. Senate Foreign Affairs Committee Chairman Richard Lugar sent letters to President Uribe asking the president to take into account concerns about the punishment of human rights offenders. Id. at 3.


\textsuperscript{60} Id.

A sense of unfairness marks the law as well. Ironically, the ex-guerrillas will receive job training intended to re-incorporate them into society. On the other hand, although the legislation created a Reparations Commission for victims, this new body remained in limbo with no regulations promulgated by the government for six months, and victims, whose homes and livelihoods have often been destroyed, receive no such aid. For these reasons, and judging from more recent events, the skepticism of human rights organizations and Colombia’s allies appears to be at least partially justified.

B. The Effect of the Justice and Peace Law

“A conflict with 30 years of roots doesn’t end with a decree.”

Demobilization and reintegration, the two foundations of the Justice and Peace Law, have yet to be achieved at any significant level. While some paramilitary members have kept their promises to demobilize, the Law has not provided a foundation strong enough to withstand the lack of political willpower exhibited by the state in advancing the demobilization process. Due to an easily foreseeable lack of funds and organization, the jobs and other assistance promised to those who surrender their arms have simply not materialized. Months after two thousand members of a paramilitary group turned in their weapons at a televised ceremony in August 2005, the vast majority remained unemployed with little hope of finding stable employment that would enable them to distance themselves from their former lives. A former guerrilla commented to the local media that the “reinsertion process is out of control.” In the past three years, eleven thousand demobilizations have taken place with the same number expected to surrender their weapons in

62 The Law of the Fraud, supra note 9.
63 Justice and Peace Law, supra note 11, arts. 49–55.
64 See ISACSON, supra note 25; HUMAN RIGHTS WATCH, supra note 15.
65 Colombia: One and a Half Steps Forward, One Back, ECONOMIST, Jan. 7, 2006, at 5.
66 See HUMAN RIGHTS WATCH, supra note 15 (discussing the failures of demobilization); Carlos Salgado, Reinsertados tienen ideas pero no empleo, EL COLOMBIANO, July 13, 2006 (investigating the lack of employment for those who have chosen to demobilize and return to Colombia’s Cordoba region).
68 Id.
69 Id.
70 Id.
Combined with an estimated eight thousand deserters, nearly thirty thousand young people, many with little education or training in any field other than warfare, now face the prospect of reinsertion into society by underfunded and sometimes incompetent state actors. It takes little imagination to foresee, rather than reinsertion into society, a plunge into the abyss of crime, whether organized or common. As a cautionary tale, one need only glance back to the turmoil in El Salvador, which arguably became even more violent after the end of its civil war in 1992, owing to the state’s failure to reinsert combatants into society, and the resulting spiral into gang violence. As a result, the Colombian media has characterized the current situation as a “time bomb” waiting to explode.

Much of the problem stems from the generic definition of the word “victim” in the law itself. Anyone from the recipient of a machete attack to the spouse of a displaced farmer is covered under the law as a “victim,” leading to questions of how a country with modest resources can possibly compensate everyone with a claim. The Colombian government’s lack of a substantive, workable plan to compensate the paramilitaries’ victims has been matched by its inattention to procedure. In addition to a lack of a fully developed reinsertion plan, Colombia’s Congress also erred by failing to promulgate regulations regarding enforcement of the Justice and Peace Law until the end of 2005. While the law remained unchanged, the agencies charged with the execution of the legislation were left in limbo for six months awaiting direction from Congress, and prosecutors were largely unable to take action.

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71 Id.
72 Id. Furthermore, in January 2006, 1 out of every 100 demobilizers was already dead due to a lack of protection or a quick return to violent crime. Colombia: One and a Half Steps Forward, One Back, supra note 65. As of the first week of January 2006, only 460 of the ex-paramilitaries had been given jobs, 123 had been killed, and authorities had arrested 223 for the commission of common crimes. Id.
74 Id.
75 Justice and Peace Law, supra note 11, art. 5. Awards of up to $6 million per family in cases decided by the Inter-American Court in the late 1980s lead one to believe that Colombia cannot possibly afford to compensate all of its victims fully. See Bomba de Tiempo, supra note 73.
77 Colombia: One and a Half Steps Forward, One Back, supra note 65.
These and other failures fostered continuing criticism from international groups such as the United Nations. Taking a cue from other human rights groups, the Office of the High Commissioner for Human Rights offered its critique of the Law, stating that it "has not succeeded in establishing the legal framework for the dismantling of illegal groups, the reintegration into society of their members and the respect for the truth, justice and reparation of the victims." Unfortunately, when compared to the judicial revolution underway in Argentina, these words certainly ring true.

IV. ARGENTINA'S AMNESTY LAWS

Continuing its recovery from the human rights abuses of the junta that ruled from 1976 to 1983 and the economic collapse at the turn of the twenty-first century, Argentina has chosen a path very different from that of Colombia. During the time of Argentina's military dictatorship, the Supreme Court repeatedly requested clarification of the status of hundreds of missing individuals. The Court consolidated four hundred writs of habeas corpus into one such request, but the ruling junta denied any knowledge of the individuals' disappearances. Soon after the Falklands disaster and during its final days in power, the junta passed the Law of National Pacification, amnesty legislation that immunized every member of the military from prosecution.

Although the Argentine Criminal Code requires courts to apply the law more beneficially to the defendant in the case of a change of law after the criminal

78 Oficina de Naciones Unidas Insiste en Criticas a Ley que da Beneficio a Paramilitares, EL TIEMPO, Jan. 5, 2006.
79 Id.
80 While this divergence may involve such issues as political culture, geography, and wealth, recent differences may be tied to the belief that while Argentina is on the verge of consolidating its democracy, Colombia is still finding its way. Compare Hector E. Schamis, Argentina: Crisis and Democratic Consolidation, 13 J. DEMOCRACY 81 (2002) (discussing Argentina's economic crisis and its effect on consolidation), with Ana Maria Bejarano & Eduardo Pizarro Leongómez, From "Restricted" to "Besieged": The Changing Nature of the Limits to Democracy in Colombia (Notre Dame Kellogg Inst., Working Paper No. 296), available at http://www.nd.edu/~kellogg/workingpapers/WPS/296.pdf (arguing that Colombia remains a "semi-democracy" in a state of erosion).
82 Id. The right of a prisoner to go before a judge to determine whether he has been detained according to due process (habeas corpus) is not set forth in the Argentine Constitution.
the succeeding government of President Raul Alfonsin mustered arguments against the constitutionality of the National Pacification law, resulting in the law’s nullification in 1983. Subsequent legislation nullified the amnesty law, opening the door for the prosecution of the junta’s human rights violators, and nine officers were arrested almost immediately thereafter. However, the military resisted in the name of national reconciliation, and the newly elected government’s caution toward offending the military resulted in the passage of two laws which would haunt Argentina for two decades.

Three years after the demise of the military junta, Argentina’s Congress passed the “Punto Final” law, which extinguished, by means of a sixty-day statute of limitations, criminal proceedings for crimes “related to the establishment of violent methods of political actions.” If suspects were not summoned within the allotted time period to submit statements, prosecution could not go forward. Facing great pressure from army commanders, President Alfonsin justified the passage of this law as an attempt to reincorporate the military back into public life in a break with the past. Since the truncated time period allowed little leeway for the gathering of evidence, few thought any offenders would be prosecuted. However, to the surprise of all observers, courts remained in session over the 1986–1987 summer vacation (December—February in the Southern Hemisphere), and the Federal Court of Appeals seized jurisdiction over cases pending before the Supreme Court of

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84 CÓD. PEN. art. 2 (Arg.).
85 First, the government argued that the precarious validity of statutes passed by the junta may be outweighed by the law’s offensive content. Second, the National Pacification statute violated Article 29 of the Constitution, which prohibits the concentration of all governmental power in one branch. Finally, the law violated Article 16, the equal protection clause. Dahl & Garro, supra note 81, at 319. Alfonsin’s work was perhaps made possible by the fact that four hundred leaders of the previous regime had been imprisoned at this time. Id.
87 See Punto Final law, supra note 29; Obediencia Debida law, supra note 29.
88 According to Article 1,

The crime shall be extinguished with respect to any person whose alleged involvement in any degree . . . whose summons has not been ordered to give a signed statement by a court having jurisdiction over the subject matter, prior to sixty calendar days counted as from the date of promulgation of this law.

89 The law contained no such tolerance of some offenses frequently committed by state actors during this time, including the crimes of kidnapping of minors and rape. Id. art. 5.
90 Dahl & Garro, supra note 81, at 328.
91 Id. at 329.
the Armed Forces. As a result, eight different appeals courts had issued 150 summonses by the last week of February 1987.

However, after the passage of the Punto Final law, Argentine military leaders again rose up and pressured President Alfonsin to stop the ongoing trials against the armed forces. The President’s personal negotiations with the officers had little positive effect, and eventually Alfonsin’s successor, Carlos Menem, issued pardons for selected officers who had been convicted and then pardoned the rest of the military after December 1990. Responding to further threats from the military, Congress followed with the passage of the Obediencia Debida law in March 1987. This legislation created the presumption that military officers of low and medium rank merely followed orders in any actions that possibly violated human rights. Argentine law requires freedom to act in order to be found guilty of a crime, and in these cases, such officers would be presumed to have been coerced by those issuing

92 Id.
93 Id.
95 Luis Marquez Urtubey, Non-applicability of Statutes of Limitation for Crimes Committed in Argentina: Barrios Altos, 11 Sw. J.L. & TRADE AM. 109, 111 (2005). Menem’s pardons’ status as the last vestige of legal acquiescence to the rule of the junta may soon come to an end. As of September 2006, the great majority of these pardons still stand, but current President Nestor Kirchner has begun to support their repeal, a stance which, if it translates into further judicial action, would perhaps overcome the final hurdle in Argentina’s journey to democratic consolidation. El Gobierno opina que ahora “hay que llegar mas lejos,” LA NACION, Sept. 5, 2006. Kirchner’s government supported the September 4, 2006 decisions of federal judge Norberto Oyarbide, who ruled that the pardons were precluded since those charged had committed crimes against humanity which are not pardonable. La Justicia declaro nulo el indulto a Martinez de Hoz, LA NACION, Sept. 5, 2006. Among those affected by the initial ruling (which will almost certainly be appealed) is former junta leader Jorge Rafael Videla, who currently remains under house arrest. If upheld on appeal, the invalidation of his pardon will result in Videla again facing trial for the 1976 kidnapping of two businessmen. La Justicia tambien anulo el indulto a Videla, LA NACION, Sept. 5, 2006.
96 Obediencia Debida law, supra note 29.
97 Id. Article 1 of the Obediencia Debida law states that

It is presumed without admitting any conflicting evidence that those who at the time the acts were committed were chief officers, subordinates and troops – are not subject to punishment for the crimes committed, since they have acted in obedience of orders. In such cases it will be considered by operation of law that the above-mentioned individuals have acted under coercion.
The Supreme Court confirmed the validity of both laws in the *Camps* decision of 1987, reasoning that Congress has the power to promulgate criminal codes; therefore, Congress should possess the ability either to declare certain acts non-criminal or abolish punishment for their commission.

The tables started to turn in the 1990s as families of the "desaparecidos," those who vanished in state custody during the rule of the junta, asserted their right to know the truth about what really happened to their family members.

At the same time, Congress amended the Constitution in order to give treaty law precedence over domestic law, setting the framework for the compulsory application of international law. Most important, federal courts began to reconsider the validity of the amnesty laws. In 2001, both the Punto Final and Obediencia Debida laws were declared invalid on the grounds that they functioned as amnesties, which Congress had no right to grant. This decision started a trend of federal courts refusing to apply statutes of limitations, amnesties, or pardons to crimes committed during the dictatorship. Actions previously barred by the Punto Final law were reopened, including the *Camps* case, and actions against medium-rank officers previously exempted by the Obediencia Debida law saw the light of day as well.

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98 See *Urtubey*, *supra* note 95, at 112.

99 *Corte Suprema de Justicia* [CSJN], 22/6/1987, "Ramon Juan Alberto Camps y otros," Fallos (1987-310-1162) (Arg.).

100 *Urtubey*, *supra* note 95, at 112.

101 *Id*. at 113.

102 CONST. ARG. art. 75, available at http://pdba.georgetown.edu/Constitutions/Argentina/argen94_e.html.

103 *Urtubey*, *supra* note 95, at 119.

104 "Congress . . . may not grant acts of submission or supremacy whereby the life, honor, or wealth of the Argentine people will be at the mercy of governments or any person whatsoever." CONST. ARG. art. 29.


V. THE INTER-AMERICAN COURT AND BARRIOS ALTOS

The Argentine Supreme Court based much of its decision to hold the amnesty laws unconstitutional on the reasoning of the Barrios Altos case decided by the Inter-American Court of Human Rights.\textsuperscript{107} This case dealt with the state-sponsored execution of fifteen individuals suspected of being subversives in Lima, Peru in 1991.\textsuperscript{108} Peruvian authorities refused to begin an investigation into the case until 1995. Even at that time, investigators encountered a lack of cooperation from the military, followed by the passage of amnesty laws by the regime of President Alberto Fujimori in response to the investigation.\textsuperscript{109} The first such law exonerated any member of the army, police, or even civilians who had violated human rights at any time between 1980 and 1995.\textsuperscript{110} The law was adopted by the Fujimori government immediately without public notification, discussion, or comment.\textsuperscript{111} In other words, the Peruvian military and security forces were granted blanket amnesty from being accused, investigated, prosecuted, or convicted for a human rights violation, and those who had been convicted saw those convictions annulled.\textsuperscript{112} When a judge declined to apply the amnesty law on the basis of its violation of international obligations, the Fujimori government threatened the judicial branch with prosecution for the refusal to apply the law.\textsuperscript{113} Shortly thereafter, a second amnesty law made judicial compliance with the government’s legislation a matter of law.\textsuperscript{114}

The Inter-American Commission on Human Rights already had called on Peru to reopen an investigation into the facts of the case, grant reparations for material and moral damage to the victims or their next of kin, annul the amnesty laws, and to pay the victims’ litigation costs.\textsuperscript{115} After attempting to withdraw from the Court’s jurisdiction, which the Court rejected as failure to comply with Article 68 of the Convention and a violation of the principle of

\textsuperscript{107} Barrios Altos, supra note 20.
\textsuperscript{108} Id.
\textsuperscript{109} Id. para. 2(i).
\textsuperscript{110} Law No. 26479 (June 15, 1995) (Peru).
\textsuperscript{111} Barrios Altos, supra note 20, para. 2(i).
\textsuperscript{112} Id. para. 2(j).
\textsuperscript{113} Id. para. 2(k).
\textsuperscript{114} Law No. 26492 (July 3, 1995) (Peru). “Application of amnesty is obligatory.” This effectively closed any judicial debate on the matter, and a judicial decision from a Fujimori-friendly court followed, finding the laws constitutional.
\textsuperscript{115} Barrios Altos, supra note 20, para. 1.
pacta sunt servanda, Peru admitted responsibility for violation of Articles 4, 5, 8, and 25 of the Convention on Human Rights and agreed to discuss reparations with the victims and their next of kin.\textsuperscript{116} Furthermore, the Court reasoned that it considers all amnesty laws inadmissible, characterizing them as mechanisms for the prevention of the investigation of human rights violations and punishment of those responsible.\textsuperscript{117} Finally, it held that Peru's laws are "incompatible with the Convention on Human Rights and . . . lack legal effect."\textsuperscript{118} Using this reasoning, Argentina's Supreme Court, having been bound by such international norms in 1994, struck down the amnesty laws by a 7–1 margin in June 2005.\textsuperscript{119}

Argentina, like Peru, ratified the American Convention and accepted the jurisdiction of the Inter-American Court on Human Rights; however, by 1990, no one had been punished for human rights violations.\textsuperscript{120} Empowered by the establishment of "truth commissions," complaints to the Commission from victims' next of kin ensued regarding the invalidity of President Menem's pardons and the amnesty laws under the Convention.\textsuperscript{121} Argentine nongovernmental organizations pressed the issue in these trials, which were limited to the investigation and documentation of human rights violations without the possibility of prosecution or punishment.\textsuperscript{122} The \textit{Lapaco} case, in particular, triggered dialogue between human rights groups and the national courts.\textsuperscript{123} Finally, in 2001, Judge Cavallo of the Buenos Aires Federal Court of Appeals ruled the Punto Final and Obediencia Debida laws unconstitutional.

\begin{itemize}
\item \textsuperscript{116} \textit{Id.} para. 51. Article 4 guarantees every person's right to life; Article 5 concerns a person's right to humane treatment; Article 8 guarantees the right to a fair trial; and Article 25 provides the right to judicial protection. American Convention on Human Rights, July 18, 1978, 1144 U.N.T.S. 123.
\item \textsuperscript{117} \textit{Barrios Altos, supra} note 20, para. 43.
\item \textsuperscript{118} \textit{Id.} para. 51.
\item \textsuperscript{120} Cerna, \textit{supra} note 94.
\item \textsuperscript{121} See \textit{id}. Complaints to the Inter-American Commission invoked violations of Argentines' rights to judicial protection and a fair trial. \textit{Id.}
\item \textsuperscript{122} See \textit{Nunca Mas, supra} note 1.
\item \textsuperscript{123} Carmen Aguiar de Lapaco v. Argentina, Case 12.059, Inter-Am. C.H.R., Report No. 70/99, OEA/Ser.L/V/II.106, doc. 3 rev. at 161 (1999). As a result of this case, filed with the Inter-American Court, Argentina agreed to adopt legislation allowing criminal courts to have exclusive jurisdiction over all cases concerning the "desaparecidos.”
\end{itemize}
on account of their violation of both the American Convention on Human Rights and the United Nations Convention Against Torture. As a result, the case of Julio Hector Simon was reopened. Simon, nicknamed "Julian the Turk," plied his trade as part of a "work group" sanctioned by the military to kidnap and "disappear" alleged subversives. This case was appealed to the Supreme Court, and in August 2002, Attorney General Nicolas Becerra recommended that the amnesty laws be declared unconstitutional. After the June 2005 final Supreme Court ruling, new charges for possibly three hundred defendants may result, finally providing the victims of the junta the opportunity for justice.

VI. THE 2005 ARGENTINE SUPREME COURT DECISION—THE CONSTITUTIONAL BASIS

In June 2005, Argentina’s Supreme Court decided one of the most important cases in the country’s history. The appellant, Julio Hector Simon, relied on the country’s amnesty laws and the running of the statute of limitations to spare him from criminal punishment as a consequence of his kidnap and torture of the Poblete family. The Court, however, in upholding an appeals court decision, ruled otherwise, focusing on: Argentina’s direct application of international law in domestic matters; the lack of an effective statute of limitations in crimes against humanity; the finding that forced disappearance itself is a crime against humanity; and, finally, on the basis of the Inter-American Court’s ruling in Barrios Altos. The Court not only upheld the sentence against Simon, but also declared both the Obediencia Debida and Punto Final laws unconstitutional and null and void and affirmed the constitutionality of Law 25.779, which annulled both amnesty laws.

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124 Julio Simon, supra note 105.
125 Id.
126 Cerna, supra note 94.
128 Tobar, supra note 2.
129 Julio Simon, supra note 105.
130 Hector Simon, supra note 14.
131 Id.
132 Id.
Regarding the application of international law to Argentina’s domestic legislation, the Constitution allows international norms to be applied directly without being incorporated through legislative action on the domestic level. Furthermore, the Constitution explicitly recognizes the American Convention on Human Rights as one of the treaties at the summit of the “constitutional hierarchy.” Argentine jurisprudence clearly states that human rights treaties, such as the Inter-American Treaty, are directly incorporated into domestic law. Therefore, one can view the Barrios Altos decision as a precedent for Argentine courts upon the decision of the Inter-American Court.

Concerning the concept of the inapplicability of crimes against humanity to statutes of limitation, as a signatory of United Nations General Assembly Resolution 23 of 1968, Argentina agreed to investigate such crimes and bring offenders to justice. Congress approved this agreement in 1995, memorializing Argentina’s obligation to adopt the means to prosecute such criminals. In effect, the state would no longer have any power to renounce or hinder the criminal prosecution of any crime against humanity committed on Argentine soil. As a result, in Hector Simon, the Court found that a statute of limitations protecting those committing crimes against humanity acts merely as a “security clause” for the evasion of mechanisms adopted by international law and therefore must not be allowed to have a legal effect in such cases.

According to Article 31 of the Constitution, This Constitution, the laws of the Nation enacted by Congress in pursuance thereof, and treaties with foreign powers, are the supreme law of the Nation; and the authorities of each province are bound thereby, notwithstanding any provision to the contrary included in the provincial laws or constitutions, except for the province of Buenos Aires, the treaties ratified after the Pact of November 11, 1859.

CONST. ARG. art. 31. This is known as a monist approach, through which treaties become the law of the land. Other states maintain a dualist approach, through which an aggrieved party would have to look to the implementing legislation of the treaty in domestic law, rather than the treaty itself.

CONSTITUTION OF ARGENTINA, art. 75, sec. 22.

Hector Simon, supra note 14, para. 17 (opinion of Justice Lorenzetti).


Hector Simon, supra note 14, para. 14 (“Sentencia” opinion of Justice Petracchi).

Id. para. 92 (opinion of Justice Maqueda).
The Court rejected the argument that forced disappearance does not reach the level of a crime against humanity; therefore, the kidnappings undertaken during the dictatorship would be covered as well.\textsuperscript{140} Affirming that "the systematic practice of the forced disappearance of persons constitutes a crime against humanity,"\textsuperscript{141} the Supreme Court reaffirmed its commitment to bringing to justice those responsible for offenses against Argentine citizens during the dictatorship.\textsuperscript{142}

\section*{VII. BARRIOS ALTOS AND JULIO HECTOR SIMON}

The Inter-American Court's decision in \textit{Barrios Altos} answered any doubts about the duty of the Argentine state in relation to its amnesty laws.\textsuperscript{143} When the Court ruled Peru's amnesty laws null and void as violations of the Inter-American Convention, it followed logically that Argentina's similar legislation would also be prohibited as a contravention of the international law of human rights.\textsuperscript{144} First, the Commission recommended to Argentina the adoption of measures necessary to shed light on human rights violations which occurred during the dictatorship.\textsuperscript{145} Next, Argentine courts caught up with the trend in Latin American jurisprudence toward accepting international tribunal decisions.\textsuperscript{146}

The legislatures of Peru and Argentina did not pass their respective amnesty laws under equivalent circumstances and the details of the cases can be distinguished from each other, with the decision in \textit{Barrios Altos} clearly understood as a judicial guideline.\textsuperscript{147} In general the cases remain very similar.\textsuperscript{148} The Argentine legislation "present[s] the same vices which led the


\textsuperscript{142} Hector Simon, supra note 14, para. 31 (opinion of Justice Highton de Nolasco).

\textsuperscript{143} Id. para. 23 ("Sentencia" opinion of Justice Petracchi).

\textsuperscript{144} Id.

\textsuperscript{145} Id. para. 20 ("Sentencia" opinion of Justice Petracchi).

\textsuperscript{146} See Barrios Altos, supra note 20.

\textsuperscript{147} Id. para. 24.

\textsuperscript{148} However, one justice dissented on this point. In the opinion of Justice Fayt, \textit{Barrios Altos} remains distinguishable from \textit{Hector Simon} since the Peruvian laws more closely resembled Argentina's National Pacification Law, which was rejected by Congress in 1983. Law No.
court to reject the Peruvian laws," and both sets of laws were written to avoid prosecuting those responsible for serious violations of human rights.\textsuperscript{149} In other words, \textit{Barrios Altos} imposes strict limits on Congress's power to grant amnesty by simply not allowing acts such as those covered by Argentina's legislation.\textsuperscript{150} While the concurrence in the Inter-American Court case recognized that under certain circumstances selective amnesty may help re-establish peace, states may not pardon the most severe violations of human rights, those which signify contempt for human dignity.\textsuperscript{151} \textit{Barrios Altos}, according to the majority of the Argentine Court, cannot be seen as an isolated precedent, but rather as a milestone in a line of consistent jurisprudence holding that the "promulgation of a law manifestly contrary to obligations assumed by the state party to the Convention constitutes \textit{per se} a violation of [the Convention] and generates international responsibility for the state."\textsuperscript{152}

Furthermore, a mere finding of unconstitutionality will not suffice. Such legislation must be repealed in order to remove the possibility of the defendant invoking the more lenient criminal law or the principle of \textit{res judicata}.\textsuperscript{153} In other words, the amnesty laws were declared to have no legal effect, with subsequent legislation repealing both the Punto Final and Obediencia Debida laws. Congress took the first step toward voiding the laws with legislation in 2003,\textsuperscript{154} and the Supreme Court affirmed the validity of that law in the instant case.\textsuperscript{155} In finding constitutional the law nullifying the amnesty legislation, the Supreme Court opined that the revocation constituted a first step in amending Argentina's past infractions of international law.\textsuperscript{156}

There is no doubt that Argentina is bound to follow the jurisprudence of \textit{Barrios Altos}, obliging states to assist victims and their families by ensuring effective resources to the investigation and punishment of those responsible for

\begin{itemize}
\item \textsuperscript{149} Hector Simon, \textit{supra} note 14, para. 24 (opinion of Justice Fayt).
\item \textsuperscript{150} Id. para. 26.
\item \textsuperscript{151} Id. para. 27, citing \textit{Barrios Altos, supra} note 20 (concurrence of Garcia Ramirez).
\item \textsuperscript{152} Id. para. 29, citing \textit{Barrios Altos, supra} note 20.
\item \textsuperscript{153} Id. para. 28.
\item \textsuperscript{154} Law No. 25779, Sept. 3, 2003, B.O. 30.226.
\item \textsuperscript{155} Hector Simon, \textit{supra} note 14.
\item \textsuperscript{156} Id. para. 29 (opinion of Justice Highton de Nolasco).
\end{itemize}
human rights violations and denying any validity of amnesty laws.\textsuperscript{157} Congress was never authorized in the first place to pass such laws and in doing so violated both constitutional principles and international human rights treaties, implicitly sanctioning a policy of impunity for state actors under the dictatorship.\textsuperscript{158} The amnesty laws violated the principle of equality before the law since they prevented victims and their successors in interest from attaining justice against the perpetrators of human rights abuses.\textsuperscript{159}

VIII. ANALYSIS

Clearly, Argentina and Colombia are moving in different directions in their attempts to come to terms with their legacies of human rights abuse. On its face, it appears that Colombia’s Justice and Peace Law violates Articles 4, 5, 8, and 25 of the Inter-American Convention, while the decision of Argentina’s Supreme Court following the ruling in the \textit{Barrios Altos} case successfully removes Argentina from the list of countries allowing or tolerating such violations. While the Justice and Peace Law does not specifically mention the word “amnesty” and theoretically sets penalties for human rights violators, these penalties will fail to serve as an effective deterrent to the paramilitaries. Furthermore, the Colombian state apparatus, depending on foreign donations and forfeited assets, lacks the resources to enforce the law, therefore allowing the paramilitaries to operate with virtual impunity. This is tantamount to the formalized state protection extended to the Argentine military throughout the 1980s and 1990s until the present.\textsuperscript{160}

The situations facing Argentina during the “Dirty War” and Colombia during its travails can be distinguished to some extent due to the fact that Argentines faced repression from state actors, while Colombian paramilitaries have always operated, at least ostensibly, outside the realm of state security. However, the two countries have both faced a lack of political will to prosecute human rights abusers coupled with legislation enabling the state to shield offenders from investigation, trial, or punishment.\textsuperscript{161} The decision taken

\textsuperscript{157} \textit{Id.} para. 72 (opinion of Justice Maqueda) (citing \textit{Barrios Altos}, supra note 20).
\textsuperscript{158} \textit{Id.} para. 18 (opinion of Justice Highton de Nolasco).
\textsuperscript{159} \textit{Id.} para. 19.
\textsuperscript{160} This amnesty occurred as a result of the Obediencia Debida and Punto Final laws.
\textsuperscript{161} \textit{Justice and Peace Law, supra} note 11; \textit{Obediencia Debida law, supra} note 29; \textit{Punto Final law, supra} note 29; Press Release, Amnesty International, Colombia: Constitutional Reform Undermines Human Rights (Dec. 11, 2003), \textit{available at} http://web.amnesty.org/library/Index/ENGAMR230772003.
expressly by the Argentine Congress to protect the military after the fall of the junta differs only in form from the Colombian Congress’s action making prosecution and investigation of demobilizers prohibitively difficult.\textsuperscript{162}

Accordingly, Colombia’s Constitutional Court was forced to intervene, extending the time period available to investigators,\textsuperscript{163} which, distinct from the situation in Argentina, some may see as thwarting the will of a freely-elected Congress operating in no junta’s shadow. While Argentine society has progressed to a point of being able to view the actions of the junta as crimes against humanity, the current Colombian administration does not yet seem confident enough in its staying power to be able to meet the problem directly.\textsuperscript{164} To be sure, Colombia has been facing low-intensity insurgencies over a timeframe of decades, a phenomenon unknown to Argentina. However, a piecemeal approach shielding human rights abusers from punishment makes little sense in the region given the examples of Argentina, and to a lesser extent, Peru, and the failures of El Salvador.\textsuperscript{165} At the same time, officials have rejected the lessons of another country which also faced decades of abuse.\textsuperscript{166} Therefore, it remains incumbent upon Colombia to come up with a previously untested approach which must satisfy both domestic victims and international observers. However, the Justice and Peace Law seems unlikely to fulfill any of these requirements.

The Justice and Peace Law is likely to be challenged in an international context for two reasons.\textsuperscript{167} First, Colombia, like Argentina, has provided in its

\textsuperscript{162} While the Justice and Peace Law confers no express amnesty upon state actors, as did the Argentine legislation, it originally placed strict limitations on prosecutors. See HUMAN RIGHTS WATCH, supra note 15.

\textsuperscript{163} See Human Rights Watch, supra note 33.

\textsuperscript{164} See ISACSON, supra note 25.

\textsuperscript{165} See Bomba del Tiempo, supra note 73.

\textsuperscript{166} The Chairman of the Reparation and Reconciliation Commission, Eduardo Pizarro, refuses to consider the idea of "sensational public hearings," such as those in which offenders and victims met face to face in South Africa. Rachel Van Dongen, Colombia Seeks Peace in the Middle of War, CHRISTIAN SCI. MONITOR, Jan. 13, 2006.

Constitution that international treaties take precedence over domestic law. Therefore, Colombia must abide by the provisions of the Inter-American Convention, including the enforcement of the right to a fair trial and the right to judicial protection. Second, as other South American countries, including Argentina and Peru, abandon amnesty laws, Colombia most likely will encounter greater pressure from abroad to repeal the Justice and Peace Law. This pressure may also come from the Inter-American Court, whose decision in Barrios Altos reflects a growing impatience with the impunity fostered by amnesty laws and legislation closely modeled on amnesty provisions.

Ironically, incorporating international jurisprudence into the domestic courts will likely prove to be reassuring for proponents of national sovereignty. By relying on the Barrios Altos precedent prominently in their decision, the justices of the Argentine Supreme Court spared the country the possible humiliation of being forced to bow to international pressure. With their own national court solving the problem of amnesty, Argentines, unlike Colombians, can be proud that the issue was resolved domestically, with no need for an international court ruling, which may be characterized by some as foreign meddling. Once the Colombian people become increasingly frustrated with the results of the Justice and Peace Law, due both to a lack of foresight in drafting and a general lack of resources, a ruling similar to Barrios Altos in the Inter-American Court may well have to act as a catalyst for change in the country’s national reconciliation. As a fellow signatory of the American Convention on Human Rights, Colombia is bound by the same obligations as Peru and Argentina. The Justice and Peace Law, like Peru’s amnesty laws, may meet its demise at the hands of the Inter-American Court.

Due to its shortcomings, the Justice and Peace Law appears to be an easy target for a Colombian non-governmental organization with the wherewithal to present a case to the Inter-American Court. While the Justice and Peace


170 Barrios Altos, supra note 20.

171 Hector Simon, supra note 14, para. 23 (opinion of Justice Petracchi).


173 See La Proxima Semana, supra note 167.

174 Indeed, after being generally upheld by the ruling of Colombia’s Constitutional Court, it
Law never mentions the word “amnesty” itself, in *Barrios Altos* the Inter-American Court focused on the incompatibility of the legislation with the Convention rather than on the form. While proponents of the Colombian law may argue that it is not “intended to prevent the investigation and punishment of those responsible for serious human rights violations,” the Justice and Peace Law, through its original sixty-day limit on a prosecutor’s decision to bring a case and its lenient sentences, begs the question of whether Congress intended to focus on the protection of offenders and punishment of victims. The Constitutional Court struck down this provision, perhaps imagining a situation in which Colombian prosecutors, hamstrung by restrictive criminal procedure working to the defendant’s advantage, lack not just the monetary resources, but also the time required to uncover an offender’s serious human rights violations. In any case, Congress’ original language raises the question of whether the law was designed, and therefore “intended,” to hinder investigation of such offenses. This would constitute a violation of Article 1 and, by extension, Article 4 of the Convention. Furthermore, the lack of measures adopted to ensure that victims obtain legal protection and enjoy the right to effective and simple recourse also works against Colombia as a possible violation of Article 8 and Article 25. Colombians are notoriously suspicious of the national police, making debatable the existence of legal protection even in the most positive circumstances. Moreover, if demobilizers are allowed to hide their assets through loopholes in the Law, simple and effective recourse hardly seems readily available. All these

seemed that the peace process may be over. Paramilitary leaders reacted with furor at the suggestion that paramilitary leaders sentenced before the commencement of negotiations with the government would still have to serve their full sentences. However, a second interpretation by court president Jaime Córdoba assured leaders that even prior sentences would be suspended if the demobilizers continued to comply with the peace agreement. Steven Dudley, *Court’s Amnesty Dispute Hurting Peace Prospects*, MIAMI HERALD, June 18, 2006, at 14A, available at http://www.miami.com/mlq/miami/herald/news/world/americas/14845375.htm.

175 *Barrios Altos*, supra note 20, paras. 41–44.
176 *Id.* para. 41.
177 *Justice and Peace Law*, supra note 11, arts. 17–21.
180 *See The Law of the Fraud*, supra note 9.
181 *See Colombia: Between Peace and Justice*, supra note 23. However, after the Constitutional Court’s May 2006 decision, offenders must now pay full reparations to the families of their victims. Juan Forero, *Court Overrules Parts of Law Shielding Colombia’s*
factors enhance the likelihood of a future ruling by the Inter-American Court that the Law of Justice and Peace is no more than self-amnesty legislation precisely of the sort discussed and rejected in *Barrios Altos*.  

*Barrios Altos* contains the discussion of a number of Articles of the American Convention on Human Rights. Specifically, the Court referred to Articles 4, 5, 8, and 25 in its decision striking down the Peruvian amnesty laws. While the Justice and Peace Law operates in a manner dissimilar to the Peruvian laws in form, in practice it is designed to bring about similar results, therefore conflicting with the decision of the Inter-American Court and traversing a path diametrically opposed to that taken by Argentina.

Article 25, the Right to Judicial Protection, was of particular significance for the Argentine Supreme Court. This Article specifically refers to the possibility of the violation of fundamental rights by "persons acting in the course of their official duties." This clause directly linked the offenses in Peru which gave rise to *Barrios Altos* with the crimes of the junta in the "Dirty War." In both situations, security forces whose actions were officially, although secretly, authorized by the state, terrorized civilians.

While the Colombian paramilitaries, at least ostensibly, have never acted officially as organs of the Colombian state, therefore eluding the scope of Article 25, the Justice and Peace Law may still run afoul of this part of the Convention. The Law does contain provisions that ensure a victim's rights will be "determined by the competent authority provided for by the legal system of the state"; however, the ability and motivation of the Colombian state to undertake "to ensure that the competent authorities shall enforce such remedies when granted" are highly suspect. Events such as the government dawdling for six months to issue regulations for the execution of the law, the deaths of recent demobilizers, and the lack of funds for reparations may all play a significant role in a determination that the Law is at odds with Article 25 of the Convention. On the other hand, the Argentine Supreme Court’s

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182 *Barrios Altos*, supra note 20, para. 43.
183 *Id.* para. 39.
184 *Hector Simon*, supra note 14, para. 74 (opinion of Justice Maqueda).
186 See *Nunca Mas*, supra note 1; *Barrios Altos*, *supra* note 20, para. 2.
188 *Id.*
189 See *Gobierno Reglamento la Ley de Justicia y Paz*, *supra* note 76; *Colombia: One and a Half Steps Forward, One Back*, *supra* note 65.
ruling in *Hector Simon* leaves no doubt that victims will continue to have their day in court.\(^\text{190}\)

Article 5 of the Convention, Right to Humane Treatment, comes into play as a guarantee against further abuse of the sort suffered by the Poblete family or the victims of the Chengue massacre.\(^\text{191}\) While Argentina has taken steps through its judiciary and state security forces to guard against further episodes of "degrading punishment or treatment,"\(^\text{192}\) and Colombia’s Justice and Peace Law certainly speaks the language of humane treatment, problems remain. Beyond proscribing a spectrum of mistreatment ranging from torture to the disrespect of a person’s physical and mental integrity, Article 5 also prohibits the punishment of any person other than the criminal.\(^\text{193}\) While the Law certainly contains no language memorializing a governmental directive to prosecute the innocent, Colombians have nevertheless been subjected to a long history of abuse from state security forces, including the police, who, as an arm of the executive branch of government, will be tasked with the enforcement of a Law lopsidedly lenient toward demobilizers who have terrorized villages.\(^\text{194}\) Survivors who speak up may be singled out for further punishment.\(^\text{195}\)

Of course, much of the danger in such situations results less from legislation than from factors such as the lack of control the Colombian state exhibits over the provinces.\(^\text{196}\) However, the Inter-American Court’s ruling in *Barrios Altos* focused on signatories’ acceptance of a human rights strategy based on “recognizing responsibilities” and “proposing integrated procedures for attending to the victims based on three fundamental elements: the right to

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\(^{190}\) After the decision, officials anticipated that new cases would be tried; however, at that time fiscal matters precluded large-scale government action. Larry Rohter, *Argentine Ruling Revives Cases of ‘Dirty War’ Victims*, N.Y. TIMES, July 15, 2005, at A3. In fact, on August 24, 2006, after a six-week trial, an Argentine court sentenced Julio Hector Simon to twenty-five years in prison for the torture and "illegal privation of liberty" of Jose Poblete and Gertrudis Hlaczik. This was the first criminal sentence for human rights violations by a member of the security forces since the repeal of the amnesty laws. *Por Secuestros y torturas, le dan 25 anos de carcel al ‘Turco Julian,’* CLARIN, Aug. 5, 2006.

\(^{191}\) See Nunca Mas, supra note 1; *The Law of the Fraud*, supra note 9.

\(^{192}\) American Convention on Human Rights, supra note 116, art. 5(2).

\(^{193}\) Id. art. 5(3).

\(^{194}\) *The Law of the Fraud*, supra note 9. Authorities detained and interrogated survivors of the Chengue massacre who dared confront officials in a nearby town regarding the lack of a teacher for the town’s remaining children. Since Chengue remains “under guerrilla influence,” the authorities continue to regard the locals with suspicion.

\(^{195}\) Id.

\(^{196}\) Id.
truth, the right to justice and the right to obtain fair representation." Unless the state somehow inculcates the rural populace with a newfound trust in the authorities, future cases in which Colombian victims are made to feel like perpetrators of human rights offenses, and are not aided by the procedures adopted in the Justice and Peace Law may well present the Inter-American Court with an opportunity to rule that the Law has no legal effect due to a substantive breach of Article 5.

Finally, Articles 8 and 25 of the Convention guarantee the right to the truth and judicial representation, and Article 13 recognizes the right to seek and receive information. Here, the Justice and Peace Law, as written by Congress, encounters grave self-imposed obstacles. The free confession required by the law may amount to no more than a brusque recitation of the demobilizer's name and his willingness to take advantage of the benefits of the Law. Ex-paramilitaries are not required to divulge the full extent of their participation in past crimes, regardless of the level of atrocities committed. Prosecutors may ask for more details, but an intelligent offender will most likely decline this invitation to self-incrimination, as is his right. This seemingly official acceptance of a lack of information likely amounts to a violation of Article 13 of the Convention, requiring the freedom to seek and receive information. It therefore follows that a victim lacking enough information to make use of his right to "simple and prompt recourse" would then have a cause of action for violation of Article 25. In Barrios Altos, the Peruvian amnesty laws denied the surviving victims and the next of kin of the deceased their rightful knowledge of the truth about the events that occurred on that fateful day, a fact the Court relied upon in its ruling. Victims clearly have the right to obtain clarification of the offenses which amounted to human rights violations, and the state's responsibility to investigate remains beyond question as well.

197 Barrios Altos, supra note 20, para. 46.
199 Justice and Peace Law, supra note 11, art. 17. The Constitutional Court's May 2006 ruling certainly strengthens the hand of prosecutors, holding that demobilizers who hide the truth will be tried under preexisting criminal law, and allowing victims to participate in all stages of the criminal proceedings. See Human Rights Watch, supra note 33. However, it remains to be seen whether the Law will be re-written to comply more fully with the aforementioned Articles.
200 The Law of the Fraud, supra note 9.
202 Id. art. 25.
203 Barrios Altos, supra note 20, para. 47.
In Colombia, since former combatants possess the right to keep secret all but the most basic personal information, victims have little hope of pressing the state to prosecute specific cases.\(^\text{204}\) Furthermore, Colombia lacks the institutionary breadth and depth which aided Argentines in uncovering information about the crimes of the Dirty War.\(^\text{205}\) This lack of information also leads to a violation of Article 8 by denying a victim the right to a hearing to determine his rights before a judge.\(^\text{206}\) Such limited knowledge of past events simply adds to the victim's trauma when attempting to pursue a case and must also be addressed by the Colombian state in order to avoid the threat of the Inter-American Court ruling against the Justice and Peace Law.

IX. CONCLUSION: ARGENTINA ON THE RIGHT PATH

While the Law of Justice and Peace purports to offer the procedural safeguards and substantive power necessary to provide a catalyst for renewed respect for the rule of law in Colombia, the Law most likely surrenders too much to the ex-paramilitaries in the name of good will and reconciliation.\(^\text{207}\) Victims will continue to suffer, while human rights offenders will escape with little or no punishment for their crimes.\(^\text{208}\) However, Colombia need only look to the south for an example of successful reconciliation achieved through domestic legislation and judicial proceedings. Argentina's legislative renunciation of its amnesty laws set the stage for a slow, yet effective, judicial examination of the past which will aid untold numbers of Argentines not only in coming to terms with the actions of the military dictatorship, but also in their trust of the state. Such trust appears to be diminishing in Colombia, where the Justice and Peace Law's future as effective centerpiece legislation remains, at best, questionable.\(^\text{209}\) Both international agreements and case precedent contradict the likely effects of the Justice and Peace Law, making a ruling of no legal effect by the Inter-American Court very possible.

\(^\text{204}\) Justice and Peace Law, supra note 11, para. 17.

\(^\text{205}\) No formal organization such as CONADEP has been set up by the Colombian authorities to ascertain the truth about past offenses. See Nunca Mas, supra note 1. However, this is changing, with domestic nongovernmental organizations such as INDEPAZ openly criticizing the peace process. See Van Dongen, supra note 166.

\(^\text{206}\) American Convention on Human Rights, supra note 116, art. 8; Hector Simon, supra note 14, para. 19 (opinion of Justice Maqueda).

\(^\text{207}\) See HUMAN RIGHTS WATCH, supra note 15; Justice and Peace Law, supra note 11.

\(^\text{208}\) See ISACSON, supra note 25.

\(^\text{209}\) Id.