

# SOUTHWESTERN JOURNAL OF INTERNATIONAL LAW

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## 2019 SYMPOSIUM

TWENTY-FIVE YEARS AFTER ARGENTINA'S AMIA BOMBING:  
JUSTICE VS. IMPUNITY

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# KEYNOTE ADDRESS: INTER-AMERICAN COMMISSION ON HUMAN RIGHTS' OBSERVER AT THE AMIA BOMBING TRIAL<sup>1</sup>

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Claudio Grossman\*

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1. The facts in this Keynote Address are derived from the personal memories and experiences gained by Dean Claudio Grossman before, during, and after the AMIA attack. All of the details regarding the AMIA investigation may be found in the following source, which provides the relevant citations to the trial record.

Claudio Grossman, *Informe de decano Claudio Grossman Observador Internacional de la Comision Interamericana de Derechos Humanos en el Juicio de la AMIA* (Feb. 22, 2005), <https://www2.jus.gov.ar/amia/grossman.htm>.

\* Professor Claudio Grossman served as Dean of American University, Washington College of Law for 20 years. He is presently a member of the United Nations International Law Commission, a key body for the development of international law. He is also on the board of the Open Societies Foundations Justice Initiative and the Robert F. Kennedy Center for Human Rights, and is the President of the Inter-American Institute of Human Rights. He previously served as the Chairperson of the United Nations Committee Against Torture, one of the UN's human rights treaty-monitoring bodies. Most recently, Dean Grossman served as the agent of Chile in a case between Chile and Bolivia before the International Court of Justice. In the past, he also served on the Inter-American Commission on Human Rights, serving two terms as the Commission's president. While serving as President of the Commission, he was appointed to be its observer at the AMIA bombing trial.



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### *Remarks*

#### I. INTRODUCTION

2018 marked the 25th anniversary of the AMIA bombing. It is a sad anniversary. Memoria Activa presented the case to the Inter-American Commission on Human Rights in 1999, and now, 25 years later, its perpetrators remain at large. What mattered then, and now, is bringing those responsible to justice.

#### II. THE DECISION TO OBSERVE THE TRIAL AND THE SCOPE OF THE OBSERVATION

Initially, when Memoria Activa brought the case to the Commission, there was a discussion in the Commission regarding the appointment of an observer. The Commission had observed situations in the past, investigating and issuing reports establishing the responsibility of States. Because of the mass and gross violations of human rights committed by dictatorial regimes in the Americas, the Commission had resorted to country reports as a preferred mechanism to expose the magnitude and character of those violations. On occasion, the Commission's reports were preceded by an observation in loco. In other occasions, such as in the absence of an authorization to enter a country, reports were preceded by extensive interviews and research done with victims, international civil servants, NGO's, and the public in general.

The AMIA observation was different because it would not lead to a report on the overall human rights situation in Argentina; instead, the Commission would be restricted to observing a case. I had acted before as an observer for the Commission in other situations with the aim of investigating a single event and drawing conclusions based on the facts available. For instance, I was appointed to be an observer following the "Massacre of Navidad" in Bolivia, where the Bolivian police killed 11 miners after they resisted the sale of a goldmine. Additionally, all of us in the Commission had visited dozens of jails. But, observing a case is

different. For instance, no conclusions are drawn or made public during the observation and the observers do not control the procedure. In spite of these differences, and the lack of specific institutional precedents, we decided to observe this case because of an important principle in human rights law – the principle that the requests of victims should be honored as far as possible. In classic international law, an ambiguous provision in a treaty is interpreted in favor of state sovereignty. This is not the case in human rights law. Here, when you have a doubt, treaties are interpreted in favor of human beings, and in light of their object and purpose. So, in August 2000, while I was President of the Commission, I was appointed to serve as the observer for the case. Both the petitioners and the Government agreed to my appointment.

Once the decision was made to appoint an observer, the next issue became determining the scope of the observation. According to the initial position of the government of Argentina, the observation should have been restricted solely to the trial. Instead, I suggested that we look at the trial and everything relevant to the terrorist attack against the AMIA. We did not want to narrow the scope of our observation solely to the determination of whether the trial was fair. If the analysis would have stopped there, the Commission would not have been in the position to elaborate further, including commenting on topics related to the broader context of the case and on what transpired from it. It would not have been able to make recommendations concerning follow-up and so forth. To the credit of the Argentine government, it did not object to our “counteroffer”, and we leapt at the opportunity.

### III. PRESENCE IN ARGENTINA

The Commission wanted to ensure that the observation covered every matter that could be relevant to the success of its mission. To achieve that goal, it was essential to have a permanent presence in the country, so our observation would not be restricted by the schedule of the trial. That required having a fulltime person in the country during those three years, in addition to having me attend as many sessions of the trial as possible. It also required interviewing relevant actors, including victims, journalists, government officials, NGO members, and academics. We also had to examine records contained in 600 books, which were 200 pages each, plus other editions that were more or less the same length.

(While the Commission was not able to read all of them, we were able to assess the professionalism and quality of the work). Since I was the Dean of a law school at the time, and could not attend some of the sessions, we hired an excellent individual, Maria Lusto, to be there on the ground fulltime. I visited Argentina more than twelve times during this period, sometimes for a week or more, and used the phone, internet, and all means available to aid the endeavor.

#### IV. REALITY AND APPEARANCE OF INDEPENDENCE

The Commission not only needed to act independently, but also to appear independent and above any influence that would interfere with it performing its mission to produce an “objective” report. In accordance with the famous proverb, the wife of Caesar not only needs to be, but also needs to appear to be, above any suspicion. This meant, for example, that the Commission needed to abstain from making any statement during the trial. This was not easy because the case attracted both domestic and international attention, and there were numerous requests for interviews and comments. It was very important to understand, however, that the success of the mission depended on its objectivity. This required overseeing the whole trial without prejudging any outcome until the end of the mission, while supporting those internal actors involved in the case with our presence and conduct. The judges needed the additional political space created by the observation of the Commission to make their decisions and to satisfy their duty to uphold the high standards for judicial independence established by the American Convention.

We came to the conclusion that the three judges of the tribunal in charge of the trial, Guillermo Andrejo Gordo, Gerardo Felipe Larrambère, and Miguel Nigel Pons, performed their functions with professionalism and integrity and exemplified what it meant to be competent judges. They were not influenced politically, and they took the role of the judiciary in determining the truth very seriously. As the world was watching Buenos Aires through our eyes, the presence in situ of the Commission gave them additional support.

These judges deserved recognition because they dismantled a conspiracy that came from the highest echelons of the political establishment in Argentina. Had it not been for them, the

policemen who were accused would likely have been indicted, and the cover-up would have been successful.

## V. THE TRIAL

Concerning the trial itself, let me start with the compelling testimony of some witnesses. I will never forget the testimony of two female witnesses, one of whom also survived the Second World War. The first woman was walking her little dog in front of the AMIA right before the explosion. She knelt down to pick up her dog as the AMIA exploded, and this act saved her life. The second woman was taking her young son to the doctor, but she stopped to look in a store along the way. As a result, she and her son were in front of the AMIA when the terrorist attack took place. Her son died as a result of the explosion, and she blamed herself for deciding to stop at the store. The experiences of these women illustrate the fleeting nature of existence and how lives can be arbitrarily lost. As these testimonies took place in the beginning of the trial, they were grim reminders of the multiple impacts and dimensions of the tragedy caused by the attack.

### *A. Failure to Prevent*

Very early on, we recognized issues with the investigation, including the failure of the Argentinian State to prevent the bombing. Among other indications, we learned in the trial that there were warnings in cables from the Argentinian embassies in Lebanon and Israel mentioning that an attack would take place, but the State did not adequately respond to these warnings. Additionally, there were two policemen in a parked car in front of the AMIA, but the car's engine was not working. One of the policemen was not even in position – he was drinking coffee somewhere else. There were multiple indications of an absolute failure to take appropriate measures of prevention, compounded by the fact that two years earlier, a terrorist attack against the embassy of Israel in Argentina had killed 30 people and wounded over 80.

### *B. Irregularities in the Investigation*

Irregularities in the investigation were also apparent early on and continued to develop throughout our observation. First, there

were reports of a mysterious helicopter that appeared the night before the attack. Numerous witnesses saw the helicopter over the AMIA, but the prosecution did not look into these reports early on. It was also known that a construction container in front of the AMIA, which belonged to a businessman who imported the same explosive that destroyed the AMIA, was removed shortly before the attack. The owner's records showed that he could not account for those explosives.

There were also serious issues with gathering evidence in a timely manner. In my experience being on the Commission to Control INTERPOL's Files for eight years, investigations need to begin immediately, otherwise, evidence is lost. You need to do everything possible to preserve evidence. In the trial, it was shown that telephonic records were not requested until years later, which only hindered proper investigation and gave time for the perpetrators to hide additional evidence. For instance, there was a record of a call by Kanoore Edul to Telleldín, the car thief who sold the Renault Traffic van used in the attack. But, when he was asked a couple years later what had happened and why he had called the car thief, he said that it had been his driver. The driver, however, responded that it was not him because he was hospitalized at the time. Crimes of this nature are not committed in the presence of a notary public. Rather, they are conspiracies where those involved try to erase all evidence of their participation. An effective prosecution acts promptly, investigating all possible routes and moving with determination and speed. To the contrary, the delays, inefficiencies, and lack of commitment in the AMIA prosecution make it a poster child for how a prosecution should not take place.

### *C. Questioning Witnesses and Suspects*

There were also serious and unacceptable issues when it came to questioning witnesses and suspects. For instance, the authorities allowed Mose Ravani, the cultural attaché of the Iranian embassy, to leave Argentina, even though the Intelligence service in Argentina possessed a photo showing Ravani attempting to buy a vehicle similar to the one used in the terrorist attack. While absolute immunity exists for some diplomats, Ravani was not entitled to such immunity. The authorities needed to question him, but did not. There were many other examples of inexcusable omissions, but we simply do not have time to cover them all. Let

me mention just one that caught my attention. On the 4th of April 1994, an Iranian national attempted to leave the country through the Argentinean international airport in Ezeiza using a North American passport that was not his, which is extremely suspicious. He was caught and placed at the disposition of the Argentinean authorities. Then, on July 11th, one week before the attack, he requested authorization to leave the country and return to Iran; his request was granted on July 25<sup>th</sup>, one week after the terrorist attack – how is that possible?

#### *D. The Finding of the Motor*

Even considering the unacceptable actions by the authorities mentioned above, perhaps the most suspicious behavior is related to the handling of the vehicle motor after the attack. The signed affidavits of two witnesses show that the motor was discovered almost immediately after the bombing. However, in the oral trial, the witnesses testified that they did not discover the motor and that they were ordered to sign the affidavits. Only later in the trial did it become apparent that the people who discovered the motor were part of an Israeli group sent to assist in the investigation. Experienced in investigations, they photographed the motor and provided credible evidence of the date and location of their discovery. The mystery is that it seems that the Israelis discovered the motor *after* the police had gone to pick up Telleldín, the car thief who was responsible for selling the vehicle used in the terrorist attack. If the motor was not discovered until after Telleldín was detained, then why did the police seek him out? That would have been enough to raise tremendous doubts about the integrity of the investigation, but there is another very important piece of evidence regarding Telleldín that erases any remaining doubt.

#### *E. Destruction of Evidence*

When the Buenos Aires police went to Telleldín's house to try to convince him to surrender, he was not there because he had escaped to a town near Paraguay. The officers then phoned Telleldín to convince him to come back and surrender. Sixty-six tapes of those conversations were made, and those tapes, which were crucial, *inter alia*, to analyze his motives and the reasons for his surrender, mysteriously disappeared. We have no idea what

Telleldín said. The destruction of evidence is always a serious matter.

However, there were still other issues, especially concerning the behavior of judge Galeano. A missing video showed Galeano and an assistant offering \$400,000 to Telleldín to implicate the police of a precinct in Buenos Aires as the authors of the terrorist attack. When the policemen were indicted, their lawyer went to Galeano and asked to meet with him alone to show him a copy of the video – in spite of early confessions by Telleldín implicating three middle eastern individuals and then a central American. Following the meeting, the video went missing and the Judge ordered the detention of the lawyer, who was jailed for 40 days. A commission of Congress supported the Judge’s decision, and the executive did as well. They claimed this was all a conspiracy to blackmail the Judge and that the video was not available because it had been stolen.

#### *F. Parallel Investigations and the Absence of a Credible Narrative*

Judge Galeano also opened “parallel investigations” to undermine the original purpose of his appointment to identify and prosecute those guilty of committing the terrorist attack. These detours appeared to be solely designed to avoid disclosing information and to consume resources that would have been better used going after credible evidence. The indictment of the police officers, as shown by the video where judge Galeano bribed Telleldín to change its testimony, would be enough to show the questionable behavior of Judge Galeano. Additionally, during the first two years that followed the attack, there was no evidence concerning the involvement of the indicted policemen. Later, based on Telleldín’s testimony and the testimony of a witness with strong connections to the security services in Argentina who was given access to Telleldín under the false pretext of been his relative, it was alleged that the police had blackmailed Telleldín in the past regarding his “business” of stealing cars. These circumstances gave support to the opinion that the indictment of the policemen was a way to uphold an appearance of investigating the attack without going after the States that appeared directly involved in the attack, namely Hezbollah, Syria, and Iran.

It was never probed or argued why Hezbollah would risk asking corrupt policemen in Buenos Aires to be directly involved in the terrorist attack. Little or no research was done on a

persuasive motive behind this “internal connection”. The police were obviously corrupt, but at the same time, it appeared that the authorities decided not to confront Iran, Syria, or Lebanon. Was it a political calculation based on an analysis of the position of Argentina and its interests in the world, and specifically in those countries? Were the authorities concerned about further terrorist attacks following the two that had already taken place? Why did it take Argentina more than two years to request that INTERPOL issue red notices for the detention of the Iranian nationals allegedly involved in the attack? Why did the investigation fail to look seriously into the involvement of Syria?

## VI. CONCLUSION

To the credit of Argentina and the judges in the trial, a “punto final” was not placed in the case, and a cover up was exposed. The President of Argentina at the time also fully accepted our report. However, our recommendations concerning a thorough investigation and legal changes concerning, *inter alia*, changes in the laws that regulate security matters, have not been implemented. The world received with horror the news of the killing of Alberto Nisman, the prosecutor appointed after Galeano, and criticized an attempted “agreement” with Iran, which would not have ensured justice in the case.

Allow me to finish my remarks by resorting to literature, which, as Milan Kundera says, shows with imagination the hidden aspects of reality. In the book, *La Fiesta del Chivo* by Mario Vargas Llosa, an individual, who lost the the favor of dictator Trujillo, attempted to regain that favor by giving his daughter to Trujillo to be raped. Notwithstanding the repulsiveness of the act, what was interesting to me was that the act appeared to be completely normal, or otherwise an entirely rational course of action. Surrendering his daughter is what he needed to do, so he did it. One cannot but notice that one of the worst consequences of dictatorship, and perhaps other forms of authoritarianism, is that a distortion of common sense occurs, and abhorrent and insane behavior becomes normal. Conspiracies, cover ups, and even assassinations have pervaded our observation of this case. From this perspective, the AMIA case is not just about the AMIA. It is about the possibility to strengthen and rebuild institutions so that such abhorrent behavior is not seen as a normal event. This will not be possible, however, until justice is served, the suspects of



this terrorist attack are tried, and full reparation is made to include truth, satisfaction, and measures of non-repetition.

# THE USE OF EVIDENCE PROVIDED BY INTELLIGENCE AGENCIES IN TERRORISM PROSECUTIONS: CHALLENGES AND LESSONS LEARNED FROM ARGENTINA’S AMIA BOMBING

Leonardo Filippini\*

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## I. INTRODUCTION

The July 18, 1994 attack against several Jewish institutions in Buenos Aires has been under investigation for years by Argentina's judicial authorities and several State agencies. Among those agencies, the Argentine Intelligence Secretariat (SIDE, for its Spanish acronym)—the agency that oversaw national intelligence—played a significant role. SIDE would later be replaced by the Intelligence Secretariat (SI, for its Spanish acronym) and after that by the current Federal Intelligence Agency (AFI, for its Spanish acronym).<sup>1</sup> Because the information is classified, crucial information about the attack has been kept from the parties in the judicial investigation.

The first requests to declassify government information related to the attacks date back to 1999.<sup>2</sup> Since then, a series of decisions issued by different government institutions have gradually resulted in information declassification. Recent milestones towards declassification include Presidential Decree Nos. 395/2015 and 229/2017.<sup>3</sup>

The declassification process is part of a wider trend aimed at facilitating open access to classified information. This includes, but is not limited to, several government decisions that ordered the declassification of files, documents, and reports linked to historical events and human rights violations.<sup>4</sup> On December 1, 2015, Decree No. 2704/15 established a public access mechanism and authorized access to all the information contained in the Historical Records Database belonging to the AFI's Directorate of Database and Intelligence Files, which does not fall under any of the exceptions stipulated in Article 3 of the Decree.<sup>5</sup> More recently, Law No. 27275 regulating access to public information was passed

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1. Law No. 27126, Mar. 3, 2015, [33083] B.O. 1 (Arg.).

2. *See On Declassification of Files of the Former SIDE*, MEMORIA ACTIVA (Dec. 30, 2015), <http://memoriaactiva.com/?p=1236>.

3. Law No. 395/2015, Dec. 3, 2015, [33089] B.O. 1 (Arg.); Law No. 229/2017, Apr. 5, 2017, [33600] B.O. 1 (Arg.).

4. Law No. 4/2010, Jan. 5, 2010, [31815] B.O. 4 (Arg.); Law No. 200/2012, Feb. 8, 2012, [32335] B.O. 1 (Arg.); Law No. 503/2015, Apr. 6, 2015, [33101] B.O. 3 (Arg.); Resolución 103/2011, Jan. 27, 2012, [32327] B.O. 38 (Arg.); Resolución 408/2009, Dec. 29, 2009, [31810] B.O. 13 (Arg.).

5. Law No. 2704/2015, Dec. 1, 2015, [33269] B.O. 4 (Arg.).

establishing the government's duty, without exception, to grant access to information in cases involving severe human rights violations.<sup>6</sup>

Throughout the early 2000s, the Federal Oral Criminal Court No. 3 of the Federal Capital oversaw the trial pertaining to the 1994 attack. The trial ended in 2004 with the defendants' acquittals.<sup>7</sup> The Court found procedural irregularities occurred during the judicial investigation and ordered another investigation into the possible crimes committed by, among others, the same intelligence personnel that conducted the initial investigation.<sup>8</sup>

Thus, a decade after the attack, it became evident that a discussion with respect to the original evidence gathered in the investigation was necessary, as the evidence could potentially shed light on both the attack itself and the irregularities in the investigation. This is the backdrop of all declassification processes of government-held information about the attack.

This article attempts to identify potential lessons and challenges learned from the 1994 attacks investigation and the use of declassified intelligence in the criminal proceedings. Part One will look at three time points in the declassification process. This includes the declassification that resulted from the trial before the Oral Criminal Court No. 3 beginning in 2001, the administrative selection of evidence and its remission to the Prosecution Unit (UFI, for its Spanish acronym) in 2005, and the massive declassification that resulted from Decrees in 2015 and 2017. Part Two examines three conclusions and current unresolved challenges with the hope of revealing some valuable lessons. The first lesson relates to the identification and characterization of evidence, the second considers the validity and admissibility of declassified evidence in criminal proceedings, and finally, the third discusses evidentiary performance.

## II. PART ONE: PHASES OF THE DECLASSIFICATION PROCESS

The declassification process can be broken into three phases. The first phase started in 2001 with the trial before the Oral

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6. Law No. 27275, Sept. 29, 2016, [33472] B.O. 1 (Arg.).

7. Memorandum from Alberto Nisman, Attorney General in Charge of Attorney General's Unit, to Jose Pablo Vázquez, (Mar. 4, 2015) (on file with Southwestern Law Library) [hereinafter Nisman Memo].

8. Dexter Filkins, *Death of a Prosecutor*, NEW YORKER (Jul. 20, 2015), <https://www.newyorker.com/magazine/2015/07/20/death-of-a-prosecutor>.

Criminal Court No. 3, the second phase began with an administrative selection of documents that culminated in their submission to the Investigations and Prosecutions Unit in 2005, and the third phase is the massive declassification that commenced in 2015.<sup>9</sup> Despite numerous false starts and setbacks, each phase marked a favorable trend toward declassification.

The initial investigation into the 1994 attack was conducted by a federal judge, aided in part by the national intelligence services and with the support of foreign intelligence agencies. It is worth mentioning that, by that time, a prior 1992 attack on the Israeli Embassy in Buenos Aires was being investigated under a similar framework by the Supreme Court of Argentina.<sup>10</sup> The Supreme Court ordered that a federal first instance judge investigate the 1994 attack.<sup>11</sup> In short, regardless of the hierarchical differences between investigating judges, both investigations were carried out by the judiciary with the support of national intelligence.

President Carlos Saúl Menem was incumbent at the time of the attacks, from mid-1989 to late 1999, and was succeeded by Fernando de la Rúa. Rúa took on a more explicit role in the investigation. Thus, on June 8, 2000, just months after taking office, Rúa created a Special Investigation Unit within the executive branch and charged it with the task of assisting the judiciary in its investigation.<sup>12</sup>

The Special Investigation Unit was formed by the Argentine Federal Police Force's (PFA, for its Spanish acronym) antiterrorist and intelligence divisions, SIDE, the Argentine National Gendarmerie (GN, for its Spanish acronym) and the Argentine Federal Penitentiary Service (SPF, for its Spanish acronym).<sup>13</sup> Each government agency shall prioritize requests from the Special Investigation Unit as urgent. In addition, the Special Investigation Unit had power to conduct its own investigations and report its findings to judicial authorities.

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9. Law No. 395/2015, Dec. 3, 2015, [33089] B.O. 1 (Arg.); Law No. 229/2017, Apr. 5, 2017, [33600] B.O. 1 (Arg.).

10. Art. 116, Constitución Nacional [CONST. NAC.] (Arg.).

11. *See Terrorism: Bombings in Argentina*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/terrorist-bombings-in-argentina> (last visited Oct. 16, 2019).

12. Law No. 452/2000, June 8, 2000, [29510] B.O. 4 (Arg.); Resolución 39/2000, Procuración General de la Nación, Apr. 11, 2000 (Arg.).

13. Law No. 452/2000, June 8, 2000, [29510] B.O. 4 (Arg.).

On September 19, 2000, the Executive concentrated the oversight of the different units' operations to the Secretary of Political Affairs of the Ministry of the Interior.<sup>14</sup> The decree authorized more lenient sentences for defendants who collaborated with the investigation of terrorist acts, coordination and collection of human and institutional resources within the Public Prosecutor's Office to facilitate the investigation, creation of the Special Investigation Unit, granted powers to the Special Investigation Unit to conduct its own investigations, and ordered all government bodies to cooperate in full with the investigators, treating each request as urgent and immediately dispatching requested documents.

Additionally, the Secretary was given several powers, including directing the Special Investigation Unit.<sup>15</sup> Not long after, the recently created Anti-Corruption Office also joined the list of government bodies working with the Special Investigation Unit. The Argentine Congress also authorized the Special Bicameral Commission to oversee the investigation and ultimately issued three reports about the attacks on the Israeli Embassy and AMIA/DAIA building. In that capacity, the Secretary had unlimited access to files and documents related to the attacks.<sup>16</sup> Throughout the following months, there were several changes to the Special Investigation Unit's authorities.<sup>17</sup> Additionally, the imminent trial before the Oral Criminal Court No. 3 prompted witness protection measures.<sup>18</sup>

The relatively increased notoriety of the Executive's work with respect to the evidence produced by different agencies and the political role of the Special Investigation Unit's authorities marked the onset of the declassification process that took place during the trial.

#### A. *Specific Judicial Declassification Orders (2001-2004)*

Between 2001 and 2003, judges and the Executive had a heated exchange with respect to document declassification and

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14. Law No. 846/2000, Sept. 29, 2000, [29499] B.O. 1 (Arg.).

15. *Id.*

16. *Id.*; Law No. 452/2000, June 14, 2000, [29419] B.O. 4 (Arg.).

17. Law No. 430/2001, Apr. 23, 2001, [29633] B.O. 2 (Arg.); Law No. 960/2000, Oct. 25, 2000, [29511] B.O. 2 (Arg.); Law No. 952/2000, Oct. 24, 2000, [29510] B.O. 4 (Arg.).

18. Law No. 262/1998, Mar. 9, 1998, [28859] B.O. 1 (Arg.).

waiving intelligence officials' confidentiality duties. Despite opposing views, the Executive tended to grant access to information.

The trial outlasted several presidential administrations. As time passed, the Executive's responses varied as to declassification requests. For the most part, the requests for classified evidentiary information were related to the attacks and to the examination of the government's subsequent investigation.

In October 2001, the Oral Criminal Court No. 3 requested the Executive waive the duty of confidentiality for a group of current and former SIDE to allow them to testify in court.<sup>19</sup> In response, the Executive waived SIDE's top official's duty of confidentiality and authorized him through Decree No. 490/02 to testify in court regarding the agency's investigation of the attacks.<sup>20</sup> The Executive also ordered the SI to authorize certain other agents to testify before the Oral Criminal Court No. 3.<sup>21</sup>

The Executive's authorizations did not extend to classified information related to actions or facts involving foreign citizens.<sup>22</sup> The Oral Criminal Court No. 3 believed that such restrictions diminished its fact-finding efforts and hindered the investigation of relevant circumstances of the case and consequently changed the criteria.<sup>23</sup> The Executive clarified in Decree No. 41/03 that the issue was not necessarily one of national security, but the government's interest in maintaining its relationships with foreign intelligence agencies.<sup>24</sup> The Executive believed that certain secrets could affect national security as well as other ongoing investigations and concluded that if the scope of the investigation was going to be broadened, the list of authorized personnel who could testify would be reduced.<sup>25</sup> It only authorized the testimonies of qualified, high-ranking agents with direct factual knowledge, testimonies of previously authorized witnesses with information that could acquit a defendant, and clarified the

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19. Nisman Memo, *supra* note 7.

20. Law No. 490/2002, Mar. 12, 2002, [29858] B.O. 3 (Arg.).

21. Law No. 291/2003, June 30, 2003, [30182] B.O. 1 (Arg.).

22. Law No. 41/2003, Jan. 9, 2003, [30064] B.O. 22 (Arg.).

23. Tribunal Oral en lo Criminal Federal N°3 de la Capital Federal [Oral Criminal Federal Court 3], 8/8/2002, Case No. 487/00, "Telledin Carlos A. otros s/Homicidio Calificado (Atentado a la AMIA)," (2000-¶3 and 4) (Arg.) [hereinafter Case No. 487/00].

24. Law No. 41/2003, Jan. 9, 2003, [30064] B.O. 22 (Arg.).

25. Law No. 950/2002, June 5, 2002, [29915] B.O. 4 (Arg.).

authorization of agents who signed minutes or documents to appear exclusively to ratify or recognize the signatures in documents submitted.<sup>26</sup> In other words, the Executive only waived the confidentiality duty of some agents requested by the Court, i.e. directors and operation heads.<sup>27</sup>

The Court struck down the Executive's new restrictions. On February 20, 2002, the Court ordered all the officials mentioned in the first decree (Decree No. 490/02) to testify.<sup>28</sup> On June 30, 2003, the incumbent president reviewed the request and finally authorized the testimonies in question, through Decree No. 291/2003, by reiterating that the testimonies could only involve information related to the attacks under investigation with the exception of matters that concerned national security or foreign citizens involved in foreign intelligence services.<sup>29</sup> The Decree also added that the waiver did not authorize witnesses to testify as to how intelligence activities were conducted, the identity of intelligence personnel (with the exception of those who had already been cleared to testify), or any documents that exceeded the scope of the facts at issue.<sup>30</sup> Article 5 of the Decree also ordered the Oral Criminal Court No. 3 to take necessary measures so testimonies were given only before Court staff and the parties to the trial.<sup>31</sup>

However, these restrictions were rapidly struck down and voided by Decree No. 785/03, enacted on September 18, 2003. The Decree ratified that the only valid restrictions were those relating to foreign intelligence personnel who had cooperated with the judicial investigation and the dissemination of information that could threaten national security.<sup>32</sup>

In short, the trial resulted in an unprecedented declassification process that allowed classified evidence to be used in court. The presiding judges first requested the Executive declassify certain information and waive the witness' confidentiality duties.<sup>33</sup> Subsequently, in each individual case, the Court analyzed the

26. *Id.*

27. Case No. 487/00, *supra* note 23.

28. See Law No. 490/2002, Mar. 12, 2002, [29858] B.O. 3 (Arg.); see also Law No. 291/2003, June 30, 2003, [30182] B.O. 1 (Arg.).

29. Law No. 291/2003, June 30, 2003, [30182] B.O. 1 (Arg.).

30. *Id.*

31. *Id.* at art. 5.

32. Law No. 785/2003, Sept. 18, 2003, [30237] B.O. 1 (Arg.).

33. See generally *id.*



Executive's rationale and ultimately reserved for itself the final say with respect to the scope of the confidentiality duties in question.<sup>34</sup> The process played a large part in the Executive's erratic behavior, which varied significantly depending on the Court's different requests.

Another series of declassification-related decisions more directly impacted the judiciary's assessment of the investigation's legality. For example, in August 2002, the Oral Criminal Court No. 3 requested declassification of an internal SIDE brief containing the testimony of a former judicial officer, a whistleblower on irregularities in the investigation.<sup>35</sup> The request was turned down on the basis of needing to keep matters of national interest secret, such as the intelligence service composition, special operations, and intelligence community collaboration, as well as its division of labor.<sup>36</sup> However, on May 27, 2003, the Oral Criminal Court No. 3 ordered the Executive to declassify the brief, redacting only portions that revealed the agency's operations and agents' identities.<sup>37</sup> The Court's decision was, in turn, challenged by the Executive in the same court proceeding; however, before the Court could decide on the matter, the Executive pivoted its position and authorized the declassification of the brief in question.<sup>38</sup>

In June 2003, the Executive also waived the former intelligence head's confidentiality duty and authorized him to testify in the judicial investigation of the alleged embezzlement of intelligence funds in March of the year in which the attack had been investigated.<sup>39</sup> The Executive also submitted attack-related accounting records to the Court.<sup>40</sup> A few months later, the Executive broadened the scope authorizing specified officials to testify on all matters relating to the investigation.<sup>41</sup>

Similarly, over the next few years, judicial decisions broadened access to relevant information connected to the investigations. For example, the Courts declassified useful

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34. Nisman Memo, *supra* note 7.

35. Case No. 487/00, *supra* note 23.

36. *See generally* Law No. 116/2003, Jan. 23, 2003, [30074] B.O. 1 (Arg.).

37. Case No. 487/00, *supra* note 23.

38. *See generally* Law No. 146/2003, June 6, 2003, [30166] B.O. (Arg.).

39. *See generally* Law No. 249/2003, June 26, 2003, [30179] B.O. 5 (Arg.).

40. Law No. 293/2003, July 1, 2003, [30182] B.O. 3 (Arg.).

41. Law No. 785/2003, Sept. 18, 2003, [30237] B.O. 1 (Arg.).

government information related to the investigation and prosecution of the alleged irregularities in the investigations. In 2005, the SI authorized the Court to access certified copies of the administrative inquiries related to a payment made to one of the defendants, and other relevant documents.<sup>42</sup> The information was provided in accordance with Decree No. 146/03 which restricted any information that could reveal the agency's operations and identities of its agents, while also alerting the prosecutor that measures had to be taken to ensure that personal files be kept safe and to prevent reproduction or dissemination of documents.<sup>43</sup> Former President Carlos Saúl Menem was authorized to testify as a defendant in the trial on the investigation before the Federal Oral Criminal Court No. 2 of the Federal Capital to shed light on some of the facts of the case.<sup>44</sup> More recently, on July 11, 2016, the General Director of the AFI granted the Oral Criminal Court No. 2 unlimited access to all documentary evidence related to the investigation.<sup>45</sup>

#### B. *General Administrative Declassification (2003-2005)*

Some of the Executive's early decisions regarding evidence declassification pertaining to the attacks were issued from 2003 to 2005 and focused on specific documents and witnesses requested by the judiciary.<sup>46</sup> In contrast, in 2003, three presidential decrees greenlighted judicial authorities and the Special Investigation Unit to also access classified information gathered by the security forces and SI.<sup>47</sup>

In July 2003, the Executive authorized the Argentine Federal Criminal and Correctional Court No. 9 to access all classified evidence linked to the investigation of the attack in possession of the PFA, National Gendarmerie, and Marine Forces.<sup>48</sup> Unlike the more specific declassification made to the Oral Criminal Court No. 3, this was generic and did not involve specific documents.

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42. See *Terrorism: Bombings in Argentina*, *supra* note 11.

43. See Law No. 146/2003, June 6, 2003, [30166] B.O. (Arg.).

44. Nisman Memo, *supra* note 7.

45. See generally Resolución 470/2016, July 21, 2016, [33429] B.O. 38 (Arg.).

46. *On Declassification of Files of the Former SIDE*, *supra* note 2.

47. Law No. 398/2003, July 21, 2003, [30196] B.O. 1 (Arg.); Law No. 786/2003, Sept. 17, 2003, [30237] B.O. 2 (Arg.); Law No. 787/2003, Sept. 17, 2003, [30237] B.O. 2 (Arg.).

48. Law No. 398/2003, July 21, 2003, [30196] B.O. 1 (Arg.).

The task was delegated to the Ministry of Justice, Security, and Human Rights, which ordered law enforcement heads to set aside adequate space in their facilities to ensure judicial authorities could access the documents.<sup>49</sup>

Shortly thereafter, the Executive issued two decrees in response to a formal request from the Federal Criminal and Correctional Court No. 9.<sup>50</sup> The first decree was for a detail of the materials.<sup>51</sup> The Executive, thus, ordered the Special Investigation Unit to create an Information Survey Unit (URI, for its Spanish acronym) inside each law enforcement agency to search for and analyze documents, investigate, and report the results to the courts and to the Special Congressional Commission.<sup>52</sup> The decree designated the Executive Secretary of the Special Investigation Unit to be in charge of the URIs, and authorized him to create URIs in other annexes, forces, and divisions, and even petition the police forces to collaborate in order to create similar units in provincial departments.<sup>53</sup>

Further, the Executive issued Decree No. 787/03, which authorized access to the SI's documents and databases with respect to the attacks in the AMIA/DAIA buildings and the Israeli Embassy.<sup>54</sup> It also ordered the Special Investigation Unit to create a URI inside the SI with unlimited access to all types of documents, reports or files—regardless of clearance level and physical format—to facilitate their search, collection, and analysis, as well as to conduct any necessary investigations and report their results to the competent judges.<sup>55</sup> The decree assigned the Special Investigation Unit's Executive Secretary as head of the URI, established a means of safely including investigative materials sourced by foreign intelligence officers into the official case records, and authorized the participation of authorities from the judiciary and the Public Prosecutor's Office as well as representatives of the complainants.<sup>56</sup>

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49. Resolución 54/2003, Aug. 1, 2003, [30204] B.O. 16 (Arg.).

50. Law No. 786/2003, Sept. 17, 2003, [30237] B.O. 2 (Arg.); Law No. 787/2003, Sept. 17, 2003, [30237] B.O. 2 (Arg.).

51. Law No. 786/2003, Sept. 17, 2003, [30237] B.O. 2 (Arg.).

52. *Id.*

53. *Id.*

54. Law No. 787/2003, Sept. 17, 2003, [30237] B.O. 2 (Arg.).

55. *Id.*

56. *Id.*

However, several important changes occurred by then, particularly with respect to the activities of the Oral Criminal Court No. 3 and its decision to declare a partial mistrial and acquit the defendants. In December 2003, the Federal Appeals Chamber removed the judge who oversaw the investigation and designated another judge in his place.<sup>57</sup> A few months later, on September 13, 2004, the Argentine Attorney General created the AMIA Prosecution Unit to oversee all cases pertaining to the attack and its cover-up.<sup>58</sup>

On February 8, 2005, the federal investigation court delegated the investigation of the attack to an Investigations and Prosecutions Unit. Criminal procedure in Argentina, particularly the pre-trial investigation of crimes, is conducted by investigative courts and prosecutors. Delegating the investigation of the attack to a prosecutor's office meant emulating an adversarial model in which the judge rules on issues brought to him without committing to any particular hypothesis of the facts. Therefore, the investigation was in the Prosecution Unit's hands which, at the same time, had possession of the declassified documents submitted in 2005 that were not accessible to any other parties. It was not for another ten years that the Executive would significantly increase access to the declassified materials by allowing the opposing parties to view them.<sup>59</sup>

From mid-2003 to February 2005, the Special Investigation Unit conducted a series of surveys in different offices to search for information about the attack. As a result, on February 24, 2005, the SI submitted classified evidence to the Prosecution Unit, which consisted of nearly two thousand classified files.<sup>60</sup> The Prosecution Unit, created only one year earlier, had the power to act as both the prosecutor in the judicial proceedings and as the exclusive custodian of the classified intelligence documents.<sup>61</sup>

Finally, on July 12, 2005, the Executive approved the resolution adopted before the Inter-American Commission on

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57. *Apartan a Galeano de la Causa AMIA*, LA NUEVA (Dec. 4, 2003, 9:00 AM), <https://lanueva.com/nota/2003-12-4-9-0-0-0-apartan-a-galeano-de-la-causa-amia>.

58. Nisman Memo, *supra* note 7.

59. Law No. 395/2015, Dec. 3, 2015, [33089] B.O. 1 (Arg.).

60. Nisman Memo, *supra* note 7.

61. *See generally* Law No. 384/2005, Apr. 29, 2005, [30643] B.O. 7 (Arg.).

Human Rights (IACHR) in the framework of Petition No. 12204.<sup>62</sup> The government acknowledged its international responsibility for failing to meet its obligation to prevent the AMIA attack, for covering up the facts, and for the severe and deliberate failure to investigate the event, which amounted to a denial of justice.<sup>63</sup> The Executive included measures regarding declassification and waiving the confidentiality duty which had already been adopted in 2003.<sup>64</sup>

In short, the substantial evidentiary submission to the judiciary in 2005 was the culmination of five years of work by the Special Investigation Unit (in its capacity as an Executive unit) gathering national intelligence information. Unlike the relatively specific requests of the Oral Criminal Court No. 3—analyzed in the previous section of this work—the requests analyzed in this section are relatively broader in scope, and the Executive’s response is, consequently, more autonomous. While the volume of declassified information was greater, it was less detailed with respect to each record’s specific origin, the selection process, and the grouping of these records.

### C. *Second Generic Administrative Declassification (2015 - 2017)*

In August 2014, the Prosecution Unit requested that the PFA, National Gendarmerie, and Marine Forces submit documents that had been declassified under Decree Nos. 398/03 and 786/03 to further the investigation.<sup>65</sup> Each force complied with the request between August and September 2014. Some even submitted

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62. See Law No. 812/2005, Mar. 4, 2005, [30694] B.O. 1 (Arg.).

63. Compare Law No. 229/2006, Mar. 6, 2006, [30859] B.O. 3 (Arg.) (ordered the Special Investigation Unit to investigate irregularities in the attack investigation and authorized the Argentine Secretariat of Criminal and Penitentiary Policies of the Ministry of Justice and Human Rights to intervene as complainant) with Law No. 1157/2008, July 18, 2008, [31449] B.O. 1 (Arg.) (authorizing the Argentine Attorney General for the National Treasury to file a civil suit for the recovery of assets and remedies for the loss of government assets embezzled in the framework of the investigation into the attacks).

64. Law No. 229/2006, Mar. 6, 2006, [30859] B.O. 3 (Arg.); Law No. 1157/2008, July 18, 2008, [31449] B.O. 1 (Arg.).

65. Law No. 786/2003, Sept. 17, 2003, [30237] B.O. 2 (Arg.) (request issued after learning from a witness that the Federal Police Force had evidence of secret intelligence tasks that had been carried out but were not recorded in the order); see generally Law No. 398/2003, July 21, 2003, [30196] B.O. 1 (Arg.).

inventories of the evidence they had gathered.<sup>66</sup> On March 10, 2015, the Prosecution Unit also requested the declassification of documents that had been submitted to it in compliance with SI's Resolution No. 119/05 as well as any other evidence in under the possession of said agency.<sup>67</sup>

In response to the request, the Executive declassified all of the documents in the Prosecution Unit's custody, the additional documents selected by the URI of the former SI, and all new documents in the AFI's custody that had not already been submitted.<sup>68</sup> In compliance with the order, the AFI inspected its installations with the judges and officials of the Prosecution Unit, together with a government Civil-Law Notary.<sup>69</sup>

This inspection resulted in a massive evidence submission in the most diverse formats. It was initially estimated that, if lined up, the recovered boxes would extend over two kilometers. To review the evidence, a Special Document Survey and Analysis Task Force was created (GERAD, for its Spanish acronym).<sup>70</sup> Since June 2015, the Special Document Survey and Analysis Task Force restored and systematized information following a work protocol that tried to ensure the parties' rights, including the oversight over such work.<sup>71</sup>

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66. Law No. 229/2017, Apr. 5, 2017, [33600] B.O. 1 (Arg.) (On August 6, 2014, the Federal Police Force submitted three boxes of documents and two days later it submitted twelve more boxes that were stored in the Antiterrorism Investigation Unit's warehouse. On September 2, 2014, the Argentine National Gendarmerie submitted a summary report on Arab citizens. One was on Ms. Daniela Laura Rodríguez Piñas by the 33rd Precinct of "San Martín de los Andes" and consisted of 57 photographs and a video recording labeled under forensic evaluation No. 25665, which had been conducted by the former Directorate of Forensic Science. In addition, the Argentine National Gendarmerie reported that it had documents and other evidence in its warehouse; all of which is now in the Argentine Federal Criminal and Correctional Court No. 9. Lastly, on August 6, 2014, the Marine Force replied claiming it had no information that could help with the investigation); see MINISTERIO PÚBLICO FISCAL, UNIDAD FISCAL AMIA, EL PROCESO DE DESCLASIFICACIÓN DE INFORMACIÓN RESERVADA O SECRETA SOBRE EL ATENTADO Y SU ENCUBRIMIENTO 14 (2016), <https://www.fiscales.gob.ar/wp-content/uploads/2016/10/AMIA-Desclasificación.pdf>.

67. See Law No. 229/2017, Apr. 5, 2017, [33600] B.O. 1 (Arg.).

68. See Law No. 395/2015, Dec. 3, 2015, [33089] B.O. 1 (Arg.).

69. See MINISTERIO PÚBLICO FISCAL, *supra* note 66 (The government's Civil-Law Notary's record entries for March 16 and 18 and April 23, 2015).

70. LAW NO. 1872/2015, SEPT. 16, 2015, [33215] B.O. 13 (ARG.).

71. *Id.* (Later, the Special Document Survey and Analysis Task Force also examined the files of the Buenos Aires Police Force's Intelligence Directorate, which from 2000 to 2002, commissioned by the Provincial Remembrance

Regardless of its broad scope, Decree No. 395/2015 did not encompass every possible piece of documentary evidence.<sup>72</sup> Hence, the Prosecution Unit issued a series of new requests before the Executive, the Argentine National Congress, and even foreign intelligence agencies through the Office of the Attorney General and the Ministry of Foreign Affairs and Worship.<sup>73</sup>

The Executive Decree No. 229/2017 of April 2017 partially granted the request and declassified additional documents. The decree also ordered the Special Investigation Unit to intervene in the surveying, digitalizing, and detailing of the unit's declassified documents. To that effect, the decree assigned the Special Investigation Unit the facilities where such evidence was stored, which was until then under control of the AFI.<sup>74</sup> In addition, the decree ordered the Special Investigation Unit to collaborate with the Prosecution Unit to submit and transfer to their facilities any and all documents, reports, and files that were declassified in light of Decree No. 395/15 so that both units could "continue their work until the task is finalized."<sup>75</sup>

In June 2015, the Prosecution Unit also requested the Executive declassify the reports submitted in October 2003 by the General Director of Operations of the SI, and define the scope of

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Commission [Comisión Provincial por la Memoria], had in its power approximately 39,000 pages worth of documents that could help with the investigation).

72. *See generally* Law No. 229/2017, Apr. 5, 2017, [33600] B.O. 1 (Arg.) (This and its following decrees did not order the declassification of evidence submitted to the Investigations and Prosecutions Unit before and after Resolution "R" No. 119/2005. It only pertained to documents currently in the power of the Federal Police Force, National Gendarmerie, Marine Force, and former SIDE; nor did it extend to any evidence produced or obtained after its date of issuance); *see generally* Law No. 395/2015, Dec. 3, 2015, [33089] B.O. 1 (Arg.) (To date, it is still possible that there may be information out there of relevance to the investigation in the hands of other security forces, national government office, or within the power of the legislature).

73. In the framework of these requests, on October 25, 2016, the Investigations and Prosecutions Unit pinpointed certain matters of concern, including a group of documents held by what is currently the AFI which did not fall under the scope of Law No. 395/2015 because they had been submitted to the AMIA Prosecution Unit after Resolution "R" No. 119/2005 of the SI and had not been used by the Information Submission Unit. *See* Law No. 395/2015, Dec. 3, 2015, [33089] B.O. 1 (Arg.).

74. Law No. 229/2017, Apr. 5, 2017, [33600] B.O. 1 (Arg.).

75. MINISTERIO PUBLICO FISCAL, *supra* note 66 (The process of declassifying reserved or secret information about the 1994 bombing and its cover-up); *Id.*

that decision to allow the parties to access the documents. The SI admitted the request and ordered the reports declassified.<sup>76</sup>

One decade after the first administrative submission of general evidence, documents were massively submitted, but this time, with greater volume and more specific selection of evidence.<sup>77</sup> In fact, Decree Nos. 395/15 and 229/17 limited the description of how to identify the evidence to be declassified, ultimately broadening its scope to include “any and all new documents, reports, and files that have not already been submitted.”<sup>78</sup>

The decrees in question are very similar in scope and were issued by two presidential administrations that held opposing views of the investigation of the attacks. In sum, this situation might have ultimately contributed to establishing an Administration with a pro-access position with respect to the intelligence gathered during the investigation.<sup>79</sup>

However, in the scope of access to information, the government’s practices continue to limit the decrees’ effectiveness. The overall design and efficiency of the system for congressional supervision of intelligence agency operations merits a separate discussion. From a critical standpoint, Roberto Saba highlighted that “the right to access information to ensure the oversight and transparency of espionage and national security agencies is severely hindered, as has been the last thirty years and practically throughout all of Argentina’s history.”<sup>80</sup>

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76. See Resolución No. 1024/2015, June 3, 2015, [33142] B.O. 8 (Arg.) (Also ordered the Investigations and Prosecutions Unit to take any necessary measures for the parties to personally submit requests wherever the evidence was held, provided they neither reproduced nor disseminated it).

77. See generally Law No. 395/2015, Dec. 3, 2015, [33089] B.O. 1 (Arg.); see generally Law No. 229/2017, Apr. 5, 2017, [33600] B.O. 1 (Arg.).

78. Law No. 229/2017, Apr. 5, 2017, [33600] B.O. 1 (Arg.); See generally Law No. 395/2015, Dec. 3, 2015, [33089] B.O. 1 (Arg.).

79. See generally Law No. 395/2015, Dec. 3, 2015, [33089] B.O. 1 (Arg.); see generally Law No. 229/2017, Apr. 5, 2017, [33600] B.O. 1 (Arg.).

80. ROBERTO SABA, ACCESO A LA INFORMACIÓN Y SEGURIDAD NACIONAL, ESTUDIOS EN DERECHO A LA INFORMACIÓN, NO. 3, INSTITUTO DE INVESTIGACIONES JURÍDICAS, UNAM 99, 109 (2017) (Mex.).



### III. PART TWO: IDENTIFICATION, VALIDITY AND EVIDENTIARY POWER OF DECLASSIFIED EVIDENCE

#### A. Evidence Identification and Labelling

The first question regarding the use of intelligence documents in criminal procedures is whether the documents were adequately identified and labeled. The above analysis clearly reveals that the mere submission of documents previously in the custody of an intelligence agency does not amount to a genuine contribution of official intelligence to a judicial investigation. In fact, even a substantial change in the way the administration views its own role does not necessarily result in collaboration either. In the worst scenario, it can cause delays in the proceeding and create a heavier workload.

Typically, criminal procedure evidence is admitted in compliance with procedures or with a court order. This includes, for example, going through someone's phone records or tapping their phone.<sup>81</sup> Such information can only be obtained with a court order in the interest of preventing or investigating criminal activities.<sup>82</sup> In addition, that kind of surveillance is lawful inasmuch as legal procedure is followed.

Beyond that scope, there is also a large spectrum of cases in which government authorities may legally obtain information. The government can collect data in situations that do not necessarily involve criminal activities.<sup>83</sup> This includes perfectly legal government activities, such as border control, environmental monitoring, or migration control.<sup>84</sup> Under certain circumstances, intelligence can be lawfully gathered for genuine interests and may remain, to some extent, classified. In such cases, there is no direct relationship between the information gathered by the government and a criminal procedure. This information can be

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81. GEOFFREY S. CORN, JIMMY GURULÉ & JEFFREY D. KAHN, NATIONAL SECURITY LAW AND THE CONSTITUTION 618-20 (Wolters Kluwer, 1st ed. 2017).

82. *Id.*

83. Robert C. Power, *Intelligence Searches and Purpose: A Significant Mismatch Between Constitutional Criminal Procedure and the Law of Intelligence-Gathering*, 30 PACE L. REV. 620, 679-85 (2010).

84. See Kristina Davis, *The U.S Tracked Border Activists, Journalists and Attorneys. Is it Legal?*, L.A. TIMES (Mar. 10, 2019, 12:05 AM), <https://www.latimes.com/local/lanow/la-me-ln-us-tracked-activists-20190310-story.html>.

useful to a criminal case even though it is not obtained through the criminal procedure process for that particular purpose.

Moreover, in such cases, information is pieced together without regard for the intelligence agency involved. In other words, the information collected by the Executive often resulted from government activities that are independent of judicial activities, which, as a result, subjects that information to fewer checks. Ultimately then, the output of intelligence activities coexists with that of the judicial investigation.

When evidence is obtained in a transparent manner and for a clear purpose, performance is generally enhanced. The declassification, guided by the successive declassification requests during the Oral Criminal Court No. 3 trial, contributed to a certain calmness and order in the identification of each element. Specifically, the administrative selection of evidence submitted to the Prosecution Unit in 2005, though much more generic, followed a relatively logical criterion and included an index of organized files.<sup>85</sup> In contrast, the massive declassifications of 2015 and 2017 were much broader and their actual contents were never uncovered.

Hence, unlike the first batch of evidence submitted in the framework of the above described oral trial, the later submissions of declassified material posed a significant challenge to the receiving party in terms of identification and characterization. For later submissions of declassified material, the prosecutor, the judge, and the parties had to sort through hundreds of boxes of paper with no indication as to what documents corresponded to judicial orders and what documents were produced by intelligence activities.

The later submissions of declassified material posed even greater problems. Under normal circumstances, there is a direct relationship between validly submitted government information obtained for lawful intelligence purposes and interest in the outcomes of criminal proceedings. Whether or not the government can reasonably expect each piece of evidence to remain classified must be analyzed on a case-by-case basis, though a certain deference to the government's credibility is justified, both with

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85. MINISTERIO PÚBLICO PROCURACIÓN GENERAL DE LA NACIÓN [Public Ministry General Procuration of the Nation], 3/09/2004, "Telleldín, Carlos Alberto y Otros s/Homicidio Claificado," (2004) (Arg.).

respect to the content of the documents and the procedures followed for the documents' procurement.

However, some public events as well as the trial itself called for certain necessary clarifications. On one hand, the same level of judicial deference was not possible with respect to the evidence submitted by the government. This decreased the chances of inter-institutional collaboration and, in turn, resulted in fewer resources for the investigation. On the other hand, the inquiry into the possible irregularities committed during the first investigation expanded the scope of the judicial investigation. Thus, different investigations focused not only on the products of the intelligence activities, but also on whether they were obtained through the legal process.

This was the backdrop against which the 2005 and 2015 submissions occurred. Both submissions significantly increased judicial access to intelligence evidence. However, the evidence did not have proper references to descriptions nor to possible authors, and it was in a context of certain distrust towards the assignment's quality. In other words, both the judges and the parties had access to large volumes of evidence, but with insufficient elements necessary for interpretation.

The production of intelligence and dissemination of intelligence involve different, albeit related, procedures. As is the case with any procedure, it is possible to identify better practices. It is widely held that this is especially true when dealing with work that involves different phases, or an "intelligence cycle."<sup>86</sup> For example, The Operations Field Manual of the United States Army's Human Intelligence Collector (HUMINT) stipulates that intelligence procedures involve planning, preparation, collection, processing, and production, together with analysis, dissemination, and assessment.<sup>87</sup> The reporting phase is the last phase of all, and if the information obtained is not reported to the appropriate addressee in a precise and timely manner, the information is not useful.<sup>88</sup> Producing intelligence materials varies, depending on

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86. DEPT. OF ARMY, HUMAN INTELLIGENCE COLLECTOR OPERATIONS, FM No. 2-22.3 (FM 34-52) 1-1, 1-5 (2006), [https://armypubs.army.mil/epubs/DR\\_pubs/DR\\_a/pdf/web/fm2\\_22x3.pdf](https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/fm2_22x3.pdf).

87. *Id.*

88. John Joseph & Jeff Corkill, *Information Evaluation: How One Group of Intelligence Analysts Go About the Task*, SEC. RES. INST. 97 (2011), <https://ro.ecu.edu.au/cgi/viewcontent.cgi?article=1019&context=asi>; U.N. OFF. ON DRUGS AND CRIME, HANDBOOK ON CRIMINAL JUSTICE RESPONSES TO TERRORISM

specific moments and objectives; the absence of meaningful references prevents the efficiency of generic declassifications.

The 2015 and 2017 decrees could have provided better guidance through more precise and detailed wording. The lack of precision ultimately forced the prosecutor to take on the responsibility of preserving and filing evidence that, for decades, the Executive had produced and stored.

While this approach may seem superficial, the sheer volume of the files and the time that elapsed render it important. This experience suggests that the right to access information also involves a series of positive government obligations that go beyond merely declassifying information. Particularly, with respect to its own discretionary actions, the government should have provided a documented record of how information was obtained. Authorizing access to a warehouse with documents that had previously been deemed confidential is a necessary but insufficient step.

Additionally, this experience clearly reveals that there are several possible procedures for clearing access to declassified information. There is no doubt that access mechanisms require greater certainty. Better classification and storage routines would have enabled more orderly access to evidence. For example, The Freedom of Information Act (FOIA) in the United States enables access to information about the case through a standard mechanism, which is far more precise than Argentina's procedures.<sup>89</sup>

#### *B. Admissibility of Evidence Gathered by Intelligence Agencies in Criminal Procedures*

This experience also gives rise to a second issue: whether the evidence gathered by intelligence agencies is admissible in criminal procedures. Historians, intelligence agencies, and the judiciary share a common interest of evaluating evidence in a case.<sup>90</sup> However, the fact that some government activities for

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52 (2009),  
[https://www.unodc.org/documents/terrorism/Handbook\\_on\\_Criminal\\_Justice\\_Responses\\_to\\_Terrorism\\_en.pdf](https://www.unodc.org/documents/terrorism/Handbook_on_Criminal_Justice_Responses_to_Terrorism_en.pdf).

89. Freedom of Information Act, 5 U.S.C. §552 (1988).

90. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 6/03/2001, "Andres Pablo Paszkowski y Otros/ recurso extraordinario," Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2001-324-593) (Arg.).

intelligence purposes are legal does not necessarily mean that its product is admissible in criminal court.

In 1999, the Argentine Attorney General deemed that intelligence reports on the activities of a skinhead group were of “undoubted circumstantial value” with respect to the discriminatory nature of a hate crime.<sup>91</sup> In a decision handed down in the Israeli Embassy case on December 23, 1999, the Argentine Supreme Court repeatedly alluded to “intelligence reports” when deciding the fate of a defendant from a procedural point of view and assessing whether the investigation should continue.<sup>92</sup>

In general, the word “documents” is used to refer to the different records of intelligence agencies. However, not all records are documents in the legal sense of the term, i.e. as a material element that is, on its own accord, sufficient proof (under certain precautions) of an event or fact.<sup>93</sup>

Evidentiary freedom is the dominant standard in modern Western criminal procedural law. The Argentine Criminal Code (CPPN, for its Spanish acronym) includes the same principle in Article 206, which reads, “restrictions to investigations stipulated by law with respect to evidence gathering shall be not be applicable, with the exception of those pertaining to the civil status of individuals.”<sup>94</sup> Title III, Book II of the CPPN, governing so-called “Evidentiary Means,” does not explicitly govern documentary evidence; thus, it raises the question as to whether documentary evidence is, in a criminal proceeding, classified evidence, or whether it is governed by the rules of civil procedure or other areas of the law that touch on the matter more explicitly.<sup>95</sup>

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91. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 23/12/1999, “Dictamen del Procurador General/ Sobreseimiento Provisional,” Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1999-322-3297) (Arg.) [hereinafter *Dictamen del Procurador General*]; CORTE SUPREMA DE JUSTICIA DE LA NACIÓN [CSJN] [SUPREME COURT OF JUSTICE OF THE NATION], 14/06/2005, “SIMON, JULIO HECTOR Y OTROS S/ PRIVACION ILEGITIMA DE LA LIBERTAD/ RECURSO DE HECHO,” FALLOS (2005-253) (ARG.) [HEREINAFTER *SIMON*].

92. *Dictamen del Procurador General*, *supra* note 91; *Simon*, *supra* note 91.

93. *Dictamen del Procurador General*, *supra* note 91; *Simon*, *supra* note 91.

94. CÓDIGO PROCESAL PENAL [COD. PROC. PEN.] [CRIMINAL PROCEDURE CODE] art. 206 (Información Legislativa, Buenos Aires, 1921) (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/383/textact.htm#8>.

95. MICHELE TARUFFO, *LA PRUEBA DE LOS HECHOS*, 403-404 (Editorial Trotta, 2nd Ed. 2005).

It is clear that its inclusion in judicial practice would not be a problem today.

Regardless of how evidence gathered by intelligence agencies is characterized, the core issue involves the imprecision related to the nature of those evidentiary elements. This calls for clarification of, among other aspects, the validity of criminal evidence obtained by intelligence agencies, which depends on how the evidence was acquired. In simpler terms, and as a general rule, a person cannot be tried on the basis of evidence unlawfully obtained or subjected to procedures in which the chain of custody was somehow breached.<sup>96</sup>

The European Court of Human Rights (“ECHR”) had the opportunity to establish certain criteria for the admissibility of evidence in criminal cases obtained by intelligence agencies in the case of *A & Others v. UK* (2009), which involved suspected terrorist activity.<sup>97</sup> The Court analyzed Article 5(4), which provides for the right to have the lawfulness of detention speedily examined by a Court.<sup>98</sup> The defense argued that it did not have the opportunity to challenge the evidence upon which the prosecution’s terrorist activity accusation rested.<sup>99</sup> In response, the applicants stated that “some of the evidence in the proceedings was not disclosed to [them].”<sup>100</sup> In particular, the applicants noted that, in the United Kingdom, the procedure limited their contact with their defense lawyers and refused them access to certain evidence.<sup>101</sup> The Court found that “four of the applicants were indeed unable to effectively challenge the allegations against them.”<sup>102</sup> The ECHR found that:

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96. CÓDIGO PROCESAL PENAL [COD. PROC. PEN.] [CRIMINAL PROCEDURE CODE] arts. 216-217, (Información Legislativa, Buenos Aires, 1921) (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/383/texact.htm#2>.

97. “The Court’s general position on derogations is quite flexible and undogmatic. It shows that the Court is prepared to cut some slack to governments fighting terrorism, within certain limits.” Marko Milanovic, *European Court Decides A and Others v. United Kingdom*, EUROPEAN J. INT’L L: TALK! (Feb. 19, 2009), [ejiltalk.org/european-court-decides-a-and-others-v-united-kingdom/](http://ejiltalk.org/european-court-decides-a-and-others-v-united-kingdom/).

98. Article 5(4) of the Convention establishes that “[e]veryone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.” *Id.*

99. *Id.*

100. *Id.* at 236.

101. *See id.*

102. *Id.*

[T]he requirement of procedural fairness under Article 5(4) does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances.<sup>103</sup> As a general rule, an Article 5(4) procedure must have a judicial character but it is not always necessary that the procedure be attended by the same guarantees as those required under Article 6 for criminal or civil litigation.<sup>104</sup> The guarantees it provides must be appropriate to the type of deprivation of liberty in question.<sup>105</sup> Finally, “[t]he proceedings must be adversarial and must always ensure ‘equality of arms’ between the parties.”<sup>106</sup>

The Court parted from the fact that at the time the applicants were detained, there was thought to be an urgent need to maintain the source’s secrecy to prevent terrorist attacks.<sup>107</sup> Although it is true that part of the hearings were closed to enable the judge’s scrutiny, “the procedure . . . allowing the court to exclude the applicants and their lawyers from any part of a hearing was conceived in the interest of the detained person, and not in the interest of the police.”<sup>108</sup> This enabled the court to conduct a penetrating examination of the grounds relied upon by the police to justify further detention to show, in the detained person’s best interest, there were reasonable grounds to believe that further detention was necessary. The Court further found that the “District Judge was best placed to ensure that no material was unnecessarily withheld from the applicants.”<sup>109</sup>

According to the Court, terrorism falls into a special category.<sup>110</sup> Article 5(4) does not preclude the use of a closed hearing wherein confidential sources of information supporting the authorities’ line of investigation are submitted to a court, in the absence of the detainee or his lawyer.<sup>111</sup> It is important that the authorities disclose adequate information to enable a detainee to know the nature of the allegations against him and to have the

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103. *Sher v. United Kingdom*, 7 Eur. Ct. H.R. 337, 366 (2015).

104. *Id.* at 386.

105. *Id.* at 366.

106. *A v. United Kingdom*, 3 Eur. Ct. H.R. 595, 647 (2009).

107. *See Sher*, 7 Eur. Ct. H.R. 337, 367 (2015).

108. *Id.* at 368.

109. *Id.*

110. *Id.* at 367.

111. *See generally id.*

opportunity to refute them, and to participate effectively in proceedings concerning his continued detention.<sup>112</sup> Here, the Court accepted that the threat of an imminent terrorist attack justified “restrictions on the adversarial nature of the proceedings concerning the warrants for further detention, for reasons of national security.”<sup>113</sup>

In addition, it has been held that: “despite a traditional reluctance to engage with sensitive intelligence evidence [...] some national courts have become increasingly more at ease with assessing so-called secret evidence before reaching a conclusion on the appropriateness of imposing particular counter-terrorism measure(s) on an individual or organization.”<sup>114</sup>

Referring back to the issue of massively declassified evidence, it is clear that such evidence may be considered documentary evidence in the broadest sense and is typically admitted by the courts. However, the tenor of recorded events is not clear, such as the nature of the evidence and who authored each of the incorporated elements. Consequently, the quality of the proceedings that led to its inclusion in the government files cannot be easily assessed so as to overcome a certain standard of judicial scrutiny in every case, such as the one established by the European Court, for example. Overall, the evidence cannot be rejected in full. Instead, each element must be assessed individually.<sup>115</sup>

### C. *The Matter of Evidentiary Performance*

A final issue arises with respect to evaluating what evidence can legitimately be identified and used in the prosecution. To what extent is evidence gathered by intelligence agencies deemed persuasive? Should there be specific rules governing such matters? The question is particularly relevant when it comes to extremes like when evidence cannot be replaced by an alternative.

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112. *Id.*

113. *Id.* at 367-368.

114. Rumyana Grozdanova *The Right to Fair Trial and the Rise of Sensitive Intelligence Evidence: Responses from the Dutch and UK Courts*, *VERFASUNGBLOG*, (May 7, 2009), <https://verfassungsblog.de/the-right-to-fair-trial-and-the-rise-of-sensitive-intelligence-evidence-responses-from-the-dutch-and-uk-courts/>.

115. The Oral Criminal Court No. 2 seems to have reached a similar conclusion when striking down a generic challenge against the prosecutor’s reliance on evidence that had been gathered in the declassification process. *See generally* Case No. 487/00, *supra* note 23, at 3.



Inconveniences do not arise in cases where it is possible to prove a part of the information through usual evidentiary means. Imagine a situation in which an intelligence agent, whose confidentiality duties are waived, testifies in court about situations that he or she may have experienced. In such cases, procedures that start as intelligence activities, like tailing a suspect, become direct testimony, assuming, of course, that the agent was duly authorized to carry out such activity.

A more complex question deals with the use of evidence, gathered by intelligence agencies, that cannot be reproduced under any other format, particularly when it constitutes an intelligence agent's evaluation. Should such evidence be deemed as circumstantial evidence or as an expert opinion?

Intelligence analysts are "information translators, whose role is to review information and provide reliable intelligence in a [functionally] practical and operational format."<sup>116</sup> Analysts must look at several factors, including source aptitude, performance record, source origin, source motivation, bias, credibility, and pertinence of the information.<sup>117</sup> As a result, analysts create the actual intelligence product, distribute it, create its context, and advise on it and how it is generally perceived, in order to render it valid for decision-making purposes.<sup>118</sup> However, despite potential overlap, validity criteria at a political level does not always match criminal proceeding requirements.

A possible alternative is to assess whether information that supports an intelligence agency's conclusion could guide judicial proceedings with respect to its efficiency as evidence. There is extensive literature on the matter of producing intelligence, and, naturally, on the correctness of their estimations and which procedures could render such evidence more effective.<sup>119</sup>

Authors, John Joseph and Jeff Corkill, researched and wrote extensively on the assessment of evidence collected by intelligence agencies. According to their field work, the assessment of evidence collected by intelligence agencies is carried out in compliance with implicit and informal procedures.<sup>120</sup> This assessment relates to a number of matters such as relevance

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116. Joseph & Corkill, *supra* note 88, at 98.

117. *Id.* at 99.

118. *Id.* at 98.

119. *Id.* at 97.

120. *See id.* at 100.

and credibility, record, capacity and motivation of the source.<sup>121</sup> The authors also suggest that analysts assess these matters holistically with greater emphasis on how the different pieces of evidence relate to what is already known, rather than their individual value in a vacuum.

Joseph and Corkill also highlight the importance of interpreters. In order to make “estimates” in the intelligence field, it is essential to draw conclusions as to the credibility of sources, and this unavoidable task cannot be implicitly delegated onto individuals that are untrained or uninformed about available intelligence.<sup>122</sup> If this is true, then the use of intelligence agency conclusions belongs in a practical area of law, but outside of judicial procedures with limited exceptions.

Some authors similarly address the matter of the uncertainty surrounding such estimates. For example, Jeffrey Friedman and Richard Zeckhauser claim that analysts almost always face uncertainty about whether probabilities are ambiguous.<sup>123</sup> They also studied and discussed the idea of dealing with uncertainty while having to produce intelligence.<sup>124</sup>

An additional issue is the so-called “estimated chance” that tends to capture the extent to which a person believes a certain statement to be true.<sup>125</sup> The estimated percentage does not express the chances of something actually happening, but rather the personal conviction of the analyst.

It is also important to know whether an analysts of a single event handles uniform levels and amounts of information.<sup>126</sup> Friedman and Zeckhauser believe that an agent’s involvement in collecting evidence can generate a confidence overload with respect to that information.<sup>127</sup> Conversely, analysts that are charged with questioning the evidence, i.e. “Devil’s advocates,” have the opposite bias.<sup>128</sup> In sum, making a prediction is

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121. *Id.* at 97-103.

122. Jeffrey Friedman & Richard Zeckhauser, *Handling and Mishandling Estimative Probability: Likelihood, Confidence, and the Search for Bin Laden*, 1 J. INTELLIGENCE & NAT’L SEC. 13 (2014), [https://sites.hks.harvard.edu/fs/rzeckhau/Estimative\\_Probability.pdf](https://sites.hks.harvard.edu/fs/rzeckhau/Estimative_Probability.pdf).

123. *Id.* at 4.

124. Friedman & Zeckhauser, *supra* note 122.

125. *Id.* at 11.

126. *See id.*

127. *See id.*

128. *Id.* at 10.

challenging, and must be done in a way in which the decision maker can assess an analyst based on their credibility.

Another criterion for evaluating analysts' performance is focusing attention on different units of assessment, such as individual, team, divisions, agencies, and even the intelligence community as a whole. The criterion reveals another layer: the hierarchy of intelligence sources. Is a team's account worth more than an individual's account? Or, is the agency's assessment worth more than a division's assessment? If the hierarchy were based in analytical capacities or responded, at the normative level, to information validation systems, the answer could be affirmative. Thus, identifying who issued the report can constitute a relevant piece of information for giving value to the report. Nevertheless, Thomas Fingar, Argentine Director of Analytical Intelligence from 2005 to 2008, stated there are no mechanisms in place to evaluate collective performance and it is currently impossible to determine how well an individual analyst or unit is performing.<sup>129</sup> The systematic lack of information on precision, he stated, "feeds the perception of politicization or lack of information about the matters in question."<sup>130</sup>

In addition, there are formal assessment systems in place for information obtained for intelligence purposes. One of them is the NATO System. The other is the U.K. National Intelligence Model, which is also known as 5x5x5. The Intelligence Community Directive (ICD 203) defined adequate standards for exchanging information.<sup>131</sup> Yet, even considering these efforts, it is evident that uncertainty is inevitable. In fact, Friedman and Zeckhauser stressed that the American intelligence community has been highly criticized for making imprecise predictions.<sup>132</sup> As stated by Sherman Kent, "[e]stimating is what you do when you don't know."<sup>133</sup>

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129. THOMAS FINGAR, *REDUCING UNCERTAINTY: INTELLIGENCE ANALYSIS AND NATIONAL SECURITY* 34 (2011).

130. *Id.*

131. INTELLIGENCE COMMUNITY DIRECTIVE, ICD 203, ANALYTIC STANDARDS (2015), <https://www.dni.gov/files/documents/ICD/ICD%20203%20Analytic%20Standards.pdf>.

132. Friedman & Zeckhauser, *supra* note 122, at 3.

133. Sherman Kent, *Estimates and Influence*, in *SHERMAN KENT AND THE BOARD OF NATIONAL ESTIMATES: COLLECTED ESSAYS* (2007), <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi->

As a result, even a perfectly confectioned intelligence report will always be an estimation. This is why the “batting average” metaphor is used.<sup>134</sup> Not even the best players in baseball have high batting averages. This concept is critical when assessing intelligence reports used as evidence in situations where clashing views are to be expected.<sup>135</sup>

In the case at hand, the legal community will be tasked with determining the weight of each piece of evidence more accurately. Some parts of an investigation, documented in the declassified material, can be easily reproduced in established evidentiary formats. Others will possibly require further clarification of the circumstantial value before the Supreme Court is willing to admit the evidence gathered by the intelligence agencies. Even when giving weight to such materials can be justified, unifying all considerations on the basis of a single parameter is not an adequate and precise criterion, especially considering specialized literature on the topic.

In addition, the evidence assessed is ultimately an estimate. In other words, the criminal system must decide as to the value of evidence when the evidence is, by nature, the conclusion of a series of inferences. Thus, the goal is to evaluate the potential judicial efficiency of the product of a different discipline which is also nurtured by investigations and inferences.<sup>136</sup> The operation is naturally affected by the relative obscurity that exists with respect to work methodology and the way in which some of the investigation was deployed. Without such a response by the criminal system, the probative power in a trial tends to diminish,

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publications/books-and-monographs/sherman-kent-and-the-board-of-national-estimates-collected-essays/4estimates.html.

134. Jim Marchio, “How Good is Your Batting Average?” *Early IC Efforts to Assess the Accuracy of Estimates* (No. 4), 60 *STUD. IN INTELLIGENCE* 3, 5-8 (2016).

135. *Id.* at 11.

136. Thus, for example, Anderson, Schum, and Twining have stated that: “The investigations and inferences used in the analysis of the intelligence agencies share characteristics of the tasks performed in other areas, such as law, medicine, history and science. There are three disciplines in which people who carry out analytical tasks must be prepared to find and evaluate all kinds of substantial tests that are imaginable. Those disciplines are the law, the intelligence agency’s analysis and history. Establishing the relevance, credibility and inferential [probatory] force of the evidence is as important in the analysis of the intelligence agencies as in the law.” *TERENCE ANDERSON, DAVID SCHUM & WILLIAM TWINING, ANALYSIS OF EVIDENCE* 35-36 (Cambridge U. Press, 2nd ed. 2005).

even beyond the limitations normally posed by the use of this type of evidence.

#### IV. CONCLUSION

While the criminal process has improved by defining a narrower space for allowing state secrecy into an investigation, there are still several reasons that call for prudence regarding the efficiency of such investigational products. This paper describes three moments in the declassification process, each with a broader scope than the one before. At the same time, it also shows three matters that must be considered when facing the potential problems related to such information. Correctly identifying evidence, examining its procedural validity, and concluding about the possibilities and limitations of its use must all be a part of the equation to better use information appropriately.

# THE AMIA SPECIAL INVESTIGATION UNIT: AN OVERVIEW OF ITS HISTORY AND A PROPOSAL FOR THE FUTURE

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Agustín Cavana\*

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## I. INTRODUCTION

By June 2000, the Israeli-Argentine Mutual Association (AMIA) attack investigation had been open for almost six years and was being led by Federal Judge Juan José Galeano and two Federal Prosecutors, Jose Barbaccia and Eamon Mullen. Some months prior, Judge Galeano concluded the so-called “local connection” who helped the foreign attackers, including, Carlos Telleldín, the last known owner of the truck used as the car bomb, and a group of Argentine policemen, who had knowledge of the plan and allegedly delivered the vehicle to the foreign attackers, should stand trial.<sup>1</sup> Although the “international connection” investigation stalled because all the suspects had fled the country, there were ongoing efforts to gather additional leads and information about what had happened.

The investigators, however, faced allegations of serious misconduct and the investigation’s integrity had already been questioned. During 1995, Telleldín reported that a former military officer, who claimed to be a friend of his father, visited him in prison and offered him money in exchange for testifying that a Lebanese national, who at the time was being held in Paraguay, was involved in the attack.<sup>2</sup> In March 1997, Juan José Ribelli, another defendant in the case, requested to see Judge Galeano and gave him a copy of a video which contained a recorded meeting between Judge Galeano and Carlos Telleldín in which the two discussed a monetary payment

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1. *AMIA: pocas evidencias*, LA NACION (July 18, 1996), <https://www.lanacion.com.ar/sociedad/amia-pocas-evidencias-nid167940>.

2. Report Observation by Dean Claudio Grossman International Observer of the IACHR during the Trial about the Israeli-Argentine Mutual Association (AMIA), Captain Héctor Pedro Vergez visits, p. 2993/3020, <https://www2.jus.gov.ar/amia/grossman/Las%20visitas%20del%20Capitan%20Hector%20Pedro%20Vergez.pdf>.

in exchange for Telleldín's testimony.<sup>3</sup> Shortly after, a television program aired the material which prompted an investigation against Judge Galeano, but the case was closed in a matter of months.<sup>4</sup>

Thereafter, President Fernando de la Rúa created the Special Investigation Unit for the AMIA attack (hereinafter, "AMIA Unit" or "the Unit") to assist in the investigation. According to the Minister of Justice, Ricardo Gil Lavedra, this initiative was a sign that the government was committed to the investigation and intended to give "a strong push" to the trial that was about to commence.<sup>5</sup> The AMIA Unit began as a coordination body in which both intelligence and law enforcement agencies worked together to assist the judge and the prosecutors and carry out investigations.<sup>6</sup> A few months later, the AMIA Unit incorporated the Anti-Corruption Office and was in charge of a governmental official, who would represent the Executive Branch and have unrestricted access to all information related to the case.<sup>7</sup>

From this moment on, the AMIA Unit began to operate as an investigative body which withstood many changes throughout the case. The AMIA Unit was not the only way in which the Executive Branch participated in the AMIA case, but it was the only institution specifically created to take part in the case and did so for the longest amount of time. Under the management of seven lawyers, six men and one woman with experience in public office, the body carried out a broad spectrum of tasks while it represented the government for eighteen years until its dissolution in March 2018.<sup>8</sup> Therefore, a review of the AMIA Unit's history is useful in furthering our understanding of the Executive Branch's participation in the case and its attitude towards it.

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3. *No hay cosa juzgada*, INFOJUS NOTICIAS, <http://juicioamia.infojusnoticias.gov.ar/audiencias/no-hay-cosa-juzgada/> (last visited Oct. 14, 2019).

4. *Id.*

5. *Becerra coordinará la Unidad Especial de Investigaciones de la AMIA*, DIARIO JUDICIAL (Sept. 14, 2000), <https://www.diariojudicial.com/nota/38649> [hereinafter *Becerra coordinará la Unidad Especial de Investigaciones*].

6. Law No. 846/2000, arts. 1-4, Sept. 29, 2000, B.O. 1 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/60000-64999/64485/norma.htm>.

7. Law No. 107/2001, art. 1, Jan. 30, 2001, B.O. 1 (Arg.), <https://www.boletinoficial.gob.ar/#!DetalleNorma/7211797/20010130>; see Law No. 846/2000, *supra* note 6.

8. See Law No. 846/2000, *supra* note 6.



This paper's purpose is to examine the AMIA Unit's institutional trajectory and relationships with judges, prosecutors, victims, and government agencies involved throughout the case. First, this article argues the AMIA Unit failed to achieve its goals not only because of flaws and relative weaknesses in its design, but also due to the government's refusal to treat the AMIA case as more than a criminal investigation and the unwillingness to recognize the need to utilize non-judicial truth-seeking mechanism to move the process forward. Second, this article claims that, post-AMIA Unit dissolution, the government could have reversed damages caused by such omissions through two seemingly uncontroversial decisions: playing an active role in the on-going survey of the Intelligence Agency archives and releasing declassified documents.

This article's second section provides a brief description of distinctive traits in the Argentine legal system and a recap of relevant events of the AMIA case necessary to understand the AMIA Unit's role. The third section is devoted to the AMIA Unit's history and its main lines of work. In the fourth section, the AMIA Unit's legacy is examined to identify problems which affected its ability to make meaningful contributions to the investigation and prevented the Unit from becoming an important actor. Lastly, the fifth section proposes a work agenda that should be adopted and examines contributions it could make to the case. This paper concludes with brief thoughts regarding the case's the future.

## II. SOME BASIC FACTS ABOUT THE ARGENTINE LEGAL SYSTEM AND THE AMIA CASE

This section provides a brief description of Argentina's criminal justice system and partly explains why the government chose to participate in the investigation through the AMIA Unit. The Argentine Constitution states the prosecutors answer only to the Public Prosecutor's Office, an office independent from all other government branches, and bars the President from giving instructions to the Attorney General and federal prosecutors.<sup>9</sup> However, Argentina's federal law allows many actors, including the federal government, to take part in criminal proceedings as "victim complainants," granting them powers similar to the prosecutors.<sup>10</sup>

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9. Law No. 24.946, art. 1, Mar. 11, 1998, B.O. 1 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/804/norma.htm>.

10. *Id.*

Initially, the AMIA Unit was created to assist the leading judge and the prosecutors in the AMIA investigation. However, in 2006, the government took advantage of their ability to become a “victim complainant” in the criminal proceedings.<sup>11</sup>

This section’s last two segments recap the AMIA bombing’s main investigation and summarizes the events which prompted the criminal proceedings that spurred the AMIA II case. The AMIA II case investigated the attack’s alleged cover up and the initial investigation tampering. The second case sparked a division among victims which prompted the creation of several victim organizations, each attributing their different beliefs on effectiveness of the contributions made toward the AMIA bombing investigation by Judge Galeano and Federal Prosecutors Barbaccia and Mullen and the several Presidents who held office during these twenty-five years.<sup>12</sup> With each organization and community institution who participated in the criminal proceedings as victim complainants came extra layers of complexity.

#### *A. The Public Prosecutors Office and the Executive Branch*

The Republic of Argentina has a predominantly European-inspired civil law system and a criminal procedure code which distributes authority between the judges and prosecutors. The criminal procedure code also contains rules which dictate how criminal investigations and trials should be conducted. For example, all relevant activity and information must be documented in a file which is the main, and almost exclusive, source of information for the parties. The case file remains under the judge’s or the prosecutor’s custody, depending on who controls the investigation. Almost all criminal investigations are led by investigative judges who are responsible for gathering evidence and ultimately defining the case’s outcome by deciding whether or not the proceedings go to trial.<sup>13</sup>

The prosecutor’s role is to advise judges, propose investigative measures, and challenging judicial opinions with which they

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11. *Id.*

12. *AMIA: El Estado desistió de la acusación contra los ex fiscales Mullen y Barbaccia por encubrimiento*, PERFIL (Feb. 1, 2018), <https://www.perfil.com/noticias/politica/amia-el-estado-no-pidio-penas-para-los-ex-fiscales-mullen-y-barbaccia-por-encubrimiento.phtml>.

13. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 196 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/383/texact.htm#4>.

disagree. In certain circumstances, judges may delegate their investigative power to prosecutors.<sup>14</sup> Under federal law, judges are responsible for investigating particular crimes, such as kidnappings.<sup>15</sup> AMIA bombing investigation judges delegated their power to prosecutors as follows, Federal Judge Juan Jose Galeano led the investigation until 2005 when his successor, Federal Judge Rodolfo Canicoba Corral, handed the investigation over to prosecutors, Alberto Nisman and Marcelo Martínez Burgos, who were in charge of the recently created AMIA Prosecution Unit.<sup>16</sup>

Since the 1994 constitutional reform,<sup>17</sup> the independent Public Prosecutor's Office has been responsible for promoting justice, advocating for society's general interests, and defining its own criminal prosecution policy.<sup>18</sup> The Public Prosecutor's Office is not subject to the President's authority, nor does it represent the President before the courts. Although the President selects an Attorney General to lead the Public Prosecutor's Office, such selection is subject to two-thirds of Senate's approval.<sup>19</sup> Once appointed, the Attorney General has autonomy to exercise their duties and can only be removed for grave ethical or criminal misconduct through the same procedure established for removing Supreme Court justices.<sup>20</sup> Federal prosecutors are appointed through a similar procedure.<sup>21</sup>

Prosecutors are almost autonomous and do not receive specific instructions for how to handle cases from the Attorney General.<sup>22</sup> However, prosecutors are required to investigate all crimes of which they have knowledge and have limited discretion to engage in

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14. *Id.*

15. *Id.*

16. AMIA CASE: REPORT ON THE JUDICIAL ACTIVITY 1994-2015 (EXCERPTS), AMIA COMUNIDAD JUDIA, 33 (2016), <http://www.albertonisman.org/wp-content/uploads/2019/07/AMIA-Case-Report-on-the-Judicial-activity.pdf> [hereinafter AMIA CASE: REPORT ON THE JUDICIAL ACTIVITY].

17. Art. 120, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/804/norma.htm>.

18. Law No. 24946, art. 3, Mar. 23, 1998, B.O. 1 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/45000-49999/49874/texact.htm>

19. Law No. 24946, art. 5, Mar. 23, 1998, B.O. 1 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/45000-49999/49874/texact.htm>.

20. *Id.* at art. 18.

21. *Id.* at art. 5.

22. *Id.* at art. 31.

making deals or negotiating pleas with defendants.<sup>23</sup> With no authority over prosecutors or judges, the Executive Branch may cooperate with investigations through law enforcement agencies and provide additional support from the outside. If the Executive Branch wishes to participate directly in a case, it must do so as a “victim complainant.”<sup>24</sup>

### *B. Victims and Government Agencies’ Participation in Criminal Proceedings*

Argentina’s federal criminal procedure code allows for many actors to take part in criminal proceedings as “victim complainants.” Both victims of crimes or a victim’s parents, children, or surviving spouse can act as a “victim complainants.”<sup>25</sup> Legally registered associations may also act as a “victim complainant,” but only during cases in which the association’s statutory purpose is directly related to a trial for crimes against humanity or serious violations of human rights.<sup>26</sup> Since 1967, the Executive Branch has been able to participate in cases involving crimes against national security, public authorities, constitutional order, the public administration, and governmental assets.<sup>27</sup> Government agencies can intervene as “victim complainants” in cases related to their responsibility.<sup>28</sup>

Typically, government agencies which monitor highly regulated activities or combat complex crimes, such as money laundering and white-collar crimes, intervene as “victim complainants.” In other situations, the Executive Branch’s participation represents its commitment towards certain values or causes, including the public administration’s transparency or the fight against impunity. For

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23. *Id.*

24. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 82 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/383/texact.htm#4>.

25. *Id.*

26. *Id.*

27. Law No. 17516, art. 4, Oct. 31, 1967, B.O. 1 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/25000-29999/28644/norma.htm>.

28. Law No. 24946, art. 37, Oct. 31, 1967, B.O. 1 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/45000-49999/49874/texact.htm>; Law No. 20091, art. 67, Feb. 7, 1973, B.O. 1 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/20000-24999/20965/texact.htm>; Law No. 17811, art. 7, Jul. 22, 1968, B.O. 1 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/15000-19999/16539/texact.htm>.

example, in December 1999, President de la Rúa created an Anti-Corruption Office to act as a victim complainant in criminal cases against corrupt government officials.<sup>29</sup> More recently, President Kirchner and Christina Fernández de Kirchner, ordered the Ministry of Justice to intervene, as a victim complainant, in cases against former members of the Armed Forces for crimes against humanity.<sup>30</sup> The AMIA Unit became a part of this trend in March 2006 when they entered the AMIA II case as a victim complainant.<sup>31</sup>

To take part in a criminal proceeding as a victim complainant, the interested party must submit an application to the case's judge.<sup>32</sup> The judge determines whether the proposed victim complainant satisfied the legal requirements to join the criminal proceeding.<sup>33</sup> If application is not granted, the proposed victim complainant can appeal a rejected application.<sup>34</sup> However, if the application is granted, a victim complainant is admitted to the criminal proceedings and allowed to propose evidence gathering measures, file charges against the defendant, appeal adverse rulings, and participate in the trial.<sup>35</sup> Although victim complainants and prosecutors enjoy similar powers, there are three relevant differences: (1) judges cannot delegate investigative obligations onto a victim complainant, (2) victim complainants cannot challenge bail decisions; and (3) victim complainant's cannot make deals with defendants.

Without significant oversight, the Executive Branch directly appoints the attorneys who represent them in criminal proceeding. These lawyers usually answer to high-ranking government officials in the agency they represent during such proceedings. Unlike prosecutors, Executive Branch's lawyers are told what to do by their superiors. It is important to mention that while this arrangement

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29. Law No. 102/99, art. 2, B.O. Dec. 29, 1999 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/60000-64999/61724/texact.htm>.

30. Natalie Alcoba, *Argentina's Ex-President Kirchner Faces First Corruption Trial*, AL JAZEERA (May 21, 2019), <https://www.aljazeera.com/news/2019/05/argentina-president-christina-kirchner-faces-corruption-trial-190521131408914.html>.

31. Law No. 229/2006, art. 1-4, Mar. 1, 2006, B.O. 1 (Arg.) [servicios.infoleg.gob.ar/infolegInternet/anexos/11000-114392/norma.htm](http://servicios.infoleg.gob.ar/infolegInternet/anexos/11000-114392/norma.htm).

32. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 84 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=16546>.

33. *Id.*

34. *Id.*

35. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 80 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=16546>.

might seem obvious, the fact that a lawyer representing a government agency in a criminal case can be subjected to anyone's authority other than the law and the evidence of the case is somewhat controversial in Argentine legal culture.

While there is no legal impediment, it is uncommon for actual victims and the federal government to participate as victim complainants in the same proceeding, except in connection with crimes against humanity. Additionally, victims do not regularly hold entirely different views about event which lead to criminal trials or the defendant's responsibility. As an exception to all such principles, the AMIA case presents a series of distinctive features.

### C. *An Outline of the AMIA Case and its Offspring*

The AMIA case pursues two connected, independent theories respectively referred to as the attack's "local connection" and the "international connection." The former, which was particularly active between 1994 and 2004, investigated the alleged participation of Argentine citizens in the bombing.<sup>36</sup> Judge Galeano and Federal Prosecutors Mullen and Barbaccia pursued the hypothesis that, Carlos Telleldín, a used car salesman with a criminal record, and his associates used stolen vehicle parts to modify a Renault traffic van<sup>37</sup> allowing for a bomb to be placed inside the van before handing it over to a group of police officers. According to their theory, police officers Juan José Ribelli, Anastasio Leal, Raul Ibarra, and Mario Barreiro allegedly had knowledge of the final plan when delivered the van to those responsible for the attack.<sup>38</sup>

These defendants and several others stood trial before the Third Federal Trial Court of the City of Buenos Aires between September 2001 and September 2004, but each defendant was acquitted and the entire investigation was nullified. As such, Judge Galeano, Federal

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36. Alexei Barrionuevo, *Inquiry on 1994 Blast at Argentina Jewish Center Gets New Life*, N.Y. TIMES (July 17, 2019), <https://www.nytimes.com/2009/07/18/world/americas/18argentina.html>. Judge Galeano initiated the "local connections" investigation in 1994, but was impeached in 2005.

37. *Chronology of the AMIA Case 20 Years After the Attack*, BBC (July 18, 2014), [https://www.bbc.com/mundo/noticias/2014/07/140716\\_argentina\\_amia\\_cronologia\\_nc](https://www.bbc.com/mundo/noticias/2014/07/140716_argentina_amia_cronologia_nc).

38. *Carapintadas y terroristas en la mira*, LA NACION (July 27, 1997), <https://www.lanacion.com.ar/sociedad/carapintadas-y-terroristas-en-la-mira-nid73626>.

Prosecutors Mullen and Barbaccia, and several other high ranking investigators were accused of bribing witnesses, destroying evidence, and unlawfully depriving defendants of their freedom.<sup>39</sup> This ruling was appealed several times, but was ultimately, in May 2009, the Supreme Court affirmed the initial ruling which found only the investigation's first fifteen months were not tainted and there was enough evidence against Telleldín to conclude that he should face a retrial.<sup>40</sup>

Following the Third Federal Trial Court decision, the Council of Magistrates removed Judge Galeano from the bench and Federal Prosecutors Mullen and Barbaccia resigned. In September 2004, the Attorney General created the AMIA Prosecution Unit and appointed Alberto Nisman, who at that time already collaborated with Federal Prosecutors Mullen and Barbaccia, and Marcelo Martinez Burgos as lead prosecutors when.<sup>41</sup> Shortly thereafter, Federal Judge Rodolfo Canicoba Corral, who replaced Judge Galeano, handed investigation back to them. Caught in the midst of another scandal, Burgos resigned in April 2007, but Nisman led the AMIA Prosecution Unit until his death in February 2015.<sup>42</sup> After, the Attorney General decided at least three prosecutors were needed to lead the AMIA Prosecution Unit.<sup>43</sup>

The "international connection" investigation was carried out in two stages. Judge Galeano, Mullen, and Barbaccia led the first stage and the AMIA Prosecution Unit led the second.<sup>44</sup> The accusations arising from the two investigations are substantially similar, alleging

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39. Tribunal Oral en lo Criminal Federal N°3 de la Capital Federal [Oral Criminal Federal Court 3], "Telleldín, Carlos Alberto y otros s/ homicidio calificado atentado a la AMIA", Tribunal Oral Federal 3, (2004) (Arg.), <https://www2.jus.gov.ar/amia/sentencia/fallo.pdf>.

40. La Corte reabre investigación por el atentado a la AMIA, CENTRO DE INFORMACIÓN JUDICIAL (May 27, 2009), <https://www.cij.gov.ar/nota-1391-La-Corte-reabre-investigaci-n-por-el-atentado-a-la-AMIA.html>.

41. *Id.*; Ricardo Kirschbaum, *AMIA: destituyeron a Galeano*, CLARIN (Aug. 2, 2005), [https://www.clarin.com/ediciones-antiores/amia-destituyeron-galeano\\_0\\_SJsedfuk0Ke.html](https://www.clarin.com/ediciones-antiores/amia-destituyeron-galeano_0_SJsedfuk0Ke.html); *Cronología del caso AMIA a 20 años del atentado*, BBC NEWS (July 18, 2014), [https://www.bbc.com/mundo/noticias/2014/07/140716\\_argentina\\_amia\\_cronologia\\_nc](https://www.bbc.com/mundo/noticias/2014/07/140716_argentina_amia_cronologia_nc).

42. Raúl Kollmann, *El extraño giro de la causa AMIA*, PÁGINA 12 (Apr. 23, 2007), <https://www.pagina12.com.ar/diario/elpais/1-83936-2007-04-23.html>.

43. Aurelio Tomás, *Siete fiscales, novedades y varias polémicas en la unidad AMIA*, PERFIL (Jan. 17, 2019), <https://www.perfil.com/noticias/politica/nisman-siete-fiscales-novedades-y-varias-polemicas-en-la-unidad-amia.phtml>.

44. See Kirschbaum *supra* note 41.

that in Mashad, Iran on August 14, 1993, senior officials in the Islamic Republic of Iran met with Mohsen Rabbani and Ahmad Reza Asgahri, Iranian diplomats from the delegation to Argentina, and the Iranian Special Affairs Committee.<sup>45</sup> At the Iranian Intelligence and Security Office's request, the committee allegedly ordered an attack against the AMIA headquarters in Buenos Aires which members of Hezbollah, the terrorist organization, subsequently planned and carried out.<sup>46</sup>

Judge Galeano ordered their international arrests and persuaded Interpol to issue red notices for twelve Iranian citizens, including several Iranian diplomats.<sup>47</sup> However, following the Third Federal Trial Court's ruling and complaints from the Islamic Republic of Iran, Interpol suspended and ultimately canceled these initial red notices after Argentina failed to prove it conducted a faultless investigation.<sup>48</sup> In 2007, the AMIA Prosecution Unit, led by Judge Rodolfo Canicoba Corral, issued international arrest warrant against ten individuals for the aforementioned crimes and later convinced Interpol to reinstate red notices against six of the individuals.<sup>49</sup> Since then, the Argentine authorities have confirmed the death of two suspects, Imad Fayez Moughnieh and Ali Akbar Hashemi Bahramiaie Rafsanjani, as well as detected international movements of several others, but constantly fail to secure international cooperation to carry out the remaining arrests.<sup>50</sup>

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45. *See generally id.*

46. *Iran Charged Over Argentina Bomb*, BBC NEWS (Oct. 25, 2006), <http://news.bbc.co.uk/2/hi/americas/6085768.stm>.

47. Ralph Joseph, *Iran Seeks Documents Supporting Charges*, U. PRESS INT'L (Aug. 11, 1994), <https://www.upi.com/Archives/1994/08/11/Iran-seeks-documents-supporting-charges/9615776577600/>.

48. *Argentinean Red Notices for Iranian Officials Cancelled*, INTERPOL (Sept. 27, 2005), [https://www.interpol.int/en/News-and-media/News/2005/PR041/\[hereinafter Argentinean Red Notices\]](https://www.interpol.int/en/News-and-media/News/2005/PR041/[hereinafter Argentinean Red Notices]).

49. *Executive Committee Takes Decision on AMIA Red Notice Dispute*, INTERPOL (Mar. 15, 2007), <https://www.interpol.int/en/News-and-Events/News/2007/INTERPOL-Executive-Committee-takes-decision-on-AMIA-Red-Notice-dispute>, Wendy Carillo, *A Who's Who in Argentina's Alleged Cover-up of the Death of Alberto Nisman and the 1994 Bombing of the AMIA Jewish Center*, MEDIUM (Feb. 26, 2015), <https://medium.com/reportedly/a-who-s-who-in-argentina-s-alleged-coverup-of-the-death-of-alberto-nisman-and-the-1994-amia-bombing-e03aa38cc932>.

50. *AMIA: Se acreditó judicialmente la muerte de uno de los imputados por el atentado*, MINISTERIO PÚBLICO FISCAL (May 18, 2017), <https://www.fiscales.gob.ar/amia-se-acredito-judicialmente-la-muerte-de-uno-de-los-imputados-por-el-atentado/>.



Concurrent criminal investigations against Judge Galeano, the prosecutors, and several other government officials began in 1997, as a result of the leaked video recording of a conversation between Judge Galeano and Telleldín.<sup>51</sup> While initially dismissed, Claudio Lifschitz, Judge Galeano's former judicial clerk, gave a television interview in August 2000 where he claimed Judge Galeano's paid Telleldín to change his statement and revealed other irregularities allegedly committed during the investigation.<sup>52</sup> As such, the Minister of Justice, Ricardo Gil Lavedra, requested the Attorney General open new investigations into these events.<sup>53</sup> The investigation only gained momentum after the Third Federal Trial Court's ruling, later becoming what is known today as the AMIA II case.

The AMIA II trial hearing took place between 2015 and 2019.<sup>54</sup> The defendants were former President Menem, Judge Galeano, former Federal Prosecutors Mullen and Barbaccia, Telleldín, Telleldín's ex-wife, and Telleldín's former lawyer. Additional defendants included former leaders of the Intelligence Agency, Hugo Anzorreguy, Patricio Finnen, and Juan Carlos Anchezar, former police division leaders previously involved in the investigation, Carlos Castaneda and Jorge Alberto Palacios, and the Delegation of Israeli Argentine Association's (DAIA) former president, Ruben Ezra Beraja.<sup>55</sup> Each faced different charges, but the trial focused on Judge Galeano's payment to Telleldín and investigation tampering by Alberto Kanoore Edul, who allegedly used his family's friendship with President Menem to prevent the police from executing search warrants on several of his properties in attempts to destroy or suppress incriminating evidence.<sup>56</sup>

On February 28, 2019, the Second Federal Trial Court of Buenos Aires announced its verdict in which it convicted Judge Galeano, Federal Prosecutors Mullen and Barbaccia, Anzorreguy, Anchezar,

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51. *See No hay cosa juzgada, supra* note 3.

52. *Acusan a Claudio Lifschitz de recibir coimas*, LA POLÍTICA ONLINE (July 19, 2019), <https://www.lapoliticaonline.com/nota/nota-59441/>.

53. Raúl Kollmann, *Gil Lavedra le pidió a Becerra que investigue los dichos de Lifchitz*, PÁGINA 12, <https://www.pagina12.com.ar/2000/00-08/00-08-16/pag10.htm> (last visited Sept. 23, 2019).

54. *Judge Who Led AMIA Bombing Probe Given 6 Years in Jail; Menem Cleared*, BUENOS AIRES TIMES (Feb. 28, 2019), <https://www.batimes.com.ar/news/argentina/judge-who-led-amia-bombing-probe-given-6-years-in-jail-menem-cleared.phtml>.

55. *Id.*

56. *Id.*

Telleldín and Castaneda<sup>57</sup> and acquitted President Menem, Palacios, Finnen and Beraja were acquitted.<sup>58</sup> These decisions were appealed by several parties and, at the time of writing, is currently under review.

#### *D. Victim Participation in the AMIA and AMIA II Cases*

Shortly after the attack many victims and relatives separated into two separate organizations, “Family Members and Friends of Victims of the AMIA Attack”<sup>59</sup> and “Memoria Activa.”<sup>60</sup> Those who formed Memoria Activa would meet at the AMIA bombing site near the Supreme Court of Justice building.<sup>61</sup> Initially acting as a single victim complainant, the same lawyers represented such organizations and community institutions. However, in 1997, differences arose between Memoria Activa, whose members strongly criticized Judge Galeano’s work, and the community institutions who supported and believed in Judge Galeano’s work.<sup>62</sup>

As a result, Memoria Activa hired their own representation to pursue a divergent strategy and began acting as an independent victim complainant. Memoria Activa members were marginalized from relevant developments in the case due to differences with Judge Galeano and Federal Prosecutors Mullen and Barbaccia, while AMIA/DAIA lawyers had privileged access. For example, only one of DAIA’s attorneys was present during all three of Abolghasem Mesbahi’s statements.<sup>63</sup> Other victim complainants were denied access and Judge Galeano ignored the AMIA Unit’s repeated offers

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57. *Difunden los fundamentos de la sentencia del juicio oral por encubrimiento en la investigación del atentado a la AMIA*, CENTRO DE INFORMACIÓN JUDICIAL (May 3, 2019), <https://www.cij.gov.ar/nota-34335-Difunden-los-fundamentos-de-la-sentencia-del-juicio-oral-por-encubrimiento-en-la-investigaci-n-del-atentado-a-la-AMIA.html>.

58. *Id.*

59. Ignacio Rullansky et.al., *Estrategias Políticas De La Memoria: Las Agrupaciones De Familiares En Torno Al Caso AMIA Y Su Demanda De Justicia*, in 11 *HISTORIA, ESTADO, POLÍTICA Y MEMORIA: MIRADAS SOBRE LA SEGUNDA MITAD DEL SIGLO XX EN EL CONO SUR 3* (Esteban Pontoriero et al eds., 2005), <https://xdoc.mx/preview/actas-correspondientes-a-este-grupo-de-trabajo-5c140e1d963bd>.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

to provide technological means which would have allowed them to remotely follow the interrogation.<sup>64</sup>

In 2002, Laura Ginsberg, one of the original members of Memoria Activa, formed a new organization called, “Group for the Clarification of the Unpunished AMIA Massacre” (abbreviated in Spanish to APEMIA).<sup>65</sup> According to Alberto Zuppi, Memoria Activa’s lead attorney, the problem originated when he accepted President Alberto Rodríguez Saá’s offer to become Secretary of Justice.<sup>66</sup> Zuppi and other Memoria Activa members believed that this appointment would help propel the investigation forward, but Ginsberg disagreed. Ginsberg’s public criticism of Zuppi’s decision created a rift within Memoria Activa which ultimately led to APEMIA’s formation.<sup>67</sup> Since then, APEMIA hired its own representation and pursued a different strategy.

Further deepening the differences between the complainants was the Third Federal Trial Court’s 2004 finding that Ruben Ezra Beraja, the DAIA president at the time of the attack, might have been aware of Telleldín’s payment having instructed judicial authorities to investigate him.<sup>68</sup> Memoria Activa and APEMIA were very critical of Beraja’s participation in the first investigation and requested his conviction during the AMIA II trial.<sup>69</sup> In contrast, AMIA and DAIA repeatedly defended Beraja’s work in the case and denounced the charges against him as being politically motivated or unsubstantial. In fact, AMIA’s president harshly criticized the AMIA Unit for requesting his conviction during its closing argument.<sup>70</sup>

During a commemoration ceremony in July 2011, seventeen years after the attack, Sergio Burstein, a Family and Friends of Victims of the AMIA Attack member gave a controversial speech in which he heavily criticized the then Buenos Aires mayor, Mauricio Macri, for appointing Jorge Alberto Palacios, a defendant in the

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64. *Id.*

65. SANDRA BRUNNEGGER & KAREN ANN FAULK, A SENSE OF JUSTICE: LEGAL KNOWLEDGE AND LIVED EXPERIENCE IN LATIN AMERICA 57 (Sandra Brunnegger & Karen Ann Faulk eds., 2016).

66. KAREN ANN FAULK, IN THE WAKE OF NEOLIBERALISM: CITIZENSHIP AND HUMAN RIGHTS IN ARGENTINA 134, 187 (2013).

67. BRUNNEGGER & FAULK, *supra* note 65, at 53, 58.

68. *Id.* at 71. *See also* FAULK, *supra* note 66, at 74.

69. BRUNNEGGER & FAULK, *supra* note 65, at 54.

70. *Fuertes críticas de AMIA contra Cimadevilla por la acusación a Beraja*, LA POLÍTICA ONLINE (Feb. 28, 2018), <https://www.lapoliticaonline.com/nota/111042-fuertes-criticas-de-amia-contr-cimadevilla-por-la-acusacion-a-beraja/>.

AMIA II trial, as his chief of police, and called attention to journalist José Eliashev, who exposed that the Argentine government was negotiating a deal with Iran several months earlier.<sup>71</sup> As a result, Burstein was banned from future commemorations<sup>72</sup> and formed a new organization called, “Association 18-J-Family Members and Friends of the victims of the AMIA attack.”<sup>73</sup>

In late 2005, the Executive Branch began participating as a victim complainant in the AMIA II case through the Anti-Corruption Office, which was replaced by the AMIA Unit in March 2006.<sup>74</sup> Finally, the police officers who Judge Galeano charged and imprisoned, but were ultimately acquitted by the Third Federal Trial Court of the City of Buenos Aires, participated as victim complainants.<sup>75</sup>

### III. A BRIEF HISTORY OF THE AMIA UNIT’S WORK (2000-2018)

This section provides a brief overview of the AMIA Unit’s history which is divided into three separate eras based on its focus and its relationship with other governmental agencies and the parties to the proceedings. The first era began in 2000 when, after a few minor tweaks in its structure, the AMIA Unit began to operate under Nilda Garré’s direction. This first era lasted for about six years<sup>76</sup> and its distinctive feature was the tension between both Garré and her successor Alejandro Rúa and Judge Galeano and Federal Prosecutors Mullen and Barbaccia, who were already facing serious accusations

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71. *AMIA: al acto de homenaje a las víctimas terminó con polémica*, EL CRONISTA (July 19, 2011) <https://www.cronista.com/economiapolitica/AMIA-el-acto-de-homenaje-a-las-victimas-termino-con-polemica-20110719-0069.html>.

72. *Id.*

73. Natasha Zaretsky, *Struggles of Coherence: Listening as Political Agency in the Plazas and Streets of Memory*, in *LANDSCAPES OF MEMORY AND IMPUNITY: THE AFTERMATH OF THE AMIA BOMBING IN JEWISH ARGENTINA* 130 (Annette Levine et al eds., 2015).

74. See generally *Denuncia penal de un exfuncionario contra el ministro Garavano*, *LA NACION* (Mar. 23, 2018), <https://www.lanacion.com.ar/politica/denuncia-penal-de-un-exfuncionario-contra-el-ministro-garavano-nid2119479>; see also Luciana Bertoia, *Argentina Reacts to AMIA Cover-Up Trial Rulings – With Appeals Set to Follow*, *BUENOS AIRES TIMES* (Feb. 3, 2019), <https://www.batimes.com.ar/news/argentina/argentina-reacts-to-amia-cover-up-trial-rulings-with-appeals-set-to-follow.phtml> [hereinafter Bertoia, *Argentina Reacts to AMIA Cover-Up Trial Rulings*].

75. Bertoia, *Argentina Reacts to AMIA Cover-Up Trial Rulings*, *supra* note 74.

76. AMIA CASE: REPORT ON THE JUDICIAL ACTIVITY, *supra* note 16.

for their work on the case.<sup>77</sup> During this era, the AMIA Unit contributed to the investigation while publicly denouncing the judicial authorities and filing criminal charges against them.

The second era began in March 2006 when the Unit stopped supporting to the bombing's investigation to become a victim complainant in the AMIA II case led by AMIA Prosecution Unit and Federal Judge Canicoba Corral.<sup>78</sup> Until December 2015, the main parties' interests remained relatively synchronized and the AMIA Unit did not have any major conflicts with such parties. This era ended after the 2015 Argentine presidential elections, which provoked a renewal in the Minister of Justice's authority thereby signaling the beginning of the third and final era in which confrontations between the AMIA Unit's leadership and its superiors in their respective attempts to regain importance in the main AMIA investigation.

In March 2018, the AMIA Unit dissolved in the midst of a national restructuring process and new tampering accusations.<sup>79</sup> Shortly thereafter, then AMIA Unit's director, Mario Cimadevilla, filed a criminal complaint against then Minister of Justice, Germán Garavano, and several cabinet.<sup>80</sup> According to Cimadevilla, the Minister of Justice interfered with the AMIA Unit's strategy in the AMIA II case to prevent former Federal Prosecutors Mullen and Barbaccia from being convicted despite there been sufficient evidence against them.<sup>81</sup> The Truth and Justice Program, which has operated under the Ministry of Justice since 2007, absorbed the AMIA Unit's remaining responsibilities.<sup>82</sup>

#### A. *A Tough Start and Ambiguous Relationships (2000-2006)*

After three months, the government decided the AMIA Unit's leader should be a high-ranking government official who could serve as a liaison between the government, judicial authorities, and the victims and their families. The President's first pick was the

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77. *Id.*

78. *Id.* at 33-37.

79. *AMIA: Mario Cimadevilla acusó a Macri y Garavano de "encubrir amigos,"* PERFIL (Jan. 29, 2019), <https://www.perfil.com/noticias/politica/causa-amia-mario-cimadevilla-acuso-mauricio-macri-german-garavano-de-encubrir-amigos.phtml>.

80. *Id.*

81. *Id.*

82. *Id.*

Secretary of Political Affairs, Carlos Becerra, who only lasted a month in the position<sup>83</sup> and was later appointed Secretary General of the Presidency and then to the Secretary of Intelligence.<sup>84</sup> His replacement was Congresswoman Nilda Garré, who served as the Unit's coordinator until April 2001 and following a minor reform in its structure, became its Executive Secretary under the Secretary of Justice, Melchor Cruchaga.<sup>85</sup>

Nilda Garré's short lived cycle was largely focused on solving organizational problems which threatened to delay the trial. Nevertheless, Garré set the tone with those in charge of the attack's investigation. Throughout Garré's term, the AMIA Unit carried out several tasks Judge Galeano and the prosecutors ordered, but Garré remained very critical of their work and helped to expose the cover-up plot denounced by some victim's organizations.<sup>86</sup> Garré's administration ended in October 2001, after Federal Prosecutors Barbaccia and Mullen accused her of revealing Abolghasem Mesbahi's identity and leaking his testimony to the press, and José Hercman, DAIA's president, publicly asked for her resignation.<sup>87</sup> Garré received some support from Memoria Activa, whose lawyers claimed that the same information had already been made public, but it was not enough.<sup>88</sup>

Thereafter, Minister of Justice, Jorge De la Rúa, stated that Garré's declarations had been "very unfortunate" and that "her eagerness to let society know what was going on, caused her to cross

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83. FLORENCIA FONTAN BALESTRA, TOWARDS A DEMOCRATIC CONTROL OF ARGENTINA'S INTELLIGENCE COMMUNITY 23 (Int'l Ctr. for Crim. Jus. ed., 2007), <http://www.law.harvard.edu/programs/criminal-justice/argentina.pdf>.

84. Law No. 430/2001, art. 2-3, Apr. 23, 2001, B.O. 1 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/65000-69999/66741/norma.htm>.

85. *Id.*

86. *Juicio Por La AMIA: La DAIA Pide Que La Echen De La Comisión AMIA: Crece la presión para desplazar a Nilda Garré*, CLARIN (Oct. 4, 2011), [https://www.clarin.com/politica/crece-presion-desplazar-nilda-garre\\_0\\_BJUgJPg0Ke.html](https://www.clarin.com/politica/crece-presion-desplazar-nilda-garre_0_BJUgJPg0Ke.html).

87. BEATRIZ GUREVICH, PASSION, POLITICS AND IDENTITY: JEWISH WOMEN IN THE WAKE OF THE AMIA BOMBING IN ARGENTINA 31 (Hadassah-Brandeis Inst. Ed., 2005).

88. *AMIA: interrogarán a Mestre y Garré se fue del Gobierno*, EL DIA (Oct. 6, 2001), <https://www.eldia.com/nota/2001-10-6-amia-interrogaran-a-mestre-y-garre-se-fue-del-gobierno> [hereinafter: *AMIA: interrogarán a Mestre y Garré*]; *A Jorge de la Rúa no le gusta el "afán de informar" de Nilda Garré*, PÁGINA 12 (Oct. 1, 2001), <https://www.pagina12.com.ar/2001/01-10/01-10-04/PAG12.HTM> [hereinafter *A Jorge de la Rúa*].

the line,” and, thus, announced her resignation.<sup>89</sup> However, the criminal charges against her were quickly dismissed.<sup>90</sup> Months later in a television interview, Garré described Judge Galeano’s work as “abominable” and “shameful,” suggesting that AMIA, DAIA, and Judge Galeano were working together.<sup>91</sup> Garré was later elected to Congress, where she kept working to expose their crimes, the investigation’s flaws, and pushed for the impeachment of Judge Galeano’s and Federal Prosecutors Mullen and Barbaccia.

Garré’s replacement was Alejandro Rúa, a lawyer who had worked for the Ministry of Justice.<sup>92</sup> Rúa’s administration spanned throughout Judge Galeano’s investigation until the Nisman’s era began. Like his predecessor, Rúa worked with both Judge Galeano and the prosecutors, while attempting to expose the flaws in the investigation and the unequal treatments of the victim organizations. The AMIA Unit also drafted several decrees which allowed intelligence officers involved in the investigation to appear as witnesses during the trial while granting Judge Galeano and the prosecutors access to classified documents from intelligence and law enforcement agencies’ archives.<sup>93</sup>

Between 2001 and 2003, the AMIA Unit submitted work plans that contemplated carrying out investigative measures required by the judge, the prosecutors, and the victim organizations while also including more ambitious tasks.<sup>94</sup> First, the AMIA Unit was tasked with digitizing Argentina’s immigration records from 1992 through 1994 and the diplomatic cables the Ministry of Foreign Affairs received prior to the attack.<sup>95</sup> Later, Judge Galeano requested the Unit survey intelligence and law enforcement agency archives, which

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89. *AMIA: interrogarán a Mestre y Garré*, *supra* note 88.

90. See Daniel Schnitman, *La Voz y la Opinión*, YOUTUBE (July 20, 2002), [www.youtube.com/watch?v=o1Kg3KeHxAM](http://www.youtube.com/watch?v=o1Kg3KeHxAM).

91. *A Jorge de la Rúa*, *supra* note 88.

92. *Alejandro Rúa: “Cayó el impulso en la causa AMIA,”* LA NACION (Feb. 26, 2006), <https://www.lanacion.com.ar/opinion/alejandro-rua-cayo-el-impulso-en-la-causa-amia-nid783730> [hereinafter *Cayó el impulso*].

93. See Judge Galeano, Orders, [https://www2.jus.gov.ar/amia/Informe00/Informe\\_02.htm](https://www2.jus.gov.ar/amia/Informe00/Informe_02.htm).

94. See Law No. 846/2000, *supra* note 6.

95. Law No. 398/2003, art. 1, July 22, 2003, B.O. 1 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/85000-89999/86928/norma.htm>; Law No. 786/2003, art. 1, Sept. 18, 2003, B.O. 1 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/85000-89999/88547/norma.htm>.

the President had put at the disposal of the judicial authorities.<sup>96</sup> The AMIA Unit also announced its intention to create a repository for the materials' categorization and storage.<sup>97</sup>

Rúa's relationship with Judge Claudio Bonadio, who at the time led the AMIA II case, was strained and he ultimately asked to be separated from the case.<sup>98</sup> In one of the Unit's public reports, Rúa stated that Bonadio consistently denied requests to access case files and to be present during testimonies relevant to Rúa's work, in violation of Federal Court of Appeals' orders and, thus, suggested the need to relay this situation to the Council of Magistrates.<sup>99</sup> In the Unit's last report, Rúa described the ongoing conflict, during which the Federal Court of Appeals issued additional orders which Bonadio ignored.<sup>100</sup>

In December 2003, Judge Galeano was removed from the case, while Federal Prosecutors Mullen and Barbaccia were removed in April 2004 when they both resigned.<sup>101</sup> In September 2004, the Attorney General created the AMIA Prosecution Unit to take part in all AMIA related proceedings.<sup>102</sup> In October 2004, the Third Federal Trial Court of Buenos Aires acquitted every defendant from the "local connection" and ordered the investigation of Judge Galeano, Mullen, Barbaccia, President Menem, former Minister of Political Affairs, Carlos Corach, and various Federal Police and the Intelligence Agency members.<sup>103</sup> In August 2005, the Council of Magistrates removed Judge Galeano from the bench.<sup>104</sup> Both Rúa and Garré appeared as witnesses in the proceedings.<sup>105</sup> Thereafter,

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96. *Id.*

97. *Id.*

98. AMIA CASE: REPORT ON THE JUDICIAL ACTIVITY, *supra* note 16.

99. *See* Law No. 398/2003, *supra* note 96.

100. AMIA CASE: REPORT ON THE JUDICIAL ACTIVITY, *supra* note 16.

101. *See id.*; Marcela Valente, *ARGENTINA: Expulsions in AMIA Blast Case Revive Plaintiff Discord*, INTER PRESS SERV. (Apr. 14, 2004), <http://www.ipsnews.net/2004/04/argentina-expulsions-in-amia-blast-case-revive-plaintiff-discord/>.

102. *See* AMIA CASE: REPORT ON THE JUDICIAL ACTIVITY, *supra* note 16, at 132.

103. *Doctor Juan José Galeano's Pedido de Enjuiciamiento*, COUNCIL OF MAGISTRATES (Aug. 3, 2005), <https://www.pjn.gov.ar/Publicaciones/00006/00006904.Pdf>.

104. *Id.*

105. Raúl Kollman, *Un oscuro porvenir para usía*, PÁGINA 12 (May 14, 2004), <https://www.pagina12.com.ar/diario/elpais/1-35320-2004-05-14.html>.



Interpol's Executive Committee cancelled the twelve red notices in connection with the case.<sup>106</sup>

Rúa took part in the Inter-American Commission on Human Rights (IACHR) sessions in which Argentina took responsibility for its breaching several obligations of state. Argentina then committed to initiating a friendly settlement process to strengthen the AMIA Unit.<sup>107</sup> Rúa also assisted in drafting a new presidential decree which ordered all government agencies to refrain from destroying documentation possibly related or relevant to the AMIA case.<sup>108</sup> However, almost simultaneously, the Secretary of Intelligence ordered a transfer all of the classified documents which the Unit gathered from its archive to the AMIA Prosecution Unit.<sup>109</sup> These significant changes in the attack's criminal proceedings shifted the Unit into a new role.

#### *B. New Partners and a Change in Direction (2006-2015)*

A second era began in March 2006, when President Kirchner ordered the AMIA Unit to help move the AMIA II case forward, in compliance with Argentina's IACHR commitment, and to actively participate as a victim complainant.<sup>110</sup> Although the Executive Branch was already acting as a victim complainant through the Anti-Corruption Office, the AMIA Unit took over this responsibility.<sup>111</sup> Rúa claimed responsibility for this initiative and for convincing the Minister of Justice, Horacio Rosatti, to set this strategy.<sup>112</sup> A few weeks after, however, Rosatti resigned and was replaced with Alberto Iribarne, who, according to Rúa, did not support this decision and ultimately removed him from his position.<sup>113</sup>

Rosatti's departure and criticism of how Bonadio proceedings were handled diminished the case's momentum which then allowed

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106. *Argentinean Red Notices*, *supra* note 48.

107. Law No. 812/2005, July 13, 2005, B.O. 1 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/105000-109999/107751/norma.htm>.

108. Law No. 384/2005, art. 1, Apr. 29, 2005, B.O. 1 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/105000-109999/105875/norma.htm>.

109. *See id.*

110. Law No. 24.946, *supra* note 11.

111. *Id.*

112. *Cayó el impulso*, *supra* note 92.

113. *Id.*

for the Council of Magistrates to dismiss the case against Bonadio.<sup>114</sup> Minister Iribarne sued Rúa for slander, but that case too was quickly dismissed.<sup>115</sup> Alejandro Slokar, an experienced lawyer and criminal law professor, replaced Rúa as Secretary of Criminal Policy and Prison Affairs.<sup>116</sup> Since then, the AMIA II case evolved into the AMIA Unit's main focus. Prosecutors Nisman and Martinez Burgos were primarily responsible for investigating the attack.

Slokar gave various interviews which revealed the AMIA Unit's shift in focus. Slokar established the government's commitment to prosecuting the cover-up of the AMIA II case, while presenting the bombing's investigation as Nisman's responsibility. For example, when confirming the Federal Chamber of Appeals confirmed the indictment against Judge Galeano and the Federal Prosecutors Mullen and Barbaccia,, Slokar stated the federal government took "a significant step forward in the case, against impunity and in favor of establishing the role played by each one of the public officials that were responsible for covering up the attack," noting his office was analyzing the performance of the rest of the alleged participants "strictly and rigorously."<sup>117</sup>

The AMIA II case included Minister Gil Lavedra's complaint filed after the Lifschitz interview which mentioned Telleldín's payment and the investigation into the tampering of the Kanoore Edul's lead, both of which were already under the direction of Federal Judge Ariel Lijo.<sup>118</sup> Almost six years after the AMIA Unit's became a victim complainant, Federal Judge Lijo concluded both investigations and decided Menem, Judge Galeano, Federal Prosecutors Mullen and Barbaccia, Telleldín, and a group of police

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114. *Id.*

115. Raúl Kollmann, *Un delito que nunca existió*, PÁGINA 12 (Sept. 7, 2006), <https://www.pagina12.com.ar/diario/elpais/1-72637-2006-09-07.html>.

116. Law No. 229/2006, art. 2, Mar. 6, 2006, B.O. 1 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/110000-114999/114392/norma.htm>. See Sebastián Abrevaya, "Nisman Tiene Luz Verde de Interpol," PÁGINA 12 (July 15, 2007), <https://www.pagina12.com.ar/diario/elpais/1-88165-2007-07-15.html>; Slokar, *El Angel Abolicionista*, LA POLÍTICA ONLINE (Feb. 7, 2009), <https://www.lapoliticaonline.com/nota/nota-33594>.

117. *¿Ya de campaña? Ordenan pesquisar a Menem por AMIA*, ÁMBITO (July 3, 2007), <https://www.ambito.com/ya-campana-ordenan-pesquisar-menem-amia-n3438806> [hereinafter *¿Ya de campaña?*].

118. See *supra* Section II(c).

and intelligence officers should stand trial.<sup>119</sup> Judge Lijo, however, later acquitted four senior officials of Judge Galeano's court.<sup>120</sup>

The Federal Court of Appeals revoked Judge Lijo's decision to drop charges against Judge Galeano's former law clerks and ordered Judge Lijo to continue his investigation against them.<sup>121</sup> Judge Lijo resisted complying with such orders until he was finally removed from the case in May 2016. In a particularly harsh ruling, the First Chamber of the Federal Court of Appeals questioned Judge Lijo's "notorious inactivity" during the two-year period, accusing him of disobeying their rulings, and concluded he lost his impartiality.<sup>122</sup> Judge Sebastian Ramos, who replaced Judge Lijo, was tasked with the investigation against Corach.<sup>123</sup> To this day, however, none of these proceedings have significantly progressed.

In September 2011, Slokar was appointed as judge of the Federal Court of Cassation. At which time Juan Martín Mena, a lawyer who served as the Minister of Justice's Chief of Staff, took over the AMIA Unit for nearly four years. Under Mena, the Unit prepared for the AMIA II case trial and the Executive Power signed a memorandum creating an investigation commission with Iran, which was sent to Congress in the midst of the scandal.<sup>124</sup> Nisman died the night before the trial, as such, Mena was appointed as Assistant Secretary of Intelligence and tasked with reforming the Argentine intelligence system.<sup>125</sup> The three prosecutors who replaced Nisman

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119. Alvaro Herrero, *El juicio AMIA: después de 21 años y solo por el encubrimiento*, GLOBAL AM. (Aug. 5, 2015), <https://theglobalamericans.org/2015/08/el-juicio-amia-despues-de-21-anos-y-solo-por-el-encubrimiento/>.

120. *Los secretaries de Galeano: parte de la maniobra*, INFOJUS NOTICIAS, <http://juicioamia.infojusnoticias.gov.ar/causas-conexas/secretarios> (last visited Sept. 7, 2019).

121. *Id.*

122. Informe de Gestión Diciembre 2016, UNIDAD FISCAL DE INVESTIGACIONES DEDICADA A LAS CAUSAS VINCULADAS CON EL ATENTADO A LA AMIA 21, 22 (2017) ("informe-de-gestion-anual" under "Documentos").

123. *Id.*

124. Law No. 82/2011, Dec. 12, 2011, B.O. 1 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/190000-194999/191178/norma.htm>; Adriana Balaguer, *Juan Martín Mena, el espía nombrado por el Gobierno para alinear a la Justicia*, LA NACION (Jan. 4, 2015), <https://www.lanacion.com.ar/opinion/juan-martin-mena-el-espia-nombrado-por-el-gobierno-para-alinear-a-la-justicia-nid1756655>.

125. Law No. 1312/2015, art. 2, June 7, 2015, B.O. 1 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/245000-249999/248915/norma.htm>; Law No. 27126, Mar. 5, 2015, B.O. 1 (Arg.),

urgently requested the President declassify all Intelligence Agency documents on the case.<sup>126</sup> Although subject to various conditions, the prosecutors' declassification request was granted.<sup>127</sup>

Luciano Hazan, an experienced human rights lawyer who had worked for Memoria Activa between 2007-2009 and served as the Program for Truth and Justice of the Ministry of Justice's coordinator, replaced Mena in March 2015.<sup>128</sup> Hazan oversaw the initial stage of the AMIA II trial. However, Hazan's term ended in December 2015 when President Mauricio Macri was elected and installed his new cabinet.<sup>129</sup>

### C. A Failed Relaunch Followed by an Abrupt Ending (2016-2018)

President Macri relaunched the AMIA Unit on the anniversary of Nisman's death.<sup>130</sup> This last phase began with ambitious announcements, but ultimately ended with failed attempts to regain influence over the attack's investigation and a tense relationship between the Unit's leadership and the Ministry of Justice. President Macri appointed Germán Garavano, a former lawyer who served as Buenos Aires' District Attorney, as his Minister of Justice and chose Mario Cimadevilla, a former senator and member of the Council of Magistrates, as the AMIA Unit's leader. Cimadevilla and Garavano

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<http://servicios.infoleg.gob.ar/infolegInternet/anexos/240000-244999/243821/norma.htm>.

126. *Siete fiscales, novedades y varias polémicas en la unidad AMIA*, PERFIL (Jan. 17, 2019), <https://www.perfil.com/noticias/politica/nisman-siete-fiscales-novedades-y-varias-polemicas-en-la-unidad-amia.phtml> (The three prosecutors were Sabrina Namer, Roberto Salum, and Patricio Sabadini, who were later replaced by prosecutor Leonardo Filippini and Aurelio Tomas).

127. Law No. 395/2015, Dec. 3, 2015, B.O. 1 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/240000-244999/244799/norma.htm>.

128. Law No. 378/2015, art. 1, Mar. 3, 2015, B.O. 1 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/240000-244999/244556/norma.htm>.

129. Jonathan Gilbert, *Mauricio Macri, Argentina's New President, Is Sworn In Amid Feud With Predecessor*, N.Y. TIMES (Dec. 10, 2015), <https://www.nytimes.com/2015/12/11/world/americas/argentina-president-mauricio-macri-sworn-in-snubbed-by-kirchner.html>; *Germán Garavano, ministro de Justicia y Derechos Humanos*, LA NACION (Nov. 25, 2015), <https://www.lanacion.com.ar/politica/german-garavano-nid1848800>.

130. Ana Gerschenson, *Crearán una secretaría de Estado para seguir el caso sobre la muerte de Nisman*, EL CRONISTA (Dec. 11, 2015), <https://www.cronista.com/economia/politica/Crear-an-una-secretaria-de-Estado-para-seguir-el-caso-sobre-la-muerte-de-Nisman-20151211-0049.html>.

were supposed to lead the government's settlement with the victims, but conflicts between the pair besieged the Unit with accusations of wrongdoing and political manipulation.<sup>131</sup>

At the beginning of this phase, Minister Garavano declared the Unit should assess all suspicious activities related to the attack, including Alberto Nisman's death.<sup>132</sup> Cimadevilla championed for greater autonomy within the Unit and announced his intention to bring transparency to every AMIA related case and revealed the government was considering a possible trial in absentia to advance the otherwise paralyzed process.<sup>133</sup> The trial in absentia idea received mixed reviews from victim organizations, community institutions, and members of the government, ultimately presaging the challenges awaiting the Unit.

The DAIA expressed its support, describing the proposal as a step forward. AMIA's president stated the idea should be carefully examined and called for input from experts and victims.<sup>134</sup> Memoria Activa rejected the idea of a special proceeding, instead supporting a solution similar to that of the Lockerbie case.<sup>135</sup> The 18-J Association and APEMIA decried the idea as a farce whose goal was closing the case and consolidating the impunity of the perpetrators and accessories.<sup>136</sup> Ultimately, a draft was not sent to Congress, but presumably due to Cimadevilla's legislative allies, a coalition of senators from different political parties introduced the plan to Congress. The proposed amendment received some attention and was discussed in different congressional committees but was never approved by the Senate.<sup>137</sup> Some months later, it became known that

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131. *Carrió Acts on Impeachment Threat Against Justice Minister Garavano*, BUENOS AIRES TIMES (Oct. 17, 2017), <https://www.batimes.com.ar/news/argentina/carrio-lodges-impeachment-request-against-justice-minister-garavano.phtml>.

132. Eamonn MacDonagh, *Can Argentina's New Government Deliver Justice for Its Victims of Iranian Terror?*, TOWER MAG. (Jan. 2016), <http://www.thetower.org/article/can-argentinas-new-government-deliver-justice-for-the-amia-victims/>.

133. *New Argentina AMIA Investigator Eyeing Trial in Absentia*, JEWISH TEL. AGENCY (Jan. 14, 2016), <http://www.jta.org/2016/01/14/global/new-argentina-amia-investigator-eyeing-trial-in-absentia>.

134. Jaime Rosemberg, *AMIA: juzgarán en ausencia los iraníes*, LA NACION (Dec. 12, 2017), <https://lanacion.com.ar/politica/amia-juzgaran-en-ausencia-a-los-iranies-nid2090559>.

135. Raúl Kollmann, *La discusión del juicio en ausencia*, PÁGINA 12 (Dec. 20, 2015), <https://www.pagina12.com.ar/diario/elpais/1-288658-2015-12-20.html>.

136. Rosemberg, *supra* note 134.

137. *Id.*

the Ministry of Foreign Affairs had expressed its reservations to the President.<sup>138</sup>

On the second anniversary of Nisman's death, President Macri ordered the AMIA Unit to collaborate with officials to declassify documents in the case.<sup>139</sup> Until then, the survey of evidence had been under the direction of the prosecutors with very limited collaboration from the Intelligence Agency. Cimadevilla explained they were going to take over the responsibility, without side-lining the prosecutors, and planned on hiring experts to analyze the documents.<sup>140</sup> Because he failed to secure support from victim organizations, his remarks immediately prompted a heated response. APEMIA and Memoria Activa took on legal actions to prevent this from happening, arguing that the government was trying to meddle with the prosecutor's work and managed to get a ruling that ordered the AMIA Unit to follow the prosecutors lead.<sup>141</sup> The AMIA Unit finally settled on taking over some of the tasks that the Intelligence Agency had been performing.

Later, Cimadevilla went public with a dispute he had been waging against Minister Garavano, making several statements to the press about poor funding and limited resources. Specifically, Cimadevilla accused Minister Garavano of erecting "bureaucratic" barriers to his requests for additional funds needed to acquire specialized software that, purportedly, would allow the AMIA Unit to deepen their ongoing case analysis.<sup>142</sup> High ranking officials at the Ministry of Justice responded by questioning the judgment and dedication of Secretary Cimadevilla.<sup>143</sup> Thereafter, unnamed Ministry of Justice sources released derogatory comments about Cimadevilla's work to the press and claiming the AMIA Unit had fulfilled its

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138. Hernán Cappiello, *Reflotan en el Gobierno la Idea del juicio en ausencia por el atentado a la AMIA*, LA NACION (Jan. 6, 2019), <https://www.lanacion.com.ar/politica/reflotan-en-el-gobierno-la-idea-del-juicio-en-ausencia-por-el-atentado-a-la-amia-nid2208332>.

139. Law No. 229/2017, May 4, 2017, B.O. 1 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/270000-274999/273333/norma.htm>.

140. Martín Di Natale, *El Gobierno analiza cerrar la Unidad Especial de AMIA por falta de resultados y escasa transparencia*, INFOBAE (Sept. 4, 2017), <https://www.infobae.com/politica/2017/09/04/el-gobierno-analiza-cerrar-la-unidad-especial-de-amia-por-falta-de-resultados-y-escasa-transparencia/>.

141. *Id.*

142. *Id.*

143. *Id.*

purpose and that the government was assessing whether to close the unit.<sup>144</sup>

In March 2017, several weeks before the AMIA II trial's closing arguments, another issue was raised. An AMIA Unit lawyer resigned citing irreconcilable moral and ethical differences with José Console, a Garavano appointee, and claimed Console was trying to get a group of defendants acquitted.<sup>145</sup> In February 2018, the Secretary of Justice ordered Cimadevilla to fire Enrique Ventos, the attorney who was supposed to deliver the unit's closing argument in the AMIA II case, and passed the task to Console, who argued for Mullen's and Barbaccia's acquittal against the judgment of the rest of the AMIA Unit lawyers.<sup>146</sup> A few days later, Console was removed from the case after it was noted that he held a position in the Council of Magistrates that barred him from acting as a lawyer.<sup>147</sup>

AMIA's president praised the decision, but the remaining victims' organizations strongly criticized it. Cimadevilla made Garavano responsible for this decision, accusing him of interfering in order to protect Barbaccia due to an alleged friendship between them, and filed a criminal complaint against him and several Ministry of Justice officials.<sup>148</sup> Federal courts rapidly dismissed such decision.<sup>149</sup> Days later, the AMIA Unit dissolved and the Program for Truth and Justice of the Ministry of Justice absorbed its responsibilities.<sup>150</sup> A few months later, Memoria Activa and Congresswoman Elisa Carrió, leader of a political party of the governing coalition, called for

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144. *Id.*

145. *See Audiencia No. 120 – 1/2/2018*, MEMORIA ACTIVA (Feb. 1, 2018), <https://memoriaactiva.com/?p=2468>.

146. Hernán Cappiello, *La Justicia apartó al abogado del Gobierno en el juicio por la AMIA*, LA NACION (Feb. 23, 2018), <https://www.lanacion.com.ar/politica/la-justicia-aparto-al-abogado-del-gobierno-en-el-juicio-por-la-amia-nid2111529>; *El Gobierno planea diluir la unidad AMIA y desplazar a Cimadevilla del cargo*, POLÍTICA CHUBUT (Mar. 3, 2018), [https://politicachubut.com.ar/noticia/30720/el\\_gobierno\\_planea\\_diluir\\_la\\_unidad\\_a\\_mia\\_y\\_desplazar\\_a\\_cimadevilla\\_del\\_cargo](https://politicachubut.com.ar/noticia/30720/el_gobierno_planea_diluir_la_unidad_a_mia_y_desplazar_a_cimadevilla_del_cargo).

147. *Revés para el gobierno: apartaron al abogado del Estado en el juicio AMIA II*, TIEMPO ARGENTINO BETA (Feb. 22, 2018), <https://www.tiempoar.com.ar/nota/reves-para-el-gobierno-apartaron-al-abogado-del-estado-en-el-juicio-amia-ii>.

148. *AMIA: Mario Cimadevilla acusó a Macri y Garavano de “encubrir amigos,”* PERFIL (Jan. 29, 2019), <https://www.perfil.com/noticias/politica/causa-amia-mario-cimadevilla-acuso-mauricio-macri-german-garavano-de-encubrir-amigos.phtml>.

149. *Id.*

150. *See id.*

Garavano's the impeachment, but their request was not seriously considered.<sup>151</sup>

#### IV. THE QUESTION ABOUT THE AMIA UNIT'S LEGACY

This section examines the different strategies the AMIA Unit pursued and argues that while it initially helped to visualize and legitimize and make the victims' demands, the Unit's growing identification and overlap with other agencies heavily diluted its contribution to the case and made it difficult to assess. Particularly, the AMIA Unit's initial design and the attempts to relaunch it were not through independent assessments of the investigation's needs and problems nor through the potential benefits and contributions that might derive from the chosen intervention format. Its legacy and ability to influence the proceedings, therefore, was compromised by a flawed diagnosis of the investigation's weaknesses and by the difficulties it faced to its own agenda and to distinguish itself from other agencies. Despite all these difficulties, the main problem was the government's fixation on criminal justice as the only possible answer to the victim's demands and their unwillingness to look for alternative ways to find more information about what happened when it became clear that it could not deliver what was initially promised.

##### *A. A Rough Start: Political and Institutional Obstacles*

During the case's early stages, the AMIA Unit's ability to contribute to the investigation was hindered when the government refused to seriously address the accusations against Judge Galeano and Federal Prosecutors Mullen and Barbaccia, and due to a lack of authority and power to overcome the resistance from the intelligence and law enforcement agencies and precarious government records. All these flaws suggest that the Unit's creation had not been preceded by a proper assessment of the investigation needs and that the government failed to provide the additional support that necessary to move the investigation forward. By June 2000, the judge, prosecutors, and intelligence and law enforcement agencies had no incentives to build or maintain working relationships with the AMIA

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151. See *Elisa Carrió Sets Aim on Garavano, Calling for Minister's Impeachment*, BUENOS AIRES TIMES (June 6, 2018), <https://www.batimes.com.ar/news/argentina/elisa-carrio-sets-aim-on-garavano-calling-for-ministers-impeachment.phtml>.



Unit and most were interested in blocking any line of inquiry likely to expose their wrongdoing.

Even so, the government insisted the AMIA Unit should function as an extension of the judge and the prosecutors, acting as a nexus between them and the intelligence and law enforcement agencies. Predictably, this arrangement did not work out and the AMIA Unit was never a focal point, nor did it help improve coordination between agencies. Instead, the AMIA Unit exposed differences and made investigation's flaws more noticeable. The AMIA Unit was not able to assert its own authority and had no choice but to rely on the President or a higher court to step in. However, the government often failed to provide adequate support and occasionally sided with the Unit's rivals. The internal investigations against intelligence officials ordered by the former AMIA Unit director and Secretary of Intelligence, Carlos Becerra, were stalled and did not result in any meaningful action.<sup>152</sup> Garré and Rúa's efforts to influence the investigation and further the criminal charges against Judge Galeano and the prosecutors were either ignored or obstructed. The higher courts, on the other hand, laid down favorable rulings, but their orders were often resisted and the Council of Magistrates failed to respond accordingly.

Despite everything, some judicial requests made to the AMIA Unit were undoubtedly useful. In fact, they exposed deeper causes behind the shortcomings and ultimately showed that any serious attempt to drive the investigation forward would have to include an ambitious institutional reform plan. For example, the Direction of Migrations refused for many years to survey its own archives for patterns or records relating to persons of interest, arguing that the task was extremely time consuming and it lacked the appropriate resources.<sup>153</sup> The Ministry of Foreign Affairs proved equally incapable of searching and identifying diplomatic cables relevant to the investigation. All of these tasks were passed to the AMIA Unit without proper directions.

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152. See *Becerra coordinará la Unidad Especial de Investigaciones*, *supra* note 5; *Dicen que hubo duras internas en la SIDE*, LA NACION (Sept. 25, 2003), <https://www.lanacion.com.ar/sociedad/dicen-que-hubo-duras-internas-en-la-side-nid530533>.

153. See *Terrorism in Latin America/AMIA Bombing in Argentina: Hearing Before the Comm. on Int'l Rel.*, 104th Cong. (1st Sess. 1995), at 22, <https://ia600900.us.archive.org/3/items/terrorisminlatin00unit/terrorisminlatin00unit.pdf>.

The presidential order to preserve all information potentially useful for the case was not backed by a concerted implementation effort. The intelligence and law enforcement agencies never seemed to overcome the initial disruption the attack caused, thus, evidence was lost or remained misplaced for years. The most notorious example was the discovery of unaccounted human remains found in a Federal Police laboratory in September 2016.<sup>154</sup> These shortcomings in many government archives and databases were not comprehensively addressed.<sup>155</sup> In fact, only flaws which judicial authorities labeled as a priority were and, in some cases, are still being surveyed.<sup>156</sup>

Overall, the AMIA Unit's creation had the unwanted effect of relieving other government agencies from any duty to contribute to the investigation, even if this meant as little as keeping potentially useful documents and records available and organized. As the government representative in the investigation, the AMIA Unit was in an uncomfortable position as it could not explicitly denounce these failings and difficulties. The AMIA Unit and its leadership had no option but to try to overcome them, despite lacking appropriate resources or proper guidance from investigators who refused to share their hypothesis.

### *B. Lack of Stability and Support in Key Moments*

For the most part, the government relied on the judges and prosecutors to set the priorities and to define what had to be done. The AMIA Unit's mandate was defined loosely and the government made no attempt to identify alternative courses of action or to set objectives of its own. This void was filled by the leadership's initiative, but sometimes their decisions were not anticipated, nor supported by their superiors. On a few occasions, these differences sparked conflicts with the Ministry of Justice and the victim's

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154. *UFI-AMIA: encontraron pruebas sin inventariar en el Laboratorio Químico de la Policía Federal Argentina*, MINISTERIO PÚBLICO FISCAL (Sept. 12, 2016), <https://www.fiscales.gob.ar/amia/ufi-amia-encontraron-pruebas-sin-inventariar-en-laboratorio-quimico-de-la-policia-federal-argentina/>, *AMIA: Genetistas encuentran ADN de dos de las víctimas en los restos de la camioneta hallada en el atentado*, MINISTERIO PÚBLICO FISCAL (July 27, 2017), <https://www.fiscales.gob.ar/amia/amia-genetistas-encuentran-adn-de-dos-de-las-victimas-en-los-restos-de-la-camioneta-hallada-en-el-atentado/>.

155. Dexter Filkins, *Death of a Prosecutor*, THE NEW YORKER (July 20, 2015), <https://www.newyorker.com/magazine/2015/07/20/death-of-a-prosecutor>.

156. *Id.*

organizations and led to changes which undermined the Unit's ability to pursue steady and consistent lines of inquiry and work throughout the years.

Without government support and due to the Argentine criminal justice system's distinctive traits, judicial authorities ignored or dismiss the AMIA Unit's requests and proposals, thereby eroding the Unit's authority without facing consequences. The AMIA Unit also failed to take advantage of its own powers and, particularly, to exploit the full potential of its ability to conduct independent investigations and access government archives related to the subject. Perhaps, the emphasis placed on the need to gather evidence and further the criminal investigations discouraged the Unit's leadership from looking for alternatives ways to contribute.

Once Judge Galeano and the prosecutors were removed from the case, the interests of the several agencies involved in the investigation realigned and opening the possibility of collaborative work, but the government did not seize this opportunity.<sup>157</sup> Instead of promoting a task division, the President removed the AMIA Unit from the investigation, ordered the Intelligence Agency to transfer the files that were being surveyed to the newly created AMIA Prosecution Unit, and changed its focus to the AMIA II case and the cover-up plot. Thereby, deepening its overlap with other agencies.<sup>158</sup>

Slokar's statements about the AMIA Unit's work clearly show this shift in its focus, as he began referring to the AMIA Prosecution Unit as bearing sole responsibility for investigating the terrorist attack and constantly underlined the government's commitment to bringing those charged with tampering with the initial inquiry to justice, while explaining the difficulties to do the same with those responsible for the actual bombing.<sup>159</sup> Slokar's public discourse seemed to reflect the consensus that during the Unit's second stage his successors faced an increasingly demanding scenario and were further constrained by the AMIA II trial's requirements.

These changes made it more difficult for the Unit to set a clear and coherent outreach strategy, however, the government and the

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157. See Filkins, *supra* note 155; Bertoia, *Argentina Reacts to AMIA Cover-Up Trial Rulings*, *supra* note 74; Ben Cohen, *25 Years After the AMIA Bombing, Justice Is Denied Again*, THE ALGEMEINER (Mar. 4, 2019), <https://www.algemeiner.com/2019/03/04/25-years-after-the-amia-bombing-justice-is-again-denied/>.

158. Filkins, *supra* note 155; Bertoia, *Argentina Reacts to AMIA Cover-Up Trial Rulings*, *supra* note 74; Cohen, *supra* note 157.

159. Abrevaya, *supra* note 116; *¿Ya de campaña?*, *supra* note 117.

AMIA Unit took steps to disseminate information about the case launching a website and publishing the first trial verdict online.<sup>160</sup> Its news agency even published a special report on the AMIA II case.<sup>161</sup> But these initiatives were few and far between, almost exclusively focused on the cover-up plot. Meanwhile it is hard to recognize a consistent effort to address the victims' concerns and expectations, even when case distinctive traits made it clear that finding some common ground with the organization's and community institutions was important to the success of the Unit's work. Under these circumstances and after eighteen years of work and right before the end of the trial, the AMIA Unit still found itself in a vulnerable position.

### *C. Problems to Determine the Impact of the AMIA Unit as a Victim Complainant*

The decision to focus on the AMIA II case and to act as a victim complainant worsened the AMIA Unit's overlap problem. Again, it seems unlikely this shift in the AMIA Unit's strategy was predicated on an assessment achievable by acting in this capacity and such results were certainly not monitored throughout the years. With this decision, the government may have intended to signal an inflection point in its attitude towards the case by siding with the victims before the courts.<sup>162</sup> But, arguably, as this goal was achieved, the AMIA Unit's influence and importance was diluted.

The AMIA Unit acted as a victim complainant for twelve years and its impact on the AMIA II case remains unclear and difficult to determine. The way in which the Argentine criminal justice system tracks activity, the fact that the AMIA Unit shared responsibilities with the judge, the prosecutors, and the victims, the secrets which usually surround investigations, the extent of both the investigation and the trial, and the limited media coverage, among many other factors, may prevent us from ever appreciating the full magnitude and importance of AMIA Unit's work. But the publicly available information suggests that it has little to show for.

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160. *2 Bombas 107 Muertos, Fallo del Tribunal Oral*, <https://www2.jus.gov.ar/amia/sentencia/fallo.pdf> (last visited Sept. 6, 2019).

161. *Hubo una nueva audiencia por el encubrimiento del atentado a la AMIA*, INFORJUS NOTICIAS, <http://juicioamia.infojusnoticias.gov.ar/audiencias/audiencia-xix/> (last visited Aug. 23, 2019).

162. Abrevaya, *supra* note 116.

The indictments against Judge Galeano, Federal Prosecutors Mullen and Barbaccia, and the defendants coupled with the rulings that ordered them to stand trial barely mention the AMIA Unit's work and filings. The government's involvement also failed to speed up the proceedings. The AMIA II case had been open for six years when the AMIA Unit became a victim complainant and, thirteen years later, it is far from over.<sup>163</sup> While the trial's verdict was handed down in 2019, the Second Federal Trial Court from the City of Buenos Aires, the appeal process will surely take several years.<sup>164</sup> The criminal proceedings against Judge Galeano's judicial clerks and the former Ministry of Interior, Carlos Corach, are still in their preliminary stages.<sup>165</sup> At the time of this writing, Telleldín was being tried for his alleged participation in the attack.<sup>166</sup>

While the AMIA II case may be characterized as complex because of its political implications, the volume of information that needed to be processed, or the resistance and obstacles it faced throughout the years. The charges brought against the defendants were straight forward, making it harder to argue the AMIA Unit's intervention was to provide technical assistance or to make up for potential flaws in the prosecution strategy. The victim's organizations, on the other hand, acted as victim complainants exercising their own representation in the investigations and trials.<sup>167</sup>

Finally, during the preliminary investigation, the judge, the AMIA Unit, and the prosecutors did not have significant disagreements regarding the facts or proper strategies, merely experiencing relatively minor differences during the trial. In fact, the Garavano-Cimadevilla incident was the only serious disagreement between the parties. Thus, the government did not act as a victim complainant to assert a particular case theory.

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163. *Audiencia No. 174 – La Sentencia*, MEMORIA ACTIVA (Feb. 28, 2019), <http://memoriaactiva.com/?p=3059>.

164. *See id.*

165. Bertoia, *Argentina Reacts to AMIA Cover-Up Trial Rulings*, *supra* note 74.

166. Comenzó un juicio oral contra Carlos Telleldín en la causa por la conexión local del atentado a la AMIA, CENTRO DE INFORMACIÓN JUDICIAL (May 8, 2019), <https://www.cij.gov.ar/nota-34357-Comenz-un-juicio-oral-contra-Carlos-Telleldin-en-la-causa-por-la-conexi-n-local-del-atentado-a-la-AMIA.html>.

167. Natasha Zaretsky, *An AMIA Verdict is Read in Argentina. But is it Justice?*, GLOBAL AM. (Mar. 1, 2019), <https://theglobalamericans.org/2019/03/an-amia-verdict-is-read-in-argentina-but-is-this-justice/>.

*D. The Insularity of the AMIA Unit and its Overly Limited Approach to the Case*

Initially, the government's main pursuit in the AMIA case was to bring the perpetrators to justice and, later on, it shifted to prosecuting those who allegedly tampered with the initial investigation. The government's emphasis is always placed in criminal justice and accountability. For the first twelve years, the government described the AMIA headquarters bombing as just a criminal act, instead of as a crime against humanity or as a human rights violation.<sup>168</sup>

The government's vision of what it could do to respond to such events foreclosed on other alternative responses, despite the fact that different measures were needed and possible. Around the same time, the human rights movement prevailed when it reopened the criminal investigations against those responsible for crimes against humanity during the last military dictatorship, with such cases being met with a more sophisticated approach.<sup>169</sup> The government used new tools which were utilized in the transitional justice process, but failed to involve the AMIA Unit in a significant way and to truly diversify its aim. As such, punishment was seen as the one and only legitimate answer.

At Judge Galeano's request, the AMIA Unit became responsible for the Intelligence Agency archives survey. In 2005, the Unit was also involved in the proceedings before the Inter-American Commission.<sup>170</sup> When Judge Galeano was removed from the case, the government failed to recognize the importance of the Inter-American Commission proceedings and withdrew. The government disregarded the *Grossman* report recommendation to further its own truth-seeking effort.<sup>171</sup> Ten years later, again after judicial authorities made requests, the President ordered the largest declassification in the case's history, but merely transferred the custody of these documents to the prosecutors and provided limited

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168. Filkins, *supra* note 155.

169. María José Gumbe, *Reopening of Trials for Crimes Committed by the Argentine Military Dictatorship*, 3 INT'L J. ON HUM. RTS., 115 (2005).

170. Press Release, Inter-Am. Comm'n on Human Rights, IACHR Expresses Satisfaction at the Argentine State's Acknowledgement of Liability in the AMIA Case (Mar. 4, 2005).

171. Brian Byrnes, *Terror Case Lawyer Alleges Agents Tortured Him*, CNN WORLD (Mar. 9, 2009), <http://edition.cnn.com/2009/WORLD/americas/03/09/argentina.probe/>.

assistance.<sup>172</sup> Finally, the AMIA Unit attempts to get involved in the attack's investigation were poorly crafted and raised suspicions and resistance from the victims' organizations.<sup>173</sup>

The government declared the attack's thirteenth anniversary a national mourning day and requested Congress to enact a reparations program for the victims, but the AMIA Unit did not play a significant role in either request.<sup>174</sup> While many programs and institutions that collaborated with the transitional justice reform were either created or had worked under the Ministry of Justice's supervision, none were involved in the attack, the cover-up investigation, nor had any meaningful interaction with the AMIA Unit.

Furthermore, since the case against the alleged local connection unraveled, it became clear that the bombing's investigation was unlikely to end successfully and that criminal prosecutions were fundamentally ill-suited to undo the damage that had been done to the process's credibility. For many years, the government acted as if it could eventually fulfill its promise for justice, then merely relegated to asking victims to settle on punishing those responsible for tampering with the first investigation, thereby accepting that answers were no longer within the government's reach.

The AMIA Unit's inefficiency, inability to assert its will, and lack of purpose were problematic, but those were not the only reasons the Unit failed or, more specifically, why it was destined to fail. It is hard to believe that the results would have turned out differently had the AMIA Unit led the investigation. In this respect, the AMIA cases was handled exceedingly differently from the multi-layered approach used to address the crimes against humanity committed by the Argentine dictatorship and its legacy of violence. The government, however, insisted on this different strategy, doubled down when it became a victim complainant in the AMIA II case.

#### V. AN OPPORTUNITY TO DO BETTER: A PROPOSAL FOR THE FUTURE OF THE CASE

This paper has analyzed how the government handled the AMIA bombing investigation and the AMIA II case, as well as presented a critique on government's decisions. But what could have been done

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172. Law No. 395/2015, Mar. 12, 2015, B.O. 33089 (Arg.).

173. Law No. 229/2017, Apr. 5, 2017, B.O. 33600 (Arg.).

174. Law No. 886/2007, July 10, 2007, B.O. 31194 (Arg.); Law No. 27139, May. 18, 2015, B.O. 33136 (Arg.).

differently and what can be done to help the investigation and the victims today? This section discusses that while the AMIA case was alternatively characterized as a human rights violation and a crime against humanity, the government's approach to the case and the AMIA Unit's strategy, in particular, failed to capitalize the experience obtained during the memory, truth, and justice process. Additionally, the decision to transfer remaining responsibilities to the Truth and Justice Program presents the opportunity to try the more sophisticated and multilayered approach that emerged from that experience.

As such, the government should seek to play a more significant role in the Intelligence agency Archive survey and focus on the victims' family members and the community's right to the truth. These actions should complement ongoing efforts to search for potential evidence, determine the facts, causes, underlying reasons, assess the attack's consequences, and address the failed first investigation.<sup>175</sup> More specifically, there must be a commitment to finish the survey within a reasonable timeframe, publicly release declassified material, publish reports regarding the archive system's progress and contents, and preserve materials for study. Each step of the way must also be met with a sense of commemoration and remembrance.

Finally, a non-judicial truth-seeking effort could (i) create awareness as to the roles the intelligence and law enforcement agencies played in the investigation so as to more precisely identify the investigation's problems and enact reforms as a non-recurrence guarantee, (ii) contribute to creating a centralized account of the events while enabling other non-institutional social mechanisms that help shape our collective memory, and (iii) expose the evidence and underlying reasons behind the indictments and subsequent the abandonment of other potential leads in an attempt to undo damage the investigation's credibility has suffered.

#### *A. Why the Involvement of the Program for Truth and Justice Could Mean Good News*

In November 2006, Federal Judge Canicoba Corral declared the attack against the AMIA headquarters was a crime against humanity.

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175. EDUARDO GONZALEZ & HOWARD VARNEY, TRUTH SEEKING: ELEMENTS OF CREATING AN EFFECTIVE TRUTH COMMISSION, INT'L CTR. FOR TRANSITIONAL JUST 3 (Eduardo Gonzalez & Howard Varney eds., 2013).



The AMIA investigation faced challenges, such as time passages, precarious government records, archives and databases, the government's acknowledgement of responsibility, declassification and surveys of archives, and reparations. However, the case was not included in the agenda which numerous government agencies created to support the criminal proceedings against those responsible such crimes against humanity during the military dictatorship that ruled Argentina between 1976-1983 and to address their legacy of violence.<sup>176</sup>

The Ministry of Justice created the Program for Truth and Justice in 2007. The Program was tasked with monitoring the memory, truth, and justice process by assessing needs and progress while removing potential obstacles which may affect its normal development.<sup>177</sup> As a main function, the Program guarantees protection to victims, witnesses, and judicial authorities. To fulfil these guarantees, the Program tracks criminal investigations throughout different jurisdictions, producing reports on the armed forces, law enforcement agencies, other actors in clandestine operations, and crimes against humanity as a way to detect and prevent potential threats to the advancement of these cases.

The Program's objectives and responsibilities are similar to the AMIA Unit's, but the Program's wider aim recognizes the importance of the tasks that been neglected in the AMIA cases. For example, the Program's investigation team is responsible for "strengthening the state's capacity to gather reliable information," as well as "surveying state, federal or international archives and any other potentially useful source of information that may contribute to further to institutional truth and justice process."<sup>178</sup> Although the Program is taking over remaining AMIA Unit responsibilities, it is not necessarily comprehensive. Thus far, the Program's involvement

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176. *Causa AMIA: Informe de lo actuado 1994-2015*, AMIA COMUNIDAD JUDIA, [https://www.amia.org.ar/Amia/upload/download/2016/08/16/download\\_147134680681.pdf](https://www.amia.org.ar/Amia/upload/download/2016/08/16/download_147134680681.pdf).

177. *AMIA Bombing: Argentina Ratifies Commitment to Search for Memory, Truth and Justice*, MINISTRY OF FOREIGN AFF. AND WORSHIP ARGENTINE REPUBLIC (July 18, 2019), <https://www.cancilleria.gob.ar/en/announcements/news/amia-bombing-argentina-ratifies-commitment-search-memory-truth-and-justice>.

178. Admin. Decision No. 312/2018, Annex IV, Mar. 13, 2018, B.O. 33831 (Arg.).

suggests the opportunity to diversify the government's aim and to set complimentary objectives.

Participation in the Program for Truth and Justice might also put an end to AMIA case insularity, which in the past kept the AMIA Unit from adhering to best practices resulting in important measures being implemented in an inferior manner. For example, there are significant differences in declassification measures between the Program and the AMIA Unit. While the Program completed surveys, published reports, released secret documents, and created a National Memory Archive in connection with its work, the survey of the AMIA related archives, despite being authorized in 2003, is far from over with no official end. Further still, the AMIA survey is merely fixated on gathering evidence which contributes to the criminal investigation.<sup>179</sup>

In sum, the contrast between the way these two processes were handled suggests that agencies, such as, the Program for Truth and Justice may help achieve small, but relevant improvements in our understanding and public conversation about what happened within the AMIA Unit. It may also contribute to the investigation by placing the attack and the cover-up plot in a larger context.<sup>180</sup> Again, it is not clear whether the Program's involvement will generate any significant changes, and the circumstances surrounding the decision to dissolve the AMIA Unit certainly caution us. But the decision definitely presents an opportunity to move forward with a new and more sophisticated approach.

### *B. What is Missing and How Could the Government Help?*

The Executive Branch never promoted truth-seeking efforts through non-judicial bodies. In September 1996, Congress created an inquiry commission which interviewed many main figures within the case, but its only objective was keep track of the investigation and its three reports about the AMIA bombings were never made public.<sup>181</sup> Some Executive Branch members were formally accused of failing to

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179. Law No. 1259/2003, Dec.12, 2003 B.O. 30299 (Arg.).

180. Rodrigo Uprinsky Yepes & Maria Paula Saffon, *Verdad judicial y verdades extrajudiciales: la búsqueda de una complementariedad dinámica*, DEJUSTICIA (July 24, 2007), <https://www.dejusticia.org/verdad-judicial-y-verdades-extrajudiciales-la-busqueda-de-una-complementariedad-dinamica/>.

181. La Comisión Bicameral Especial Seguimiento de la Investigación para el Esclarecimiento de los Atentados contra la Embajada de Israel y la A.M.I.A., <https://www2.jus.gov.ar/amia/grossman/La%20Comision%20Bicameral.pdf>.

report the crimes Judge Galeano committed.<sup>182</sup> Many years later, the government signed a Memorandum of Understanding for Judicial Cooperation with the Islamic Republic of Iran, which was widely rejected, declared unconstitutional, and resulted in criminal charges against its proponents.<sup>183</sup> In recent years, several initiatives to establish a local truth commission were frustrated.<sup>184</sup> As a result, many pressing questions about the attack and its initial investigation remain unanswered without a common account of many sensitive issues.

Based on this experience and considering the subject's sensibility, a more modest approach would be to create an understanding of the connections between the government, prosecutors, and the victim's organizations. Essentially, the government should help the prosecutors search for evidence and complete the Intelligence Agency archive survey within a reasonable timeframe, while also engaging in truth-seeking efforts which publicly releases all declassified information and documents for incorporation into the National Memory Archive. Materials in the National Memory Archive should remain publicly available, except for reasonable conditions.

The need for the government's collaboration with this task is indisputable. In March 2015, the President declassified intelligence reports measuring nearly 2,000 lineal meters when piled up in three deposits which were heavily deteriorated and disorganized.<sup>185</sup> Allegedly, this constituted all the materials in connection with AMIA investigation, but since then, the Intelligence Agency has sent another 306 boxes of materials and without providing reassurance that this will not happen again.<sup>186</sup> Attempts to find relevant information in other archives revealed many government archives had little to no record keeping methods.

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182. *Id.*

183. Bertoia, *Argentina Reacts to AMIA Cover-Up Trial Rulings*, *supra* note 74.

184. *AMIA: presentan proyecto para crear comisión investigadora*, *ÁMBITO* (Sept. 27, 2016), <https://www.ambito.com/amia-presentan-proyecto-crear-comision-investigadora-n3956615> [hereinafter *AMIA: presentan proyecto*].

185. AFP, *Argentina Declassifies Files on Jewish Center Bombing*, *TIMES OF ISR.* (Mar. 13, 2015), <https://www.timesofisrael.com/argentina-declassifies-files-on-jewish-center-bombing/>.

186. Michelle Mendeluk, *Fresh Findings in 1994 AMIA Bombing Case*, *JERUSALEM POST* (Dec. 19, 2016), <https://www.jpost.com/Diaspora/Fresh-findings-in-1994-AMIA-bombing-case-475799>.

In June 2015, the Attorney General created a task force to restore and survey these archives in search of potentially useful information.<sup>187</sup> This task force currently employs around fifteen people and prosecutors publish progress reports which suggest the task force will not complete its work for several years.<sup>188</sup> The AMIA Prosecution Unit reports show that the Intelligence Agency has been unable or unwilling to provide basic information about the files and that the government's contribution has been scant. Like the Intelligence Agency before it, the AMIA Unit was charged with safeguarding the archive but did very little to help the process move forward. Without additional resources, this task force will not complete their archive survey until it is too late and will contribute too little improve our understanding of the events. Thus, there is a need to examine other experiences which show the judiciary, Public Prosecutors Office, and Executive Branch can and, in fact, do work together to gather useful information in government archives.

In 2011, the Ministry of Foreign Affairs created a task force which located, declassified, and published hundreds of documents related to the illegal activities during the military dictatorship.<sup>189</sup> In 2012, the President assigned a team to declassify and redact portions of a secret report on the Malvinas war, known as the "Rattenbach Report."<sup>190</sup> Thereafter, the slightly redacted version was published online.<sup>191</sup> This team also assisted in declassifying documents related to the South Atlantic conflict, most of which was made publicly available, save sensitive information which could be consulted under specific circumstances.<sup>192</sup> In 2014, the Ministry of Social Development surveyed 82,000 documents and located 196 adoption

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187. Daniel Santoro, *Alberto Nisman Lost His Life. But He May Win His Case*, TABLET (July 9, 2017), <https://www.tabletmag.com/jewish-news-and-politics/221705/alberto-nisman-amia-kirchner>.

188. See *AMIA: presentan proyecto*, *supra* note 184.

189. Silvina Segundo, *Archivos: Memoria y acceso a la información*, [http://conti.derhuman.jus.gov.ar/2018/01/seminario/mesa\\_22/segundo\\_mesa\\_22.pdf](http://conti.derhuman.jus.gov.ar/2018/01/seminario/mesa_22/segundo_mesa_22.pdf) (last visited Sept. 23, 2019); MINISTRY OF FOREIGN AFF., *DECLASIFICACION 2014* (2014), <http://desclasificacion.cancilleria.gob.ar/desclasificacion-2014>; MINISTRY OF FOREIGN AFF., *DECLASIFICACION 2009* (2009), <http://desclasificacion.cancilleria.gob.ar/desclasificacion-2009>; MINISTRY OF FOREIGN AFF., *DECLASIFICACION 2011* (2011), <http://desclasificacion.cancilleria.gob.ar/desclasificacion-2011>.

190. Law No. 200/2012, Arts. 1 and 2, Feb. 8, 2012, B.O. 1 (Arg.).

191. Law No. 431/2012, Mar. 23, 2012, B.O. 1 (Arg.).

192. Law No. 503/2015, Apr. 6, 2015, B.O. 1 (Arg.).

files used to further the investigation on the illegal appropriations of children during the military dictatorship.<sup>193</sup>

Finally, there are reasons to believe that an agreement to emulate such experiences is possible and attainable in the AMIA case. The victim organizations' resistance to the AMIA Unit's involvement was, at least, partly motivated by the lack of a proper explanation about the initiative's content and objectives and the Unit's disinterest in involving them in any meaningful way. The AMIA Unit already had access to hundreds of declassified documents and its willingness to play a larger role. However, there are legitimate concerns which remain unaddressed because the AMIA Unit has not provided details about how they plan to work and what goals they have. We can only assume that a more comprehensive plan may produce a different outcome.

In any case, the government could itself move forward should it chose to focus on the documents which prosecutors have restored and reviewed or focus only on documents particularly relevant to improve public knowledge about the AMIA attack. We do not know much about what the archives contain, but we do know that in 2003, the Intelligence Agency prepared an extensive report on the attack's international connection for the judicial authorities which allegedly was key to the investigation and is profusely mentioned in the indictments.<sup>194</sup> The prosecutors have already asked the Intelligence Agency to authorize its public release in 2017.<sup>195</sup> A gesture like this could help boost the government's credibility and set the stage for a more ambitious actions.

### *C. What Could be Achieved by This?*

Distinctive traits from the AMIA case suggest that a truth-seeking effort through non-judicial means could be particularly beneficial. Since 1997, the investigation's credibility has been at stake and many alternative versions about what happened exist. Even

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193. Lesa Humanidad, *Abuelas recibió 196 legajos de adopciones hechas durante la dictadura*, INFOJUS NOTICIAS (Aug. 4, 2014), <http://www.infojusnoticias.gov.ar/nacionales/abuelas-recibio-196-legajos-de-adopciones-hechas-durante-la-dictadura-5097.html>.

194. AMIA DAIA: *El proceso de desclasificación de información reservada o secreta sobre el atentado de 1994 y su encubrimiento*, 16 MINISTERIO PÚBLICO FISCAL (July 2017), [https://www.fiscales.gob.ar/wp-content/uploads/2017/07/amia-desclasificacion-archivos\\_julio.pdf](https://www.fiscales.gob.ar/wp-content/uploads/2017/07/amia-desclasificacion-archivos_julio.pdf).

195. *Id.* at 17.

today, journalists, victim organizations, and even by the AMIA Unit's last director, Mario Cimadevilla, publicly question fundamental aspects of the attack. Cimadevilla even published a report, after he resigned, in which he argued that the investigation "eluded some of the fundamental analytical steps that should be followed in these types of events" and called for the reexamination of an alternative hypothesis, such as, explosive charges inside the AMIA headquarters, explosive charges in a construction dumpster outside the AMIA headquarters, or the use of multiple explosive devices.<sup>196</sup>

The secrecy within both judicial proceedings and the intelligence and law enforcement agencies' archives allowed for the proliferation of different accounts and made it impossible for investigators to officially discredit or even fact-check some theories. In sum, the lack of reliable public information and the asymmetry between those who have access to archives and other primary sources and those who merely rely on secondary sources deeply alters public discourse.

Access to archives is restricted to the investigators and the parties in criminal proceedings. The public release or dissemination of documents is expressly prohibited and only accessible to further criminal investigations.<sup>197</sup> Argentine law lacks automatic declassification provisions and experience suggests that the Intelligence Agency is unlikely to take the initiative to declassify AMIA files. Although the Access to Information Act of 2016 established that information requests made regarding crimes against humanity or gross human rights violations cannot be refused, the courts have not fully implemented or examined the Act.<sup>198</sup> In any case, the volume, disorder, and total lack of information in connection with these archives means an individual's request is not likely to be useful or successful.

This lack of official information and institutional flaws allowed abuses and crimes to flourish, setting a limit on victim's attempts to transform their experience and suffering into generalized demands.

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196. Christian Sanz, *Informe de disolución de la Unidad Especial de Investigación AMIA*, 27-8, LINKEDIN (Sept. 12, 2018), [https://www.slideshare.net/cesanz1/amia-informe-final?qid=703416ec-2595-4fc2-bcc0-604b96f94eb1&v=&b=&from\\_search=2](https://www.slideshare.net/cesanz1/amia-informe-final?qid=703416ec-2595-4fc2-bcc0-604b96f94eb1&v=&b=&from_search=2).

197. Law No. 206/2017, Mar. 23, 2017, B.O. 1 (Arg.).

198. Daniel Gutman, *Finally, Argentina Has a Law on Access to Public Information*, INTER PRESS SERV. NEWS AGENCY (Sept. 28, 2017), <http://www.ipsnews.net/2017/09/finally-argentina-law-access-public-information/>. See Law No. 206/2017, Mar. 23, 2017, B.O. 1 (Arg.).

Unlike other tragic episodes in Argentine public life, the AMIA bombing and the first investigation's failure were not followed by significant institutional reforms, but resulted almost exclusively in criminal and disciplinary proceedings which, for the most part, failed to produce results. To mention a few examples, the intelligence and law enforcement agencies and the judiciary remained unchanged until 2015 at least and even then, some the reforms were rapidly suspended or reversed.<sup>199</sup>

All these circumstances suggest that implementing non-judicial truth-seeking mechanisms which preserve and publish information about the cases would help to further our understanding and to create a common account of these tragic events. Until now, the public conversation about the AMIA case has been monopolized by few agencies and personalities. Only non-judicial truth-seeking initiatives can provide resources needed to engage in a deeper and more meaningful debate about the subject and allow for non-institutional social mechanisms to enrich our narrative of the past events with all the political, social, and cultural aspects with which they are that are entwined.<sup>200</sup>

Publishing and making these materials accessible to the public is necessary to stimulate public debate about these events and prevent history from repeating itself. As the Inter American Court of Human Rights stated, preventive measures and non-recurrence guarantees begin with the revelation and acknowledgement of past atrocities.<sup>201</sup> A more intense scrutiny into the intelligence and law enforcement agencies' actions could raise awareness about the system's past and present problems while reinvigorate the victim's demands and the institutional reform surrounding the AMIA matters.

Finally, allowing the public to access declassified evidence which supports both the indictments against the alleged AMIA perpetrators and the decision to abandon other potential leads could help the investigation to regain credibility. Enabling open debate about the strengths and weaknesses of each hypotheses still plausible would allow suspects to be tried in absentia albeit more slowly and costly since the scope is no longer limited by indictment's the content. In some cases, this may lead to disappointing conclusions,

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199. Law No. 1311/2015, Jul. 7, 2015, B.O. 1 (Arg.).

200. Yepes & Saffon, *supra* note 180, at 12.

201. *Bamaca Velzquez v. Guatamala*, Inter-Am. Ct. H.R. (ser. C) No. 70, 76-7 (Feb. 22, 2001).

but the current silence around the investigation only feeds mistrust and speculation.

In the end, making such archives public and playing an active role in reconstructing what happened is necessary to allow many other things to fall into place and bring us closer to a scenario which might not meet our expectations, but which is unquestionably superior.

## VI. CONCLUSION

This overview of the AMIA Unit's history suggests that while part of the transitional justice toolkit was applied to the case, the different government agencies had been almost exclusively concerned with the criminal justice aspect. In doing so, such agencies failed to commit resources to taskforces which could have broadened their perspective and helped to understand the victims. Nearly twenty-five years after the attack, we can appreciate the chosen strategy's shortcomings and the problems which stem from relying on the criminal justice system to guarantee the victims' right to truth.

The ability to implement truth-seeking mechanisms through non-judicial institutions was only briefly considered during a time when the government had a strenuous relationship with the Intelligence Agency, which still operates with little to no external oversight. Even today, the Intelligence Agency has never been held accountable for its failure to prevent the attacks, nor the crimes it helped commit during the investigation. As such, it is rather difficult to consider the AMIA Unit suspension as good news, but nevertheless the new agencies' involvement is needed to help jumpstart a new investigative era with a wider focus. More than a year after this decision, we must once again stress the importance of the ongoing AMIA survey and the fact that it may offers the government a chance to settle some of its many debts with victims, family members, and society in general.

Of course, there are more ambitious alternatives available, which this paper does not intend to discard, but historically these alternatives were difficult to implement and created additional divisions. So, in the meantime, the preservation of the Intelligence Agency's archive, the publicly disseminating as much content as possible, and ensuring the archive's accessibility are necessary steps to correct some past mistakes and allow us look ahead more clearly. Without renouncing to our aspirations of justice, nor abandoning the quest for alternatives to overcome the obstacles investigations



historically faced, it's time to start thinking about what is within our immediate reach and what can we offer victims here and now. Only the truth can help victims find closure and the fact that we cannot expect the such truths to be evident in criminal proceedings is clearer now than ever.

# ACTING AS PRIVATE PROSECUTOR IN THE AMIA CASE

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Alberto L. Zuppi\*

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## I. INTRODUCTION

On July 18, 1994, a van loaded with TNT and ammonal destroyed the AMIA<sup>1</sup> building located in the center of Buenos Aires, killing 85 people and injuring hundreds more.<sup>2</sup> Carlos Menem was then in the fifth year of his presidency, after succeeding Raul Alfonsin in 1989. Menem immediately defied all political projections

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1. AMIA is an acronym for *Asociación Mutual Israelita Argentina*, an association of Argentine Jewish philanthropic institutions. See Karen Ann Faulk, *The Walls of the Labyrinth: Impunity, Corruption, and the Limits of Politics in Contemporary Argentina* 44 (2008) (unpublished Ph.D. dissertation, The University of Michigan) (on file with the University of Michigan).

2. *Id.*

and employed a liberal economic policy that conflicted with Peronist tradition.<sup>3</sup>

In 1992, Buenos Aires suffered what is regarded as its first major foreign terrorist attack when an explosion demolished the Israeli Embassy.<sup>4</sup> To this day, questions remain as to whether the explosion started outside or within the Embassy walls. The Argentine National Academy of Engineers concluded that the explosion occurred from inside the Embassy, caused by the detonation of explosives, though the report was highly debated.<sup>5</sup> Nonetheless, news outlets circulated a rumor that the bombings were intended to punish Menem for his failure to fulfill promises made to Syrian president, Hafez El Assad, in exchange for Assad's financial support of Menem's presidential campaign.<sup>6</sup>

Menem's policies were radical deviations from those of previous Peronist administrations. He opened the economy to foreign exports and began privatizing state-owned enterprises. In addition, his pursuit of a special relationship with the U.S. was the direct result of some of the modifications made to Argentina's foreign policies. For example, he opted out of Argentina's affiliation with the coalition of non-aligned countries and even participated with the U.S. in Operation Desert Storm during the war in Iraq in 1992. Menem also initiated constitutional reform that helped his campaign for re-election during his second term. He also increased the number of placements for judges allowed on the Supreme Court to further secure his agenda.

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3. See, e.g., Alberto Fracchia, *América Latina: "La primera presidencia de Menem*, REVISTA DE CIENCIA POLÍTICA, <http://www.revinciapolitica.com.ar/num1art2.php> (last visited Apr. 3, 2019).

4. See Eugene Robinson, *Israeli Embassy Blasted in Argentina*, WASH. POST (Mar. 18, 1992), [https://www.washingtonpost.com/archive/politics/1992/03/18/israeli-embassy-blasted-in-argentina/055cd031-77b5-459a-a70d-72a197e13570/?noredirect=on&utm\\_term=.5eb103440263](https://www.washingtonpost.com/archive/politics/1992/03/18/israeli-embassy-blasted-in-argentina/055cd031-77b5-459a-a70d-72a197e13570/?noredirect=on&utm_term=.5eb103440263).

5. See *Seven Years and Counting – The 1992 Israeli Embassy Bombing in Buenos Aires*, B'NAI B'RITH INT'L (Mar. 1999), <https://www.bnaibrith.org/seven-years-and-counting.html>.

6. See Sergio Moreno, *El atentado*, PÁGINA 12, <https://www.pagina12.com.ar/especiales/15aniversario/12.htm> (last visited Apr. 3, 2019); DANIEL BLINDER, *Irán, Siria e Israel y sus huellas en la Argentina: Los atentados de la Década de 1990*, Nov. 28, 2008, at 2; see also Claudio Fantini, *Atentado a la embajada de Israel: 23 años de oscuridad*, TURELLO (Mar. 17, 2015), <http://turello.com.ar/atentado-la-embajada-de-israel-23-anos-de-oscuridad/>; see also *Irán, Siria y la AMLA; Dos pistas que convergen*, LA NACIÓN (Aug. 31, 2003), <https://www.lanacion.com.ar/523210-iran-siria-y-la-amia-dos-pistas-que-convergen>.

Menem's judicial appointments to the Argentine Federal Court are examples of the reigning impunity and degradation of Justice in Argentina.<sup>7</sup> Many of these appointed judges were known as napkin judges because, on one occasion, during a meeting with the Minister of the Interior, Carlos Corach, Corach wrote on a napkin the names of all the judges under his control.<sup>8</sup> Juan Galeano, a former court clerk, and then the Federal Judge in charge of the AMIA investigation, was appointed as a Federal Judge likely due to his relationship with Corach.

The AMIA case required an experienced judge, and Galeano certainly did not fit the bill. Prior to the bombing, Galeano's only moment of recognition occurred in May 1994, when he prosecuted a detainee on a charge of theft because the man ate one of Galeano's employees' lunch. After the lengthy and derisory proceeding, which involved eight eyewitnesses, Galeano acquired a reputation amongst colleagues as the *sandwichide*, or *the federal roll*. Ultimately, the Federal Criminal Chamber of Appeals acquitted the Defendant and issued a serious warning to Galeano.<sup>9</sup>

Given his inexperience as a judge and as an investigator, Galeano, even with the help of the Argentine government, found himself to be no match for the difficulties involved with the AMIA case. The Argentine government publicly announced that it had provided Galeano the most advanced equipment and software, and assigned more than 300 people to work for him. In addition, the government relieved his Tribunal of work related to other cases in the hopes that Galeano would concentrate his efforts solely on the bombing. However, these government provisions produced no results. Galeano completely failed in establishing a systematic

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7. See Christopher Larkins, *The Judiciary and Delegative Democracy in Argentina*, 30 COMP. POL. 423, 427-28 (1998).

8. See Cavallo: *Me convencieron de que no siga hablando*, LA NACIÓN (Oct. 29, 1996), <https://www.lanacion.com.ar/169680-cavallo-me-convencieron-de-que-no-siga-hablando>; see Adrián Ventura, *El militante que se hizo juez gracias a corach*, LA NACIÓN (Aug. 15, 2003), <https://www.lanacion.com.ar/politica/el-militante-que-se-hizo-juez-gracias-a-corach-nid519536>; see *Corach volvió a la carga*, LA NACIÓN (Oct. 17, 1998), <https://www.lanacion.com.ar/173391-corach-volvio-a-la-carga>.

9. See *Un caso jamón jamón*, PÁGINA 12 (May 31, 2004), <https://www.pagina12.com.ar/diario/elpais/subnotas/36070-12663-2004-05-31.html>; Larry Rohter, *5 Acquitted in '94 Bombing of a Jewish Center in Argentina*, N.Y. TIMES (Sept. 3, 2004), <https://www.nytimes.com/2004/09/03/world/americas/5-acquitted-in-94-bombing-of-a-jewish-center-in-argentina.html>.

collection of evidence of any kind. Moreover, rather than investigate, Galeano preferred to rely on work produced by the secret service.

Sometime after the bombing, the media offered to the public what was supposed to be an “official story.”<sup>10</sup> The story claimed that the AMIA bombing was a terrorist attack carried out by Iranian members of Hezbollah, and that Hezbollah used a van provided by the corrupt police officers of Buenos Aires. The truth, however, was that the story could not be supported by any evidence related to the case. Unfortunately, the AMIA and DAIA,<sup>11</sup> the Jewish institutions that acted in the proceedings as representatives of a group of victims and their families, fully supported Galeano and this “official story.”

I first met with the victims and their families in October 1995. Sergio Wider, a representative of the Simon Wiesenthal Center in Argentina, arranged the meetings. The family members were frustrated with the lack of results in the investigation and sought a counselor who could represent their interests better than the AMIA and the DAIA. I explained to them that, as a Catholic, my appointment as counselor could be interpreted as an insult by the Jewish institutions. While many victims of the bombing did not belong to the Jewish community, it was clear that the perpetrators purposely targeted Jewish institutions.<sup>12</sup> Days after that meeting, the families informed me that they appointed a prestigious Jewish counselor, and I expressed my genuine satisfaction with their decision. However, things changed in 1997, when three members of that original group, including Diana Malamud, Laura Ginsberg, and Norma Lew, president of a non-profit organization called Memoria Activa,<sup>13</sup> requested to meet with my law firm. They explained that

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10. The “official story” is described in the following sentence and will be referenced in quotes in various sections throughout this article.

11. DAIA is an acronym for *Delegación de Asociaciones Israelitas Argentinas*, an organization which united the major Argentine Jewish institutions. DELGACIÓN DE ASOCIACIONES ISRAELITAS ARGENTINAS, <http://www.daia.org.ar/la-daia/> (last visited Mar. 25, 2019).

12. A delegation of DAIA occupied the upper floor of the destroyed AMIA building. See *The AMIA/DAIA Bombing: Terror in Argentina*, ADL, <https://www.adl.org/education/resources/backgrounders/the-amia-daia-bombing-terror-in-argentina> (last visited Mar. 25, 2019).

13. Memoria Activa translates to “Persistent Memory.” It is a non-profit organization that reunited victims, relatives and friends of the victims of the AMIA attack, and continues to represent the dissident group of the “official story.” From the original group that I met in October 1995, the majority are now members of this organization. See *Quienes Somos*, MEMORIA ACTIVA, [http://memoriaactiva.com/?page\\_id=172](http://memoriaactiva.com/?page_id=172) (last visited Mar. 25, 2019).

their counselor resigned, leaving them with no one to represent them in the proceeding.<sup>14</sup>

The Argentine criminal proceeding was divided into two parts at that time. In the first part, a judge was responsible for collecting all of the evidence and determining whether a person should be indicted. Moreover, any person that demonstrated a legitimate interest in participating in the proceeding could be appointed as a Private Prosecutor<sup>15</sup> and act in the proceeding as an additional party. Any party could write and submit a request to the Tribunal, and the Tribunal would respond with approval or denial of the request. The second part of the Argentine criminal proceeding involved an oral proceeding before a different collegiate Tribunal, where defense counselors and prosecutors ratified or offered new evidence and presented their pleadings. They could also request sanctions or a non-guilty verdict.

This article will explain how I performed my role as Private Prosecutor during the AMIA criminal proceeding. The first section deals with the collection of evidence and my disputes with Galeano, my conflicts with AMIA and DAIA, and the unexplained international connection. I will show that the Jewish institutions followed directives to support the “official story,” which only bolstered the Iranian connection to the case, and led law enforcement to ignore the use of evidence that would have been more helpful to the case. The second section details our case before the Inter-American Commission on Human Rights (“ICHR”) and its importance in unveiling the cover-up carried out by Galeano and the Argentine government. The last section discusses the evolution of the case and its consequences to present day.

## II. ACTING AS PRIVATE PROSECUTOR

By 1997, the main proceeding covered more than 270 volumes.<sup>16</sup> I refer to this proceeding as the *main proceeding* because at that

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14. The situations that produced this meeting and their results are detailed to great lengths in my book. See ALBERTO L. ZUPPI, *AMIA: AN ONGOING CRIME* 33 (2018).

15. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 82 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/383/texact.htm#5>.

16. To see the extreme number of volumes in this case, Leo Vaca’s prized photo can be viewed in *Premiaron una foto de infojus noticias*: “Un poco de luz a una causa oscura”, INFOJUS NOTICIAS (Oct. 21, 2015),

point, Galeano already started his pathless investigation into some apparent leads in separate proceedings. For instance, he opened a parallel investigation known as the *causa Armas*, or the *Weapons case*, where he presumably investigated the activities of a rebel group in the Army.<sup>17</sup> Without any clear purpose, he filed hundreds of volumes. Then, and again without any clear purpose, he opened another investigation known as the *causa Brigadas*, or the *Brigades case*, where Galeano investigated a group of policemen suspected of delivering the van used in the bombing to its perpetrators, despite doubts expressed by the press over the matter.<sup>18</sup> By the time of my appointment, seventeen policemen were detained without legal basis or evidence against them to justify indictment. Most of these policemen remained in prison for more than eight years, though they were later acquitted by the Federal Oral Tribunal.<sup>19</sup> The case involving these policemen is particularly grievous because Galeano knew from the very beginning that the policemen had nothing to do with the bombing. Galeano initiated many more similar parallel investigations, even though they failed to produce any meaningful evidence for the case. He only further derailed the investigation by introducing some procedural institutions, then unknown to Argentine legislation, such as the *witness of concealed identity*, under which the parties were restricted from examining evidence collected in the parallel cases. This was clearly illegal.<sup>20</sup>

#### A. *Separating the Wheat from the Chaff*

The proceedings were a mess, and attempting to read through the files was like riding an unpredictable and never-ending roller-coaster.

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<http://www.infojusnoticias.gov.ar/nacionales/premiaron-una-foto-de-infojusnoticias-un-pco-de-luz-a-una-causa-oscura-10256.html>.

17. See *Venta ilegal de armas*, CLARÍN, (May 27, 2001), [https://www.clarin.com/politica/armas-investigacion-contactos-atentado-amia\\_0\\_BJSU-ugAYg.html](https://www.clarin.com/politica/armas-investigacion-contactos-atentado-amia_0_BJSU-ugAYg.html); see also *Nexo entre los casos AMIA y armas*, LA NACIÓN, (June 1, 2001), <https://www.lanacion.com.ar/sociedad/nexo-entre-los-casos-amia-y-armas-nid309358>.

18. See Adrián Ventura, *Once policías detenidos por la causa de la AMIA*, LA NACIÓN (July 14, 1996), <https://www.lanacion.com.ar/sociedad/once-policias-detenidos-por-la-causa-de-la-amia-nid175741>.

19. See *historia de los detendios en la causa AMIA*, INFOBAE (Sept. 2, 2004), <https://www.infobae.com/2004/09/02/137160-historia-los-detenidos-la-causa-amia> (listing of acquitted policemen).

20. See generally Law No. 25764, B.O. Aug. 13, 2003 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/85000-89999/87581/norma.htm>.

In the first volume of work, which involved the description of the site where the blast occurred, the subject oddly, and too quickly, shifted from the suspicious activities of two Germans tourists to a Federal Police investigation of a group of Arabic-speaking people in the neighborhood of the AMIA building. It also included a report of a taxi driver who saw a group of people taking photos outside of the building. There were also several phone calls randomly added to the record. One recorded phone call involved a man named Wilson dos Santos, who stated, "I told you that this was going to happen."<sup>21</sup> Despite the alarming nature of Santos' statement, investigators failed to develop the evidence. The following pages in the first volume read in the same illegible manner.

Investigators also lacked clear procedures to preserve evidence, as indicated by the lack of meaningful evidence collected after the attack. Perhaps this failure had something to do with the chaos caused by the terrorist attack. Surely, forensics teams did not participate with the policemen, firemen, and volunteers that searched for survivors trapped beneath the wreckage. However, there is no explanation for when Galeano instructed his contractors to load the debris onto bulldozers to move the evidence into an open field near a river several miles from the blast.<sup>22</sup> At the time, it could only be assumed that law enforcement simply did not communicate as there was no clear hierarchy of order under Galeano's directive.

After separating the wheat from the chaff, it was evident that a vehicle, presumably a white Renault Trafic van, had been loaded with ammonal and detonated near the doors of the AMIA building. Nonetheless, some journalists doubted the van's existence because there were no witnesses that claimed to have seen the van. Instead, these journalists believed that a bomb had been stocked either inside the AMIA building, or in a dumpster placed near the doors of the AMIA building just minutes before the blast.<sup>23</sup> All doubts were later resolved, however, when people found pieces of the van at the blast

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21. *El atentado contra la sede de la mutual judia: La extradición del Brasileño Wilson Dos Santos*, CLARÍN (Dec. 24, 2000), [https://www.clarin.com/politica/amia-larga-historia-hombre-sabia-demasiado\\_0\\_Sk-e1VF1Ctx.html](https://www.clarin.com/politica/amia-larga-historia-hombre-sabia-demasiado_0_Sk-e1VF1Ctx.html); *Ubican a un Testigo Clave del Caso AMIA*, LA NACIÓN (Nov. 19, 1998), <https://www.lanacion.com.ar/sociedad/ubican-a-un-testigo-clave-del-caso-amia-nid118410>; MATTHEW LEVITT, HEZBOLLAH: THE GLOBAL FOOTPRINT OF LEBANON'S PARTY OF GOD 95 (2013).

22. ZUPPI, *supra* note 14, at 35-36.

23. *See generally* JORGE LANATA AND JOE GOLDMAN, CORTINAS DE HUMO (1994).



site, including one of the van's shock absorbers recovered near a building across the street.<sup>24</sup> Then, on July 25, 1994, the government announced the discovery of the van's engine, which helped law enforcement determine the type of vehicle involved. The discovery of the engine was important because it bore an engraved registration number that would lead investigators to its original owner. By 1997, news reports announced that the van belonged to Carlos Telleldin, a man who was already in custody.

However, I noticed several peculiarities with regards to the new evidence and events subsequent to its discovery. For example, the statement that announced the engine's discovery was dated July 15. Yet, on page 114 in the first volume of the case, law enforcement reproduced an undated and unsigned police communication which included a request to Galeano to intercept several dozen phone lines, including those belonging to Telleldin, his mother, and his brother.<sup>25</sup> Though the police communication was undated, the preceding page 113 was dated July 19, and page 115, dated July 21; so it is plausible that if the request to Galeano was dated, it would have been dated as sometime between July 19 and July 21. However, this makes no sense since Telleldin was not under investigation prior to July 25, when law enforcement discovered the engine and traced it back to the original owner. Why would the police request to tap Telleldin's phone line four days prior to the bombing? This is one of many lingering questions that remain unanswered to this day.

By the time law enforcement finally identified Telleldin, he had flown to the northern province of Misiones, which borders Paraguay and Brazil. Shortly afterwards, the secret service recorded a lengthy telephone conversation with Telleldin. In total, law enforcement produced sixty-six tapes documenting their first contact and various interviews with Telleldin. These tapes were stored and secured with the Secret Service at the time Telleldin was arrested at the airport after returning from Misiones. However, those sixty-six tapes somehow mysteriously disappeared, simultaneously from both the Federal Department of Police and from SIDE.<sup>26</sup> To make matters

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24. Raúl Kollman, *Las claves del caso AMIA*, PÁGINA 12 (Jan. 25, 2004), <https://www.pagina12.com.ar/diario/elpais/1-30765-2004-01-25.html>.

25. *Caso AMIA: Las nulidades de Telleldin*, DIARIO JUDICIAL (July 16, 2010), <http://www.diariojudicial.com/nota/11342>.

26. SIDE is the acronym for "*Secretaría de Inteligencia del Estado*," which is the equivalent of the American CIA. See *El atentado que la SIDE Sospechó*, INFOJUS NOTICIAS, <http://juicioamia.infojusnoticias.gov.ar/las-pruebas/las-sospechas-de-la-side/> (last visited Apr. 4, 2019); see *Telleldin dice que tuvo*

worse, law enforcement erased and returned the electronic agenda seized from Telleldin without making copies of its contents.<sup>27</sup> Luckily, law enforcement also seized from Telleldin a number of telephones directories. However, and to my dismay, I found most of the names and phone numbers cut out with what appeared to be scissors, which left the pages bristled like a comb.

After reading the written proceedings, one may conclude with a degree of certainty that the secret service was very much involved in the case. Clearly, something was being hidden from curious eyes, and it became more evident the deeper we investigated the case. We discover that in the morning of July 18, 1994, the day of the blast, a helicopter with a searchlight flew over the AMIA building for several minutes, illuminating its roof and surroundings.<sup>28</sup> What were they looking for? Could it be that someone already knew that the AMIA building was a target of a terrorist attack, and if so, why was nothing done to prevent it? We cannot chalk these events up to mere coincidence. Page 114, the tapes, the telephone records, the helicopter: all of the evidence pointed to the presence of the Secret Service. If the Argentine SIDE<sup>29</sup> was linked to these events, it is likely that the Mossad<sup>30</sup> would have been informed, given the close relationships that existed at the time between Argentina, the U.S., and

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*vínculos con Menem y con su familia*, LA NACIÓN (Sept. 2, 2002), <https://www.lanacion.com.ar/politica/telledin-dice-que-tuvo-vinculos-con-menem-y-con-su-familia-nid427729>; *Por el Caso AMIA, Condenan a un ex comisario de la federal*, LA GACETA (June 23, 2005), <http://www.lagaceta.com.ar/nota/118310/argentina/por-caso-amia-condenan-ex-comisario-federal.html>.

27. *Ataques Terroristas: Caso AMIA*, CLARIN (Aug. 7, 1997), [https://www.clarin.com/ediciones-antiores/beraja-busca-datos\\_0\\_rkI7yWWZAKe.html](https://www.clarin.com/ediciones-antiores/beraja-busca-datos_0_rkI7yWWZAKe.html).

28. *See Relataron extraños vuelos de aeronaves*, LA NACIÓN (Nov. 8, 2001), <https://www.lanacion.com.ar/349677-relataron-extranos-vuelos-de-aeronaves>; Claudio Grossman, *La presencia de un helicóptero* (Feb. 22, 2005), <https://www2.jus.gov.ar/amia/grossman/La%20presencia%20de%20un%20helicoptero.pdf>; and Raul Kollman, *Otro Cuento Para El Caso AMIA*, PÁGINA 12, October 8, 2006, <https://www.pagina12.com.ar/diario/sociedad/3-74155-2006-10-08.html>; Raúl Kollman, *Otro cuento para el caso AMIA*, PÁGINA 12 (Oct. 8, 2006), <https://www.pagina12.com.ar/diario/sociedad/3-74155-2006-10-08.html>.

29. *See El atentado que la SIDE Sospechó*, INFOJUS NOTICIAS, <http://juicioamia.infojusnoticias.gov.ar/las-pruebas/las-sospechas-de-la-side/> (last visited Apr. 4, 2019).

30. The Mossad is Israel's national intelligence agency.

Israel.<sup>31</sup> After all, we cannot forget that a Jewish institution was the main target of the attack.

President Menem was raised a Muslim; his parents were native Syrians. Menem later converted to Catholicism, the official religion of Argentina. In those days, presidents were required to be Catholic.<sup>32</sup> Similar to the conduct of the secret service, the AMIA case presents evidence that points to a Syrian-Lebanese connection to the case. For example, a member of Menem's family argued in favor of Alberto Kanoore Edul, an Argentine citizen of Syrian ancestry who called Telleldin a week before the blast.<sup>33</sup> In addition, the dumpster located by the doors of the AMIA building and the truck that collected the dumpster minutes before the explosion occurred belonged to an enterprise owned by Nassib Haddad, a Lebanese man. At the time of the AMIA bombing, Haddad owned great quantities of ammonal for work on a quarry on his property.<sup>34</sup> Moreover, the truck that collected the filled dumpster and left the empty one at the AMIA building before the blast also left, in the same trip, another empty dumpster on an open property belonging to a man named Kanoore Edul.<sup>35</sup> Within Kanoore Edul's telephone book, investigators discovered contact information linked to a weapons dealer named Mozzar Al Kassar, a friend of the Menem family.<sup>36</sup>

After reading the twenty-fifth volume of the AMIA proceeding, I learned that in October 1994, another Judge from the Province of Buenos Aires was present during a judicial raid purposed to discover

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31. See Raúl Bernal-Meza, *Política Exterior Argentina: De Menem a de la Rúa*, 16 SÃO PAULO EM PERSPECTIVA 74, 81 (2002), available at <http://www.scielo.br/pdf/spp/v16n1/12126.pdf>; see also *Judíos, la seducción menemista*, LA NACIÓN (Apr. 30, 2000), <https://www.lanacion.com.ar/209481-judios-la-seducion-menemista>.

32. This was a requisite of Article 73 of the National Constitution of 1853, which was in force until 1994 when the constitutional reform suppressed within current Article 89 the candidate's religion as a requisite. CONSTITUCIÓN NACIONAL [CONST. NAC.] ART. 89 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/804/norma.htm>.

33. See *Los secretos de Kanoore Edul*, LA NACIÓN (Feb. 20, 2000), <https://www.lanacion.com.ar/6032-los-secretos-de-kanoore-edul>.

34. See Raúl Kollman, *Huellas que llevan al atentado*, PÁGINA 12 (Sept. 25, 2004), <https://www.pagina12.com.ar/diario/elpais/subnotas/41503-14246-2004-09-25.html>.

35. *Id.* See *Irán, Siria y la AMIA: Dos pistas que convergen*, LA NACIÓN (Aug. 31, 2003), <https://www.lanacion.com.ar/opinion/iran-siria-y-la-amia-dos-pistas-que-convergen-nid523210>.

36. See Horacio Verbitsky, *Hilando fino*, PÁGINA 12 (July 26, 2009), <https://www.pagina12.com.ar/diario/elpais/1-128889-2009-07-26.html>.

a secret, illegal electrical connection.<sup>37</sup> When police officials arrived at the premises, they discovered a man named Ali Chehade Al Kassan, hiding among the carpets stocked there. Al Kassan, a Lebanese citizen, did not speak Spanish and could not explain the reasons for his presence. Upon a search of his premises, the police discovered leaflets from Hezbollah, tapes of the same origin, a fake credential for Al Kassan as a military attaché to the Syrian Embassy in Buenos Aires, and most importantly, two pressed blocks of TNT in their unbroken, original U.S. Army packaging.<sup>38</sup> The tenement belonged to a Syrian family, and upon a search of their home, the police found brochures, tapes, and even a sculpture of a scimitar from Hezbollah. In my first written request to Galeano, I demanded that Al Kassan be interrogated immediately. As surprising as it sounds, Al Kassan had not been interrogated since the day of his arrest. Galeano's response was as underwhelming as it had always been throughout the duration of the case. He often, and repeatedly said he would, "téngase presente," meaning *keep it in mind*, but he never took serious action. Several months later, law enforcement freed Al Kassan. In addition, law enforcement released the owner of the tenement, even though law enforcement failed to verify his confusing explanations regarding Al Kassan's presence. All of these details are clearly transcribed in the first volumes of the written proceeding. There is no mystery, or mastermind detective work on my part. To learn of these events, all one must do is simply read the files.

I do not, nor have I ever, considered myself an expert on international policy. However, it was clear to me that the evidence of the AMIA case pointed to Syrian or Lebanese involvement. Yet, because Galeano accused Iran, the "official story" also accused Iran. Syria and Lebanon are not mentioned at all therein. When I asked Galeano about his suspicions, he mentioned that some of the members of the Iranian Embassy in Buenos Aires connected to the bombing described in their declarations a repentant witness named Manucher Moatamer, who Galeano met in Venezuela in 1994.<sup>39</sup> I asked Galeano to call these members as witnesses. He answered that

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37. It is unusual that a judicial raid would be ordered for an illegal electric connection but it is even more strange that a Federal judge was personally present during the seizure.

38. ZUPPI, *supra* note 14, at 84-85.

39. *AMIA: El juez busca el contacto externo*, LA NACIÓN (Nov. 23, 1997), <https://www.lanacion.com.ar/81358-amia-el-juez-busca-el-contacto-externo>; *Galeano trajo documentos que apuntan a Irán*, LA NACIÓN (Nov. 29, 1997), <https://www.lanacion.com.ar/81830-galeano-trajo-documentos-que-apuntan-a-iran>.

they were immune as diplomats. This was clearly wrong. They are not immune until they claim diplomatic immunity, and even then, Iran may waive their immunity. I gave him several scholarly articles that I wrote on the matter of foreign sovereign immunity.<sup>40</sup> Although I understood at the time the weaknesses in the “official story,” I did not realize the extent of the cover-up. Ultimately, Galeano ignored my request. The Iranian diplomats flew from Argentina to their new destinations, and only then did he issue the first arrest warrant against eight of the members.<sup>41</sup>

It became clear to me that Galeano was involved in a cover-up. I was most intrigued, however, as to how the AMIA and DAIA could support Galeano’s poor work, as both institutions were direct victims to the bombing. In addition, both institutions represented a group of victims and their families. How could they consent to such a scandal?

Beatriz Gurevich,<sup>42</sup> who studied the behavior of the Jewish institutions during the AMIA case, wrote:

“[O]nly a few people at the core of AMIA and DAIA had real knowledge of what was going on with the investigation; few knew the role of the government in the cover-up. The victims’ families were not informed, and many participants in the CF<sup>43</sup> activities respected the DAIA’s security rules. Not asking questions and having faith (more than trust) became a symbol of communitarian spirit and reciprocal solidarity.”<sup>44</sup>

Memoria Activa was the dissenting voice, and criticisms of Galeano’s cover-up “were perceived as an intrusion into the field of DAIA’s incumbencies.”<sup>45</sup> This viewpoint presented many problems

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40. See Alberto Luis Zuppi, *La inmunidad soberana de los estados y la emission de deuda pública*, in REVISTA JURIDICA ARGENTINA LA LEY 2, 118 (1992).

41. See JL, Romina Manguel, and Luciana Geuna, *Tócala de nuevo*, *Nisman*, PERFIL (Nov. 19, 2006), <http://www.perfil.com/noticias/columnistas/Tocala-de-nuevo-Nisman-20061119-0005.phtml>; see Rafael Bielsa, *La Orden de Captura que Desencadenó la Tempestad*, PERFIL (Dec. 15, 2017), <http://www.perfil.com/noticias/elobservador/la-orden-de-captura-que-desencadenola-tempestad.phtml>; *AMIA: Interpol Argentina lanzó a su red mundial los pedidos de captura de los ex funcionarios Iraníes*, CLARÍN (Nov. 16, 2006), [https://www.clarin.com/ultimo-momento/amia-interpol-argentina-lanzo-red-mundial-pedidos-captura-ex-funcionarios-iranies\\_0\\_Ska6RM1CYe.html](https://www.clarin.com/ultimo-momento/amia-interpol-argentina-lanzo-red-mundial-pedidos-captura-ex-funcionarios-iranies_0_Ska6RM1CYe.html).

42. See generally BEATRIZ GUREVICH, *PASSION, POLITICS AND IDENTITY* (2005).

43. In Gurevich’s text, “CF” means “community fortress,” which is a select leader group that imposes knowledge, surveillance, regulation, and discipline. *Id.* at 9.

44. *Id.* at 10.

45. *Id.* at 22.

for me during the case, and clearly conflicted with my concern for how the AMIA and DAIA led the prosecution.<sup>46</sup> Although I respect the work of Mrs. Gurevich and some of her conclusions, I disagree with her explanations regarding the behavior of AMIA and DAIA in the judicial proceedings. Gurevich stated, “AMIA and DAIA, incapable of making a diagnosis about the pace of the preliminary judicial investigation, contributed to the veiling of intentional deviations by the Judge in charge of the case and, finally, to the failure of the trial in 2004.”<sup>47</sup>

This understanding of AMIA and DAIA’s behavior could work as a superficial explanation for the conflict of Jewish opinion among the different groups of victims of the attack. However, the conclusion seems too simple. The truth is more complex and requires a look into the political context of the attack.

#### B. *AMIA as Collateral Damage*

Following the Madrid Conference,<sup>48</sup> peace talks began in Washington between Israeli and Syrian delegations, in accordance with the Madrid formula. In 1994, negotiations were held on the ambassadorial level in Washington.<sup>49</sup> On June 1, 1994, Shimon Peres, then Minister of Foreign Affairs of Israel, and Isaac Rabin, visited Argentina.<sup>50</sup> There are not many records of the visit and,

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46. *Id.* at 24.

47. *Id.* at 38.

48. The Madrid Conference was a peace conference held in Madrid in 1991, concerning the Israeli-Palestinian conflict. It was supported by Arab countries, such as Lebanon, Syria and Jordan, and was followed by several bilateral negotiations. *See Lexicon of Terms*, KNESSET, [https://www.knesset.gov.il/lexicon/eng/madrid\\_eng.htm](https://www.knesset.gov.il/lexicon/eng/madrid_eng.htm) (last visited Apr. 6, 2019); *Israel-Syria Negotiations*, ISRAEL MINISTRY OF FOREIGN AFFAIRS, <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israel-syria%20negotiations.aspx> (last visited Apr. 6, 2019).

49. *Israel-Syria Peace Talks to Resume*, JEWISH VIRTUAL LIBRARY, <https://www.jewishvirtuallibrary.org/israel-syria-peace-talks-to-resume>; Walid Al-Moualem, *Fresh Light on the Syrian-Israeli Peace Negotiations*, 26 J. PALESTINE STUD. 81, 85 (1997); Marwa Daoudy, *A Missed Chance for Peace*, 61 J. INT’L AFF. 215, 215 (2008).

50. According to Israel’s Ministry of Foreign Affairs, the visit occurred January 10<sup>th</sup> through 17<sup>th</sup>, 1995. *Chronology of Events – 1995-1996*, ISRAEL MINISTRY OF FOREIGN AFFAIRS (Nov. 28, 2000), <http://www.israel.org/MFA/ForeignPolicy/MFADocuments/Yearbook10/Pages/CHRONOLOGY%20OF%20EVENTS-%201995-1996.aspx>. Another statement claims that the visit occurred January 12, 1995. *Foreign Ministry Statement on Visit of Foreign Minister Peres to Venezuela and Argentina*, ISRAEL MINISTRY OF

surprisingly, the Israeli Ministry of Foreign Affairs claims that the visit occurred in January 1995.<sup>51</sup> It is surprising because the bombing of the AMIA building happened right in the midst of these meetings, and discussions of security arrangements led to two meetings between the Israeli chief-of-staff and Syrian chief-of-staff in December 1994 and June 1995.

It is alleged that in the early morning of July 19, 1994, the day after the attack, the Argentine Ambassador to Israel, Jose Otegui, cabled the Argentine Foreign Ministry, stating that a former Israeli Ambassador in Argentina, Dov Schmorak, was flying to Buenos Aires as a special envoy to Prime Minister Rabin, with the intention of meeting with Menem in order to coordinate the version of events for the bombing that would be announced to the world.

According to a transcript provided by Alejandro Rúa, the cable stated, “[f]or the Israeli government it is important to coordinate with our version of the attack coincidentally-mainly by impact will have a way to present the issue before Israeli public opinion-given that opposition parties and some media are using the fact to attack harshly government peace policy Rabin.”<sup>52</sup> After meeting Menem, Schmorak

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FOREIGN AFFAIRS (Jan. 15, 1995), <https://mfa.gov.il/MFA/ForeignPolicy/MFADocuments/Yearbook10/Pages/Foreign%20Ministry%20Statement%20on%20visit%20of%20Foreign%20Min.aspx>. However, a CIA report articulates that the visit occurred June 1, 1994. CENT. INTELLIGENCE AGENCY, ISRAELI FONMIN’S VISIT A SURPRISE PLUS FOR BILATERAL RELATIONS 1 (1994). Another source dates the visit in July 1994. *Sus dos Visitas a la Argentina, al que Consideraba “Un País en Transición”*, ÁMBITO (Sept. 28, 2016), <https://www.ambito.com/sus-dos-visit-as-la-argentina-al-que-consideraba-un-pais-transicion-n3956787>.

51. It should be noted that this is not the only inaccuracy of the site, which counts 102 victims of the AMIA bombing, while the accurate number is 85. *Foreign Ministry Statement on Visit of Foreign Minister Peres to Venezuela and Argentina*, ISRAEL MINISTRY OF FOREIGN AFFAIRS (Jan. 15, 1995), <https://mfa.gov.il/MFA/ForeignPolicy/MFADocuments/Yearbook10/Pages/Foreign%20Ministry%20Statement%20on%20visit%20of%20Foreign%20Min.aspx>.

52. A transcription of the cable EISRA 010365/1994, June 19, 1993 is available on Alejandro Rúa’s twitter. Alejandro Rúa (@AleRuaTwit), TWITTER (Apr. 21, 2018, 8:14 AM), <https://twitter.com/AleRuaTwit/status/987711269389176832>; *Exclusivo: El video que revela cómo empezó el encubrimiento*, INFOJUS NOTICIAS, <http://juicioamia.infojusnoticias.gov.ar/las-pruebas/versiones-coincidentes> (last visited Apr. 7, 2019); Horacio Verbitsky, *La InfAMIA*, PÁGINA 12 (July 18, 2004) <https://www.pagina12.com.ar/diario/elpais/1-38318-2004-07-18.html>. Surprisingly, another cable from the US Embassy in Beirut, dated July 1994, informs Washington of the sudden call back to Argentina from Ambassador Feraldo. U.S. DEP’T OF ST. REV. AUTH., A SHADOW ON ARGENTINE-LEBANESE TIES (1994), available at [https://archive.org/stream/AMIA\\_Files/104608204-A-Shadow-on-Argentine-Lebanese-Ties](https://archive.org/stream/AMIA_Files/104608204-A-Shadow-on-Argentine-Lebanese-Ties).

declared to the press, “[p]ossibly, the number one on the list of suspects is Iran. There are Islamic fundamentalist organizations inspired by Iran, financed by Iran, trained by Iran, but not Iranian, like Hezbollah, in Lebanon.”<sup>53</sup> In an interview filmed on July 19, 1994, Prime Minister Rabin admitted to speaking with Menem after the bombing, and mentioned that Menem supported the Israeli peace process and was determined to coordinate the strengths of their countries in the fight against Hezbollah, Hamas, and Islamic Jihad.<sup>54</sup>

On September 27, 1994, President Menem and Foreign Minister Peres held a private meeting at the United Nations in New York to discuss the AMIA attack.<sup>55</sup> Later that year, President Menem visited Syria.<sup>56</sup> In another interesting interview during a visit by President Menem to Buenos Aires, which was undated but ostensibly held in the summer of 1997, Peres explains the necessity of making certain compromises with Israel’s Arab partners.<sup>57</sup> Israel was clearly seeking to reach peace with its neighbors.<sup>58</sup> Later, in 2015, Menem requested

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53. Raúl Kollman, *Una década de misterio y las nuevas evidencias disponibles*, PÁGINA 12 (July 18, 2004), <https://www.pagina12.com.ar/diario/elpais/1-38344-2004-07-18.html>.

54. The interview is available via YouTube through a video uploaded by Infojus Noticias. InfojusNoticias, *Especial de Tiempo Nuevo Sobre el Atentado a la AMIA - 19 de Julio de 1994*, YOUTUBE (Oct. 6, 2015), <https://www.youtube.com/watch?v=WJAGU5HKc6w>.

55. Menem allegedly carried a letter from Peres to Assad, offering the retreat of the Golan Heights in exchange for a Peace Treaty. Magdalena Carrancio, *Las repercusiones del conflicto de medio oriente en la política exterior Argentina*, in LA POLÍTICA EXTERIOR ARGENTINA 1994/1997 149, 153 (1998); *Menem Diz que Houve Erro*, FOLHA DE S.PAULO (Nov. 25, 1994), <https://www1.folha.uol.com.br/fsp/1994/11/25/mundo/8.html>; Nayla W. Razzouk, *Argentine President Visits Syria*, UPI (Nov. 21, 1994), <https://www.upi.com/Archives/1994/11/21/Argentine-President-visits-Syria/8038785394000/>.

56. Marcela Valente, *ARGENTINA: Menem se Propone Acercar a Siria e Israel*, INTER PRESS SERVICE (Nov. 19, 1994), <http://www.ipsnoticias.net/1994/11/argentina-menem-se-propone-acercar-a-siria-e-israel/>.

57. DiFilm, *Shimon Peres habla de la AMIA – Yasser Arafat – Acuerdo OLP 1994*, YOUTUBE (June 11, 2018), <https://www.youtube.com/watch?v=nhi5aov6jF4>.

58. In October 1994, Israel and Jordan drafted a peace treaty, which paved the way for regular diplomatic relations after forty-six years. Allan Cowell, *Israel and Jordan Sign Draft of Wide-Ranging Peace Treat*, N.Y. TIMES (Oct. 18, 1994), <https://www.nytimes.com/1994/10/18/world/israel-and-jordan-sign-draft-of-wide-ranging-peace-treaty.html>.



from the TOF 2<sup>59</sup> for relief of his duty of confidentiality, claiming that his declaration could affect “state interests” and breach the “peaceful coexistence” established between Argentina and other countries.<sup>60</sup> These events support a conclusion that Israel and Argentina coordinated a false narrative in the hopes of furthering their political agenda. From a political perspective, it was important to shift the blame for the terrorist attack away from Syria or Lebanon, and to Hezbollah or Hamas alone.<sup>61</sup> Accusing Syria or Lebanon of supporting the attack would only cause irreversible setbacks for Israel in the midst of peace negotiations. Israeli leaders expressed these political concerns to the main Jewish institutions in Argentina, and thereafter, the false narrative ran its course to the people. Through these moments, the AMIA bombing effectively became a case of collateral damage.

In accordance with the version of the story coordinated between Argentina and Israel, the Iranian narrative began taking form in the proceeding and beyond.<sup>62</sup> Israel agreed with the Argentine government that there would not be an investigation into Syria’s involvement in the AMIA bombing. There were also rumors that the Legal Attaché, in an unverified cable sent to the U.S. Ambassador, discounted any Syrian connection to the AMIA case, and asserted that Iran, and not Syria, financed the Hezbollah agents responsible for the attack.<sup>63</sup> Israel was clearly interested in preventing a Syrian connection to the AMIA case.

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59. TOF is an acronym which stands for Argentina’s “Tribunal Oral en lo Criminal Federal,” and is used several times throughout this article. The TOF 2 was the Tribunal overseeing the AMIA II trial.

60. *AMIA: Menem pidió que se lo releve del “secreto de estado”*, PERFIL (Aug. 20, 2015), <https://www.perfil.com/content/22759>; *AMIA: Menem prometió datos clave*, LA NACIÓN (Aug. 21, 2015), <https://www.lanacion.com.ar/1820987-amia-menem-prometio-datos-clave>; *A 21 años de la AMIA, Menem ahora afrece pruebas para esclarecer el atentado*, ÁMBITO (Aug. 20, 2015), <http://www.ambito.com/804084-a-21-anos-de-la-amia-menem-ahora-ofrece-pruebas-para-esclarecer-el-atentado>.

61. Adriana Camisar, *Ibrahim Yassin: Another Voice Confirming Hezbollah’s Participation in the AMIA Bombing*, B’NAI B’RITH INT’L (Apr. 16, 2018), <https://www.bnaibrith.org/expert-analysis/ibrahim-yassin-another-voice-confirming-hezbollahs-participation-in-the-amia-bombing>.

62. Paulo Botta, *Argentina e Irán entre 1989 y 1999*, 14 AURACARIA 155, 156 (2012); see generally Mike Lasusa, U.S. Involvement in the AMIA Bombing Investigation (Apr. 2006) (unpublished Masters thesis, American University) (on file with American University).

63. This citation refers to leaked government cables uploaded onto, and only available through, Wikileaks. The unclassified nature of documents found on Wikileaks is well noted, and are only included to point out possibilities and to

The leaders of AMIA and DAIA were aware of the conspiracy. They blindly followed Israeli instructions to support Galeano's inefficient and directionless investigation, and ignored the insurmountable evidence pointing to the cover-up. Their political agenda became more important than the truth.<sup>64</sup> I can only imagine how long it took, or how difficult it must have been for them to keep a straight face and process the indigestible "official story." In spite of the gaps, errors, and absurdities in the narrative, they were still convinced that the public would accept the story without question. The situation would be amusing if we could only ignore the horrors of the tragedy they obscured.

In August 1994, Galeano flew to Venezuela on Tango 04, the Presidential Plane, to interview a potential Iranian suspect named Manoucher Moatamer. As Galeano stepped off the plane in his return, several reporters immediately approached him to ask him questions. His only response was "you are going to fall on your back."<sup>65</sup> Thereafter, Galeano visited the Presidential House in Olivos to speak with President Menem.<sup>66</sup> There, it is presumed that he presented Present Menem with the videotape of his interview with

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further facilitate discussions regarding the uncertainties of the AMIA case. *Ambassador Meeting with AMIA Friends and Family Group*, WIKILEAKS, [https://wikileaks.org/plusd/cables/07BUENOSAIRES1327\\_a.html](https://wikileaks.org/plusd/cables/07BUENOSAIRES1327_a.html) (last visited Apr. 7, 2019).

64. See Christian Sanz, *La verdad sobre el atentado a la AMIA fue revelada por Wikileaks*, MENDOZA POST (Feb. 18, 2018), <https://www.mendozapost.com/nota/83064-la-verdad-sobre-el-atentado-a-la-amia-fue-revelada-por-wikileaks/>. Reporters transcribed a conversation with a high level official from DAIA, who said, "[w]e know that Iran is not behind the attack on the AMIA, but we need to say yes because Iran is a country that has promised to eliminate Israel from the face of the Earth and that kind of enemy must be fought with everything at hand." See Raúl Kollman, *Una Ayudita a los Amigos Para Acusar a Irán*, PÁGINA 12 (Feb. 27, 2011), <https://www.pagina12.com.ar/diario/elpais/1-163172-2011-02-27.html>; Gareth Porter, *Bush's Iran/Argentina Terror Frame-Up*, NATION (Jan. 19, 2008), <https://www.thenation.com/article/bushs-iranargentina-terror-frame/>.

65. "Fall on your back" is a phrase used to describe a person fainting (and falling on their back) from hearing overwhelming news. Adrian Ventura, *A dos años del atentado a la AMIA*, LA NACIÓN (July 12, 1996), <https://www.lanacion.com.ar/175720-a-dos-anos-del-atentado-a-la-amia>; *El juez que debió Resolver el peor Atentado en la Argentina*, LA NACIÓN (Aug. 3, 2005), <https://www.lanacion.com.ar/726953-el-juez-que-debio-resolver-el-peor-atentado-en-la-argentina>.

66. Susana Viau, *"Donde no hay justicia es peligroso tener razón"*, CLARÍN (Feb. 16, 2012), [https://www.clarin.com/politica/justicia-peligroso-tener-razon\\_0\\_SktZeessD7x.html](https://www.clarin.com/politica/justicia-peligroso-tener-razon_0_SktZeessD7x.html).

Moatamer.<sup>67</sup> Since a Federal Judge should function independently of every other governmental power, it is not surprising that his decision to meet with President Menem to present new evidence was met by a flock of curious news outlets waiting to report on a new development in the AMIA case. It is reasonable to assume that one would expect a break in the case. However, Galeano's promise to reporters that they would "fall on their back" would remain unfulfilled.

Something clearly changed during Galeano's meeting with President Menem. Perhaps Galeano realized the likelihood of failure in attempting to develop an Iranian connection to the AMIA case based solely on the testimony of a random repentant who lacked any credibility. Galeano knew that he did not have evidence to corroborate Moatamer's statements.<sup>68</sup> The Argentine Foreign Minister, Guido di Tella, shared the same skepticism.<sup>69</sup> In one interview, Tella stated, "[t]o my knowledge, there was never any real evidence [of Iranian responsibility]. They never came up with anything."<sup>70</sup> Tella also displayed hesitance in severing Argentina's relationship with Iran, which conflicted with his previous statements about taking a firm position with Tehran. His reluctance not only

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67. *Citan a declarar a 14 agentes de la secretaría de inteligencia*, LA NACIÓN (Sept. 12, 2003), <https://www.lanacion.com.ar/526827-citan-a-declarar-a-14-agentes-de-la-secretaria-de-inteligencia> (detailing that meeting); *El juez lijo pidió detalles de una reunión entre Menem y Galeano en Olivos*, LA CAPITAL (Jan. 26, 2015), <https://www.lacapital.com.ar/politica/el-juez-lij-pidio-detalles-una-reunion-menem-y-galeano-olivos-n481366.html>; *Juez AMIA revisa reunión con Menem*, ÁMBITO (Jan. 26, 2015), <http://www.ambito.com/776258-juez-amia-revisa-reunion-con-menem>.

68. Unclassified diplomatic cable from James Cheek, U.S. Ambassador, Argentina, to Philip Wilcox, U.S. Ambassador, Counterterrorism (Sept. 1994) at 4, [https://archive.org/stream/AMIA\\_Files/104608273-Scenesetter-for-Counter-Terrorism-Team-Visit-to-Buenos-Aires-September-5-6#mode/2up](https://archive.org/stream/AMIA_Files/104608273-Scenesetter-for-Counter-Terrorism-Team-Visit-to-Buenos-Aires-September-5-6#mode/2up); Calvin Sims, *Argentine Chief, Noting Bombing Report, May Expel Iran Envoy*, N.Y. TIMES (Aug. 11, 1994), <https://timesmachine.nytimes.com/timesmachine/1994/08/11/917966.html?action=click&contentCollection=Archives&module=LedeAsset&region=ArchiveBody&pgtype=article&pageNumber=9>. ("While an Iranian role is widely assumed, hard evidence is lacking and the GOA case is based largely on the testimony of the Iranian defector Manucher Moatamer, *who lacks credibility both locally and internationally*. Argentine investigators have come up with little or no information to corroborate Moatamer's allegations." (emphasis added)).

69. Unclassified diplomatic cable from James Cheek, U.S. Ambassador, Argentina, to Philip Wilcox, U.S. Ambassador, Counterterrorism (Sept. 1994) at 3, [https://archive.org/stream/AMIA\\_Files/104608273-Scenesetter-for-Counter-Terrorism-Team-Visit-to-Buenos-Aires-September-5-6#mode/2up](https://archive.org/stream/AMIA_Files/104608273-Scenesetter-for-Counter-Terrorism-Team-Visit-to-Buenos-Aires-September-5-6#mode/2up).

70. Gareth Porter, *Bush's Iran/Argentina Terror Frame-Up*, NATION (Jan. 19, 2008), <https://www.thenation.com/article/bushs-iranargentina-terror-frame/>.

revealed doubts about Galeano's investigation, but also uncertainties with regards to the economic relationship between Argentina and Iran.<sup>71</sup>

The sudden shift in Galeano's position is best explained by examining the political pressure that the Argentine government faced at the time from the general public. To that regard, the U.S. Ambassador of Argentina, James Cheek, made the following statement in an unclassified cable dated August 1994:

"There is tremendous political pressure on the Argentine government to arrest those responsible for the bombing. Many Argentines believe that the failure to solve the 1992 bombing of Israel's Buenos Aires Embassy demonstrated to international terrorists that Argentina was a soft target. The public believes that Iran was behind the AMIA bombing or supported the perpetrators in some way."<sup>72</sup>

Though the public still believed that Iran was very much involved in the AMIA attack, Galeano was slowly losing his audience as he failed to strengthen the Iranian connection to the case with concrete evidence from the investigation. Given the questionable nature of Moatamer's reliability as a witness to the case, Galeano knew that Moatamer's testimony would not hold up in Court.<sup>73</sup>

Evidence of Iranian participation in the AMIA attack has always been regarded as tenuous, based mostly on discredited testimony. It was supposed that Iran supported Hezbollah, but to that effect, Galeano failed to provide enough evidence to effectuate the issuance of Interpol red notices or any other request for extradition of Iranian diplomats.<sup>74</sup> This does not mean we should forget the Iranian

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71. Unclassified diplomatic cable from James Cheek, U.S. Ambassador, Argentina, to Philip Wilcox, U.S. Ambassador, Counterterrorism (Aug. 1994) at 3-4, <https://foia.state.gov/searchapp/DOCUMENTS/Waterfall/190113.pdf>.

72. *Id.*

73. *Id.*

74. The citations here refer to several leaked government cables uploaded onto, and only available through, Wikileaks. The unclassified nature of documents found on Wikileaks is well noted, and are only included here to point out possibilities and to further facilitate discussions regarding the uncertainties of the AMIA case. *See* Classified diplomatic cable from Anthony Wayne, U.S. Ambassador, Argentina, to U.S. Secretary of State (Jan. 19, 2007) at 1, [https://wikileaks.org/plusd/cables/07BUENOSAIRE93\\_a.html](https://wikileaks.org/plusd/cables/07BUENOSAIRE93_a.html) (The red notices submitted by Nisman to Interpol were corrected by the U.S. government); Cable from Wayne to U.S. Secretary of State (May 27, 2008) at 2, [https://wikileaks.org/plusd/cables/08BUENOSAIRE717\\_a.html](https://wikileaks.org/plusd/cables/08BUENOSAIRE717_a.html) (Nisman apologized for not informing in advance of a request to the U.S.); Cable from

connection to the case. Instead, the connection should be accurately and independently investigated, like any other potential lead in the case. AMIA Special Prosecutor, Alberto Nisman, who followed directives and instructions from the U.S. government,<sup>75</sup> and was even believed to be working for the Federal Bureau of Investigation,<sup>76</sup> would be one of the most conspicuous advocates calling for further investigation.<sup>77</sup>

### C. *Derailment of Justice*

Though likely illegal in all respects, Galeano offered Telleldin, with funds provided by the SIDE, \$400,000 to answer a list of questions. Though Galeano videotaped the offer, he likely did so only to leave a record that he did not keep the money for himself. After the meeting, the SIDE duplicated the tape.<sup>78</sup> A copy of the tape then reached Commissioner Juan Ribelli, the most prominent policeman that Galeano previously arrested. Ribelli requested an interview with Galeano, and during that meeting, Ribelli presented Galeano a package containing the copy of the tape, wrapped like a gift, and

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Wayne to U.S. Secretary of State (May 29, 2008) at 1, 3, [https://wikileaks.org/plusd/cables/08BUENOSAIRES739\\_a.html](https://wikileaks.org/plusd/cables/08BUENOSAIRES739_a.html) (Nisman explained his actions to the US Embassy); Cable from Wayne to U.S. Secretary of State (May 19, 2009) at 1-2, [https://wikileaks.org/plusd/cables/09BUENOSAIRES592\\_a.html](https://wikileaks.org/plusd/cables/09BUENOSAIRES592_a.html) (Nisman informed in advance of an indictment); Ana Delicado, *Nisman, el fiscal desenmascarado por Wikileaks*, PÚBLICO (Jan. 22, 2015), <https://www.publico.es/internacional/nisman-fiscal-desenmascarado-wikileaks.html>.

75. *Id.*

76. Harriet Alexander, *America 'Refused to Hand Over Emails Sent by Argentine Prosecutor Alberto Nisman' Before His Death*, TELEGRAPH (Oct. 23, 2015), <https://www.telegraph.co.uk/news/worldnews/southamerica/argentina/11952064/America-refused-to-hand-over-emails-sent-by-Argentine-prosecutor-Alberto-Nisman-before-his-death.html>.

77. Dexter Filkins, *Death of a Prosecutor, Alberto Nisman Accused Iran and Argentina of Colluding to Bury a Terrorist Attack*, NEW YORKER (July 20, 2015), <https://www.newyorker.com/magazine/2015/07/20/death-of-a-prosecutor>.

78. Jorge D. Boimvaser, *Historia secreta de un video que nunca se robó*, TRIBUNA DE PERIODISTAS (Sept. 4, 2004), <https://periodicotribuna.com.ar/924-historia-secreta-de-un-video-que-nunca-se-robo.html>; *La SIDE le Pagó a Telleldin y lo Filmó*, LA NACIÓN (Sept. 24, 2003), <https://www.lanacion.com.ar/530023-la-side-le-pago-a-telleldin-y-lo-filmo>; *Historia de un Video Polémico*, CLARÍN (Apr. 8, 1997), [https://www.clarin.com/politica/historia-video-polemico\\_0\\_SJhgpEGbAYl.html](https://www.clarin.com/politica/historia-video-polemico_0_SJhgpEGbAYl.html); Ailín Bullentini, *Los videos, el pago y la pista falsa*, PÁGINA 12 (Sept. 25, 2015), <https://www.pagina12.com.ar/diario/elpais/1-282453-2015-09-25.html>.

recommended that Galeano watch it in private.<sup>79</sup> One can only imagine Galeano's discomfort upon receiving the videotape, which was recorded in secret and, presumably, secured within the Tribunal's safe. After several meetings with Ribelli, Galeano claimed before another Federal Judge that he was a victim of extortion. The Judge ordered the arrest of Ribelli's counselor and others involved.<sup>80</sup> Even through Galeano's apparent attempts to hide the recording, the videotape still reached the press.<sup>81</sup>

Pablo Jacoby, a dear colleague of mine, who would later in 1999 act as my partner in the AMIA trial, is a counselor recognized by many Argentine journalists. He represented, among others, Jorge Lanata, a stubborn and courageous reporter who refused to accept the censure that the Argentine press imposed on the investigation. In an attempt to expose the truth that so many news outlets failed to do, Lanata broadcasted this tape on his TV program, "Dia D."<sup>82</sup> I recall Pablo describing how he and Lanata frantically ran from one television prompter to another to evade police searching for them in order to enforce a seizure order issued by another Federal Judge.<sup>83</sup> When Galeano's scandal reached the public, the AMIA, the DAIA, and even the Bi-Cameral Commission, established in Congress to investigate the AMIA bombing, decided to support Galeano, mistakenly believing, as Salvador Cruchaga, a member of the

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79. Marcela Valente, *ARGENTINA: A 1.000 días de atentado a la AMIA, un nuevo escándalo*, INTER PRESS SERVICE (Apr. 9, 1997), <http://www.ipsnoticias.net/1997/04/argentina-a-1-000-dias-de-atentado-a-la-amia-un-nuevo-escandalo/>.

80. *Sigue preso en un escuadrón de gendarmería*, CLARÍN (Apr. 22, 1997), [https://www.clarin.com/politica/preventiva-cuneo-libarona\\_0\\_r1wl3MGb0Fg.html](https://www.clarin.com/politica/preventiva-cuneo-libarona_0_r1wl3MGb0Fg.html).

81. See generally Alejandra Rey, *AMIA: Debate la bicameral el caso del video*, LA NACIÓN (Apr. 8, 1997), <https://www.lanacion.com.ar/66635-amia-debate-la-bicameral-el-caso-del-video>; see also *Fue amenazado el juez oyharbide*, LA NACIÓN (Apr. 18, 1997), <https://www.lanacion.com.ar/sociedad/fue-amenazado-el-juez-oyharbide-nid67279>.

82. *Atentado a la AMIA*, CLARÍN (Apr. 7, 1997), [https://www.clarin.com/politica/video-polemico-teve\\_0\\_r1yBGW0Fg.html](https://www.clarin.com/politica/video-polemico-teve_0_r1yBGW0Fg.html); *Telleldín dijo que tenía la palabra de Menem para mejorar su situación*, LA NACIÓN (Apr. 7, 1997), <https://www.lanacion.com.ar/sociedad/telleldin-dijo-que-tenia-la-palabra-de-menem-para-mejorar-su-situacion-nid66572>.

83. Claudio Gustavo Goldman, *AMIA/Encubrimiento*, ITON GADOL (Mar. 3, 2017), <http://www.itongadol.com.ar/noticias/val/102922/amia-encubrimiento-efimero-abogado-de-ribelli-recuerda-detencion-por-extorsion-a-galeano-con-video.html>; *Atentado a la AMIA*, CLARÍN (Apr. 7, 1997), [https://www.clarin.com/politica/video-polemico-teve\\_0\\_r1yBGW0Fg.html](https://www.clarin.com/politica/video-polemico-teve_0_r1yBGW0Fg.html); see *Un video muy sospechoso*, PÁGINA 12 (Mar. 4, 2003), <https://www.pagina12.com.ar/diario/elpais/subnotas/17222-6834-2003-03-04.html>.

Commission, told me years later, that they were helping the investigation. With this new support, Galeano, far from adopting a more prudent position, believed he was invincible.

Later, during the Oral Trial, a new videotape depicted Galeano and his clerks showing Telleldin a collection of photographs of the group of jailed policemen that Galeano would later recognize as the recipients of the Traffic van.<sup>84</sup> This video compromised Galeano to a far greater extent than the last one. The evidence was not only corroborated, but also proved beyond all doubt that the Judge directed Telleldin to make his accusations. Unfortunately, Galeano's clerks later destroyed these videotapes, along with several others, without informing either the counselors or the defendants that the videotapes existed.<sup>85</sup>

Memoria Activa, which consisted of the voices most critical of the AMIA investigation, began to hold meetings at Plaza Lavalle before the Supreme Court. That tribunal, followed eagerly by the press and the media, was the perfect setting to thrust accusations against Galeano and the other prosecutors. Every time I presented a request to the Tribunal, I gave them material that would later be exposed to the public by the press.

We continued to highlight the Tribunal's missteps, which revealed its willful disregard of the investigation. For example, we pointed out how Galeano failed to call several important victims and witnesses to testify about the bombing. In fact, Galeano simply overlooked some of these witnesses. For the others mentioned, Galeano merely issued inquiries through the Federal Police, which meant that if these witnesses were ever found, they would be detained and brought before the Judge. Not surprisingly, we found most of these witnesses simply by searching the Buenos Aires telephone directory, which suggests a general lack of effort on the

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84. Raúl Kollman, *El oscuro secretario que llegó de la mano del fino*, PÁGINA 12 (July 27, 2009), <https://www.pagina12.com.ar/diario/elpais/1-128903-2009-07-27.html>; *Declaró Lifschitz y volvió a denunciar encubrimiento en la causa AMIA*, GACETA MERCANTIL, <http://www.gacetamercantil.com/notas/118292/> (last visited Mar. 30, 2019); *Juicio por la AMIA*, CLARÍN (Oct. 25, 2001), [https://www.clarin.com/politica/horas-polemica-videos-galeano-telleldin\\_0\\_rJIN7hUe0Fe.html](https://www.clarin.com/politica/horas-polemica-videos-galeano-telleldin_0_rJIN7hUe0Fe.html).

85. Raúl Kollmann, *Un fiscal federal investiga irregularidades de la Causa AMIA*, PÁGINA 12, <https://www.pagina12.com.ar/2000/00-10/00-10-16/pag03.htm> (last visited Apr. 8, 2019); Raúl Kollmann, *Galeano admitió que destruyó los videos que había mandado filmar*, PÁGINA 12, <https://www.pagina12.com.ar/2001/01-09/01-09-20/PAG22.HTM> (last visited Apr. 8, 2019).

part of the Tribunal. Through our own investigation, we discovered several people who had parked their cars or motorbikes on the same block of the AMIA building at the time of the bombing. Galeano never called these witnesses to testify, and we would only come to take their testimony five long years after the tragic event.

In addition, we learned through our own investigation that the original owner of the Traffic van once reported that the vehicle accidentally burned in a parking lot, long before the day of the AMIA bombing. Further, in the second volume of the proceedings, we found that a representative of the company that had originally insured the van reported that he examined the condition of the vehicle and took photographs at the time of the accident. Yet, nobody during the course of the proceedings requested these photos, even though it was contemplated that the van's engine had been used in the attack. After requesting and viewing the photos from the first accident, I noticed that the van was only partially burned. I also realized that the insurance company did not recognize the burned vehicle as a total loss. When the owner realized that he would not receive a premium sufficient to purchase another car, the representative proposed a plan for him to sell the totaled vehicle to Alejandro Monjo, a car dealer. It was a win-win situation. The insurance company would pay a low premium, the owner would collect enough to purchase another car, and Monjo would re-sell the totaled vehicle to someone for a profit. Unfortunately, Telleldin purchased the totaled vehicle, interested only in the motor and the papers.<sup>86</sup>

During our investigation, we gathered further testimony from witnesses and discovered a modus operandi for the duplication of vehicles. First, Telleldin would buy an engine with legitimate papers. Then, he would steal a similar vehicle with the help of an accomplice. Thereafter, the stolen motor would be installed into the

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86. See *AMIA: Pocas Evidencias*, LA NACION (July 18, 1996), <https://www.lanacion.com.ar/167940-amia-pocas-evidencias>; Archivodichiaras, *DiFilm - atentado a la Amia - detención de Alejandro Monjo (1995)*, YOUTUBE (July 25, 2015), <https://www.youtube.com/watch?v=JWMss1RL5as> (documenting Monjo's arrest); CLAUDIO GROSSMAN, *LA CAMIONETA UTILIZADA (2704/2876)* (2005), available at <https://www2.jus.gov.ar/amia/grossman/La%20camioneta%20utilizada.pdf>. The "Grossman Report" was prepared by Claudio Grossman, then the President of the Interamerican Commission of Human Rights, following the claim that I submitted to the ICHR in 1999, between the Argentine Government and Memoria Activa. Claudio Grossman, *Informe de decano Claudio Grossman Observador Internacional de la Comisión Interamericana de Derechos Humanos en el Juicio de la AMIA* (Feb. 22, 2005), <https://www2.jus.gov.ar/amia/grossman.htm>.



chassis of the original vehicle, the chassis numbers would be obliterated by one of his accomplices and replaced with the chassis numbers of the motor's original vehicle, and the remains of that stolen vehicle would be used for spare parts, or sold for a hefty profit. The plan would bear perfect results, as the duplicated vehicle would pass the inspection of the official authorities.

According to testimony by Telleldin, his wife, Ana Boragni, took to the motor of the van that destroyed the AMIA building to a workshop. Once there, his accomplice installed the engine in another chassis and re-engraved the numbers belonging to the original engine. We requested several times that Galeano indict Boragni, but we always received from him the same answer that he would "Keep it in mind."

To whom did the stolen vehicle first belong to? It is still a mystery today. Even though the rubble from the blast contained human remains, debris from the building, and scraps from the van, Galeano ordered his contractors to collect the rubble from the site of the explosion and remove it to an open field by a river near University City.<sup>87</sup> Thereafter, in 1997, before my appointment as Private Prosecutor, Galeano ordered all the rubble be thrown into the river to become the foundation of a place ironically named *Plaza de la Memoria*, or *Remembrance Park*.<sup>88</sup> After these events, the remains of the van could never be recovered, and our attempts to identify the owner of the original chassis became an impossible task.<sup>89</sup>

Telleldin himself remained an unsolved puzzle. With a lengthy criminal record prior to the AMIA bombing, it was clear that he knew very well what it meant to be in jail and how to function therein.<sup>90</sup> He was unscrupulous. Among his several businesses, he owned a brothel, where his own wife, the mother of his children, worked as a prostitute. He also owned several video clubs, pawned stolen goods, and engaged in vehicular duplication. As he once

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87. See Joe Goldman, *Probe Looks at AMIA Cover-Up*, JEWISH TELEGRAPHIC AGENCY (July 5, 2006), <https://www.jta.org/2006/07/05/lifestyle/probe-looks-at-amia-cover-up> ("Among other charges [against Galeano] are ... not protecting evidence such as rubble from the demolished building, which was dumped into the river after the bombing ...").

88. *Id.*

89. ZUPPI, *supra* note 14, at 67 (referencing a photograph contained in the book).

90. See *Cuatro policías y un ladrón son los principales acusados*, LA NACIÓN (Sept. 22, 2001), <https://www.lanacion.com.ar/sociedad/cuatro-policias-y-un-ladron-son-los-principales-acusados-nid337201>.

wrote, he always worked with the criminal code in hand.<sup>91</sup> Moreover, he was a conspicuous liar.<sup>92</sup> His statements regarding the purchaser of the van consisted of conflicting answers. First, he claimed that a man named Martinez purchased the vehicle for \$10,000. Then, he stated that he was forced under duress to deliver the vehicle to the police in the Province of Buenos Aires. Thereafter, he claimed that a Chinese man bought the vehicle. He also mentioned a man named Mr. Barg, who was never mentioned in previous testimonies. In all of his declarations, Telleldin mixed small pieces of truth with lies, which made it especially difficult for anyone to trust and follow his information.

The case of Telleldin is a clear example of the misinterpretations concerning the rights of an accused person and the crime of perjury, which to the present day prevail among Argentine constitutionalists. Argentina's 1853 National Constitution was inspired by the U.S. Constitution. In the Fifth Amendment, the U.S. Constitution declares that "[n]o person... shall be compelled in any criminal case to be a witness against himself."<sup>93</sup> The Argentine Constitution reproduced a similar principle in Article 18, which states that "[n]o one can be forced to testify against himself."<sup>94</sup> However, the Argentine understanding of this text differs from that of the American. In the U.S., a person has the right to invoke the Fifth Amendment. In Argentina, the majority of the Tribunals recognize that any accused person has the implicit *right* to lie.<sup>95</sup> This interpretation is incorrect, and the case of Telleldin is a perfect example of the consequences of such a misinterpretation. I am rather in favor of legislative projects

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91. *La investigación por el ataque a la mutual judía en 1994*, CLARÍN (Oct. 26, 2003), [https://www.clarin.com/ediciones-antiores/amia-revelaciones-sorpresas-ironias-libro-telleldin\\_0\\_B1cglc1xCKe.html](https://www.clarin.com/ediciones-antiores/amia-revelaciones-sorpresas-ironias-libro-telleldin_0_B1cglc1xCKe.html).

92. *See Telleldin, Procesado como partícipe*, LA NACIÓN (Nov. 4, 1998), <https://www.lanacion.com.ar/sociedad/telleldin-procesado-como-participe-nid116634>.

93. U.S. CONST. amend. V.

94. The original Spanish text reads, "[n]adie puede ser obligado a declarar contra sí mismo." CONSTITUCIÓN NACIONAL [CONST. NAC.] ART. 18 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/804/norma.htm>.

95. Diario El Atlántico, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Nov. 22, 1971, Fallos 281:177 (1971) (Arg.); Carlos A. Carnevale, *La garantía a no declarar contra sí mismo*, in PROCESO PENAL 2 (2013); Gisella Villalba, *Orígenes del derecho a no a declarar contra sí mismo y su garantía*, 12 REVISTA DE DERECHO PROCESAL PENAL (2017), available at [http://ar.ijeditores.com/articulos.php?Hash=a0e4326340e31168a28db849ba0e7bf5&hash\\_t=6e589322dfa976ef824c209af4637279](http://ar.ijeditores.com/articulos.php?Hash=a0e4326340e31168a28db849ba0e7bf5&hash_t=6e589322dfa976ef824c209af4637279).

that include perjury as a serious crime.<sup>96</sup> The new *repentant law*, n° 27304,<sup>97</sup> is a step in the right direction, and includes Article 276 *bis* of the Argentine Criminal Code.<sup>98</sup> To be found guilty, the subject must be the presumed author, accomplice, or abettor of one of the crimes listed in the new Article 41, reformed by Article 1 of Law 27304. In order for a guilty party to receive the benefit of reduced sanctions established by this law, the information that the implicated person provides to the Public Prosecutor must be truthful and accurate. If not, the benefit is lost and the crime is aggravated, becoming yet another crime. However, these norms were not enforced during my work on the AMIA investigation.

It is clear that Telleldin was covering for someone, likely an important person, because he was prepared to spend eight years in prison. In the beginning, I believed he was covering for a family member. However, with the passage of time, I began to wonder if he was covering for somebody much more powerful, perhaps, someone who had the means to retaliate against his family. It was clear that he knew who the final recipient of the van was, but we knew that he would never confess. Considering all the evidence, I concluded that Telleldin delivered the van to the secret service. Support for this conclusion includes the disappearance of the recorded conversations between Telleldin and the Secret Service, the loss of Telleldin's electronic agenda, the cutting of his telephone wires, and the testimony of witnesses who stated that when Telleldin saw the news reporting the bombing on television, he became crazed and shouted profanities, exclaiming, "[t]hose bastards ruined my life."<sup>99</sup> In addition, we considered his hasty escape to Misiones and his

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96. See, e.g., ADOLFO RODRÍGUEZ, S-3633/13 (2013), available at [www.senado.gov.ar/parlamentario/parlamentaria/342595/downloadPdf](http://www.senado.gov.ar/parlamentario/parlamentaria/342595/downloadPdf) (Arg.) (Senator Adolfo Rodríguez proposing to make perjury a crime).

97. See generally CÓDIGO PENAL [COD. PEN.] [CRIMINAL CODE] ley 27304 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/265000-269999/267115/norma.htm>.

98. *Id.* at Art. 2 (Article 276 is incorporated as follows: "It will be punished with imprisonment of four (4) to ten (10) years and with the loss of the benefit granted, the person who benefiting from the benefit of article 41 ter [sic], will maliciously provide false information or inaccurate data.").

99. This conversation was corroborated by several witnesses who were with Telleldin when he saw the first images of the AMIA explosion. I used this evidence when I appealed Galeano's decision to dismiss Telleldin. *Un sorpresivo testimonio complicó a Carlos Telleldin*, LA NACIÓN (Oct. 19, 2002), <https://www.lanacion.com.ar/sociedad/un-sorpresivo-testimonio-complico-a-carlos-telleldin-nid441996>; *Noticias del atentado*, (Oct. 29, 2004), <https://www2.jus.gov.ar/amia/sentencia/TI%20CX%20B3hii.pdf>.

subsequent surrender to the SIDE, and the unknown helicopter that suspiciously flew over the AMIA building hours before the bombing. We also considered the reported threats and injuries to Telleldin's son when Telleldin testified before the TOF 2 during AMIA II. Evidence shows that perpetrators warned Telleldin's son that his father should remain silent during the proceeding.<sup>100</sup>

Two additional key pieces of evidence should be considered and added to the list. The evidence collected in the proceedings proves that two days prior to the explosion, someone parked the van used in the bombing in Jet Parking, a parking lot in the neighborhood of the AMIA building. Based on videotapes recovered from Jet Parking, the van entered the parking lot and the engine suffered a malfunction and died. Then, a person emerged from a vehicle parked behind the van, inspected the van's engine, and made some adjustments. The engine then restarted, allowing the driver to complete his route and park the van.<sup>101</sup> Who was this mysterious driver? According to several witness testimonies, he was an Argentine man with a provincial accent.

During the Oral Trial, we also learned from a retired member of the Air Force, who managed a covered parking garage just one block away from Jet Parking, that on July 15, 1994, a person with a heavy Middle Eastern accent requested to park a Traffic van there on the upper floor until the early hours of the following Monday, July 18. The manager explained to him that it was not possible because the van could not pass the lower point of the roof at the end of the ramp. Security cameras recorded the entire conversation. After the explosion, the manager contacted the police about the tape. Investigators told him that they would come to collect the tape, but never did. Nearly ten years after the blast, we learned of this recording, and learned too, that the tape had been re-used and written over.<sup>102</sup> During the Oral Trial, several members of the SIDE described to the TOF 3 how they cleared the zone by searching for parking lots where the van may have been parked before the attack.

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100. *Ataque a Telleldín*, PÁGINA 12 (June 23, 2002), <https://www.pagina12.com.ar/diario/elpais/1-6664-2002-06-23.html>.

101. *AMIA, el encubrimiento: la SIDE y Galeano, en la mira*, LA NACIÓN (July 13, 2003), <https://www.lanacion.com.ar/opinion/amia-el-encubrimiento-la-side-y-galeano-en-la-mira-nid510951>.

102. *Otamendi*, (Oct. 29, 2004), <https://www2.jus.gov.ar/amia/sentencia/TI%20CVII%20C.pdf>.

Yet, no one mentioned this covered garage, despite its' location, just one block away from Jet Parking.<sup>103</sup>

Between 1997 and 2000, I requested from the Tribunal more than 400 measures for collecting evidence, and some of these necessarily included requests for searches and further testimony from witnesses. Due to our perseverance, we discovered that the police car patrolling the AMIA building did not have a battery for several weeks before the blast; the car could not move an inch. In fact, the administrators of the AMIA building provided the policemen with walkie-talkies because the officers could not utilize the radio in their vehicle without a battery. The officers only requested for a new battery on the morning of July 18 because it was cold outside. A mechanic removed the old battery and left the hood slightly open, which ultimately saved a man's life because when the explosion occurred, the hood rose up and shielded the vehicle's interior and a policeman within.<sup>104</sup> We celebrate the saving of his life, but equally mourn for the victims to the tragedy that took place the same morning. Some of the blame can be placed on the negligent behavior of the Federal Police, as the unit did not hesitate to retain an entirely useless vehicle to protect the AMIA building, a threatened Jewish center.

One of the requests submitted to the Tribunal included the request for authorization to interrogate all of the police officers membered to the 5th and 7th Precincts who shared duties to patrol the AMIA building. This request alone required more than fifty interrogations. I also requested the Precinct's logbooks, which revealed that the registers on the day of the blast had clearly been altered. After the policemen testified before Galeano's Tribunal, I read with dismay their useless and identical declarations. I contacted one of the clerks, Javier de Gamas, who, after hearing my complaints, looked at me and said, "do not worry, we will call all of them again." Of course, the Tribunal would only pile on more mountains of useless paperwork unhelpful to the investigation, just to show that it was doing *something*.

There were many other events that highlighted the Tribunal's clear lack of effort in the investigation. For example, the proceedings revealed that one man, located far to the south in Ushuaia, three

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103. *La presencia de los investigadores*, (Oct. 29, 2004), <https://www2.jus.gov.ar/amia/sentencia/TI%20CVII%20B4.pdf>.

104. *Juicio por la AMIA: Ayer declararon los dos policia*s, CLARÍN (Nov. 1, 2001), [https://www.clarin.com/politica/amia-agentes-guardia-sorprendidos\\_0\\_r1Zx858gAKx.html](https://www.clarin.com/politica/amia-agentes-guardia-sorprendidos_0_r1Zx858gAKx.html).

thousand miles from Buenos Aires, declared that he bombed the AMIA building. A forensic doctor immediately declared that the man was insane, and was suffering from a severe case of psychopathy. Regardless, Galeano ordered three vehicles full of investigators to visit Ushuaia to interview the man's neighbors and relatives, conduct new medical exams, take photos, and draw sketches. After filling out more than 400 pages in a report, the investigators, too, concluded that the suspect was insane. These events highlight Galeano's suspicious intentions, and equally emphasize the waste of precious resources and time in the investigation under his guide.

During a seizure of the premises belonging to Monjo, the car dealer, law enforcement discovered thousands of U.S. dollars. For some reason, Galeano photocopied each dollar bill, adding several hundreds of pages to the report. It became evident that the photocopies served a hidden purpose. After Galeano took a statement from a woman named Miram Salinas, who was presumed to have relations with the Telleldin family, Galeano staged a performance and directed Salinas to refuse to answer any further questions. This performance ultimately led to her acquittal. Simultaneously, the Judge declared Salinas a protected witness. Galeano buried Salinas' acquittal papers with the photocopies of Monjo's dollar bills, likely in an attempt to avoid an appeal. The copies handed to us did not include the acquittal papers, and we only discovered them during the Oral Trial.<sup>105</sup> It was clear to us that Galeano would not hesitate to do what he needed to do to maintain the cover-up.

The same nothingness occurred over the course of the proceedings and thereafter. As the first anniversary of bombing approached, we received hopeful, albeit meaningless announcements. We received word of a new informant. We heard of a trip by the Public Prosecutors to Switzerland or France, presumably to investigate bank accounts, or to Munich, to hear a witness, or to Langley, to interview CIA leaders. Ultimately, however, we did not receive any positive results pertaining to the investigation.

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105. CLAUDIO GROSSMAN, MIRIAM SALINAS Y PABLO IBÁÑEZ (3168/3212) 3 (2005), <https://www2.jus.gov.ar/amia/grossman/Miriam%20Salinas%20y%20Pablo%20Ibanez.pdf>.

### III. A LONG WAY TO WASHINGTON

In a sudden moment of action, Galeano decided to dismiss Telleldin from the charge of concealment by invoking the statute of limitations. I could not accept that Telleldin, the only real link to the bombing, could go free without admitting that he delivered the van. We presumed Galeano's silence to mean that his involvement with the crime went beyond simple concealment. I had a final exchange with Galeano that ended rather badly. After the exchange in his office, I went to the site of the Bar, located in the same building, and typed my appeal to his decision. After submitting the appeal, I received a call from AMIA's counselor, Luis Dobniewsky, inviting me to meet with him in his office located near the Tribunal. When I arrived, I was surprised to find the rest of the counselors of the AMIA and the DAIA. Assuming that I did not comply with the new code when filing my appeal,<sup>106</sup> Dobniewsky stated, "your appeal did not fulfill the new requirements." In response, I told them that my submission was specifically grounded and in compliance with all of the requirements under the new code of procedure. Then, another attorney from Dobniewsky's office left the room and returned with a faxed copy of my appeal, which was strange given that I had filed it just moments ago. I found it incredible that Galeano had personally, and so quickly, sent them a copy of my submission. This revealed to me yet another inconceivable relationship held by Galeano with another Private Prosecutor. Ultimately, I would proceed to win the appeal before the Chamber, which required Telleldin to remain in jail until the end of the Oral Trial.

By the end of 1998, I started hearing strange noises from my telephone, and I suspected that my lines were tapped. As the legal representative of Memoria Activa, and the main critical voice of the investigation, I could not expect to go unnoticed by the SIDE for much longer. After that day, and whenever I met with any of my clients, I required them to deactivate their portable phones and remove the batteries therein. On one occasion, I recall taking the precaution of meeting with a prominent political leader, Elisa Carrió, in a public park near my office. Upon my return, I found my office vandalized, and my laptop stolen. Losing the data in my laptop meant a loss of months of hard work in preparing an index with cross

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106. Before the new changes in the code of procedure, an appeal did not have to be specifically grounded, and it was enough to inform the Tribunal of one's will to appeal.

references of all the volumes in the case. Luckily, I saved a copy of the archives in a safe in Washington.

I was involved in the protection of human rights following the long and bloody dictatorship in Argentina that ended in 1983, so I had contacts with several international human rights organizations. One organization especially dear to me, the CEJIL, is an organization based in Washington, which my friend, José Miguel Vivanco, helped found. I flew to Washington to meet with José Miguel, and Viviana Krsticevic, another friend involved with the CEJIL. After retrieving the copy of the archives of my AMIA documents from their safe, I discussed with them the idea of filing a complaint with the Inter-American Commission on Human Rights (“ICHR”).<sup>107</sup> We understood the difficult task of convincing the ICHR that Argentina, the victimized country, was concealing its own investigation. Miguel and Viviana put me in contact with Andrea Pochak, a young Argentine lawyer who worked in CELS, a brother organization of CEJIL in Argentina, and had excellent knowledge of caselaw of the ICHR in relation to the requirements of putting forth an acceptable claim.

At first glance, the task appeared insurmountable. We had to demonstrate that we had no other option but to submit our claim to the ICHR, and that we exhausted all local remedies. This would be an especially difficult feat given that the case was still open and, in theory, still under investigation. We also had to demonstrate that all of Galeano’s actions amounted to a cover-up, and that the Argentine government was deeply involved.

We started by meeting with Andrea in a coffee shop. Andrea improved my draft and resolved any conflicts therein. We based the accusations against Argentina on the violation of the integrity and right to life of the victims of the bombing.<sup>108</sup> By quoting the

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107. The Interamerican Pact of Human Rights, or San Jose de Costa Rica Pact, created the Interamerican Commission of Human Rights, as their first control organism which allows member countries to submit claims for serious violations of human rights. Following the Interamerican Commission of Human Rights’ investigation, a submitted claim may pass for a verdict with the Interamerican Court of Human Rights, whose decisions were highly respected. According to Law 23054, Argentina was a member of the Interamerican Commission of Human Rights. Law No. 23054, art. 1, 2, 3, B.O. Mar. 27, 1984 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/25000-29999/28152/norma.htm>.

108. American Convention on Human Rights arts. 1(1), 4(1), Nov. 22, 1969, 9 I.L.M. 763, 1144 U.N.T.S. 123.



*Velásquez Rodríguez* case,<sup>109</sup> we heightened the recognized duty of the State to prevent, investigate, and sanction any violation of the rights protected by the ICHR:

“The second obligation of the States Parties is to ‘ensure’ the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible, attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.”

We alleged that Argentina did not fulfill its duties because the State did not take any preemptive measures to prevent the AMIA bombing after the attack on the Israeli Embassy. The Federal Police disregarded its duty to protect the AMIA building by failing to initiate effective police patrols. Argentina also disregarded all warnings of the attack, including those provided by Wilson dos Santos. In addition, we argued that in obstructing the investigation, Galeano violated the rights of the victims and their families. He also violated their right to a fair judicial process against those responsible for the attack. Argentina failed to carry out an honest and effective investigation of the events relevant to the bombing. In *Ergi v. Turkey*, the European Court of Human Rights (“ECHR”) recognized the potential violation of the right to investigation.<sup>110</sup> Consistent with *Ergi v. Turkey*, we also alleged that the Argentine government violated the victims’ right to a fair trial, further underlined by the Advisory Opinion OC-9/87 of the Inter-American Court of Human

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109. We agreed that it is a recognized duty of the state to prevent, investigate, and sanction any violation of the rights protected by the Inter-American Court of Human Rights. *Velásquez-Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 166 (July 26, 1988) (quoting ACHR art. 1.1), [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_04\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf).

110. See *Ergi v. Turkey*, 1998-IV Eur. Ct. H.R. 1751, ¶ 86 (holding that “the Turkish authorities failed to protect Havva Ergi’s right to life on account of the defects in the planning and conduct of the security forces’ operation and the lack of an adequate and effective investigation. Accordingly, there has been a violation of Article 2 of the Convention”).

Rights (“ICoHR”),<sup>111</sup> as well as by the *Suárez Rosero* case.<sup>112</sup> In the case of *Blake*,<sup>113</sup> the ICoHR stated:

“... Article 8(1) of the American Convention recognizes the right of Mr. Nicholas Blake’s relatives to have his disappearance and death to effectively investigated by the Guatemalan authorities to have those responsible prosecuted for committing said unlawful acts; to have the relevant punishment, where appropriate, meted out; and to be compensated for the damages and injuries they sustained.  
...”<sup>114</sup>

In addition, the serious irregularities in the investigation resulted in a violation of the rights of the victims and their families to due process of law under Article 8 and Article 25 of the American Convention of Human Rights (“ACHR”). We showed that we fulfilled all the formal requirements of Article 46.1 of the ACHR. In addition, we argued that we exhausted all available remedies, based on the proposition that Argentina failed to offer realistic options for relief, which not only resulted in unjustified delays of justice, but also rendered any remedy ineffective. We then put forth the long list of due process violations committed by Argentina, several of which were discussed in previous sections of this article.

On July 16, 1999, I submitted our claim to the Commission’s offices on H Street, and received a stamped copy with the time and date. It did not take long for the Argentine media to reproduce our submission.<sup>115</sup> The Secretary of the Commission, Jorge Taiana, an Argentinean forced into exile during the dictatorship, was bewildered by my claim. Though many around the world regarded the AMIA

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111. Judicial Guarantees in States of Emergency (Arts. 27(2), 25, and 8 American Convention of Human Rights), Advisory Opinion OC-9/87, Inter-Am. Ct. H.R. (ser. A) No. 9, ¶ 41 (Oct. 6, 1987).

112. See *Suárez-Rosero v. Ecuador*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 35, ¶ 110(2) (Nov. 12, 1997) (holding “that the State of Ecuador violated, to the detriment of Rafael Iván Suárez-Rosero, Article 8 of the American Convention on Human Rights, in relation to Article 1(1) ...” (citation omitted)).

113. *Blake v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 36 (Jan. 24, 1998).

114. *Id.* at ¶ 97.

115. See *FAMILIARES CONTRA EL ESTADO ARGENTINO Fuerte demanda en la OEA por la AMIA*, CLARÍN (Jul. 7, 1999), [https://www.clarin.com/politica/fuerte-demanda-oea-amia\\_0\\_ry-mxT2xAKe.html](https://www.clarin.com/politica/fuerte-demanda-oea-amia_0_ry-mxT2xAKe.html); Raúl Kollmann, *LA CIDH DIO CURSO A UNA DEMANDA DE LOS FAMILIARES DE LAS VICTIMAS DEL ATENTADO A LA AMIA “Violación del derecho a obtener justicia”*, PÁGINA 12, <https://www.pagina12.com.ar/1999/99-09/99-09-07/pag03.htm> (last visited Mar. 21, 2019).

bombing as one of the most severe terrorist attacks against a Jewish community outside Israel, only a few at that time questioned whether the Argentine authorities were interfering with the investigation. Based on my knowledge that two of the members of the ICHR were Jewish, including Professor Robert Goldman and Dean Claudio Grossman of American University, I hoped that they would receive my claim with interest. I wondered whether they would be as difficult to convince as the representatives of the World Jewish Council that I met in New York just a year prior.

On December 10, 1999, merely days before President De la Rúa took office, Argentina answered our claim. The submission prepared by Argentina, signed by Ambassador Susana Cerruti, was so incredibly disorganized, that for the first time, we realized we were going to win the case. To my surprise, the Argentine government sent to the CIDH hundreds of boxes containing copies of the proceedings, which were unexpected gifts given Galeano's past reluctance in handing over these documents to anyone.

I flew to Washington again to read more than forty volumes. It was a fairly surreal moment considering that I, the claiming party, had to travel 9,000 miles across the world just to read the case. Our rebuttal, designed to destroy the Argentine government's case, highlighted all of the lies, misinterpretations, and admissions contained in its response. Towards the end of 1999, the new administration reviewed the filings and promptly requested to hold a conciliation meeting with us. During the meeting, the new administration proposed to suspend the CIDH proceeding until the Oral Trial, where an observer appointed by the CIDH would assist and prepare a report. Dean Claudio Grossman, then president of the CIDH, was appointed as an observer.

The conclusion of the case is widely known. The TOF 3 decision confirmed all our allegations and suspicions, and declared a large part of the proceeding void.<sup>116</sup> All of the allegations in our submission to the ICHR were detailed in the Dean Grossman Report.<sup>117</sup> On March 4, 2005, during a meeting held at the OAS building in Washington between Memoria Activa members and

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116. See generally *SENTENCIA DICTADA POR EL TRIBUNAL ORAL EN LO CRIMINAL FEDERAL N° 3*, DE LA CIUDAD DE BUENOS AIRES (Oct. 29, 2004), <https://www2.jus.gov.ar/amia/sentencia.htm>.

117. See generally Claudio Grossman, *Informe del decano Claudio Grossman observador internacional de la comision interamericana de derechos humanos en el juicio de la AMIA*, JUS GOV (Feb. 22, 2005), <https://www2.jus.gov.ar/amia/grossman.htm>

Argentine representatives, Ambassador Méndez Carreras, Argentina's representative of the OAS, read the following statement:

“The Argentine government recognizes its responsibility for the violation of human rights reported by Memoria Activa, including the right to life, physical integrity and judicial protection. The State recognizes its responsibility, since there was no prevention to avoid the attack, the State recognizes its responsibility for the concealment and denial of justice.”<sup>118</sup>

We brought our claim to the ICHR to bring international attention to the AMIA case and to compel the Argentine government to properly investigate the attack. In return, we obtained unconditional surrender from the Argentine government. The ICHR welcomed Argentina's admission and reiterated its willingness to accompany the parties in negotiations to reach a friendly settlement on the AMIA petition.<sup>119</sup>

#### IV. AMIA AFTERMATH

The following people have been prosecuted for concealment in what is called the “AMIA II,”<sup>120</sup> with verdicts still pending: Galeano, Public Prosecutors Muellen and Barbaccia,<sup>121</sup> President Menem, the President of DAIA, the Director and Subdirector of the SIDE, the SIDE's Director of Counterintelligence, the Director of the Federal Police Antiterrorist Unit, the Director of the Federal Police Unit for the Protection of Constitutional Order, Telleldin, Telleldin's former counselor, and Boragni.

On January 18, 2015, law enforcement found AMIA Special Prosecutor, Alberto Nisman, shot to death with a bullet hole in his head in his luxury apartment in Puerto Madero, Buenos Aires. His death occurred merely hours before he was to present evidence to the

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118. Raúl Kollmann, *Mea culpa oficial por la causa AMIA*, PÁGINA 12 (Mar. 4, 2005), <https://www.pagina12.com.ar/diario/elpais/1-48040-2005-03-04.html>.

119. See *SATISFACCIÓN DE LA CIDH POR EL RECONOCIMIENTO DE RESPONSABILIDAD DEL ESTADO ARGENTINO EN EL CASO DE LA AMIA*, OEA (Mar. 4, 2005), [http://www.oas.org/es/centro\\_noticias/comunicado\\_prensa.asp?scodigo=cidh-5-s](http://www.oas.org/es/centro_noticias/comunicado_prensa.asp?scodigo=cidh-5-s).

120. For reasons beyond our understanding, Nisman was not included in the list of indicted Prosecutors.

121. See Ailín Bullentini, *El último paso antes de la sentencia*, PÁGINA 12 (Oct. 26, 2017), <https://www.pagina12.com.ar/71728-el-ultimo-paso-antes-de-la-sentencia>; see *Veinte años para Galeano y seis para Menem*, PÁGINA 12 (Apr. 12, 2018), <https://www.pagina12.com.ar/107700-veinte-anos-para-galeano-y-seis-para-menem>.

Argentine Congress to reveal President Cristina Fernández de Kirchner's role in covering up Iran's role in the bombing of the Buenos Aires AMIA center.<sup>122</sup> On January 14, 2015, Nisman announced on the television program, *A Dos Voces*,<sup>123</sup> his plan to indict President Kirchner and Foreign Minister Timerman for treason. One day before the announcement, Nisman submitted the charge to a substitute-Federal judge<sup>124</sup> who was covering another tribunal. The press leaked the submission,<sup>125</sup> and I read the approximately 300-page indictment online that weekend. I knew Alberto Nisman very well. He worked with Muellen and Barbaccia, was the Public Prosecutor at the Oral Trial before the TOF 3, and was a clear supporter of the official story. I never understood why he was not indicted like the other two Prosecutors, though it makes sense when considering the fact that he assumed a similar role to Galeano's when Galeano led the investigation. I was teaching law in the U.S. when my partner, Pablo Jacoby, against my clear wishes to include Nisman in the indictment, decided to give Nisman another chance. Later, my dear friend, Jacoby, who passed away several years ago, admitted that he should have included Nisman in the indictment.

I had a personal issue with Nisman's indictment of President Fernández de Kirchner. On one hand, I hoped the indictment would help expose the most corrupt government that devastated Argentina, but on the other, I was profoundly skeptical that any evidence coming

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122. Gustavo Paredes, *What Happened Before Albert Nisman's Death: A Timeline of his Crucial Last Hours*, BUENOS AIRES TIMES (Jan. 17, 2019), <http://www.batimes.com.ar/news/argentina/what-really-happened-before-nismans-death-a-timeline.phtml>.

123. See Danilo Gonzalez, *A Dos Voces, Alberto Nisman – Encubrimiento del Gobierno Argentino al Atentado AMIA*, YOUTUBE (Jan. 15, 2015), <https://www.youtube.com/watch?v=4nFQ7AsXmf8>.

124. The charge was submitted to a substitute Federal Judge because the original Judge was on vacation for the "judicial holiday," which occurs over the entire month of January, and over fifteen days in July. It is difficult to explain how a country, which suffers from an inveterate backwardness in the resolution of judicial matters and a true overcrowding of legal cases, allows for these judicial holidays.

125. See Mario Weinfeld, *Una jugada fuera de la ley*, PÁGINA 12 (Jan. 17, 2015), <https://www.pagina12.com.ar/diario/elpais/1-263986-2015-01-15.html>; Raúl Kollmann, *Una acusación con hipótesis que no se comprobaron*, PÁGINA 12 (Jan. 15, 2015), <https://www.pagina12.com.ar/diario/elpais/1-263984-2015-01-15.html>; Raúl Kollmann, *"La posición fue consistente y firme"*, PÁGINA 12 (Jan. 17, 2015), <https://www.pagina12.com.ar/diario/elpais/1-264163-2015-01-17.html>; *Una lista de preguntas para el fiscal*, PÁGINA 12 (Jan. 17, 2015), <https://www.pagina12.com.ar/diario/elpais/1-264151-2015-01-17.html>.

from Nisman, similar to that coming from Galeano, could help the case in any way.

I was astonished by the lack of directive in Nisman's indictment. The indictment was merely a collection of presumptions, filled with empty promises. The evidence was entirely based on hearsay witnesses and confusing phone records from third-line members of the Government. Certainly, there was not enough evidence to impeach the President. I could not understand Nisman's personal convictions. Though his indictment was likely correct in its presumptions, it lacked sufficient evidence to prove his points.

On the weekend of his death, I was certain Nisman and his reputation would be destroyed by the official-party Congress members. When he was found dead, I confess that, just for a moment, I wondered if Nisman, in a sudden moment of awakening after realizing how weak his indictment was, committed suicide.<sup>126</sup> However, it soon became clear to me that Nisman was murdered. A black shadow has always loomed over the AMIA case. Moreover, after reading Nisman's autopsy and reviewing the dots of blood discovered with luminol at the site of his death, I was certain he did not take his own life.

With Nisman's death came the discovery of a sordid matter. Specifically, Nisman possessed a U.S. bank account with Merrill-Lynch, which involved wire transfers from nine different, suspicious sources, with deposits totaling nearly \$600,000.<sup>127</sup> In addition,

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126. This evaluation of Nisman's indictment was shared by part of the press and respected opinions. See, e.g., Maier: "*Se trata de una operación política destinada a dura ren el tiempo*", TELAM (Mar. 27, 2015), <http://www.telam.com.ar/notas/201503/99456-julio-maier-denuncia-de-nisman.html>; Leon Arslanian, "*En las 300 paginas de la denuncia no hay pruebas contra la Presidenta*", INFOJUS NOTICIAS (Feb. 2, 2015), <http://www.infojusnoticias.gov.ar/nacionales/en-las-300-paginas-de-la-denuncia-no-hay-pruebas-contra-la-presidenta-7478.html>; Horacio Verbitsky, "*¿Hasta dónde Irán Nisman y Cía.?*", PÁGINA 12 (Jan. 18, 2015), <https://www.pagina12.com.ar/diario/elpais/1-264196-2015-01-18.html>; Mario Weinfeld, "*La historia y las fábulas*", PÁGINA 12 (Jan. 18, 2015), <https://www.pagina12.com.ar/diario/elpais/1-264194-2015-01-18.html>; "*Qué dice la denuncia presentada por Nisman*", INFOJUS NOTICIAS (Jan. 21, 2015), <http://infojusnoticias.gov.ar/nacionales/que-dice-la-denuncia-presentada-por-nisman-7179.html>.

127. Emilia Delfino, "*Nisman recibió en EE.UU. casi US\$ 600 mil de nueve depositantes sospechosos*", PERFIL (Aug. 23, 2015), <http://www.perfil.com/noticias/politica/nisman-recibio-en-eeuu-casi-us-600-mil-de-nueve-depositantes-sospechosos-20150822-0098.phtml>; Michael LaSusa, "*Exclusive: Documents Confirm Leak of Unexplained Deposits to Nisman's US*

through a separate bank account held in Uruguay, Nisman received several payments from Israel Hayom, a new media group owned by U.S. billionaire, Sheldon Adelson.<sup>128</sup> Nisman did not report any of these payments to the Administración Federal de Ingresos Públicos (“AFIP”), the Argentine equivalent to the Internal Revenue Service in the U.S. In fact, when he opened the bank account, he intentionally did not disclose his position as Special Prosecutor.<sup>129</sup> Nisman also possessed two suspicious safety deposit boxes, one in a bank, and the other with a safety deposit company, both of which were cleaned out by his mother following his death.<sup>130</sup>

Judge Rafecas, a Federal Judge appointed by Kirschner in 2004, rejected Nisman’s indictment of President Cristina Kirschner after brief consideration.<sup>131</sup> Though Nisman’s indictment lacked definitive evidence, the Judge was wrong in rejecting the case. The Judge should have first ordered an investigation to determine the appropriateness of rejecting the indictment.

When President Mauricio Macri assumed power, the Federal Cassation Chamber revoked Judge Rafecas’ decision, and then used

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*Bank Account*, LOBE LOG (Feb. 1, 2016), <https://lobelog.com/argentine-leaks-of-nisman-info-violated-agreement-with-us/>.

128. Jorge Elbaum, *La otra ruta del dinero: Nisman y Adelson*, PÁGINA 12 (Sept. 29, 2015), <https://www.pagina12.com.ar/diario/elpais/1-282693-2015-09-29.html>; Horacio Verbitsky, *La planilla de Nisman*, PÁGINA 12 (Jan. 24, 2016), <https://www.pagina12.com.ar/diario/elpais/1-291002-2016-01-24.html>; see *Desde Hong Kong A Tigre Con Amor: Los Otros Depositantes De Nisman*, SEPRIN (Aug. 31, 2015), <http://seprin.info/2015/08/31/desde-hong-kong-a-tigre-con-amor-los-otros-depositantes-de-nisman> (indicating that the press was informed that Adelson made payments totaling USD \$282,000 through eleven deposits in a Uruguayan account transferred from account 9700-7548-MAJ-6325-AC874 that belonged to Israel Hayom); see also Alejandro Rebossio, *Discovery of Gun Registered to Nisman Adds to Mystery Over His Death*, EL PAÍS (Apr. 15, 2015), [https://elpais.com/elpais/2015/04/15/inenglish/1429109899\\_162795.html](https://elpais.com/elpais/2015/04/15/inenglish/1429109899_162795.html) (showing that Nisman bought three farms in Uruguay with that money, and that Nisman’s mother emptied three safe deposit boxes after his death).

129. *La cuenta oculta de la familia Nisman*, PÁGINA 12 (Aug. 29, 2015), <https://www.pagina12.com.ar/diario/elpais/1-280466-2015-08-29.html>.

130. See Paz Rodríguez Niell, *Se reaviva el misterio sobre las cajas de seguridad de Nisman*, LA NACIÓN (May 17, 2015), <https://www.lanacion.com.ar/1793588-se-reaviva-el-misterio-sobre-las-cajas-de-seguridad-de-nisman>; Horacio Verbitsky, *Los dos maletines*, PÁGINA 12 (Feb. 15, 2015), <https://www.pagina12.com.ar/diario/elpais/subnotas/1-71573-2015-02-15.html>.

131. See El juez Rafecas rechazó la denuncia de Nisman contra Cristina Kirchner por encubrimiento a Irán, LA NACIÓN (Feb. 26, 2015), <https://www.lanacion.com.ar/1771607-daniel-rafecas-denuncia-nisman-cristina-kirchner-encubrimiento-iran>.

Nisman's indictment to prosecute Cristina Fernández de Kirchner, Timerman, and other involved functionaries for treason. The case will likely reach the Oral Trial soon.<sup>132</sup> It will be interesting to see how the case continues, and more so, to learn Kirchner's true motives in arranging the memorandum of understanding with Iran.

When considering, generally, the lack of proper investigation and oversight of the AMIA case by the Argentine system, it is not surprising that the death of Nisman has yet to be resolved. If the AMIA case can be offered as an example of disgraceful investigation, Nisman's murder clearly presses the issue to new limits. A horde of policemen, firemen, and supposed investigators arrived at the crime scene without any procedures to prevent the contamination of evidence. They walked all over the carpeted apartment, stood in a pool of blood, cleaned the gun, and handled objects without gloves. They completely destroyed the crime scene.<sup>133</sup> Similar to the failed investigation of the AMIA bombing,

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132. Max Radwin & Anthony Faiola, *Argentine Ex-President Cristina Fernández De Kirchner Charged with Treason*, WASH. POST (Dec. 7, 2017), [https://www.washingtonpost.com/world/the-americas/argentine-ex-president-cristina-fernandez-charged-with-treason/2017/12/07/e3e326e0-db80-11e7-a241-0848315642d0\\_story.html?utm\\_term=.103171510750](https://www.washingtonpost.com/world/the-americas/argentine-ex-president-cristina-fernandez-charged-with-treason/2017/12/07/e3e326e0-db80-11e7-a241-0848315642d0_story.html?utm_term=.103171510750); Armin Rosen, *Argentine Court Reopens Case Accusing Ex-President Fernandez of Covering Up Iran's Role in 1994 AMIA Bombing*, TABLET MAGAZINE (Jan. 4, 2017, 3:22 PM), <https://www.tabletmag.com/scroll/221421/argentine-court-reopens-case-accusing-ex-president-of-covering-up-irans-role-in-1994-amia-bombing>; Daniel Politi, *Judge Seeks Arrest of Ex-President of Argentina on Treason Charges*, N.Y. TIMES (Dec. 7, 2017), <https://www.nytimes.com/2017/12/07/world/americas/argentina-kirchner-nisman-treason-murder.html>; *Cristina Kirchner va a juicio oral por la denuncia de Alberto Nisman*, PERFIL (Mar. 5, 2018), <http://www.perfil.com/noticias/politica/denuncia-de-nisman-cristina-kirchner-a-juicio-oral.phtml>; see also Poder Judicial de la Nación, Juzgado Criminal y Correccional Federal 11, Dec. 6, 2017, CFP 14305/2015 (2017) (Arg.).

133. See El Trece, *La Muerte De Nisman: Video Impactante Que Muestra Cómo Se Contaminó Todo*, YOUTUBE (June 1, 2015), <https://www.youtube.com/watch?v=reu08ZFihcA> (showing the recording of the prosecutor and investigators' arrival at the crime scene); Andrea Noel, *Video Shows Shoddy and Shady Investigation Tainted Evidence After Argentine Prosecutor Nisman's Death*, VICE NEWS (June 1, 2015), [https://news.vice.com/en\\_us/article/vb8gnd/video-shows-shoddy-and-shady-investigation-after-argentine-prosecutor-nismans-death](https://news.vice.com/en_us/article/vb8gnd/video-shows-shoddy-and-shady-investigation-after-argentine-prosecutor-nismans-death); Almudena Calatrava, *Police Allegedly Tampered With Crime Scene In Death Of Argentine Prosecutor Who Accused President Of Corruption*, BUS. INSIDER (June 2, 2015), <https://www.businessinsider.com/police-caught-allegedly-tampering-with-crime-scene-in-death-of-argentine-prosecutor-who-accused-president-of-corruption-2015-6>; Carlos Cué, *Argentinean Police Contaminated Evidence at Dead Prosecutor's Home*, EL PAÍS (June 1, 2015), [https://elpais.com/elpais/2015/06/01/inenglish/1433154188\\_525655.html](https://elpais.com/elpais/2015/06/01/inenglish/1433154188_525655.html).



one can assume that the failed investigation of Nisman's death was the result of pure negligence, or perhaps something more sordid than appearances suggest. Let us hope that Nisman's case will receive, at the very least, a Private Prosecutor fit to handle the task. Further, let us hope that we learned at least one thing from the AMIA case, of how the criminal system can truly benefit with active participation from the victims and their representatives in an investigation.<sup>134</sup>

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134. See Federico S. Efron, *Argentina's Solution to the Michael Brown Tragedy: A Role for the Complainant Victim in Criminal Proceedings*, 24 SW. J. INT'L L. 73, 115 (2018).

# KNOCKING DOWN THE ONE-ROOM BROTHEL IN HONG KONG

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*Virginia Wong\**

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## I. INTRODUCTION: THE LEGAL GREY ZONE

The laws controlling Hong Kong’s sex work industry lie in a legal grey zone. One study estimated that there were at least 200,000 active female sex workers in Hong Kong, and 14% of the male population aged 18 to 60 years reported having visited a

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commercial sex worker in the past six months.<sup>1</sup> However, confusion in the law often arises because paying for intercourse with a sex worker is not illegal, but everything else that leads up to the act is, such as soliciting for sex and using earnings from sex work to rent or even clean an apartment.<sup>2</sup> The major laws that regulate sex work in Hong Kong forbid controlling another individual for the purpose of unlawful sexual intercourse or prostitution,<sup>3</sup> living on the earnings of prostitutes,<sup>4</sup> keeping or letting premises be used as a vice establishment,<sup>5</sup> and soliciting for an immoral purpose.<sup>6</sup> These laws specifically target and criminalize organized prostitution.

“One-woman brothels” serve as a loophole to the numerous restrictions surrounding prostitution.<sup>7</sup> This type of brothel is exactly as the name implies: one sex worker per apartment unit.<sup>8</sup> Zi Teng, the primary support group for sex workers in Hong Kong, estimates that about 92% of its sex workers are self-employed.<sup>9</sup> Unfortunately, since it is illegal for them to hire security or share spaces with other sex workers, one-woman

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1. WCW Wong, *The Health of Female Sex Workers in Hong Kong: Do We Care?*, 9.6 H.K. MED. J. 471 (2003), <https://hub.hku.hk/bitstream/10722/132462/1/content.pdf> (however, not only are figures from this 2002 study outdated, but sex work statistics are somewhat unreliable due to the nature of the profession and industry workers’ reluctance to speak about their experiences); accord Michael Kam Tim Chan, King Man Ho, Kuen Kong Lo, *A Behaviour Sentinel Surveillance for Female Sex Workers in the Social Hygiene Service in Hong Kong*, 13 INT’L. J. STD & AIDS 815 (2002), <https://doi.org/10.1258/095646202321020071>, and K.Y. Chow, *STD Control: A Sentinel Surveillance of the STD Clinic Attendees*, 7.2 H.K. DERMATOLOGY & VENEREOLOGY BULL. 52, 53 (1999), <https://doi.org/10.1258/095646202321020071>.

2. Crimes Ordinance, (2017) Cap. 200, 72-73, § 147-147A (H.K.).

3. Crimes Ordinance, (2017) Cap. 200, 63, § 130 (H.K.).

4. Crimes Ordinance, (2017) Cap. 200, 66, § 137 (H.K.).

5. Crimes Ordinance, (2017) Cap. 200, 68, § 139 (H.K.).

6. Crimes Ordinance, (2017) Cap. 200, 72, § 147 (H.K.).

7. AMNESTY INT’L, *HARMFULLY ISOLATED: CRIMINALIZING SEX WORK IN HONG KONG: EXECUTIVE SUMMARY 14* (2016), <https://www.amnesty.org/download/Documents/ASA1741442016ENGLISH.PDF>.

8. *Id.*

9. ZI TENG, *CHINESE MIGRANT SEX WORKERS IN HONG KONG, IN RESEARCH FOR SEX WORK 9: SEX WORK AND MONEY*, 29, 30 (MELISSA DITMORE ED., GLOB. NETWORK OF SEX WORK PROJECTS 2010) (2006), [NSWP.ORG/SITES/NSWP.ORG/FILES/RESEARCH-FOR-SEX-WORK-9-ENGLISH.PDF](http://NSWP.ORG/SITES/NSWP.ORG/FILES/RESEARCH-FOR-SEX-WORK-9-ENGLISH.PDF).

brothels leave sex workers vulnerable to robbery and assault.<sup>10</sup> Sex workers are further discouraged from seeking help due to the tenuous relationship they have with the police since officers frequently use coercion and intimidation to take advantage of sex workers.<sup>11</sup> Moreover, criminalization and stigmas surrounding sex work prevent sex workers from seeking the help they need.<sup>12</sup>

Prior campaigns to abolish prostitution laws have been unsuccessful. Zi Teng's representative, Elaine Lam Yee-Ling, articulated that, "Hong Kong is very backwards. While there are many movements in other countries on decriminalization, Hong Kong has not changed at all. Part of the reason is lack of awareness by politicians, who may fear losing votes if they support sex workers."<sup>13</sup> However, younger voters engaged in social and political activism are bringing new perspectives to this old topic.

When juxtaposing Hong Kong's sex work laws with other countries, Hong Kong is unique with its middle-ground conservative social norms and westernized political position, so a full legal transplant of another country's sex work laws may not be viable. Although Singapore shares similar cultural values to Hong Kong, Singapore limits legal prostitution to its government-monitored brothels.<sup>14</sup> However, despite having such licensed brothels, sex workers in Singapore face many of the same issues as those in Hong Kong.<sup>15</sup> Meanwhile, Indonesia's lack of legislation gives rise to uncertainty and exploitation surrounding sex work.<sup>16</sup> On the other end of the spectrum, the Netherlands and Switzerland

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10. Laurie Chen, *Laws to Protect Sex Workers Leave Them Vulnerable to Robbery and Violence Instead, Hong Kong Ngos Say*, S. CHINA MORNING POST (Feb. 10, 2018), <https://www.scmp.com/print/news/hong-kong/law-crime/article/2132344/laws-protect-sex-workers-leave-them-vulnerable-robbery-and>.

11. AMNESTY INT'L, *supra* note 7, at 9.

12. AMNESTY INT'L, *supra* note 7, at 60.

13. Sherry Lee, *Campaign to Abolish Prostitution Laws*, S. CHINA MORNING POST (Oct. 23, 2006), <https://www.scmp.com/node/568714>.

14. Kok Xinghui, *Singapore's Sex Trade: Licensed Brothels, 'Sugar Babies,' and Laws You Can Run Rings Around*, S. CHINA MORNING POST (Nov. 20, 2017), <https://www.scmp.com/node/2120339> [hereinafter Xinghui, *Singapore's Sex Trade*].

15. *Id.*

16. Justin Ong, *'Don't Have Younger?' Battling Batam's Festering Issue of Youth and Child Sexual Exploitation*, CHANNEL NEWS ASIA (May 27, 2018), <https://www.channelnewsasia.com/news/asia/batam-child-sex-prostitutes-exploitation-abuse-singapore-10244372>.

have fully decriminalized commercial sex work, and even offer social benefits to sex workers.<sup>17</sup> However, some of these European models may be too liberal for Hong Kong to adopt. As such, applying sex worker laws from other countries to Hong Kong will simply not work.

Hong Kong's current sex work laws pose unnecessary occupational hazards, encourage misconduct by the police, and enforce social stigmas against sex workers. In order to protect some of its most vulnerable members of society, Hong Kong should adopt portions of the Dutch model and consider addressing these issues with more *S.E.X.*<sup>18</sup> The Legislative Council should provide (1) Social programs for sex workers, (2) the Establishment of a code of conduct for police interaction with sex workers, and (3) X-out laws that criminalize organized sex work.

## II. TROUBLES IN PARADISE

The current laws regulating sex work in Hong Kong pose unnecessary occupational hazards to those in the industry, leaving sex workers vulnerable to violence from their patrons and misconduct from the police. Sex workers are vulnerable to increased violence and societal condemnation merely because of the nature of their work. Unfortunately, few remedies exist for sex workers when they become victims to the legal system, especially because of the stigmatization they face from a socially conservative society. Because the unique socio-political climate in Hong Kong makes it unlikely to completely eradicate sex work, the current system requires reformation in order to meet sex workers' interests.

### A. Occupational Hazards

Sex workers remain vulnerable to violence from their patrons due to the inherently isolating effect of the laws regulating prostitution. Because it is illegal to maintain a vice establishment, sex workers cannot work together, even if it is just two sex

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17. ANE MATHIESON ET AL., *PROSTITUTION POLICY: LEGALIZATION, DECRIMINALIZATION AND THE NORDIC MODEL*, 14.2 SEATTLE J. FOR SOC. JUST. 367, 382-84, 394 (2016).

18. *S.E.X.* is an author-created acronym, explained by the sentence that follows. The topics discussed under each heading serve as foundational pieces to this paper.

workers sharing an apartment to split the costs of rent.<sup>19</sup> This regulation forces sex workers to work alone in one-woman brothels. One study reported that 37% of criminal incidents against sex workers involved some type of weapon.<sup>20</sup> A representative from Action for Reach Out (“AFRO”), an organization supporting the concerns of sex workers, stated, that “[s]ome girls actually expect robberies once or twice a month and accept it as one of the risks of their job.”<sup>21</sup>

The isolating nature of the one-room brothel makes sex workers easy targets. In 2008, Nadeen Razaq shocked Hong Kong when he murdered three sex workers in their one-room brothels.<sup>22</sup> The murderer raised a defense that debt collectors coerced him into killing the women, even though investigators found a used condom containing the his DNA at the crime scene.<sup>23</sup> These sex workers complied with the law by working alone in a one-room brothel, but doing so cost them their lives. Unfortunately, this was not an isolated event. In 2016, an individual named Gary Leung Ka-Wai specifically targeted sex workers in order to assault and rob them because he knew that they were likely to work alone and keep cash in their apartments.<sup>24</sup> Before murdering his victims, the assailant searched for terms online such as, “robbing one-woman brothels,” “the daily profit of one-woman brothels,” “robbery clues,” and “rape DNA.”<sup>25</sup> Not only did the assailant rob a victim

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19. Crimes Ordinance, (2017) Cap. 200, 66, 69-71 §§ 137(2), 143, 144, 145 (H.K.); see also Nga Yan Cheung, *Accounting for and Managing Risk in Sex Work: A Study of Female Sex Workers in Hong Kong* (Dec. 1, 2012) (unpublished Ph.D. dissertation, University of London) (on file with the university).

20. Jessica C. M. Li, *Violence Against Chinese Female Sex Workers in Hong Kong: From Understanding to Prevention*, 57.5 INT’L J. OF OFFENDER THERAPY & COMP. CRIMINOLOGY 613, 623, (2012).

21. CHEN, *SUPRA* NOTE 10 (AFRO is an organization supporting the concerns of sex workers).

22. In July 2009, two men were sentenced to life in jail for unrelated murders of women they hired for sex. One day before Nadeen Razaq was found guilty of three counts of murder, another man was found guilty of cutting up the body of a 16-year-old girl he hired for sex and flushing the pieces down a toilet. Martin Wong, *Murderer of 3 Prostitutes Jailed for Life*, S. CHINA MORNING POST (Jul. 29, 2009), <https://www.scmp.com/article/688248/murderer-3-prostitutes-jailed-life>.

23. *Id.*

24. Jasmine Siu, *Hong Kong Rapist Who Researched Robbing Prostitutes Online Jailed For 11 Years*, S. CHINA MORNING POST (Oct. 12, 2017), <https://www.scmp.com/news/hong-kong/law-crime/article/2115081/hong-kong-rapist-who-researched-robbing-prostitutes-online>.

25. *Id.*

in her one-woman brothel, but he also gagged and raped her.<sup>26</sup> Once caught, the assailant told the officers that he paid the sex worker to play a “rape game.”<sup>27</sup> Gary Leung Ka-Wai was later prosecuted. These are only a few of many examples of the types of violence that sex workers face in their profession. Because it is illegal for another party to earn a living off of a sex worker’s earnings, sex workers cannot even hire third-party vendors, such as security guards,<sup>28</sup> leaving sex workers with very limited ways to protect themselves.

Another occupational hazard that sex workers must face is the danger to their own health. Sex workers are often deterred from using protection, such as condoms, because police officers commonly use the presence of condoms as evidence of solicitation or vice establishments.<sup>29</sup> The Hong Kong Department of Health reported that sex workers are considered an at-risk population for HIV infections.<sup>30</sup> The U.N. obliges countries to take necessary steps for “the prevention, treatment and control of epidemic, endemic, occupational and other diseases.”<sup>31</sup> Per recommendations made by UNAIDS, “[c]riminal law should not impede provision of HIV prevention and care services to sex workers and their clients.”<sup>32</sup> Hong Kong acts contrary to such recommendations. Thus, Hong Kong’s use of condoms as evidence in cases against sex workers is inconsistent with international standards and equally discourages sex workers from using protection based on the fear that the use of condoms will be used against them in court.

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26. *Id.*

27. *Id.*

28. Wong, *supra* note 22.

29. AMNESTY INT’L, *supra* note 7, at 31-32.

30. DEPT. OF HEALTH - SPECIAL PREVENTIVE PROGRAMME CTR. FOR HEALTH PROTECTION, FACTSHEET FOR HARIS - HIV AND AIDS RESPONSE INDICATOR SURVEY 2015 FOR FEMALE SEX WORKER, 2016- 1, ¶ 1 (U.K.).

31. G.A. RES. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, ART. 12(2)(C) (DEC. 16, 1966).

32. U.N. HIGH COMM’R FOR HUM. RTS., U.N. PROGRAMME ON HIV/AIDS, INTERNATIONAL GUIDELINES ON HIV/AIDS AND HUMAN RIGHTS: 2006 CONSOLIDATED VERSION, AT 30, U.N. DOC. HR/PUB/06/09, U.N. SALES No. E.06.XIV.4 (2006).

### B. *Police Officers and Prostitution*

Police officers are allegedly some of the worst abusers of sex workers. In 2016, Zi Teng received 615 reports of physical and verbal abuse from officers and clients—an increase from 225 in 2015.<sup>33</sup> These complaints included arbitrary arrests, verbal threats and insults, coerced statements, deprivation of basic rights, unnecessary use of authority, neglect of duty, and theft.<sup>34</sup> The increased complaints correlate with the increasing political pressure for Hong Kong to “clean up” prostitution.

Because of the grey areas in the law, police officers can act manipulatively when conducting raids. For example, although it is illegal for sex workers to solicit patrons, it is not illegal for patrons to first approach sex workers. As such, police officers commonly initiate contact with sex workers via messaging, reach an agreement, and then ask the sex workers in person to renegotiate the terms of their agreement.<sup>35</sup> At that point, officers are deemed to have sufficient cause to arrest sex workers for solicitation.

There are also many instances where police officers leverage their power and threaten sex workers with arrest to receive free sexual services. While the aforementioned act is illegal, there are cases where undercover cops are given approval to engage in sexual acts with sex workers in order to generate cause for shutting down vice establishments.<sup>36</sup> Pursuing “masturbation services” requires approval from the police force’s senior superintendent, and regrettably, such investigations have been approved in previous cases.<sup>37</sup> The Legislative Council Panel on Security formed a subcommittee to review police handling of sex

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33. Rachel Blundy, *Sex Worker Abuse ‘On The Rise’ in Hong Kong and Most of the Alleged Abusers are Police Officers*, S. CHINA MORNING POST (Dec. 31, 2016), <https://www.scmp.com/news/hong-kong/law-crime/article/2058293/sex-worker-abuse-rise-hong-kong-and-most-alleged-abusers>; accord Press Release, Zi Teng, Statement on the 14th International Day to End Violence Against Sex Workers (Dec. 17, 2016), <http://www.ziteng.org.hk/eng/statement-on-the-14th-international-day-to-end-violence-against-sex-workers> [hereinafter Press Release, Zi Teng].

34. PRESS RELEASE, ZI TENG, *SUPRA* NOTE 33.

35. AMNESTY INT’L, *supra* note 7, at 19-20.

36. LEGISLATIVE COUNCIL, ‘REPORT OF THE SUBCOMMITTEE ON POLICE’S HANDLING OF SEX WORKERS AND SEARCHES OF DETAINEES,’ LC PAPER NO. CB(2)310/09-10, AT 14 (NOV. 18, 2009), <https://www.legco.gov.hk/yr09-10/english/panels/se/papers/se1201cb2-310-e.pdf>.

37. *ID.* AT 15.



workers and searches on detainees.<sup>38</sup> The subcommittee found there were rare occasions in which the practical need to conduct undercover operations actually required bodily contact.<sup>39</sup> If bodily contact is required, the type of sexual service officers may solicit is restricted “by operational need, and are determined by the officer-in-charge of the operation.”<sup>40</sup> When the practice is left unchecked, the Hong Kong government is essentially giving police officers a free pass to sexually harass sex workers under the guise of undercover raids needed to collect evidence.

The government does not address the full gravity of the aforementioned problem and does not prioritize the ethical concerns surrounding police officers’ sexual acts with sex workers. In November 2014, the Hong Kong Legislative Council met to discuss sex workers’ personal safety.<sup>41</sup> The Honorable Raymond Chan Chi-Chuen acknowledged instances in which police officers took advantage of sex workers and questioned former Secretary for Security, Lai Tung-Kwok, about the government’s response to sex worker victims.<sup>42</sup> Lai responded that sex workers were not immune from prosecution for their own crimes, and that there would be two investigations: (1) for the crime that the sex workers committed, and (2) for whatever police misconduct they may have suffered.<sup>43</sup> While Lai suggested that victimized sex workers could file their own complaints, he failed to recognize that sex workers face difficulties accessing the legal system to file such complaints.<sup>44</sup> The meeting concluded with no plans to change the status quo of laws relating to sex work.

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38. *Id.* AT 15.

39. LEGISLATIVE COUNCIL, PANEL ON SECURITY: SUBCOMMITTEE OF POLICE’S HANDLING OF SEX WORKERS AND SEARCHES OF DETAINEES, ‘INFORMATION ON ANTI-VICE OPERATIONS CONDUCTED BY LAW ENFORCEMENT AGENCIES IN OVERSEAS JURISDICTIONS,’ LC PAPER No. CB(2)1205/08-09(01), AT 2 (MAR. 2009), [https://www.legco.gov.hk/yr08-09/english/panels/se/se\\_phsw/papers/se\\_phsw0331cb2-1205-1-e.pdf](https://www.legco.gov.hk/yr08-09/english/panels/se/se_phsw/papers/se_phsw0331cb2-1205-1-e.pdf) (there are “rare occasions where it is anticipated that some form of bodily contact is genuinely necessary to achieve the objective of an anti-vice operation and to maintain the cover of the operation”).

40. *Id.*

41. LEGISLATIVE COUNCIL, *OFFICIAL RECORD OF PROCEEDINGS*, AT 2557 (NOV. 26, 2014), <https://www.legco.gov.hk/yr14-15/english/counmtg/hansard/cm20141126-translate-e.pdf>.

42. *Id.* AT 2564-65.

43. *Id.* AT 2565.

44. *Id.* AT 2565.

Demanding that sex workers file their own complaints to report police misconduct is ineffective because filing complaints against a police officer to other officers presents an opportunity for them to cover up the complaint. Currently, if sex workers have a complaint, they must file it with the Complaints Against Police Office (“CAPO”).<sup>45</sup> Although CAPO oversees this complaint process and refers all investigated cases to the Independent Police Complaints Commission (“IPCC”), only about 3% of cases are actually investigated.<sup>46</sup> CAPO is designed to be impartial, but the division often notifies police officers when complaints are filed against them, which allows officers to coerce and intimidate victims who file the complaints.<sup>47</sup> Furthermore, police culture includes fraternizing, supporting the practice of secrecy, and maintaining the code of “don’t give up another cop.”<sup>48</sup>

Even when sex workers’ CAPO reports are investigated, such investigations may not warrant any consequences for the police officer who abused his power if the investigation determines the officer’s actions were “necessary” to complete the operation. This renders the criminal justice system inaccessible to sex workers because it favors police officers. Further, if sex workers come forth with complaints, they risk further trouble with the police, either through criminal charges or future police harassment at their location of business. This adversely impacts sex workers’ ability to attract clients. In this regard, the criminal justice system is not only ineffective in policing sex work, but it also disadvantages sex workers.

### C. *Social Stigmas Associated with Sex Work in Hong Kong*

Criminalizing sex workers rather than their patrons stems from a culture favoring patriarchal and conservative values which

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45. A Guide for Complainants, COMPLAINTS AGAINST POLICE OFFICE, [https://www.police.gov.hk/info/doc/pol/en/Pol\\_679.pdf](https://www.police.gov.hk/info/doc/pol/en/Pol_679.pdf) (last visited October 7, 2019).

46. Legislative Council, *Official Record of Proceedings*, at 5447 (April 28, 2004), <https://www.legco.gov.hk/yr03-04/english/counmtg/hansard/cm0428ti-translate-e.pdf>.

47. See generally Kam C. Wong, *Police Powers and Control in Hong Kong*, 34 INT’L J. COMP. & APPLIED CRIM. JUST. 1 (2010) (raising the issue of whether CAPO officers can ever be expected to act independently of their mother organization upon which their career depends).

48. GENE L. SCARAMELLA ET AL., INTRODUCTION TO POLICING 102 (Jerry Westby et al. eds., 2011).

simultaneously dehumanizes sex workers.<sup>49</sup> Another reason that sex workers do not file reports of abuse or harassment is because society believes sex workers “ask for it,” simply due to their profession. A similar sentiment is embodied in the #MeToo movement, which does not include sex workers as victims.<sup>50</sup> Victim blaming is prevalent in sexual abuse situations, especially for sex workers, because conservative Chinese beliefs dictate that a “good” woman should be pure.<sup>51</sup>

The stigma against sex work is a social construction that labels sex workers as the “other.” This becomes extremely problematic when society’s personal beliefs bleed into the criminal justice system through legislation. Society dictates that sexual women are deviants.<sup>52</sup> Sex workers are vilified as threats to social order and the home, as they are often viewed as temptresses, working to seduce men to cheat on their spouses.<sup>53</sup> The blame, once again, is placed on women rather than men who are equally culpable. Thus, it is difficult for sex workers to garner public support for change because Chinese society is generally unsympathetic to the sex industry.

Working in the sex industry brings unwarranted judgment even though individuals have a myriad of reasons for entering the sex trade. Kendy Yim, the Executive Director of AFRO, explains that there are “women who do sex work because they enjoy it, or because they think it’s a way of contributing to society. It’s not necessarily either a situation of dependence versus full agency. There is a broader spectrum than that.”<sup>54</sup> Additionally, there are

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49. Nga Yan Cheung, *Accounting for and Managing Risk in Sex Work: A Study of Female Sex Workers in Hong Kong* (Dec. 1, 2012) (unpublished Ph.D. dissertation, University of London) (on file with the university).

50. Samantha Cooney, *‘They Don’t Want to Include Women Like Me.’ Sex Workers Say They’re Being Left Out of the #MeToo Movement*, TIME (Feb. 13, 2018), <http://time.com/5104951/sex-workers-me-too-movement/>.

51. Simon Denyer, *State Media Says Women Aren’t Harassed in Chinese Culture. Women Beg to Differ*, WASH. POST (Oct. 17, 2017), [https://www.washingtonpost.com/news/worldviews/wp/2017/10/17/state-media-says-women-arent-harassed-in-chinese-culture-women-beg-to-differ/?utm\\_term=.806997248711](https://www.washingtonpost.com/news/worldviews/wp/2017/10/17/state-media-says-women-arent-harassed-in-chinese-culture-women-beg-to-differ/?utm_term=.806997248711).

52. HENDRIK WAGENAAR, ET AL., *DESIGNING PROSTITUTION POLICY: INTENTION AND REALITY IN REGULATING THE SEX TRADE* 29 (2017).

53. Jun Pang, *Thinking Beyond the Stereotypes: The Diverse Experiences of Hong Kong’s Sex Workers*, H.K. FREE PRESS (Oct. 22, 2017), <https://www.hongkongfp.com/2017/10/22/thinking-beyond-stereotypes-diverse-experiences-hong-kongs-sex-workers/>.

54. *Id.*

many sex workers trying to make a living in a climate that is unfavorable to working mothers. One study revealed that only 47.2% of the employers interviewed would offer jobs to mothers with young children.<sup>55</sup> Given that Hong Kong has limited work opportunities for mothers, it is not surprising that some turn to sex work in order to make a living. Unfortunately, current legislation reflects the condemnation against this marginalized group.

### III. A GLOBAL PERSPECTIVE ON SEX WORK: HOW DOES THE REST OF THE WORLD “DO IT?”

There is no one-size-fits-all solution to fix the issues inherent with sex work. Countries regulate the “oldest profession in the world” differently, with each attempting to find a model that best fits their nation’s interests. Some countries completely banned prostitution, while others fully embrace it or find alternatives in between.

Most Asian countries criminalize prostitution.<sup>56</sup> However, some Asian countries, such as Thailand, legally prohibit prostitution, but in practice, tolerate and regulate sex work.<sup>57</sup> In Singapore and Indonesia, prostitution is legal, but these countries are amongst the minority in Asia.<sup>58</sup> Despite the existence of laws that appear favorable to sex workers, such as those in Singapore and Indonesia, sex workers still face a plethora of issues because there is little protection for sex workers.

Countries in Europe, like the Netherlands and Switzerland, have laws favorable to sex workers.<sup>59</sup> Consequently, the Dutch model and the Swiss’s experimental approach to improving

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55. CTR. FOR CHINESE FAMILY STUD., ET AL., A STUDY ON FAMILY STATUS DISCRIMINATION IN THE WORKPLACE IN HONG KONG (2018), <https://www.eoc.org.hk/eoc/upload/ResearchReport/20188211629521937156.pdf>; see Mandy Zheng, *Half of Hong Kong Employers do not Want to Hire Women with Children, Study Finds*, S. CHINA MORNING POST (Aug. 23, 2018), <https://www.scmp.com/news/hong-kong/community/article/2160912/half-hong-kong-employers-do-not-want-hire-women-children>.

56. PROCON, *100 Countries and Their Prostitution Policies*, PROCON (Apr. 23, 2018), <https://prostitution.procon.org/view.resource.php?resourceID=000772>.

57. Cazzie Reyes, *History of Prostitution and Sex Trafficking in Thailand*, END SLAVERY NOW (Oct. 8, 2015), <https://www.endslaverynow.org/blog/articles/history-of-prostitution-and-sex-trafficking-in-thailand>.

58. PROCON, *supra* note 56.

59. *Id.*

conditions for sex workers will be analyzed in order to offer Hong Kong another perspective. Unfortunately, Hong Kong faces distinct challenges that likely preclude it from fully transplanting another country's sex work laws. Nevertheless, it may adopt elements from other countries' legal models which are compatible with Hong Kong's socio-political climate.

#### A. Singapore: Government Regulation

Singapore's prostitution laws closely resemble those in Hong Kong. Similar to Hong Kong, Singapore makes it illegal to solicit sex work in public places,<sup>60</sup> maintain a brothel,<sup>61</sup> and live off of the earnings of a prostitute.<sup>62</sup> While the language of the statutory codes are geared towards women, Singapore's laws contain specific clauses that punish men without additional caning.<sup>63</sup> Interestingly enough, the laws surrounding sex work are primarily found in Singapore's Women's Charter – a compilation of laws that cover divorce, “monogamous marriages,” “the protection of family, the maintenance of wives, incapacitated husbands and children, and the punishment of offences against women and girls.”<sup>64</sup> Placing prohibitory sex work laws in the same code which governs marriage further reflects the idea that sex workers are viewed as a threat to a marriage – a societal belief shared in Hong Kong.<sup>65</sup>

However, unlike Hong Kong, Singapore regulates and monitors a limited number of brothels. Singapore's Anti-Vice Police Department issues licenses and gives clearance to sex workers through work permits.<sup>66</sup> Licensed sex workers must undergo health check-ups every month and receive a “yellow card” if they receive a clean bill of health.<sup>67</sup> The yellow card, which lists the sex workers' names and health check-up results, is

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60. Miscellaneous Offences (Public Order and Nuisance) Act, 06 Jul 1906, Cap 184, Art 19, 1997 Rev Ed., (Sing.), <https://sso.agc.gov.sg/Act/MOPONA1906>, (last visited Aug. 24, 2019).

61. Women's Charter, 15 Sep 1961, Cap 353, Art 148, 2009 Rev Ed., (Sing.), <https://sso.agc.gov.sg/Act/WC1961>, (last visited Aug. 24, 2019).

62. *Id.* Art 146.

63. *Id.* Art 140(2).

64. *Id.* Part XI.

65. *See* Pang, *supra* note 53.

66. *Current Situation in Singapore*, PROJECT X, <http://theprojectx.org/situation-in-singapore/> (last visited Sept. 19, 2019).

67. *Id.*

essentially their license.<sup>68</sup> Although the government does not openly list the criteria needed to receive a yellow card, ProjectX, a nonprofit organization which advocates for sex workers in Singapore, collected such information through its outreach programs.<sup>69</sup> While Singapore does not publicly or officially disclose licensing requirements, to receive a yellow card, an individual: (1) must be between 21-35 years old, (2) cannot be Malay or Muslim, (3) cannot be listed as “Male” on their identification cards; and (4) must be from an approved country (e.g., China, Malaysia, Thai, Vietnam and Singapore).<sup>70</sup>

While government-approved brothels may seem like an ideal solution, the process to get a license along with the highly restrictive requirements discourage compliance. The ProjectX outreach program revealed that sex workers are required to go through an interview process, sign an agreement with the Anti-Vice police, and get a health screening, all before they can receive clearance for a license to engage in legal sex work.<sup>71</sup> This agreement includes the following conditions: the sex worker will not break any local laws—keeping in mind that technically what they are doing is illegal, the sex worker is not permitted to have a Singaporean boyfriend, and once the sex worker’s contract is over, the sex worker will face a travel ban lasting anywhere between three years and indefinitely.<sup>72</sup> Furthermore, sex workers are not entitled to any form of medical benefits, which means that they must pay for the monthly health screenings themselves, and the brothel is not legally obligated to ensure that safe sex occurs.<sup>73</sup> These stifling terms and conditions are the tradeoffs for engaging in legal sex work in Singapore, and come at a stiff price with little to no protection for sex workers.

As a result of the secretive, unfair conditions that Singaporean sex workers must agree to in order to engage in legal sex work, Singapore has rampant “illegal” operations. In fact, illegal sex workers greatly outnumber licensed sex workers in Singapore.<sup>74</sup>

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68. Xinghui, *Singapore’s Sex Trade*, *supra* note 14.

69. *Current Situation in Singapore*, *supra* note 66.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. John Pennington, *Prostitution In Singapore – Are The Police Doing Enough to Combat it?*, ASEAN TODAY (May 31, 2017), <https://www.aseantoday.com/2017/05/prostitution-in-singapore-are-the-police->

While Singapore's efforts to legalize sex work is admirable, the system predominately fails due to the country's legal and societal limitations. Thus, such a model would fail and should not be deployed in Hong Kong because it runs contrary to the interests of sex workers. Hong Kong needs to protect its sex workers, not drive them further underground, as is the result of Singapore's attempted government-regulated brothels.

### B. *Indonesia: A Morality Concern*

Meanwhile, Indonesia's solution to prostitution is to not legislate sex work at all. There are no explicit Indonesian laws against prostitution. While the word "prostitution" is mentioned once in the entire penal code, it is used in relation to a vague misdemeanor.<sup>75</sup> A spokesman for the Indonesian National Police said, "[i]f sex workers haven't committed a criminal act, we can't stop them from using public space or hanging around along the roadside at night even though we're sure they are prostitutes."<sup>76</sup> Additionally, there are no protections for children who are trafficked into the sex trade because there are no direct laws that prohibit or regulate the industry. Consequently, Indonesia is now a hotbed for child-sex trafficking and there is little to no government action against it.<sup>77</sup> Contrary to Indonesia, both Hong Kong and Singapore have clear statutes prohibiting minors from engaging in sex work.

However, Indonesia's penal code contains an entire section covering "Crimes Against Decency."<sup>78</sup> In practice, the government groups prostitution as a crime against decency and morality, but enforcement is dependent on the political views of

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doing-enough-to-combat-it/; accord Alvin Kuo Jing Teo et al., *Estimating the Size of Key Populations for HIV in Singapore Using the Network Scale-Up Method*, at 5 (May 10, 2019), <https://sti.bmj.com/content/early/2019/05/08/sextrans-2018-053747>.

75. Specifically, the Indonesian Criminal Code states that "[a]ny person who as souteneur takes advantage of the prostitution of a roman, shall be punished by a maximum light imprisonment of one year." Indon. Penal Code art. 506.

76. Pichayada Promcherchoo, *Indonesia's Sex Trade 'Impossible' To Shut Down*, MALAYSIAN TIMES, (May 15, 2016) <https://www.themalaysiantimes.com.my/indonesias-sex-trade-impossible-to-shut-down> [hereinafter Promcherchoo, *Indonesia's Sex Trade*].

77. See U.S. DEP'T OF STATE, 2019 TRAFFICKING IN PERSONS REPORT: INDONESIA (2019), <https://www.state.gov/reports/2019-trafficking-in-persons-report-2/indonesia/>.

78. Indon. Penal Code arts. 281-303.

the party in office. Currently, there is a push to completely criminalize prostitution.<sup>79</sup> Unfortunately, the statutory language under CAD is vague, imposing a punishment of up to two years and eight months of imprisonment or a maximum fine of 3,000 rupiahs for any person who deliberately offends public decency.<sup>80</sup> While CAD explicitly imposes jail sentences of none months for adulterers and nine years for viewers of pornography, it remains vague on the topic of prostitution.<sup>81</sup>

Over the last decade, the Indonesian government started shutting down brothels in an attempt to eradicate prostitution, but some authorities feared it only forced the sex trade underground.<sup>82</sup> The government is currently revising its 100-year-old criminal code, which was adopted from the Dutch, through more explicit laws against “immoral conduct.” However, because the revision has not been shared with the public, there is no clear indication whether the government intends to criminalize, regulate, or do nothing with regards to prostitution.<sup>83</sup>

Indonesia’s non-legislative solution is clearly not a solution at all. Indonesia is a country that is more socially conservative than Hong Kong, with ironclad laws against what it considers “immoral” conduct and no system to address the sex trade. However, Indonesia is similar to Hong Kong in that its laws do not specifically prohibit individualized prostitution.<sup>84</sup> Yet, the laws differ because Indonesia completely ignores the issues that allow misconduct to occur. Consequently, Hong Kong can only look to the Indonesian model as a model of what it should not do.

### C. *The Netherlands: The Dutch Model*

Although the Dutch once ruled over what is today Indonesia, their approach to regulating prostitution comes from a completely

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79. *Livelihoods Hit as Jakarta Shuts Red-Light District*, AL JAZEERA, (Feb. 27, 2016), <https://www.aljazeera.com/news/2016/02/livelihoods-hit-jakarta-red-light-district-closes-160227194033089.html>.

80. Indon. Penal Code art. 281.

81. *See generally* Indon. Penal Code.

82. Promcherchoo, *Indonesia’s Sex Trade*, *supra* note 76.

83. Santi Kusumaningrum, *The Missing Link in the Deliberation on Indonesia’s Criminal Code Bill*, CONVERSATION, (Apr. 11, 2018, 4:55 AM), <http://theconversation.com/the-missing-link-in-the-deliberation-on-indonesias-criminal-code-bill-94512>.

84. *See generally* Indon. Penal Code.



opposite perspective. The Netherlands, arguably famous for its lax prostitution laws, categorizes prostitution into two categories: voluntary and involuntary.<sup>85</sup> The Dutch generally believe that voluntary sex work should be a valid profession, while involuntary sex work should be prohibited.<sup>86</sup> The Dutch people have a more liberal perspective about accepting sex work.

Organized prostitution is fully legalized in the Netherlands where legal protections are provided for those participating in the industry.<sup>87</sup> Sex workers in the Netherlands are treated as independent entrepreneurs and taxed accordingly.<sup>88</sup> Each local municipality enforces its own rules and regulations to ensure that sex workers in brothels are working voluntarily and complying with licensing laws, and that brothels are not illegally employing minors.<sup>89</sup> Unlike in Hong Kong, sex workers in Holland can even unionize to fight for better conditions. Furthermore, in order to protect themselves from potential harm, sex workers can install panic buttons in their work spaces, allowing them to notify others if they feel unsafe or have an issue with a patron.<sup>90</sup> In addition, the government implicitly permits people with disabilities to use their social welfare benefits however they like, including as a subsidy for sex.<sup>91</sup>

The relaxed laws surrounding sex work are indicative of a more tolerant society. The Dutch recognize that consensual sex work is a valid profession that is better controlled through legalization and regulation rather than criminalization. This gives

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85. Segura Ciara, *What Does Legalization Actually Look Like? – The Netherlands*, STANFORD UNIV. (May 20, 2010), <http://stanford.edu/group/womenscourage/cgi-bin/blogs/sextraffickingandprostitution/2010/05/20/what-does-legalization-actually-look-like-the-netherlands/>.

86. *Id.*

87. Toine Spapens & Conny Rijken, *The Fight Against Human Trafficking in the Amsterdam Red Light District*, 39 INT'L J. OF COMP. & APPLIED CRIM. JUST. 155, 159-160 (2015) [hereinafter Spapens & Conny, *The Fight Against Human Trafficking*].

88. *Id.*

89. *Id.* at 157, 158.

90. André Picard, *Women in Amsterdam's Red-Light District Say Safety for Worldwide Sex Workers Lies in Legalization, Normalization*, THE GLOBE & MAIL (Aug. 10, 2018), <https://www.theglobeandmail.com/canada/article-the-story-behind-amsterdams-infamous-red-light-district/>.

91. Marguerite Ward, *The Surprising Way the Netherlands is Helping its Disabled Have Sex*, MIC (Mar. 13, 2014), <https://mic.com/articles/85201/the-surprising-way-the-netherlands-is-helping-its-disabled-have-sex#.lm2HlHsVH>.

sex workers access to labor rights that they otherwise would not receive if prostitution were illegal. However, like other models, the Dutch Model falls short in several ways.

The Netherlands faces a human trafficking problem linked to their relaxed sex work laws. Due to sex workers' inconsistent self-reporting and a lack of data, studies of trafficking in the Dutch sex work industry are incomplete and inaccurate.<sup>92</sup> It is estimated that there are about 6,250 human trafficking victims in the Netherlands every year.<sup>93</sup> In response, the government attempted to implement tougher legislation against human traffickers but its efforts lacked multi-agency enforcement measures required to ensure success.<sup>94</sup> Thus, in order to learn from the Dutch's mistakes, Hong Kong must rely on both tough legislation and support from other agencies to enforce the law.

#### D. Switzerland: An Experimental Success Story

Switzerland legalized prostitution in the 1940s. Protections offered to sex workers in Switzerland are similar to the protections offered by the Dutch in that sex workers pay taxes and undergo regular health check-ups. While attitudes about sex work are more favorable in Switzerland than in Asian countries, like Singapore and Indonesia, residents frequently complained about the various nuisances surrounding sex work, such as noise, traffic jams, and other disturbances.<sup>95</sup> Zurich's legislators proposed drive-in "sex

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92. See generally NATIONAL RAPPOREUR ON TRAFFICKING IN HUMAN BEINGS AND SEXUAL VIOLENCE AGAINST CHILDREN, VICTIMS OF HUMAN TRAFFICKING: PERIODICAL REPORT 2012-2016 11-12, (2018), [https://www.dutchrappporteur.nl/binaries/FINAL\\_BNRM-Victims%20of%20Human%20Trafficking-%20Periodical%20Report%202012-2016\\_INTERACTIVE\\_tcm24-353879.pdf](https://www.dutchrappporteur.nl/binaries/FINAL_BNRM-Victims%20of%20Human%20Trafficking-%20Periodical%20Report%202012-2016_INTERACTIVE_tcm24-353879.pdf) [hereinafter NATIONAL RAPPOREUR, VICTIMS OF HUMAN TRAFFICKING] and Anthony Deutsch, *At Least 1,300 Dutch Girls Per Year Trafficked, Exploited*, REUTERS (Oct. 18, 2017), <https://www.reuters.com/article/us-netherlands-human-trafficking/at-least-1300-dutch-girls-per-year-trafficked-exploited-idUSKBN1CN1R2>.

93. Anthony Deutsch, *At Least 1,300 Dutch Girls Per Year Trafficked, Exploited*, REUTERS (Oct. 18, 2017), <https://www.reuters.com/article/us-netherlands-human-trafficking/at-least-1300-dutch-girls-per-year-trafficked-exploited-idUSKBN1CN1R2>.

94. Spapens & Conny, *The Fight Against Human Trafficking*, *supra* note 89.

95. Helena Bachmann, *Sex in The City: Zurich's Prostitution 'Sex Boxes' Deemed Success in Switzerland*, USA TODAY (Aug. 24, 2018), <https://www.usatoday.com/story/news/world/2018/08/24/sex-boxes-make-legal-prostitution-safe-zurich-switzerland-europe/1083444002/>.

boxes” as a solution, which replicates a fast food, drive-through concept.<sup>96</sup> These boxes would be built in discreet, safe locations, away from residential buildings, with operating hours between 7:00 P.M. and 3:00 A.M. on weekdays, and until 5 A.M. on the weekends.<sup>97</sup> Fifty-two percent of the city’s citizens voted to build these boxes at a two million dollar price tag with operation costs at approximately \$800,000 per year for maintenance.<sup>98</sup>

In 2013, Zurich opened the country’s first drive-in “sex boxes.”<sup>99</sup> To use the boxes, patrons must have a vehicle and sex workers must obtain a special permit that costs roughly \$43 per year and pay approximately \$5 per night in taxes.<sup>100</sup> These funds help offset the city’s maintenance fees for the premises.<sup>101</sup> After pulling into the sex box, the patron and the sex worker at the booth agree on a price. While there are no video cameras at the sex box to protect both patrons and sex workers, the sex workers have panic buttons to alert the on-site guards if they have any issues.<sup>102</sup> Nadeen Schuster, a city spokesperson for Zurich, stated that five years after implementing the sex boxes plan, the city has met its goals of improving the working environment for sex workers as well as meeting the needs of the city.<sup>103</sup> Evidently, the concept has proved effective in protecting sex workers against violence and human trafficking.

Zurich’s experimental success in satisfying the demands of all involved parties is an ideal outcome. However, since Hong Kong has one of the most expensive real estate markets in the world with property costing 19.4 times more than the average household income,<sup>104</sup> Hong Kong lacks the resources to implement a similar

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96. KRON, *Switzerland’s Drive-In ‘Sex Boxes’ are a Great Success*, *Officials Say*, WBTW NEWS13 (Aug. 27, 2018), <https://www.wbtw.com/news/switzerland-s-drive-in-sex-boxes-are-a-great-success-officials-say/1399132195>.

97. Bachmann, *supra* note 97.

98. *Id.*

99. KRON, *supra* note 98.

100. *Id.*

101. ASSOCIATED PRESS, *Zurich Opens Drive-In ‘Sex Boxes’*, THE GUARDIAN (Aug. 26, 2013), <https://www.theguardian.com/society/2013/aug/26/zurich-drive-in-garages-prostitutes>.

102. Bachmann, *supra* note 97.

103. *Id.*

104. Peter Yeung, *What Life is Like in Hong Kong, the Most Expensive City to Live in the World*, HUFFPOST (Nov. 20, 2018), [https://www.huffpost.com/entry/hong-kong-most-expensive-city-housing\\_n\\_5beeb701e4b0860184a79215](https://www.huffpost.com/entry/hong-kong-most-expensive-city-housing_n_5beeb701e4b0860184a79215).

plan. Even if Hong Kong could muster the resources, conservative cultural norms would prevent Hong Kong's citizens from implementing such a liberal concept. Thus, Zurich's successful sex boxes are not feasible in Hong Kong. Nonetheless, the concept of Zurich's boxes is an admirable example of attainable cooperation between the government, residents, and sex workers.

#### IV. REFORMATION THROUGH S.E.X.

“The commercial sex industry is an open secret in Hong Kong and an inseparable part of our social and economic life.” - CUHK Hong Kong Medical Journal<sup>105</sup>

The current laws criminalizing organized sex work in Hong Kong leave sex workers unprotected and vulnerable. However, a full transplant of another country's model for sex work into Hong Kong will not work. While Singapore and Indonesia share some similar cultural beliefs as Hong Kong, Singapore and Indonesia do not have effective systems that protect sex workers. Rather, their systems are arguably worse than that of Hong Kong. Although Hong Kong may not be ready for a liberal model like that in Switzerland, certain aspects of the Dutch model should be adopted. Additionally, Hong Kong's must modify existing laws to improve the many issues that plague the sex industry.

##### A. *Social Services*

Hong Kong already offers free or low-cost public healthcare for virtually all residents.<sup>106</sup> However, while resources are available for sex workers to receive health check-ups and advice on STI screenings, sex workers may be reluctant to utilize such resources given the societal stigma surrounding sex work. The University of Hong Kong conducted a study that revealed many Hong Kong sex workers felt that formal health service providers would stigmatize them.<sup>107</sup> In fact, many study subjects either concealed their occupation from their doctors or provided

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105. Wong, *supra* note 1, at 473.

106. See GOVHK, *Overview of the Health Care System in Hong Kong*, <https://www.gov.hk/en/residents/health/hosp/overview.htm> (last updated Mar. 2019).

107. William C. W. Wong et. al., *Stigma and Sex Work from the Perspective of Female Sex Workers in Hong Kong*, 33.1 SOC. OF HEALTH & ILLNESS 50, 58 (2010) (U.K.).

inaccurate accounts of their sexual history.<sup>108</sup> Looking generally to the Netherlands, it is not farfetched to say that the Dutch government does not require mandatory STI screenings for sex workers in part because the Netherlands believes that such screening requirements would perpetuate the myth that sex workers are unclean. If Hong Kong decriminalizes organized prostitution, it may not be so willing to also offer lax regulations since it is a conservative government with citizens that hold stigmatized views against sex work.<sup>109</sup>

As a solution, however, the government should provide additional training to select doctors to foster safe environments for sex workers and help manage potential public backlash. Hong Kong should also enact a program in which those who engage in sex work can confidentially register as sex workers. Such a registration program would then enable social workers and sex workers to connect, thereby allowing the social workers to act as proxy for social needs. These social workers could also improve sex workers' access to alternative job placement training, the health care system, and the justice system. To maintain confidentiality and trust, the social workers must act as neutral third parties when offering assistance, particularly when misconduct arises. Finally, sex workers must be left with an optional or voluntary decision to engage with social workers.

#### B. *Expectations for Policing Sex Work: A Code of Conduct*

The Code of Conduct regulates police conduct for: (1) undercover operations and (2) special circumstances involving victims.

To prevent misconduct that generally occurs between police officers and sex workers during undercover operations, a Code of Conduct for the police is necessary to ensure that officers do not take advantage of their positions when exercising their authority. This Code of Conduct must specify which police actions are strictly forbidden during undercover operations. For example, officers must not engage in any form of inappropriate physical

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108. *Id.*

109. Wong, *supra* note 1 (the article cited argues that Hong Kong may be avoiding the creation of policies for mandatory screening and improved access to treatment for sex workers because many citizens of the public would regard such policies to mean that Hong Kong is “tolerating if not legalizing prostitution”).

contact, including any and all forms of sexual activity. In addition, officers engaging in sex worker related investigations must be prohibited from touching anyone's genitalia through clothing, even when authorized by a superintendent.

Organized sex work must be decriminalized. However, undercover raids are still necessary to ensure individuals are not forced into sex work. To discourage misconduct, officers who obtain coerced statements or use illegal tactics to collect evidence should not be able to use this evidence, similar to how the United States prohibits fruits of the poisonous tree from being introduced into evidence.

The second part of the Code of Conduct should list specific actions an officer must take when engaging with suspected human trafficking victims or minors. For example, if an individual is trafficked into Hong Kong, the officer must provide the victim access to social services rather than immediate deportation. In the past, the government has published procedural guidelines for multiple departments that lists recommendations for handling victims of sexual violence.<sup>110</sup> However, these guidelines are suggestions which have no enforcement value. The United States Department of State's Trafficking in Persons Report revealed that Hong Kong's government fails to consistently screen women arrested for prostitution or immigration violations in order to determine whether or not they are victims of human trafficking.<sup>111</sup> Instead, these victims are often punished for immigration violations, and as a result, often take guilty pleas to expedite their return to their home country.<sup>112</sup> While officials encourage victims to participate in the prosecuting their traffickers, victims have no incentive since they are no longer able to work in Hong Kong. Thus, to encourage victims to stay and testify against their traffickers, Hong -Kong should offer a temporary visa allowing trafficked victims to work while they are in court. Police officers should also ensure that victims are aware of their rights.

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110. SOC. WELFARE DEP'T, GOV'T OF H.K. SPECIAL ADMIN. REGION, PROCEDURAL GUIDELINES FOR HANDLING ADULT SEXUAL VIOLENCE CASES (2007).

111. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 215 (2018) (according to the report, the government has "devoted significant resources to a written plan," however, since such plan has not been implemented, its efforts to eliminate trafficking fail to meet the minimum standards required under the Trafficking Victims Protection Act).

112. *Id.*

Currently, there are attempts to improve the relationship between police officers and sex workers through regular visits with police liaisons to maintain communications regarding crime, and through regular meetings with groups advocating for sex workers to openly discuss mutual concerns.<sup>113</sup> However, despite some improvements, the process will take time given the longstanding mistrust between the two groups. The relationship is likely to improve if the government maintains continued communication, establishes active efforts to bridge the two groups, and enacts laws that explicitly protect sex workers from police misconduct.

### C. X-Out Laws Criminalizing Sex Work

Certain aspects of organized sex work should be decriminalized. Specifically, the government should repeal Crimes Ordinance sections which regulate organized sex work, including controlling another individual for the purpose of unlawful sexual intercourse or prostitution,<sup>114</sup> living on the earnings of prostitutes,<sup>115</sup> keeping or allowing a premises to be used as a vice establishment,<sup>116</sup> and soliciting for an immoral purpose.<sup>117</sup> Repealing these sections would offer protection to legal Hong Kong residents. However, this plan is not a “one-size-fits-all” solution offering blanket protection for individuals choosing to illegally work in Hong Kong. Rather, this proposal is a small step towards creating protection for local resident sex workers, not resolving ongoing immigration issues.

Hong Kong’s draconian laws regulating prostitution are impractical because punishments outweigh the nature of the alleged crimes. For example, Section 137 criminalizes others for living on the sex workers’ earnings and dictates that a person who “knowingly lives wholly or in part on the earnings of prostitution of another shall be guilty of an offence and shall be liable on

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113. Viola Gaskell, *Inside Hong Kong’s High-Rise Houses of Prostitution: Who’s Really in Charge?*, THE DAILY BEAST (Oct. 17, 2017), <https://www.thedailybeast.com/inside-hong-kongs-high-rise-houses-of-prostitution-whos-really-in-charge?ref=scroll>.

114. Crimes Ordinance, *supra* note 3, § 130.

115. Crimes Ordinance, *supra* note 4, § 137.

116. Crimes Ordinance, *supra* note 5, § 139.

117. Crimes Ordinance, *supra* note 6, § 147.

conviction on indictment to imprisonment for 10 years.”<sup>118</sup> This means a domestic cleaner hired by a sex worker hires to clean his or her apartment could be prosecuted and imprisoned for 10 years. The punishment is even more severe for Section 130 violations, which criminalizes control over an individual for the purpose of prostitution. Under Section 130, a person who harbors “another person or exercises control, direction or influence over another person [...] with a view to that person’s prostitution shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 14 years.”<sup>119</sup> These laws are intentionally vague with harsh punishments to deter prostitution. However, as demonstrated above, the problem is that police officers are left with great latitude and freedom to intimidate and arrest sex workers and their contractors for trivial matters.

Of course, stringent laws regulating minors, trafficking victims, and people with mental disabilities in the sex trade must remain. Those that do not have personal autonomy must receive protection. However, sex work is an increasingly recognized profession that offers “a decent income, low entry thresholds, and a modicum of control over one’s work situation [...] that can be done part time, in addition to other work.”<sup>120</sup> Those who choose to work in the sex industry must also receive protection.

Finally, decriminalization of organized prostitution would allow sex workers to contribute to society through paying income taxes. The Central Bureau of Statistics estimates that in the Netherlands, prostitution is taxed at 19% tax and generates £550 million per year, or roughly \$705 million per year in USD.<sup>121</sup> The Dutch government works to close its budget gap by taxing sex workers. Due to a lack of data, it is unknown how much tax revenue Hong Kong truly generates from prostitution. Regardless, tax law is favorable in Hong Kong because the maximum rate for individual income tax, based on a progressive scale, ranges from a

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118. Crimes Ordinance, *supra* note 4, § 137.

119. Crimes Ordinance, *supra* note 3, § 130.

120. HENDRIK WAGENAAR ET AL., DESIGNING PROSTITUTION POLICY: INTENTION AND REALITY IN REGULATING THE SEX TRADE 50 (2017).

121. Emine Sinmaz, *Taxman to Visit Amsterdam Sex Workers*, THE GUARDIAN (Jan. 13, 2011), <https://www.theguardian.com/world/2011/jan/13/dutch-taxman-visit-amsterdam-sex-workers>.



mere 2% tax to a 17% tax.<sup>122</sup> Thus, it is in the best interest of both sex workers and Hong Kong as a city to decriminalize organized sex work and allow sex workers to contribute to society through taxation.

## V. CONCLUSION

Amidst the bright colors decorating the red-light districts of Hong Kong, the grey area behind the discriminatory laws against sex workers allow misconduct to fester and spread. The current laws surrounding sex work in Hong Kong create a hostile environment for sex workers forced to work in isolated spaces and left vulnerable to acts of violence. Because sex workers face societal condemnation, the laws that surround sex work operate against them. Sex workers are repeatedly subjected to third-party harassment, including from police officers who exploit sex workers for sexual services and then arrest them. The law does not protect sex workers and they are prevented from reaching out for help.

Despite the different approaches to prostitution across the world, there is no perfect plan that Hong Kong can adopt given its unique position. Specifically, Hong Kong's inherent economic and social constraints may prevent its government from adopting a more liberal model, similar to that implemented in the Netherlands or in Switzerland. Singapore attempts to regulate sex work through government-regulated brothels and Indonesia addresses the issue by not legislating on the matter, yet these systems have also failed in their respective countries. It is clear then that Hong Kong needs a solution that is specific to its own needs. In reforming its laws, Hong Kong should start by (1) providing social services to sex workers, (2) establishing a code of conduct for police officer-sex worker relations, and (3) decriminalizing organized sex work. These steps offer better protections for sex workers than what is currently available. Hong Kong shows no sign of eradicating sex work from its social fabric, so addressing and embracing sex workers will provide them with the rights and protections they deserve.

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122. GOVHK, *Tax Rates of Salaries Tax & Personal Assessment*, <https://www.gov.hk/en/residents/taxes/taxfiling/taxrates/salariesrates.htm> (last visited Sept. 13, 2019).

# AMERICA’S SCARLET LETTER: HOW INTERNATIONAL LAW SUPPORTS THE REMOVAL AND PRESERVATION OF CONFEDERATE MONUMENTS AS WORLD HERITAGE OF AMERICA’S DISCRIMINATORY HISTORY

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*Blake Newman\**

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## I. INTRODUCTION

The cornerstone of what the Confederacy stood for has been made clear, through speeches and actions of the parties involved, that black men, women, and children were seen as inferior to their white counterparts. In his infamous Corner Stone speech, Confederate Vice President Alexander H. Stephens said just weeks

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before the Civil War, “[Our new government’s] foundations are laid, its corner-stone rests, upon the great truth that the negro is not equal to the white man; that slavery – subordination to the superior race – is his natural and normal condition.”<sup>1</sup> This ideology continued to thrive long after the end of the American Civil War. *Plessy v. Ferguson* upheld Jim Crow laws as constitutional and legitimized the principle of “separate but equal.”<sup>2</sup>

Therefore, the country stayed divided.<sup>3</sup> Black men and women were told where they could eat, work, buy a house, go to school, where to drink, and which bathrooms they could use.<sup>4</sup> Most Confederate monuments were constructed against this backdrop.

Since 1900, over 1,700 Confederate monuments have been built in public parks, schools, and courthouses throughout the United States.<sup>5</sup> The majority of these monuments were erected between 1900 and 1930.<sup>6</sup> During that era, the lynching of African Americans was at its peak.<sup>7</sup> Additionally, the ideology of white supremacy and the Ku Klux Klan were rapidly gaining popularity, particularly in the South.<sup>8</sup> Between 1950 and 1970, during the civil rights era, Confederate monument raisings surged. Erecting vast numbers of Confederate monuments during this period prompted a rallying cry for racist ideals and delivered an intimidating message to people of color.

Recently, there has been a growing trend of protestors vandalizing or destroying Confederate monuments across the United States.<sup>9</sup> In response to the vandals, municipalities have

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1. HENRY CLEVELAND, ALEXANDER H. STEPHENS, IN PUBLIC AND PRIVATE: WITH LETTERS AND SPEECHES, BEFORE, DURING, AND SINCE THE WAR 721 (1886).

2. See *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896).

3. Arthur E. Sutherland, *Segregation and the Supreme Court*, THE ATLANTIC (July 1954), <https://www.theatlantic.com/magazine/archive/1954/07/segregation-and-the-supreme-court/306055/>.

4. *Id.*

5. *Whose heritage? Public Symbols of the Confederacy*, SPLC (Feb. 1, 2019), <https://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy#top>.

6. *Id.*

7. Kevin Drum, *The Real Story Behind All Those Confederate Statues*, MOTHER JONES (Aug. 15, 2017), <https://www.motherjones.com/kevin-drum/2017/08/the-real-story-of-all-those-confederate-statues/>.

8. *Id.*

9. See generally, *Confederate Monuments Are Coming Down Across the United States. Here’s a List*, N.Y. TIMES (Aug. 28, 2017), <https://www.nytimes.com/interactive/2017/08/16/us/confederate-monuments-removed.html>.

begun removing Confederate monuments and locking them away in storage.<sup>10</sup> Presumably, these actors have noble intentions and an end to the monuments' intimidating legacy.

However, these Confederate monuments are still a part of America's history. Bigotry and racism will not disappear with the destruction or sequester of every Confederate monument. They represent the scars of one of the darkest times in American history. We must use them as reminders of our past mistakes by maintaining public access to them.

This article uses international law to guide the United States government to a compromised solution for how to remove Confederate monuments and comply with international protections for historically significant monuments. Section II highlights current controversies and problems faced by those advocating the removal of Confederate monuments. Section III visits the history that led to the creation of the United Nations Educational, Scientific, and Cultural Organization ("UNESCO") and the various Conventions, Recommendations, and Declarations that pertain to the United States and cultural heritage. Section IV will apply the adoptions of UNESCO to Confederate monuments to show that they fall under these protections. Finally, Section V concludes that the best course of action to preserve Confederate monuments in compliance with international law is to relocate the monuments to museums or less contentious areas with federal funding.

## II. THE CURRENT CONTROVERSIES OF CONFEDERATE MONUMENTS

On August 12, 2017, the "Unite the Right" rally in Charlottesville, Virginia turned deadly when a white supremacist drove his vehicle into a crowd of counter-protesters injuring at least nineteen people and killing one, Heather Heyer.<sup>11</sup> Various alt-right groups, including white nationalists, neo-Nazis, and the Ku Klux Klan, organized hundreds of white supremacists to rally against the planned removal and sale of a Confederate statue of

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10. *Id.*

11. Rosa Flores et al., *James Alex Fields Jr. has First Hearing; Tensions Still High in Charlottesville*, CNN (Aug. 15, 2017), <https://www.cnn.com/2017/08/14/us/charlottesville-white-nationalist-protests-violence/index.html>.

General Robert E. Lee from a public park.<sup>12</sup> The organizers claimed that the rally was in response to the growing number of calls for the removal of Confederate monuments across the country.<sup>13</sup> The 2015 murders by a white supremacist of several African American churchgoers in Charleston, South Carolina prompted renewed efforts to remove Confederate monuments.<sup>14</sup> Racial tensions had been growing leading up to Charlottesville, and Confederate monuments have stood as symbols of the grievances felt against both sides.

In the wake of the events in Charlottesville, protesters gathered around Confederate monuments around the country.<sup>15</sup> The Confederate Soldiers Monument in Durham, North Carolina, which has stood in front of the Durham County courthouse since 1924, was one such monument.<sup>16</sup> It bore the quote: “In memory of the boys who wore grey.”<sup>17</sup> Law enforcement, choosing restraint and public safety, observed as protesters placed a rope around the neck of the monument and tore it down.<sup>18</sup> The monument crumpled under its own weight and the surrounding protesters violently kicked and spat on the fallen statue.<sup>19</sup> The police decided to not intervene in this destruction and waited several days to make their arrests.<sup>20</sup>

The Durham County Sheriff was quoted saying, “Let me be clear, no one is getting away with what happened.”<sup>21</sup> However, the district judge ultimately dismissed the case against several of the vandals and the Durham County District Attorney dropped all

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12. Dara Lind, *Unite the Right, the Violent White Supremacist Rally in Charlottesville, Explained*, VOX (Aug. 14, 2017, 12:06 PM), <https://www.vox.com/2017/8/12/16138246/charlottesville-nazi-rally-right-uva>.

13. *Id.*

14. *Id.*

15. Amanda Jackson & Ralph Ellis, *Seven Arrested in Toppling of Confederate Statue in North Carolina*, CNN, <https://www.cnn.com/2017/08/14/us/confederate-statue-pulled-down-north-carolina-trnd/index.html> (last updated Aug. 16, 2017, 4:04 PM).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. David A. Graham, *How the Activists Who Tore Down Durham’s Confederate Statue Got Away With It*, ATLANTIC (Feb. 21, 2018), <https://www.theatlantic.com/politics/archive/2018/02/durham-confederate-monument-charges-dismissed/553808/>.

charges against the rest.<sup>22</sup> After the charges were dropped, one participating protester stated, “I did the right thing . . . [e]veryone who was there—the people did the right thing. The people will continue to keep making the right choices until every Confederate statue is gone, until white supremacy is gone. That statue is where it belongs. It needs to be in the garbage.”<sup>23</sup>

The crash of the monument on the pavement outside the Durham courthouse echoed loudly across the country. On August 20, 2018, nearly one year after the events of Charlottesville and Durham, 250 protesters tore down “Silent Sam,” a Confederate monument located at the entrance of the University of North Carolina at Chapel Hill’s campus.<sup>24</sup> The United Daughters of the Confederacy, a group that funded and lobbied for the construction of many of the Confederate monuments standing today, helped erect this monument in 1913.<sup>25</sup> Since the 1960s, vandals frequently targeted the statue and critics frequently called for its removal.<sup>26</sup>

The protesters justified taking down the monument by pointing to white-supremacist, Julian Carr, a Civil War veteran and Ku Klux Klan supporter, who said in his speech at the monument’s dedication ceremony,<sup>27</sup> “The present generation . . . scarcely takes note of what the Confederate soldier meant to the welfare of the Anglo Saxon race during the four years immediately succeeding the war, when the facts are, that their courage and steadfastness saved the very life of the Anglo Saxon race in the

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22. *Id.*

23. *Id.*

24. Amir Vera, *UNC Protesters Knock Down Silent Sam Confederate Statue*, CNN (Aug. 21, 2018), <https://www.cnn.com/2018/08/20/us/unc-silent-sam-confederate-statue/index.html>.

25. See Jesse James Deconto & Alan Blinder, ‘*Silent Sam*’ Confederate Statue Is Toppled at University of North Carolina, N.Y. TIMES (Aug. 21, 2018), <https://www.nytimes.com/2018/08/21/us/unc-silent-sam-monument-toppled.html>.

26. Colin Warren-Hicks, *A look at the Long and Controversial Life of ‘Silent Sam’*, THE NEWS & OBSERVER (Aug. 23, 2017, 8:48 AM), <https://www.newsobserver.com/news/local/counties/orange-county/article168816697.html>.

27. Antonia Noori Farzan, ‘*Silent Sam*’: A Racist Jim Crow-era Speech Inspired UNC students to Topple a Confederate Monument on Campus, WASH. POST (Aug. 21, 2018, 2:52 AM), [https://www.washingtonpost.com/news/morning-mix/wp/2018/08/21/silent-sam-a-racist-jim-crow-era-speech-inspired-unc-students-to-topple-a-confederate-monument-on-campus/?utm\\_term=.4bdb1f7f789e](https://www.washingtonpost.com/news/morning-mix/wp/2018/08/21/silent-sam-a-racist-jim-crow-era-speech-inspired-unc-students-to-topple-a-confederate-monument-on-campus/?utm_term=.4bdb1f7f789e).

South.”<sup>28</sup> Carr concluded with a disturbingly graphic story from his academic years at the University of North Carolina:

One hundred yards from where we stand, less than ninety days perhaps after my return from Appomattox, I horse-whipped a negro wench until her skirts hung in shreds, because upon the streets of this quiet village she had publicly insulted and maligned a Southern lady, and then rushed for protection to these University buildings where was stationed a garrison of 100 Federal soldiers. I performed the pleasing duty in the immediate presence of the entire garrison, and for thirty nights afterwards slept with a double-barrel shot gun [sic] under my head.<sup>29</sup>

For many, the toppling of the Confederate monuments in Durham and the University of North Carolina marked victories against racist ideals and white supremacy. Others view toppling these monuments as a destruction of America’s culture and history.

In part, protesters tearing down Confederate monuments resulted from increased frustrations over the laws that restrict their legal removal. North Carolina is one of many states that have enacted laws that severely limit the ability to alter or remove Confederate monuments on grounds of historical significance.<sup>30</sup>

For example, Tennessee enacted the Heritage Protection Act, a 2013 law prohibiting *government* employees from removing Confederate monuments without a waiver.<sup>31</sup> However, the City of

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28. Julian Shakespeare Carr, Univ. of N.C. alumnus and Trustee, Confederate Monument Dedication Speech at the Univ. of N.C. (June 2, 1913), <http://hgreen.people.ua.edu/transcription-carr-speech.html>.

29. *Id.*

30. See generally Jaweed Kaleem, *In Some States, It’s Illegal to Take Down Monuments or Change Street Names Honoring the Confederacy*, L.A. TIMES (Aug. 16, 2017, 1:05 PM), <http://www.latimes.com/nation/la-na-confederate-monument-laws-20170815-htlstory.html> (Alabama enacted legislation in 2017 prohibiting the “altering, renaming or removing monuments, memorial streets or memorial buildings that have been on public property for more than 40 years.” Virginia prohibits cities from disturbing or interfering with historic monuments and memorials. Mississippi’s 2004 law only allows removal of memorials if they interfere with drivers’ vision or they are moved to an approved location.); see also Ivana Hrynkiw, *AG, Birmingham Attorneys Argue Over Confederate Memorial*, AL.COM (Apr. 13, 2018), [https://www.al.com/news/birmingham/index.ssf/2018/04/ag\\_birmingham\\_attorneys\\_argue.html](https://www.al.com/news/birmingham/index.ssf/2018/04/ag_birmingham_attorneys_argue.html) (describing Alabama law barring removal of Confederate monuments without a waiver, but waivers only available for monuments erected less than 40 years ago).

31. 2013 Tenn. Pub. Acts 75 (amended 2016).

Memphis exploited a loophole in the law by selling public land to a private party to legally remove monuments of Confederate President Jefferson Davis and Ku Klux Klan figure and Confederate general, Nathan Bedford Forrest.<sup>32</sup> Consequently, Tennessee amended the law in 2016.<sup>33</sup> The amended version of the Heritage Protection Act requires *all* potential removals go through the Tennessee Historical Commission.<sup>34</sup> This commission includes several Sons of Confederate Veterans, a similar organization to the Daughters of the Confederacy, sitting on the governor appointed board.<sup>35</sup>

The next hurdle that removal proponents must overcome is the cost.<sup>36</sup> In New Orleans, the original estimate to remove four Confederate monuments skyrocketed from \$170,000 to \$2.1 million.<sup>37</sup> The price escalated sharply because of workers' safety concerns.<sup>38</sup> Monument supporters terrorized the contractors hired to remove statues in an attempt to scare them off.<sup>39</sup> They firebombed a contractor's car and made repeated death threats against any contractor who accepted removal work.<sup>40</sup> The City of New Orleans was forced to pay for FBI and security officers, including snipers, to safeguard workers and the removal project.<sup>41</sup>

The final hurdle for relocating Confederate monuments is what to do with them after removal. As of August 5, 2018, at least twenty-seven cities have taken down more than forty-five monuments since the events of Charlottesville.<sup>42</sup> Each of the

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32. David Lohr, *This is Why Another Confederate Statue Won't Come Down in Tennessee*, HUFFINGTON POST (May 31, 2018, 9:01 AM), [https://www.huffingtonpost.com/entry/tennessee-confederate-statues\\_us\\_5b0f1b77e4b05ef4c22a7796](https://www.huffingtonpost.com/entry/tennessee-confederate-statues_us_5b0f1b77e4b05ef4c22a7796).

33. *Id.*

34. *See id.*

35. *Id.*

36. Paul LeBlanc, *Cost of Removing Confederate Monuments in New Orleans \$2.1 Million*, CNN (June 12, 2017, 3:44 PM), <https://www.cnn.com/2017/06/12/us/new-orleans-confederate-monument-removal-price-trnd/index.html>.

37. *Id.*

38. *Id.*

39. *Id.*

40. Anderson Cooper, *The History and Future of Confederate Monuments*, CBS NEWS (July 15, 2018), <https://www.cbsnews.com/news/60-minutes-the-history-and-future-of-confederate-monuments>.

41. *Id.*

42. Noah Caldwell & Audie Cornish, *Where do Confederate Monuments go After They Come Down?*, NPR (Aug. 5, 2018, 8:08 AM),



monuments highlighted above have been locked away in undisclosed storage units until authorities can figure out where to relocate them permanently.<sup>43</sup> Museums, including the Smithsonian, refuse to accept the monuments because they either cannot afford to conserve them, or they logistically cannot accommodate their housing; one statue of Robert E. Lee is over sixty feet tall.<sup>44</sup>

### III. DEVELOPMENT OF INTERNATIONAL PROTECTIONS OF CULTURAL HERITAGE

#### A. Codes, Treaties, and Conventions

The international community favors the protection and preservation of cultural heritage. Notably, the United States was the first country that implemented cultural heritage protections when it developed the Lieber Code during the Civil War in 1863.<sup>45</sup> Article 36 of the Lieber Code states:

If such works of art . . . belonging to a hostile nation or government, can be removed without injury, the ruler of the conquering state or nation may order them to be seized or removed for the benefit of the said nation . . . In no case shall they be sold or given away, if captured by the armies of the United States, nor shall they ever be *privately appropriated* or *wantonly destroyed or injured* (emphasis added).<sup>46</sup>

The Lieber Code marks the beginning of America's stance that some items are significant enough to warrant protection, even if the source of protection is from the "enemy" state.<sup>47</sup>

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<https://www.npr.org/2018/08/05/633952187/where-do-confederate-monuments-go-after-they-come-down>.

43. *Id.*

44. *Id.*

45. PATRICK J. O'KEEFE & LYNDEL V. PROTT, CULTURAL HERITAGE CONVENTIONS AND OTHER INSTRUMENTS: A COMPENDIUM WITH COMMENTARIES 16 (2011).

46. Instructions for the Government of Armies of the United States in the Field, Gen. Orders No. 100, War Dep't, Adjutant General's Office, Washington D.C., April 24, 1863, reprinted in Lieber Code, Section II, Art. 36; James G. Garner, *General Order 100 Revisited*, 27 MIL. L. REV. 1, 6 (1965).

47. See generally Burrus M. Carnahan, *Lincoln, Lieber, and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. OF INT'L LAW 213, 215 (1998).

In 1935, the United States codified this resolve when it entered into the Treaty on the Protection of Artistic and Scientific Institutions and Historical Monuments, later known as the Roerich Pact.<sup>48</sup> This pact sought to “preserve in any time of danger all nationally and privately owned immovable monuments which form the cultural treasure of peoples.”<sup>49</sup> Like the Lieber Code, the Roerich Pact designated certain objects to be more important than strategies of war.<sup>50</sup> Hypothetically, the Roerich Pact would prohibit bombing of a historic monument site, even if that bombing could potentially save lives.

In addition to protecting historical monuments during war, the Roerich Pact also obligated the United States to protect these monuments during times of peace: “The historic monuments, museums, scientific, artistic, educational and cultural institutions shall be considered as neutral and as such *respected and protected by belligerents* . . . The same respect and protection shall be accorded to the historic monuments, museums, scientific, artistic, educational and cultural institutions *in time of peace as well as in war* (emphasis added).”<sup>51</sup> Article II obligates the United States government to adopt “measures of internal legislation necessary to insure said protection and respect” for all articles in Article I.<sup>52</sup> Franklin Roosevelt praised the importance of the Roerich Pact in his speech at the signing ceremony: “In opening this pact . . . we are endeavoring to make of universal application one of the principles vital to the preservation of modern civilization. . . This treaty possesses a spiritual significance *far deeper than the text of the instrument itself*” (emphasis added).<sup>53</sup>

Similarly, the Hague Conventions of 1899 and 1907 expanded on the efforts of the Lieber Code.<sup>54</sup> The two Conventions have slight language variations regarding the pertinent sections, but the

48. PETER BARENBOIM & NAEEM SIDIQI, BRUGES BRIDGE BETWEEN CIVILIZATIONS 7 (2010).

49. Treaty on Protection of Artistic and Scientific Institutions, Historic Monuments, (Roerich Pact), pmbL., Apr. 15, 1935, 49 Stat. 3267, T.S. No. 899 [hereinafter Roerich Pact].

50. *Id.*

51. *Id.* at art. I.

52. *Id.* at art. II.

53. General, *Exhibition: “The Roerich Pact. History and Modernity”*, Peace Palace Library, PEACE PALACE LIBRARY (Apr. 22, 2014), <https://www.peacepalacelibrary.nl/2014/04/exhibition-the-roerich-pact-history-and-modernity-peace-palace-library-2/>.

54. O’KEEFE & PROTT, *supra* note 44, at 16.

general implications are identical. Article 56 of the 1907 Hague Regulations states, “All seizure of, *destruction* or *willful* [sic] *damage* done to institutions of this character, *historic monuments*, works of art and science, is forbidden, and should be made subject of legal proceedings.”<sup>55</sup> However, while the international community embraced the ideals of protecting historic monuments, this principle was all but abandoned during World War I and World War II.<sup>56</sup> These great wars resulted in massive damage and destruction to cultural heritage around the world.<sup>57</sup>

In Europe, Adolf Hitler and the Third Reich tried to obliterate people they found to be inferior and rewrote history to erase their existence.<sup>58</sup> For example, the Nazis attempted to exterminate Poland’s literary heritage because according to them, “Poles were subhuman.”<sup>59</sup> In 1940, the Nazis destroyed the Adam Mickiewicz Monument in Krakow, Poland, which was erected to both honor the famed Polish poet and to bolster a national and patriotic spirit.<sup>60</sup> The Nazis deliberately destroyed certain cultural and historical heritage, and many items were destroyed as a direct consequence of the war.<sup>61</sup>

After World War II, the international community took notice of the fragility of cultural heritage. The United Nations formed the United Nations Educational, Scientific and Cultural Organization (“UNESCO”),<sup>62</sup> whose goal encourages the world to unite and

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55. Hague Convention on Respecting the Laws and Customs of War on Land, art. 56, ¶ 2, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539.

56. O’KEEFE & PROTT, *supra* note 44, at 16.

57. *Id.*

58. Michael S. Roth, *How Nazis Destroyed Books in a Quest to Destroy European Culture*, WASH. POST (Feb. 24, 2017), [https://www.washingtonpost.com/opinions/how-nazis-destroyed-books-in-a-quest-to-destroy-european-culture/2017/02/24/244ace94-cdf3-11e6-a87f-b917067331bb\\_story.html?utm\\_term=.ca94e6d054dd](https://www.washingtonpost.com/opinions/how-nazis-destroyed-books-in-a-quest-to-destroy-european-culture/2017/02/24/244ace94-cdf3-11e6-a87f-b917067331bb_story.html?utm_term=.ca94e6d054dd).

59. *Id.*

60. *Adam Mickiewicz Monument*, MAGICZNY KRAKOW, <https://web.archive.org/web/20080308031812/http://www.krakow.pl/en/miasto/abc/?id=18.html> [<https://web.archive.org/web/20080308031812/>]. (last visited Oct. 1, 2019).

61. See generally Liew Hanqing, *What Happens to Heritage Sites in Times of Conflict?*, NLB (Mar. 30, 2017), <https://web.archive.org/web/20170320055809/http://www.nlb.gov.sg/sure/what-happens-to-heritage-sites-in-times-of-conflict/>.

62. Annalisa Merelli, *The US Withdrew from UNESCO Because it’s “anti-Israel.” Now Israel is Leaving, too*, QUARTZ (Oct. 12, 2017), <https://qz.com/1101051/unesco-what-is-it-and-why-is-the-us-leaving/>.

“contribute to the building of peace, the eradication of poverty, sustainable development and intercultural dialogue.”<sup>63</sup> Under UNESCO, fifty-six countries formed The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954.<sup>64</sup> The preamble perfectly sums up the purpose of the Convention as well as the rationale behind it:

Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world; [c]onsidering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection . . . that such protection cannot be effective unless national . . . measures have been taken to organize it in time of peace; being determined to take all possible steps to protect cultural property. . .[emphasis added].<sup>65</sup>

Article 1 defines cultural property as “. . . movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular . . . works of art . . . and other objects of artistic, historical or archaeological interest.”<sup>66</sup>

The international community established the concept of a world heritage as the amalgamation of different nations’ culture’s worthy of preservation, as codified by the Hague Convention. Culture that is important to the story of an individual country is, in turn, important to the story of the world. Thus, the world recognized that the protection of historical monuments is at the heart of preserving world heritage.

Like the Roerich Pact,<sup>67</sup> the Hague Convention applies in both times of peace and armed conflict.<sup>68</sup> Article 2 of the Convention states that the purpose of the agreement is to ensure the “safeguarding of and respect for such property.”<sup>69</sup> Article 3 tasks

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63. *Id.*

64. See O’KEEFE & PROT, *supra* note 44, at 16.

65. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, T.I.A.S. No. 09-313.1, 249 U.N.T.S. 240 (entered into force Aug. 7, 1956), [hereinafter 1954 Hague Convention].

66. *Id.* at art. 1 (a).

67. Roerich Pact, *supra* note 48, at art.1. ¶ 3

68. See 1954 Hague Convention, *supra* note 64, at art. 3.

69. *Id.* at art. 2.

signatory governments with installing safeguarding measures during times of peace ensuring that historical monuments are protected from “foreseeable effects of an armed conflict.”<sup>70</sup> The determination of what kind of safeguarding measures are appropriate is left to each individual country’s discretion.<sup>71</sup> Furthermore, Article 4 expands on signatory governments’ duties to world heritage by defining respect for cultural property as tasking these governments to “prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property.”<sup>72</sup>

In 1965, America held a White House Conference on International Cooperation and proposed the development for a Trust for World Heritage to “identify, establish, develop, and manage . . . historic sites for the present and future benefit of the entire world citizenry.”<sup>73</sup> This proposal led to the Convention Concerning the Protection of the World Cultural and Natural Heritage 1972 (“The World Heritage Convention”), UNESCO’s most explicit Convention concerning the protection of cultural heritage during peacetime.<sup>74</sup> The Convention creates a duty for signatory countries to identify, protect, and conserve cultural heritage monuments of “outstanding universal value from the point of view of history” situated within its borders.<sup>75</sup> This duty ensures that lessons derived from such works are preserved for future generations.<sup>76</sup> The international community believed this duty to be so important that it mandates, “[each Signatory] will do all it can to this end, to the utmost of its own resources . . .”<sup>77</sup>

To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this convention shall endeavour [sic], *in so far as possible, and as appropriate for each country:*

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70. *Id.* at art. 3.

71. *Id.*

72. *Id.* at art. 3 ¶ 3.

73. O’KEEFE & PROT, *supra* note 44, at 77.

74. *Id.*

75. Convention Concerning the Protection of the World Cultural and Natural Heritage, art. 1, 4, and 27, Nov. 23, 1972 U.S.T. 37, 1037 U.N.T.S 151 (entered into force Dec. 15, 1975) [hereinafter World Heritage Convention].

76. *Id.* at art. 4.

77. *Id.*

- a. to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes [sic];
- b. to set up within its territories, where such services do not exist, one or more services for the protection, conservation and presentation of the cultural and natural heritage with an appropriate staff and possessing the means to discharge their functions;
- c. to develop scientific and technical studies and research and to work out such operating methods as will make the state capable of counteracting the dangers that threaten its cultural or natural heritage;
- d. to take the appropriate *legal, scientific, technical, administrative and financial measures necessary* for the identification, protection, conservation, presentation and rehabilitation of this heritage; and
- e. to *foster the establishment or development of national or regional centres* [sic] for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field (emphasis added).<sup>78</sup>

The extent of a signatory government's obligation to actively protect cultural heritage is unclear due to the vague phrasing of Article 5. In particular, Article 5 advises countries to protect world heritage "in so far as possible, and as appropriate for each country."<sup>79</sup> While this question has yet to be addressed by American courts, the Australian High Court noted that a passive reading of this phrase was a ridiculous notion.<sup>80</sup> The court interpreted this soft wording as creating a flexible manner of how to perform the obligation of preservation rather than creating the discretion to - or not to -perform.<sup>81</sup> Thus, this holding exemplifies that countries that are party to the World Heritage Convention have, at a minimum, a duty to take reasonable measures to protect applicable cultural heritage.

Whether the World Heritage Convention applies to a particular piece of cultural heritage is also a legal issue. Countries submit

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78. *Id.* at art. 5.

79. O'KEEFE & PROT, *supra* note 44, at 10.

80. *See generally Commonwealth v Tasmania* (1983) 158 CLR 1 (Austl.).

81. *Id.* at 490.

cultural and natural heritage sites they believe should be added to the World Heritage List to the World Heritage Committee (“The Committee”) for approval.<sup>82</sup> However, the Committee regularly changes its’ criteria. As of writing this article, The Committee declared in pertinent part that:

Sites must be of outstanding universal value and meet at least one out of ten selection criteria:

(i) to represent a masterpiece of human creative genius;

...

(iii) to bear a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared

...

(vi) to be directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance. (The Committee considers that this criterion should preferably be used in conjunction with other criteria).<sup>83</sup>

There have been questions as to whether a particular site’s approval to be on the list was a condition precedent for a country to assume these duties under the World Heritage Convention.<sup>84</sup>

Again, we find guidance from the Australian High Court.<sup>85</sup> The court pointed to the fact that the Convention instructs each individual country to identify which cultural and natural heritage should be awarded convention protections.<sup>86</sup> The World Heritage Committee acts as a mere stamp of approval.<sup>87</sup> While inclusion on the World Heritage List certainly confirms that a country’s property should fall under World Heritage Convention protections, being added to the list is only relevant to its being eligible for international assistance.<sup>88</sup>

Although the United States has announced its plan to withdraw from UNESCO by the end of 2018, the US is still bound

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82. World Heritage Convention *supra* note 73, at art. 8, 11.

83. UNESCO World Heritage Center, THE CRITERIA FOR SELECTION, <https://whc.unesco.org/en/criteria/> (last visited Nov. 17, 2018).

84. See O’KEEFE & PROT, *supra* note 44, at 79.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 80.

by the conventions it ratified.<sup>89</sup> Namely, these include the World Heritage Convention and the Hague Convention, ratified by Congress in 1973 and 2009, respectively.<sup>90</sup>

However, this is not the first time the United States has withdrawn from UNESCO.<sup>91</sup> President Ronald Reagan withdrew from UNESCO in 1984. The US did not become a member state again until 2002 under President George W. Bush.<sup>92</sup> Additionally, President Barack Obama stopped supplying funds to UNESCO, which will amount to \$600 million by the end of 2018.<sup>93</sup>

However, in each of these cases, the US' decision to distance itself from UNESCO arose out of political grounds separate from the principles and goals of the organization.<sup>94</sup> As such, the US has taken the position to remain an active nonmember observer state that continues to contribute to debates and activities, despite losing member voting rights.<sup>95</sup>

#### B. UNESCO Recommendations and Declarations

UNESCO Recommendations require fewer votes to create legal obligations for member states because they are less imposing than those created by conventions and treaties.<sup>96</sup> Creating uniform and widely accepted obligations via convention is difficult because every country has a unique legal system.<sup>97</sup> Recommendations are helpful because they act as a guide and allow greater flexibility for individual countries to achieve compliance.<sup>98</sup> Furthermore,

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89. Merelli *supra* note 61; UNESCO, UNITED STATES OF AMERICA, <https://en.unesco.org/countries/united-states-america>.

90. *Ratified Conventions U.S.A.*, UNESCO, [http://www.unesco.org/eri/la/conventions\\_by\\_country.asp?language=e&contr=US&typeconv=1](http://www.unesco.org/eri/la/conventions_by_country.asp?language=e&contr=US&typeconv=1) (last visited Oct. 8., 2019).

91. Eli Rosenberg & Carol Morello, *U.S. Withdraws from UNESCO, the U.N.'s Cultural Organization, Citing Anti-Israel Bias*, WASH. POST (Oct. 12, 2017), [https://www.washingtonpost.com/news/post-nation/wp/2017/10/12/u-s-withdraws-from-unesco-the-u-n-s-cultural-organization-citing-anti-israel-bias/?utm\\_term=.1dc9517b5456](https://www.washingtonpost.com/news/post-nation/wp/2017/10/12/u-s-withdraws-from-unesco-the-u-n-s-cultural-organization-citing-anti-israel-bias/?utm_term=.1dc9517b5456).

92. *Id.*

93. *Id.*

94. *See id.*

95. *Id.*

96. *See* O'KEEFE & PROTTS *supra* note 44, at 205 (conventions require a two-thirds majority to adopt whereas recommendations only require a simple majority).

97. *Id.*

98. *Id.*



countries can apply Recommendations in ways that best fit their own system to achieve the goals of a given Recommendation.<sup>99</sup>

UNESCO Declarations (“Declarations”) are the weakest form of a standard-setting.<sup>100</sup> Declarations emphasize the importance of, and call attention to, certain issues concerning cultural heritage.<sup>101</sup> Declarations have no bright-line procedure for implementation.<sup>102</sup> In other words, Declarations are persuasive guidance rather than binding policies.

The United States’ planned exit from UNESCO should not affect its observance of Recommendations or Declarations. As stated above, America’s withdrawal is the result of certain actions by UNESCO and not because it disagrees with any of the Organization’s goals. Additionally, each of the relevant Recommendations and Declarations were enacted during the periods the US was an active member of UNESCO.

First, the Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works 1968 is one of the most useful Recommendations to protect cultural heritage endangered by intrastate changes.<sup>103</sup> This Recommendation recognizes that both intrastate development and cultural property are independently important but may at times be at odds with one another.<sup>104</sup> As such, this Recommendation permits the removal of a historical monument in the event that intrastate change risks damaging or destroying that monument.<sup>105</sup> Still, the preamble reiterates that accessibility to the work at hand is equally important to its preservation.<sup>106</sup> Therefore, monuments removed under this Recommendation must then be placed in a location where the public may visit.<sup>107</sup>

Second, the Recommendation Concerning the Protection, at National Level, of the Cultural and Natural Heritage 1972 expands

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99. *Id.* at 206.

100. *Id.* at 319.

101. *Id.* at 320.

102. *Id.*

103. *Id.* at 231.

104. United Nations Educational, Scientific, and Cultural Organization [UNESCO], *Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works 1968*, at pmbl. ¶ 6 (Nov. 20, 1968) (*hereinafter Recommendation for Public or Private Works*).

105. *Id.* at art. 5 (b), 22 (b).

106. *Id.* at pmbl. ¶ 10.

107. *Id.*

on a country's duty to protect heritage by broadening the applicable monuments meant for preservation. Consequently, this Recommendation dovetails with the World Heritage Convention.<sup>108</sup> Whereas the World Heritage Convention only applies to sites of "outstanding universal value," this Recommendation applies to all historical monuments within a country's territory:<sup>109</sup>

[T]hat each item of the cultural and natural heritage is unique and that the disappearance of any one item constitutes a definite loss and irreversible impoverishment of that heritage, . . . that every country . . . has an obligation to safeguard this part of mankind's heritage and to ensure that it is handed down to future generations, . . . [and] that the cultural and natural heritage forms an harmonious whole, the components of which are indissociable [sic]. .

<sup>110</sup>

This Recommendation was enacted due to fear that the World Heritage Convention would divert all available funds into preserving only works of "outstanding universal value."<sup>111</sup> The fear was that this would leave out works that may be important to a more localized community or just not meet the standard of "outstanding universal value."<sup>112</sup> This Recommendation, thus, greatly emphasizes that the moving of a monument should not be considered. However, it still creates an exception for "exceptional means of dealing with a problem, justified by pressing considerations."<sup>113</sup>

Lastly, the Recommendation for the Protection of Movable Cultural Property 1978 ("1978 Recommendation") enhances and adds greater specificity to obligations already imposed by The Hague, the World Heritage Convention, and the 1972 Recommendation.<sup>114</sup> The 1978 Recommendation notes that

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108. O'KEEFE & PROTT, *supra* note 44, at 240.

109. *Id.*

110. United Nations Educational, Scientific, and Cultural Organization [UNESCO], *Recommendation Concerning the Protection, at National Level, of the Cultural and Natural Heritage 1972*, at pmbl. ¶ 5-6, 8 (Nov. 21, 1972).

111. O'KEEFE & PROTT, *supra* note 44, at 240-241.

112. *Id.*

113. *Id.* at art. 24.

114. United Nations Educational, Scientific, and Cultural Organization [UNESCO], *Recommendation for the Protection of Movable Cultural Property 1978*, at pmbl. ¶ 8 (Nov. 28, 1978).

growing perils like riots, vandalism, and other public disorders, threaten movable cultural property which should “incite all those responsible for protecting it, in whatever capacity, to play their part.”<sup>115</sup> This Recommendation tasks each country to define the criteria for which movable cultural properties within a territory are deserving of these protections, including “items resulting from the dismemberment of historical monuments.”<sup>116</sup>

While this Recommendation suggests countries partially indemnify damaged items, it states that protection and the prevention of risks are far more important. It stresses that “the essential purpose is to preserve the cultural heritage, not to replace by sums of money objects which are irreplaceable.”<sup>117</sup> Finally, this Recommendation states that the education of the public to the importance and value of cultural heritage is essential for ensuring the continual preservation of cultural property.<sup>118</sup>

Furthermore, the UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage 2003 was adopted by the international community in response to the Taliban destroying giant Buddhas in the Bamiyan Valley in Afghanistan in 2001.<sup>119</sup> This Declaration reiterates the obligations for countries to respect their own heritage in peacetime under The Hague and readdresses the concerns over acts of vandalism previously mentioned in the 1978 Recommendation.<sup>120</sup> With it, the UNESCO underscored the abhorrent nature of deliberate acts of destruction and damage to cultural heritage. The Declaration, therefore, tasks countries to take “all appropriate measures to prevent, avoid, stop and suppress acts of intentional destruction, wherever such heritage is located.”<sup>121</sup>

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115. *Id.* at art. 1(b)(i), 4, 8.

116. *Id.* at art. 1(a)(iv), 2.

117. *Id.* at art 9.

118. *Id.* at art. 5, 17.

119. O'KEEFE & PROTT, *supra* note 44, at 328.

120. *See generally*, United Nations Educational, Scientific, and Cultural Organization [UNESCO], *UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage 2003* (2003).

121. *Id.* at art. III (2)

#### IV. APPLYING INTERNATIONAL LAW TO CONFEDERATE MONUMENTS

The above-mentioned codes, treaties, conventions, and UNESCO Recommendations and Declarations demonstrate a robust framework for protecting cultural heritage. But, do these protections cover Confederate monuments?

First, Confederate monuments are historically significant because they contextualize the development of the United States as a nation. As stated, the erection of Confederate monuments surged during a time when lynching African Americans was at its peak, the Ku Klux Klan was gaining popularity, and once again during *Brown v. Board* and the Civil Rights era.<sup>122</sup> Placing these monuments in such public areas ensured that minorities could not escape their intimidating presence.

In this context, the monuments are comparable to the Lady Justice monument erected in 1751 by occupying British authorities in Ireland's Dublin Castle.<sup>123</sup> This version of Lady Justice is different from all other iterations because it omits her traditional blindfold, the scale she holds is permanently unbalanced, and her back is towards the city and her people.<sup>124</sup> The British deliberately designed this statue to make clear that the Irish had no right to a balanced justice, and the courts would not be blind to discrimination.<sup>125</sup>

Similarly, many Confederate monuments were erected to rewrite history and purport the Lost Cause mythology, which is a revisionist ideology and a widely debunked account of the Civil War.<sup>126</sup> The mythology promulgates that the Civil War was fought over state rights rather than slavery and that slavery was a

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122. Drum, *supra* note 7.

123. Star na Heireann, *History of Ireland: Irish History, Culture, Heritage, Language, Mythology*, <https://stairnaheireann.net/> (last visited Oct. 18, 2019).

124. *Id.*

125. *Id.*

126. See James Oliver Horton, *Confronting Slavery and Revealing the "Lost Cause"*, NAT. PARK SERV., <https://www.nps.gov/articles/confronting-slavery-and-revealing-the-lost-cause.htm>. (last visited Nov. 17, 2018); see also Karen L. Cox, *The Whole Point of Confederate Monuments is to Celebrate White Supremacy*, WASH. POST (Aug. 16, 2017), [https://www.washingtonpost.com/news/posteverything/wp/2017/08/16/the-whole-point-of-confederate-monuments-is-to-celebrate-white-supremacy/?utm\\_term=.559214c85cd2](https://www.washingtonpost.com/news/posteverything/wp/2017/08/16/the-whole-point-of-confederate-monuments-is-to-celebrate-white-supremacy/?utm_term=.559214c85cd2).

benevolent institution.<sup>127</sup> The connection between erecting Confederate monuments and the Lost Cause mythology is exemplified in a booklet published by the United Daughters of the Confederacy, stated in their dedication ceremony for the controversial monument at Arlington National Cemetery, which includes a depiction of a Black Confederate soldier:

The astonishing fidelity of the slaves everywhere during the war to the wives and children of those who were absent in the army was convincing proof of the kindly relations between master and slave in the old South. One leading purpose of the U.D.C. is to correct history. [The monument's sculptor] is here writing it for them, in characters that will tell their story to a generation after generation.<sup>128</sup>

This effort to spread Lost Cause mythology should be recognized as an important aspect of the story surrounding Confederate monuments. In such context, international law would prescribe the preservation and protection of Confederate monuments, particularly those erected during the post-Reconstruction and Civil Rights eras. These monuments should be preserved as cultural heritage for the history of African Americans and the United States.

Preserving bleak moments of history as cultural heritage is not a novel concept for the international community. In 1979, Auschwitz Birkenau ("Auschwitz"), a Nazi concentration and extermination camp, was admitted onto the World Heritage List, entitling it to international protections under the World Heritage Convention.<sup>129</sup> Auschwitz satisfied criterion (iv), as it is "an outstanding example of a type of building, architectural or technological ensemble or landscape which illustrates [a] significant stage in human history."<sup>130</sup> The World Heritage Committee defines Auschwitz's outstanding universal value as being "a key place of memory for the whole of humankind for the

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127. Cox, *supra* note 124.

128. HILARY A. GERBERT, HISTORY OF THE ARLINGTON CONFEDERATE MONUMENT 77 (1914).

129. United Nations Educational, Scientific and Cultural Organization [UNESCO], World Heritage Convention, *Auschwitz Birkenau: German Nazi Concentration and Extermination Camp (1940-1945)*, <http://whc.unesco.org/en/list/31> (last visited Nov. 18, 2018) [hereinafter *Auschwitz*].

130. World Heritage Convention, *supra* note 73.

Holocaust, racist policies and barbarism; it is a place of our collective memory of this dark chapter in the history of humanity . . .”<sup>131</sup> Additionally, the Committee emphasizes that it is important to preserve Auschwitz to educate future generations and to serve as “a sign of warning of the many threats and tragic consequences of extreme ideologies and denial of human dignity.”<sup>132</sup>

The comparisons in character between Auschwitz and Confederate monuments are not difficult to make. Both represent humanity’s capacity for evil and both stand as stark reminders of how easily humanity can slip back into ugliness if lessons from history are forgotten. Yet, Confederate monuments can also be distinguished from Auschwitz. Auschwitz is the only concentration camp to be admitted onto the World Heritage List,<sup>133</sup> and there are currently well over 700 Confederate monuments.<sup>134</sup>

This is not to say that there may not be one Confederate monument that may be of such outstanding universal value as to represent the whole of Confederate monuments. Even still, a particular item of cultural heritage need not be admitted to the World Heritage List in order to enjoy World Heritage Convention protections.<sup>135</sup> If the United States federal government determines that certain monuments meet the standards set by the World Heritage Convention, it has both the authority and obligation to preserve that monument.<sup>136</sup>

However, the powerful historical context these monuments represent draws largely from the fact that vast numbers of them were rapidly constructed as a direct response to struggles for civil rights. Thus, their numerosity suggests that these monuments should be preserved and displayed together as a whole.

It has been argued that international cultural heritage law prohibits the removal of historical monuments.<sup>137</sup> However, this is

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131. Auschwitz, *supra* note 127.

132. *Id.*

133. *World Heritage List*, UNESCO, <https://whc.unesco.org/en/list/> (last visited Oct. 11, 2019).

134. S. POVERTY LAW CTR., WHOSE HERITAGE? PUBLIC SYMBOLS OF THE CONFEDERACY, 10 (2016), [https://www.splcenter.org/sites/default/files/com\\_whose\\_heritage.pdf](https://www.splcenter.org/sites/default/files/com_whose_heritage.pdf).

135. O’KEEFE & PROTT, *supra* note 44, at 79.

136. *Id.*

137. Luszcz Lixinski, *Confederate Monuments and International Law*, 35 *Wis. Int’l L.J.* 549, 607 (2018).

demonstrably false. The argument points to the Venice Charter, which was adopted by the International Council of Monuments and Sites (“ICOMOS”). ICOMOS was one of three groups of experts in charge of overseeing the implementation of the World Heritage Convention.<sup>138</sup> The author completely omits Article 7 from his argument which states: “A monument is inseparable from the history to which it bears witness and from the setting in which it occurs. The moving of all or part of a monument cannot be allowed *except where the safeguarding of that monument demands it or where it is justified by national or international interest of paramount importance* (emphasis added).”<sup>139</sup> Article 7 is in line with the stated missions of the above mentioned conventions, treaties, Recommendations, and Declarations.

As such, protecting and safeguarding cultural heritage monuments is of the utmost importance to secure access to them for all future generations. When the need arises, the movement of monuments is completely justified and has never been forbidden. The closest any of UNESCO’s adoptions have come to barring removal was in the Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works 1968.<sup>140</sup> However, as previously mentioned, this Recommendation merely states that industrial work should be mindful and avoid placing any items in danger. In fact, this Recommendation instructs that in the event such danger is unavoidable, time should be given to ensure the excavation of the site to guarantee preservation.

The current controversies surrounding Confederate monuments have sprung from protesters vandalizing and destroying monuments that possess value as cultural heritage.<sup>141</sup> Such actions have been followed by riots and even murder.<sup>142</sup> Protesters continue to call for the removal of monuments. However, many states have enacted laws, which greatly limit, if not completely forbid the removal of Confederate monuments,

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138. World Heritage Convention, *supra* note 73 at art. 8 (3).

139. Lixinski, *supra* note 135 at 568; Int’l Council on Monuments & Sites [ICOMOS], Int’l Charter for the Conservation and Restoration of Monuments and Sites, *The Venice Charter*, May 31, 1964, [https://www.icomos.org/charters/venice\\_e.pdf](https://www.icomos.org/charters/venice_e.pdf).

140. See generally *Recommendation for Public and Private Works*, *supra* note 102.

141. *Jackson*, *supra* note 15; *Vera*, *supra* note 24.

142. *Flores*, *supra* note 11.

even when a majority of local residents favor such removal. As this cycle worsens, the debate erupts, often violently.

## V. CONCLUSION

Civil disobedience is defined as “refusal to obey government demands or commands and nonresistance to consequent arrest and punishment . . . [usually] with the acceptance of consequences such as arrest, physical beatings, and even death.”<sup>143</sup> A report by the Federal Bureau of Investigation shows that overall hate crimes have risen seventeen percent between 2016 and 2017,<sup>144</sup> and hate crimes targeting Jews have risen thirty-seven percent.<sup>145</sup> It is not a stretch to foresee Confederate monuments as the easiest target for retaliation. Thus, safeguarding measures, such as the removal of Confederate monuments, would be completely warranted under international law to ensure preservation.

However, removing Confederate monuments as a safeguarding measure by itself will not satisfy international law provisions. The international community has repeatedly stated that cultural heritage should be protected to ensure that future generations have access to that heritage.<sup>146</sup> Protecting cultural heritage is a useless endeavor if the items are placed under lock and key. Therefore, municipalities and other organizations that have removed monuments and stored them in undisclosed locations are violating international law.

To best comply with international law, Confederate monuments should be removed and placed in museums or other publicly accessible, but less contentious areas. While it may be costly and logistically difficult, the United States government has a duty to protect its cultural heritage since the “damage to the cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people

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143. CIVIL DISOBEDIENCE, <http://disobediencivil.weebly.com/dr-martin-luther-king-jr.html> (last viewed Oct. 18, 2019).

144. Erin Donaghue, *New FBI Data Shows Rise in Anti-Semitic Hate Crimes*, CBS NEWS (Nov. 13, 2018, 8:24 PM), <https://www.cbsnews.com/news/fbi-hate-crimes-up-new-data-shows-rise-in-anti-semitic-hate-crimes/>.

145. *Id.*

146. *Recommendation for Public or Private Works*, *supra* note 102; *Recommendation Concerning the Protection of Cultural and Natural Heritage 1972*, *supra* note 108; *Recommendation for the Protection of Movable Cultural Property*, *supra* note 112.



makes its contribution to the culture of the world.”<sup>147</sup> As such, the federal government should consider these five options: (i) create incentives for museums to accept the monuments, (ii) help fund needed expansions of museums to accommodate the monuments, (iii) establish new museums to house the monuments and educate the people as to their history, (iv) offer assistance in the removal and moving process to ensure the monuments do not get damaged, or (v) assist in relocating the monuments to less contentious areas. All of these options are not only acceptable under international law, but also mandated by it.

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147. 1954 Hague Convention, *supra* note 64, at pmbl.

# NUCLEAR WEAPONS AND THE NEED FOR A NO-FIRST-USE AGREEMENT BETWEEN THE UNITED STATES AND SOUTH KOREA FOR NORTH KOREA

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## I. INTRODUCTION

Nuclear weapons present a modern and complex problem in the context of international law. Numerous bilateral and multilateral treaties restrict the use of nuclear weapons, but international law falls short of establishing clear legal guidelines for situations where states may use nuclear force in self-defense. For example, Article 51 of the U.N. Charter reserves in states the inherent right of self-defense in the event of an armed attack, but states have interpreted Article 51 to also allow preemptive strikes

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in response to an imminent attack.<sup>1</sup> Moreover, in the International Court of Justice's ("ICJ") Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the ICJ declined to conclude on the legality of using nuclear weapons in self-defense.<sup>2</sup> Neutrality law further complicates the matter. While neutrality law holds that "[t]he territory of neutral Powers is inviolable," international law fails to determine whether the unintentional drift of radioactive fallout over neutral third-party states should be classified as collateral damage or an attack that infringes on the rights of neutrals.<sup>3</sup> In effect, the application of international law is dangerously left open to interpretation by states, shaped by these states' personal goals and interests.

The interpretive problems of preemptive self-defense and the rights of neutrals affects the United States' options against North Korea's nuclear weapons program. Even though international law generally prohibits the use of nuclear weapons, President Trump has considered, and may again explore the idea of a preemptive nuclear strike against North Korea under a claim of self-defense, especially if North Korea continues to expand its nuclear arsenal.<sup>4</sup> The United States' nuclear policy allows both the first-use and threat of first-use of nuclear weapons in a variety of circumstances.<sup>5</sup> For example, the United States may preempt an enemy state's use of nuclear weapons and "threaten ... to deter, and if necessary, respond, to a variety of nonnuclear

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1. Alex Potcovaru, *The International Law of Anticipatory Self-Defense and U.S. Options in North Korea*, LAWFARE (Aug. 8, 2017, 1:56 PM), <https://www.lawfareblog.com/international-law-anticipatory-self-defense-and-us-options-north-korea>.

2. The requirements of self-defense, necessity, and proportionality do not necessarily exclude the use of nuclear weapons in self-defense, but the very nature of nuclear weapons could violate humanitarian law, making them unlawful to use in self-defense. *Legality of Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. Rep. 226, ¶ 40-44 (July 8) [hereinafter *Advisory Opinion*].

3. *Convention on Rights and Duties of Neutral Powers and Persons in War on Land*, art. I, Oct. 18, 1907, 36 Stat. 2310, 1907 U.N.T.S. 540 [hereinafter *Hague Convention V*].

4. Associated Press, *North Korea Celebrates Year of 'Self-Defence' Successes, But Ties with US Lowest Since Korean War*, SOUTH CHINA MORNING POST (Jul. 20, 2018, 8:54 PM), <https://www.scmp.com/news/asia/east-asia/article/2126260/north-korea-celebrates-year-self-defence-successes-ties-us>.

5. Michael S. Gerson, *The Future of U.S. Nuclear Policy: The Case for No First Use*, HARVARD KENNEDY SCHOOL BELFER CTR FOR SCIENCE AND INT'L AFFAIRS (Feb. 2011), [https://www.belfercenter.org/sites/default/files/files/publication/gerson\\_policy\\_brief\\_Feb\\_2011.pdf](https://www.belfercenter.org/sites/default/files/files/publication/gerson_policy_brief_Feb_2011.pdf).

contingencies, including large-scale conventional aggression by another nuclear power... and chemical or biological weapons attacks.”<sup>6</sup> President Trump only fuels the fire by calling for the expansion of more “usable” nuclear weapons, as supported and recommended by the latest U.S. Nuclear Posture Review.<sup>7</sup> The combination of the United States’ rhetoric and the legal ambiguities surrounding the preemptive use of nuclear weapons have left South Korea concerned that the United States will ignore its rights as a neutral third-party.

The United States and North Korea appear willing to resolve the long-term conflict involving North Korea’s intercontinental ballistic missiles and other nuclear arms efforts in weaponry. For the first time in history, and in an effort to resolve these issues, the leaders of both nations met at the 2018 Singapore Summit, and then again at the 2019 Hanoi Summit in Vietnam.<sup>8</sup> Yet, it is clear that the meetings amounted to neither true failures nor successes since the last meeting in Hanoi was cut short with the leaders unable to reach an agreement.<sup>9</sup> The deadlock may be attributed to a variety of complications, including the “take all-no give” attitude that both leaders displayed, but the most glaring issue of all is that the United States appears fixated on waiting for North Korea to act first. The Trump administration must not ignore that in order “to reach a final deal on the eventual denuclearization of North Korea, the United States must give something substantial” or find alternative means to address the problem.<sup>10</sup> Specifically, “Washington must take steps to ease North Korean fears of an American attack.”<sup>11</sup>

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6. *Id.*

7. U.S. DEP’T OF DEF., NUCLEAR POSTURE REPORT (2018).

8. *Singapore to Hanoi: The Winding Road Since First Trump-Kim Summit*, AL JAZEERA (Feb. 19, 2019), <https://www.aljazeera.com/news/2019/02/singapore-hanoi-winding-road-trump-kim-summit-190219093156706.html>.

9. Jung H. Pak, *The Good, the Bad, and the Ugly at the US-North Korea Summit in Hanoi*, BROOKINGS (Mar. 4, 2019), <https://www.brookings.edu/blog/order-from-chaos/2019/03/04/the-good-the-bad-and-the-ugly-at-the-us-north-korea-summit-in-hanoi>; see generally Jeremy Diamond, *Takeaways from the Trump-Kim Hanoi Summit*, CNN (Feb. 28, 2019, 6:42 AM), <https://www.cnn.com/2019/02/28/politics/trump-kim-hanoi-summit-takeaways/index.html>.

10. David C. Kang, *Why Should North Korea Give Up Its Nuclear Weapons?*, N.Y. TIMES (Aug. 22, 2018), <https://www.nytimes.com/2018/08/22/opinion/north-korea-nuclear-trump.html>.

11. *Id.*

The natural next step in thawing the relationship between the United States and North Korea would be for the United States to negotiate a no-first-use agreement with South Korea, similar in principle to the Sole Purpose Doctrine adopted by China, in which China pledged never to be the first to use nuclear weapons under any circumstance.<sup>12</sup> Otherwise, a preemptive nuclear strike by the United States on North Korea would violate both the law of war and the law of neutrality. Having a no-first-use policy may help defuse current tensions with North Korea and South Korea, bring the United States in line with international law, and provide diplomatic advantages for the United States-South Korean relationship.

## II. PREEMPTIVE NUCLEAR STRIKE UNDER THE LAW OF WAR

The United States cannot legally engage in a preemptive nuclear strike unless North Korea strikes first.<sup>13</sup> Yet, President Trump has, and may again, suggest the first-use of nuclear weapons. Some conservative scholars and commentators have made preemptive self-defense arguments for the use of nuclear weapons against North Korea that have no basis in international law. A no-first-use pronouncement by the United States would merely reassuringly state what is already required.

The United States' approach to the North Korean problem is controversial because the United States' understanding of self-defense is inconsistent with international law. Clashing interpretations regarding justified self-defense stems directly from opposing viewpoints on Article 51 of the U.N. Charter, which notes that every state has an "inherent right ... of self-defense if an armed attack occurs."<sup>14</sup> While some scholars argue that a state may engage in self-defense only if it first suffers an armed attack,<sup>15</sup> others recognize a broader interpretation of Article 51, which, though likely illegal, allows a state to act preemptively to

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12. Marc Finaud, *China and Nuclear Weapons: Implications of a No First Use Doctrine*, ASIA DIALOGUE (Apr. 3, 2017), <https://theasiadialogue.com/2017/04/03/china-and-nuclear-weapons-implications-of-a-no-first-use-doctrine/>.

13. Anthony Clark Arend, *International Law and the Preemptive Use of Military Force*, WASH Q. (2003), at 89; see U.N. Charter art. 51.

14. U.N. Charter art. 51.

15. Arend, *supra* note 13, at 91; see generally Potcovaru, *supra* note 1.

protect its citizens if an attack is imminent.<sup>16</sup> Under the broad approach, the United States may again claim that North Korea poses an imminent threat and authorize a preemptive nuclear strike.<sup>17</sup>

However, even if the United States justifiably engaged in self-defense, a nuclear strike, perhaps under all circumstances, is never allowed, even though the pressure to respond would be overwhelming.<sup>18</sup> Under the law of war, or *jus ad bellum*, which concerns whether a state has engaged in war for just reasons,<sup>19</sup> some states may rightfully use nuclear weapons in self-defense, as discussed later in this section. However, the United States, at least in the current situation, cannot engage in preemptive nuclear strikes on North Korea without violating international law for reasons of *jus ad bellum*.<sup>20</sup>

An argument for a preemptive nuclear strike on North Korea also crumbles under the traditional understanding of Article 51 because it fails to meet the elements of justified self-defense, established by the *Caroline* standard in 1842.<sup>21</sup> In *Caroline*, British troops in Canada travelled across the Niagara River to seize and destroy an American steamship, The S.S. *Caroline*, to prevent the ship from supporting the Canadian rebels.<sup>22</sup> The British claimed self-defense to justify the attack, but according to Daniel Webster, the United States Secretary of State at that time, the attack was not necessary for the purpose of self-defense.<sup>23</sup> Thereafter, the British publicly apologized for their actions and negotiated with the United States an agreement, the *Caroline*

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16. Arend, *supra* note 13, at 90; *see generally* Military and Paramilitary Activities in and Against Nicaragua (Nicar. V. U.S.), Judgement, 1986 I.C.J. Rep. 14, ¶ 24 (June 27).

17. Rachel Weise, *How Nuclear Weapons Change the Doctrine of Self-Defense*, 44 N.Y.U. L. J. OF INT'L L. & POL. 1331, 1334 (2012).

18. *See generally* Ira Helfand et al., *Banning Nuclear Weapons is Crucial for Global Health*, GUARDIAN (Sept. 28, 2016), <https://www.theguardian.com/commentisfree/2016/sep/28/banning-nuclear-weapons-is-crucial-for-global-health>.

19. *See generally* INT'L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW: ANSWERS TO YOUR QUESTIONS (2015).

20. *Id.*

21. LORI FISLER DAMROSCH & SEAN D. MURPHY, INTERNATIONAL LAW 1092 (6th ed. 2014).

22. *Id.*; Samuel Moyn, *The Caroline Standard*, H2O (Aug. 1, 2016), [https://h2o.law.harvard.edu/text\\_blocks/28886](https://h2o.law.harvard.edu/text_blocks/28886).

23. DAMROSCH & MURPHY, *supra* note 21.

standard, now regarded as a famous norm of customary international law.<sup>24</sup>

The *Caroline* standard authorizes a state to act in self-defense only if the perceived threat is “instant, overwhelming, and leav[es] no choice of means, and no moment for deliberation.”<sup>25</sup> In accordance with the standard, the ICJ established the following three elements to justify self-defense: (1) imminence, (2) necessity; and (3) proportionality.<sup>26</sup> A discussion of each element in the context of a preemptive nuclear strike by the United States on North Korea reveals that such an attack would clearly violate the law of war.

A preemptive nuclear strike by the United States on North Korea would not be justified given that the United States would fail to meet the imminence standard established by the ICJ. Similar to the position taken by Daniel Webster, Rachel Weise defines “imminence” as a situation that leaves a state no time to deliberate the matter or resolve the conflict in peace.<sup>27</sup> Past negotiations between the United States and North Korea regarding the denuclearization of the Korean Peninsula show that peaceful resolutions are possible even during times of heightened tensions triggered by nuclear threats. For example, after North Korea withdrew from the Non-Proliferation Treaty in 2003, the North Korean Foreign Ministry threatened to “take a measure to open its nuclear deterrent to the public as a physical force,” and the Six-Party Talks commenced immediately.<sup>28</sup> The Six-Party Talks involved a series of multilateral discussions between Japan, China, North Korea, South Korea, Russia, and the United States, primarily to denuclearize North Korea.<sup>29</sup> Although negotiations

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24. *Id.*

25. *Id.*; see Arend *supra* note 13, at 91 (“As Webster explained in a letter to Lord Ashburton, a special British representative to Washington, the state would have to demonstrate that the ‘necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment of deliberation.’”).

26. Advisory Opinion, *supra* note 2, at ¶ 41.

27. Weise, *supra* note 17.

28. Kelsey Davenport, *Chronology of U.S.-North Korea Nuclear and Missile Diplomacy*, ARMS CONTROL ASS’N (July 2019), <https://www.armscontrol.org/factsheets/dprkchron> (The Six-Party Talks commenced in the same year that North Korea withdrew from the Non-Proliferation Treaty in 2003).

29. *Id.*; see Jayshree Bajoria & Beina Xu, *The Six Party Talks on North Korea’s Nuclear Program*, COUNCIL ON FOREIGN REL. (Sept. 30, 2013), <https://www.cfr.org/background/six-party-talks-north-koreas-nuclear-program>.

fell apart in 2009, the effort reveals that peaceful negotiations are possible, even in situations where nuclear threats escalate.<sup>30</sup> The recent meetings between leaders during the 2018 Singapore Summit and 2019 Hanoi Summit would only further invalidate an argument for a preemptive nuclear strike on North Korea today because a state must have no time to resolve conflicts in peace before resorting to a preemptive strike.

Preemptive strike justifications based on imminent fear would also fail against other valid interpretations of the imminence standard. According to author, Guy B. Roberts, an imminent threat is one in which enemy troops are mobilized along the borders of a domestic territory, or more broadly, an “actually materialized” threat.<sup>31</sup> Under a literal approach, a defensive strike by the United States on North Korea would not be categorized as one in response to an imminent threat of attack because North Korean troops are not currently mobilized near the United States’ borders. That is not to say that a preemptive nuclear strike is justified when North Korean troops are gathered along domestic lines, as the preemptive attack would still have to meet the elements of necessity and proportionality. Considering the imminence standard alone, it is implicit in Roberts’ rationale that a preemptive strike is reserved only as a responsive measure, when a dire situation calls for immediate emergency action, triggered by enemy conduct that translates to a legitimate threat of war.<sup>32</sup> Thus, a preemptive strike by the United States on North Korea would violate the imminence standard under the law of war and would not be considered a preemptive measure.

Some commentators that support a preemptive nuclear strike argue that the North Korean threat has recently become imminent because North Korea’s nuclear missiles can now reach the United States.<sup>33</sup> In other words, they argue that the United States does not

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30. Davenport, *supra* note 28.

31. Weise, *supra* note 17; Guy B. Roberts, *The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction*, 27 DENV. J. INT’L L. & POL’Y 483, 505–06 (1999) (stating that the Caroline criteria remains the standard for analyzing the right of self-defense).

32. See generally Guy B. Roberts, *The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction*, 27 DENV. J. INT’L L. & POL’Y 483, 517–518 (1999).

33. Matt Martino et al., *Where Can North Korea’s Missiles Reach*, AUSTL. BROADCASTING CORP. (Oct. 15, 2017), <http://www.abc.net.au/news/2017-10-16/north-korea-missile-range-map/8880894>; Gabriel Dominguez et al., *North*



have time to wait for an initial nuclear strike to occur, and that a preemptive strike is necessary, now more than ever, to neutralize the growing North Korean nuclear threat.<sup>34</sup> The United States made similar justifications under the Bush Doctrine to invade Iraq in 2003.<sup>35</sup> The Bush Doctrine, established by former President George W. Bush after the 9/11 attacks, described American policies including the right to engage in preemptive strikes on a country that poses an immediate or future threat to the nation.<sup>36</sup> Though the United States mainly justified engaging in the war by pointing to Iraq's consistent violations of the cease fire agreement, established after Iraq lost the first Gulf War,<sup>37</sup> the Bush administration also relied on a claim of self-defense, triggered by the imminent threat posed by Saddam Hussein's ability to obtain nuclear weapons.<sup>38</sup> The Bush Doctrine is just one example of how domestic policy and personal interests can help shape the definition of self-defense to justify a preemptive strike on another country, though it should be noted that most scholars would agree that the strikes on Iraq were illegal under international law even considering the justifications made by the United States under past Security Council Resolutions.<sup>39</sup>

Even assuming that the Iraq invasion was legal under the Bush Doctrine, the situation in Iraq differs from the current situation in North Korea, enough so that a preemptive strike on North Korea fails under both the Bush Doctrine and international law. As noted by author, Guy B. Roberts, a strike in self-defense by the United

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*Korea Claims Second ICBM Test Launch Shows All of USA is Within Range*, FLIEGER FAUST (July 31, 2017), <https://www.fliegerfaust.com/north-korea-claims-missile-2468256141.html>; see generally *Large Nuclear Test in North Korea on 3 September 2017*, NORSAR (Sept. 3, 2017), <https://www.norsar.no/press/latest-press-release/archive/large-nuclear-test-in-north-korea-on-3-september-2017-article1534-984.html>.

34. Martino et al., *supra* note 33.

35. *The Bush Doctrine*, CONST. RTS. FOUND., <https://www.crf-usa.org/war-in-iraq/bush-doctrine.html> (last visited Sept. 16, 2019).

36. David Sanger, *Bush's Doctrine for War*, N.Y. TIMES (Mar. 18, 2003), <https://www.nytimes.com/2003/03/18/international/middleeast/bushs-doctrine-for-war.html>.

37. *Id.*; Potcovaru, *supra* note 1.

38. Sanger, *supra* note 36; see *The Bush Doctrine*, *supra* note 35 (“During his State of the Union Address in 2002, President Bush flagged Iraq, Iran, and North Korea as an ‘axis of evil.’...He warned that disarming Iraq of its weapons of mass destruction (banned by the U.N. after the 1991 Gulf War) ‘will be enforced’ by the U.N. or, if necessary, by the United States acting unilaterally in self-defense”).

39. *The Bush Doctrine*, *supra* note 35.

State on North Korea would not be considered a preemptive measure, but a preventive one, which is generally considered illegal under international law.<sup>40</sup> A preventive measure is one where a state acts to destroy an enemy's nuclear capabilities prior to the threat materializing, or to halt an enemy from further producing the plutonium and uranium necessary to develop more nuclear weapons.<sup>41</sup> Arguably, a potential strike on North Korea would be preemptive rather than preventive given that, unlike the threat in Iraq in 2003, the nuclear threat in North Korea today is already materialized.<sup>42</sup>

However, such a proposition would fail under Roberts' extended definition of a preventive strike, which requires confirmation of how imminent the attack is, where the enemy's nuclear weapons lie, and how capable those systems are.<sup>43</sup> Under this approach, a strike on North Korea would clearly be classified as an illegal preventive measure because one, North Korea's nuclear program is covert in nature, hidden deep in underground facilities where they remain mostly undetected,<sup>44</sup> and two, the United States has been in a nuclear standoff with North Korea since North Korea obtained its first nuclear weapon.<sup>45</sup> Given the uncertainties regarding the locations of North Korea's nuclear facilities, their capabilities, and the imminence of an initial attack, a nuclear strike in self-defense by the United States would be an illegal preventive measure. Moreover, such an attack conflicts not only with the imminence standard, but also under the necessity and proportionality elements established by the ICJ.

Even if the United States could satisfy the imminence standard, a preemptive nuclear strike would fail to satisfy the necessity and proportionality elements for justified self-defense. Much like the imminence standard under the law of war, the necessity and proportionality standards are open to state

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40. See Roberts, *supra* note 32, at 484.

41. *Id.* at 585 n.3.

42. *North Korean Strategic Nuclear Threat*, NTI (Feb. 2018), [https://media.nti.org/documents/dprk\\_strategic\\_threat.pdf](https://media.nti.org/documents/dprk_strategic_threat.pdf); see also Martino et al., *supra* note 33.

43. Roberts, *supra* note 32, at 7; see Potcovaru, *supra* note 1.

44. Christopher Woolf, *The Only Effective Arms Against North Korea's Missile Bunkers Are Nuclear Weapons, Says a Top War Planner*, PRI (Aug. 10, 2017, 6:45 PM), <https://www.pri.org/stories/2017-08-10/only-effective-arms-against-north-koreas-missile-bunkers-are-nuclear-weapons-says>.

45. Davenport, *supra* note 28.

interpretation. With respect to the necessity standard, author Francis Grimal argues that a responsive strike with nuclear weapons is valid only if the initial strike is either “launched,” or “in the air,” terms she coins respectively as “boost phase” and “free flight phase.”<sup>46</sup> The argument is interesting in the context of the necessity standard because it differentiates between a purely reactive strike in self-defense and a preemptive strike in self-defense.<sup>47</sup> To clarify, a purely reactive strike allows a state to respond with nuclear weapons only after it actually suffers an armed attack, where as a preemptive strike authorizes a state to fire nuclear weapons as soon as it detects a nuclear missile launched by the enemy. If the United States adopts Grimal’s interpretation of the necessity principle, then the United States essentially assumes a no-first-use policy.

However, a responsive or reactive strike poses numerous problems for decision makers. The United States would face potential difficulties in assessing the time of the launch as well as the type of weapon deployed by North Korea without first suffering the attack.<sup>48</sup> For example, in a hypothetical situation, the United States may misread a conventional strike by North Korea as one that is nuclear, thus triggering a nuclear response.<sup>49</sup> A misread attack and nuclear response by the United States would violate the proportionality principle under the law of war, which allows only enough force to abate and repel a threat,<sup>50</sup> as well as the proportionality standard under international humanitarian law, which balances military gain and unnecessary suffering during an armed conflict.<sup>51</sup> Given the possibility of a miscalculated response, which violates both the law of war and humanitarian law, the United States should avoid such a flexible approach and strictly adhere to the core principle of the no-first-use policy, which prohibits the first-use of nuclear weapons under any circumstance.

The United States may be able to legally resort to the first-use of nuclear weapons and satisfy the proportionality standard for

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46. Francis Grimal, *Jus ad Bellum: Nuclear Weapons and the Inherent Right of Self-Defence*, in 2 NUCLEAR NON-PROLIFERATION IN INTERNATIONAL LAW 337, 343 (Jonathan L. Black-Branch & Dieter Fleck eds., 2015).

47. *Id.*

48. *Id.*

49. *Id.* at 344.

50. *Id.*

51. *Id.* at 345.

justified self-defense if a conventional attack by North Korea is deemed extremely destructive.<sup>52</sup> In fact, some scholars suggest that the United States would be justified in responding with a first-use of nuclear weapons if an initial conventional attack by North Korea requires nuclear force to “repel and abate” the threat adequately.<sup>53</sup> Similarly, Russia’s stance under its military doctrine in 2000 reserved the right of the first-use of nuclear weapons “in response to ... large-scale conventional aggression.”<sup>54</sup> The argument is based on the idea that the law of war does not require a proportional attack to be zero-sum.<sup>55</sup> In other words, a retaliatory nuclear strike in response to a conventional weapons attack is permitted so long as the response is used to abate a threat, even if the response does not strictly adhere to the “an eye for an eye” concept.<sup>56</sup> Though the “repel and abate model offers the United States flexibility in deciding whether to use nuclear weapons first, the United States should avoid adopting such an approach because it fails to determine what constitutes an adequate nuclear response, blurring the lines of when a responsive nuclear attack exceeds the scope of proportionality for self-defense.

The “repel and abate” theory is also controversial because it ignores the blind and unpredictable nature of a nuclear bomb, especially with regards to the difficulty in monitoring radioactive fallout. If the first-use of nuclear weapons in self-defense results in future confirmed casualties due to the release of uncontrollable radiation, such a defensive strike would exceed the scope of proportionality under the “repel and abate” method. As a counter-argument, some critics claim that nuclear weapons today are so modernized and developed that they can be sufficiently controlled to satisfy the proportionality element.<sup>57</sup> Modernized nuclear weapons allow users the ability to modify, calculate, and limit the impact of an attack to ultimately meet what is required by law.<sup>58</sup>

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52. *Id.*

53. *Id.* at 348.

54. Yuri Fedorov, *Russia’s Doctrine on the Use of Nuclear Weapons*, PUGWASH (Nov. 2002), [https://pugwashconferences.files.wordpress.com/2014/05/200211\\_london\\_nws\\_paper\\_fedorov.pdf](https://pugwashconferences.files.wordpress.com/2014/05/200211_london_nws_paper_fedorov.pdf).

55. Grimal, *supra* note 46, at 340-41.

56. *Id.* at 340.

57. See Charles Dunlap, *Taming Shiva: Applying International Law to Nuclear Operations*, 42 A.F. L. REV. 157, 161-62 (1997).

58. See *Id.*

Specifically, these weapons can be programmed to reduce weapon-yield and improve accuracy.<sup>59</sup> Further, the weapons can be deployed in different sizes and adjusted in burst height.<sup>60</sup>

However, as compelling as the arguments are with regards to the accuracy of modern nuclear weapons, they fails to consider radioactive drift, subject to uncontrollable factors like the weather.<sup>61</sup> Moreover, the extent to which radiation can remain in drinking water, and thereby affect the food supply, is unaccounted for.<sup>62</sup> Though the United States possesses earth-penetrating weapons (“EPW”) that can reach deep into North Korea’s underground facilities, EPWs cannot penetrate deep enough underground to contain the blast and prevent fallout.<sup>63</sup> Indeed, it is nearly impossible to accumulate data on every death directly caused by radioactive fallout, but that is no excuse for the United States to ignore the destructive after-effects of a nuclear attack, regardless of how much the initial blast can be contained.

As a practical matter, the argument for a controlled preemptive nuclear strike on North Korea ignores the likelihood of nuclear escalation. If the United States resorts to the use of nuclear weapons, North Korea may deploy nuclear weapons of its own, especially in the likely situation that the United States fails to completely disable all of North Korea’s nuclear systems, including those hidden underground. The problem becomes more challenging when targeting mobile nuclear missiles because such a circumstance necessitates the attacker to expand the initial blast of an attack, which would ultimately lead to more unintended casualties.<sup>64</sup> Given the unfathomable risks associated with nuclear war, prompted in large part by the difficulties in locating North Korea’s nuclear facilities, the United States should never consider the use of nuclear weapons as a defensive measure.

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59. Chairman of the Joint Chiefs of Staff, Joint Publication 3-21.1, *Doctrine for Joint Theater Nuclear Operations* (Feb. 9, 1996).

60. *Id.*

61. Annie Bersagel, *Nuclear Weapons and Their Third Parties*, ILPL (Sept. 2014), <http://nwp.ilpi.org/?p=2621>;

*see e.g.* 18 ERIK V. KOPPE, *THE USE OF NUCLEAR WEAPONS AND THE PROTECTION OF THE ENVIRONMENT DURING INTERNATIONAL ARMED CONFLICT* (2008).

62. *See generally* 18 ERIK V. KOPPE, *THE USE OF NUCLEAR WEAPONS AND THE PROTECTION OF THE ENVIRONMENT DURING INTERNATIONAL ARMED CONFLICT* (2008).

63. Gerson, *supra* note 5.

64. *See Id.*

The only way the United States could legally resort to the first-use of nuclear weapons would be if other conventional weapons were unavailable upon an imminent attack. According to author, Francis Grimal, such a situation would exist only if the conventional weapons held by the United States have either been destroyed or conquered.<sup>65</sup> Considering the obvious strengths of the United States' military power and the various locations of its nuclear facilities, the United States is unlikely to fall into a situation where the use of conventional weapons is not an option. Implicit in Grimal's approach is that a first-use of nuclear weapons in self-defense, at least in the context of the United States and North Korea, is never justified.<sup>66</sup> Unfortunately, Grimal does not discuss the legality of conventional preemptive strikes.

Although several states have used conventional preemptive strikes in the past with little resistance from the international community, even a conventional preemptive strike by the United States on North Korea's nuclear facilities would violate the law of war. Some scholars point to cases such as the Al Kibar Bombing as a legal justification for the United States to use preemptive conventional strikes on North Korea.<sup>67</sup> The Al Kibar Bombing of 2007, also known as Operation Orchard, involved preemptive conventional strikes by Israel to destroy secret nuclear reactors in Syria.<sup>68</sup> Under the Begin Doctrine, Israel proclaimed the prohibition of its adversaries in the Middle East from obtaining or developing nuclear weapons.<sup>69</sup> Israel ultimately succeeded in destroying the Syrian reactors, and received very little criticism from the international community despite the illegality of the attack, perhaps due to the secretive nature of the strikes.<sup>70</sup> Since then, commentators have correctly noted that Operation Orchard failed to meet the *Caroline* standard and should have been

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65. See generally Grimal, *supra* note 46, at 346 (In the event of an attack, if conventional weapons are ineffective and a State has no other military options, then using nuclear weapons would be lawful).

66. See generally Grimal, *supra* note 46.

67. Potcovaru, *supra* note 1.

68. *Id.*

69. *Id.*

70. Louis Beres, *Israel's Preemption Lesson*, U.S. NEWS (Sept. 6, 2017, 7:00 AM), <https://www.usnews.com/opinion/world-report/articles/2017-09-06/10-years-later-israels-operation-orchard-offers-lessons-on-north-korea>; see also Amos Harel & Aluf Benn, *No Longer a Secret: How Israel Destroyed Syria's Nuclear Reactor*, HAARETZ (Mar. 23, 2018), <https://www.haaretz.com/world-news/MAGAZINE-no-longer-a-secret-how-israel-destroyed-syria-s-nuclear-reactor-1.5914407>.

considered a violation of the law of war.<sup>71</sup> It follows then that events like the Al Kibar bombings cannot be used as justification for an initial conventional strike on North Korea. The legality of a preemptive conventional strike that rests on whether an enemy state has or does not have nuclear weapons is not discussed, but it is important to note that unlike in Syria in 2007, the nuclear threat in North Korea is active and materialized. Ultimately, any preemptive strike on North Korea, whether by nuclear or conventional means, results in the same unspeakable consequences.

Even assuming that a preemptive conventional strike on North Korean nuclear facilities were legal, the United States should avoid that option for the same reasons it should avoid a controlled nuclear preemptive strike. Simply put, the risk associated with either type of strike is too high. A failed preemptive conventional strike can be measured in one of two obvious ways. First, the mission would be deemed a failure if the conventional strike does not destroy all of North Korea's nuclear launch systems and hidden bunkers.<sup>72</sup> The likelihood of success is low because, as mentioned previously, the whereabouts of North Korea's nuclear infrastructure is mostly unknown, buried deep in underground tunnels over miles of terrain. Therefore, a conventional weapons attack would merely be one against military facilities "but not one that destroys" its nuclear facilities.<sup>73</sup>

The second and most obvious measure of a failed conventional attack by the United States is if North Korea retaliates with nuclear force against the United States, or even South Korea, where many American troops are currently stationed. Conventional strikes in self-defense may be legal under certain circumstances, but the situation between the United States and North Korea clearly falls far outside the scope, particularly given the low likelihood of success and the risks associated with a conventional strike. Accordingly, President Trump should negotiate with South Korea a no-first-use agreement under the traditional interpretation of self-defense because even a

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71. See Ashley Deeks, *Taming the Doctrine of Preemption*, in THE OXFORD HANDBOOK ON THE USE OF FORCE (Marc Weller, ed., 2015).

72. *What the U.S. Would Use to Strike North Korea*, GEOPOLINTELLIGENCE (Jan. 4, 2017), <https://www.geopolintelligence.com/u-s-use-strike-north-korea/>; Woolf, *supra* note 44.

73. Woolf, *supra* note 44.

preemptive conventional strike against North Korea poses severe legal liabilities under international law and would likely place the United States in a dangerous predicament of nuclear war.

The United States lacks legal precedent to rightfully engage in any preemptive or preventive strike in self-defense against North Korea, whether it be by conventional or nuclear weapons. The United States would violate the law of war if it used preemptive nuclear strikes against North Korea because it would fail to satisfy the self-defense elements under Article 51.<sup>74</sup> Moreover, a preemptive conventional strike would likely be unsuccessful in completely neutralizing the North Korean threat, and any failed attack would surely result in nuclear retaliation against the United States and its allies. Thus, the United States should negotiate a no-first-use agreement with South Korea. The agreement would leave the United States in general compliance with international law if it ever resorted to using nuclear weapons and would effectuate South Korean consent for the United States to use of nuclear weapons, but only if it is in direct response to an initial nuclear attack on domestic or allied territories.

### III. SOUTH KOREA'S RIGHTS UNDER THE LAW OF NEUTRALITY

A preemptive nuclear strike by the United States on North Korea violates neutrality law with respect to South Korea. The law of neutrality governs the relationship between neutral states and belligerents at war.<sup>75</sup> A neutral state is one that does not “take part between two or more nations at war” and “maintains a strict indifference as between the contending parties.”<sup>76</sup> Accordingly, if South Korea fulfills its duty to remain impartial to the conflict, it enjoys the rights of a neutral under the law of neutrality. For the purposes of this section, it is assumed that upon a preemptive nuclear strike by the United States on North Korea, South Korea will not provide diplomatic or economic support for the United States' efforts and will refuse to participate in the hostilities in order to maintain its status as a neutral third-party.

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74. Potcovaru, *supra* note 1.

75. KOPPE, *supra* note 62 at 297.

76. *Id.*



Under international law, a neutral state has the right to remain impartial from conflict and to not be harmed.<sup>77</sup> At a minimum, it is clear that the use of nuclear weapons by the United States on North Korea would undoubtedly cause collateral damage and injury to South Korean citizens by means of radioactive fallout. Yet, in 1993, when the World Health Organization (“WHO”) requested from the ICJ an advisory opinion on whether the use of nuclear weapons, “in view of the health and environmental effects,” would be illegal under international law, the United States, in its written response to the ICJ, claimed that the law of neutrality does not apply to the use of nuclear weapons.<sup>78</sup> The United States may again take the same stance if it decides to engage in a preemptive nuclear strike against North Korea. However, the claim fails under international law. Moreover, the claim will fail under the United States’ own domestic policies because under several United States documents described in the sections to follow, uncontrollable radioactive fallout resulting from the use of nuclear weapons is classified not merely as collateral damage, but as an instrumentality of war.<sup>79</sup> Therefore, if a preemptive nuclear strike by the United States on North Korea results in any drift of harmful radiation onto South Korean territories, then the nuclear strike would be considered an armed attack in violation of South Korea’s rights under the law of neutrality, and a violation under the United States’ own domestic policies. The point is only further emphasized by the fact that South Korea, in its written response to the ICJ, claimed that “the use of nuclear weapons by a State in a war or other armed conflict is a clear breach of its obligations under the international conventions on the protection of environment of mankind...”<sup>80</sup>

Under a literal reading of neutrality law, South Korea faces difficulties in establishing the United States’ liability for a

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77. Norman Dwight Harris, *The Duties and Obligations of Neutral Governments, Parties to the Hague Conventions, in Case of Actual or Threatened Violations by Belligerents of the Stipulations of the Said Conventions*, 9 PROC. AM. SOC’Y INT’L L. ANN. MEETING 39 (1915).

78. Legality of Use by a State of Nuclear Weapons in Armed Conflict, Written Statement by the United States, 1993 I.C.J. 2 (June 10, 1994) [hereinafter Written Statement to ICJ].

79. U.S. DEP’T OF ARMY, FM 27-10, THE LAW OF LAND WARFARE (1956).

80. Legality of Use by a State of Nuclear Weapons in Armed Conflict, Written Statement from the Minister of Foreign Affairs of the Democratic People’s Republic of Korea, 1993 I.C.J. 2 (Jan. 24, 1994).

preemptive nuclear strike on North Korea. In fact, any literal interpretation of neutrality law, particularly with regards to the use of nuclear weapons and its radioactive aftereffects, may render application of the law inaccurate or moot, partially because neutrality law principles were developed during a time when nuclear weapons did not exist.<sup>81</sup> The law of neutrality is primarily governed by codification of The Hague Convention V, Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, and Convention XIII, Concerning the Rights and Duties of Neutral Powers in Naval Warfare.<sup>82</sup> Article 1 of the Hague Convention V, which governs warfare on land, states the “territory of neutral Powers is inviolable.”<sup>83</sup> Article 1 of the Hague Convention XIII, with respect to naval warfare, states, “Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality.”<sup>84</sup>

Other articles of the Hague Convention also reveal that the Conventions were not designed to protect neutrals from the misuse of nuclear weapons. For example, Article 2 of Convention V states that belligerents may not move troops or convoys across neutral territory.<sup>85</sup> In addition, Article 2 of Convention XIII states belligerents are strictly forbidden from using war ships in neutral waters to commit acts of hostility.<sup>86</sup> As evidenced, it appears on its face that South Korea would be unable to resort to the direct application of both Convention V and Convention XIII to claim damages for a breach of domestic territories resulting from the misuse of nuclear weapons by the United States because the Conventions were primarily designed to prevent use of neutral territories by belligerents.

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81. See Hague Convention V, *supra* note 3; see also Hague Convention XIII, Convention on Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415, 2415 T.S. 545.

82. Hague Convention V, *supra* note 3; Hague Convention XIII, Convention on Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415, 2415 T.S. 545.

83. Hague Convention V, *supra* note 3, at art. 1.

84. Hague Convention XIII, Convention on Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415, 2415 T.S. 545.

85. *Id.*

86. Hague Convention XIII, *supra* note 83, at art. 2.

However, the word “inviolable” in Article 1 of the Hague Convention V leaves room for a broad interpretation of the law. Though the negotiating history of Article 1 remains silent on the issue,<sup>87</sup> experts have confirmed that “there was awareness among the participants of certain broad principles underlying the texts they were drafting, notably the principle that the sovereignty of the neutral State implies that its territories may not be affected by the military operations.”<sup>88</sup> In the context of warfare, military operations are typically regarded as plans to resolve conflict in the state’s favor. It is unimaginable to assume that the United States’ use of nuclear weapons against North Korea would not be self-serving. Thus, under a wider approach, South Korea would have a valid claim for any resulting radioactive fallout that affects its territories.

The validity in applying a wider approach to the Hague Convention V is further supported by The Martens Clause, which operates to provide neutral states immense legal protections against harms from the radioactive byproducts of nuclear weapons. The Martens Clause, adopted as a part of the 1899 Hague Convention II with Respect to the Law and Customs of War on Land, states, “Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principle of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.”<sup>89</sup> It appears then that drafters of the Hague Conventions not only had in mind the possibility of further developments in warfare weaponry, but also, through the Martens Clause under the Hague Convention II, made a point to establish authority under the principles of international law over the use of excessive arms not previously covered in former conventions or treaties.

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87. MICHAEL BOTHE ET AL., PROTECTION OF THE ENVIRONMENT IN TIMES OF ARMED CONFLICT 56 (1985); KOPPE, *supra* note 62, at 303.

88. MICHAEL BOTHE ET AL., PROTECTION OF THE ENVIRONMENT IN TIMES OF ARMED CONFLICT 59 (1985).

89. Hague Convention II, Laws and Customs of War on Land, art. 1, July 29, 1899, 32 Stat. 1803, T.S. 403; Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, INT’L COMM. OF THE RED CROSS (Apr. 30, 1997), <https://www.icrc.org/en/doc/resources/documents/article/other/57jnhy.htm>.

Conservative critics may argue that The Hague Convention II is limited to prohibit only the use of certain types of weapons known at the time to cause excessive harm, such as expanding or exploding bullets.<sup>90</sup> However, the argument fails where it begins. The Martens Clause does not provide a list of prohibited and non-prohibited weapons, but encapsulates all weapons deemed to be excessive arms.<sup>91</sup> In fact, the principle was established in conjunction with the law of war to protect victims from unnecessarily suffering at the hands of excessive uses of force.<sup>92</sup> Given the irreparable, widespread, and painful deaths that nuclear weapons and its byproducts may cause, it follows that the Martens Clause restricts injury to neutrals caused by nuclear weapons, and that such restrictions were certainly intended when the clause was adopted.<sup>93</sup> A strict approach to the rule contradicts negotiating history,<sup>94</sup> and would only require codification of the law every time a weapon is modernized or further developed. It would also render the law inapplicable in many contexts, a proposition that has already been proven through historical practice.

Based on historical applications of neutrality law, South Korea will be able to establish legal liabilities for radioactive fallout resulting from a preemptive nuclear attack by the United State on North Korea so long as it can establish the “causal relationship” between the “extremely dangerous” attack and the subsequent harm.<sup>95</sup> In 1978, a Soviet satellite crash-landed on Canadian soil

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90. Hague Convention II, Laws and Customs of War on Land, art. 1, July 29, 1899, 32 Stat. 1803, T.S. 403; see ROBIN COUPLAND & DOMINIQUE LOYE, THE 1899 HAGUE DECLARATION CONCERNING EXPANDING BULLETS A TREATY EFFECTIVE FOR MORE THAN 100 YEARS FACES COMPLEX CONTEMPORARY ISSUES, 136-137 (Library of Congress ed., 2002).

91. Hague Convention II, Laws and Customs of War on Land, art. 1, July 29, 1899, 32 Stat. 1803, T.S. 403; see generally Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, INT'L COMM. OF THE RED CROSS (Apr. 30, 1997), <https://www.icrc.org/en/doc/resources/documents/article/other/57jnhy.htm>.

92. Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, INT'L COMM. OF THE RED CROSS (Apr. 30, 1997), <https://www.icrc.org/en/doc/resources/documents/article/other/57jnhy.htm>.

93. See *Id.*

94. KOPPE, *supra* note 62, at 302-03 (noting that scholars debate legislative history and the rights of neutral states).

95. KOPPE, *supra* note 62, at 303-04; Michael Reisman, *Compensating Collateral Damage in Elective International Conflict*, FAC. SCHOLARSHIP SERIES 8 (2013).

and injured many people.<sup>96</sup> As a result, the Soviets were subject to absolute liability under neutrality law, not because the satellite activity was forbidden, but because the conduct linked to the injuries was considered “extremely dangerous.”<sup>97</sup> The same reasoning can be applied to the United States, even in the unlikely event that a preemptive nuclear strike on North Korea is considered legal, because “[n]uclear weapons are the most dangerous weapons on earth.”<sup>98</sup> The same can be said for injuries caused by radioactive fallout, especially when compared to the harms resulting from the crash-landing of a satellite on neutral territories.

Though it is nearly impossible to determine the precise severity of damage that radioactive drift may cause, the extremely dangerous nature of radiation caused by nuclear weapons is well documented. In a written statement to the ICJ titled, “Memorial of the Government of the Republic of Nauru,” Nauru presented a variety of studies highlighting the grave effects of the use of a nuclear bomb, particularly in the context of neutrality law violations.<sup>99</sup> In the statement, Nauru expressed that the law of neutrality protects against both “trans-border incursions” as well as “trans-border damage” caused by nuclear weapons.<sup>100</sup> The choice to differentiate between the two terms further supports the validity in applying a wider approach to the law of neutrality when dealing with nuclear fallout. Nuclear radiation can travel for hundreds of miles, affecting thousands of lives by means of contaminated food, air, and water.<sup>101</sup> Moreover, cesium-137, “a major source of radiation in nuclear fallout,” has a half-life of 30

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96. Michael Reisman, *Compensating Collateral Damage in Elective International Conflict*, FAC. SCHOLARSHIP SERIES 8 (2013); Alexander F. Cohen, *Cosmos 954 and the International Law of Satellite Accidents*, 10 YALE J. INTL. L. 78, 79 (1984); see generally Andrew Cohen, *Canada Settles with Russia for Satellite Crash*, UPI (Apr. 2, 1981), <https://www.upi.com/Archives/1981/04/02/Canada-settles-with-Russia-for-satellite-crash/7336355035600/>.

97. Alexander F. Cohen, *Cosmos 954 and the International Law of Satellite Accidents*, 10 YALE J. INTL. L. 78, 80 (1984).

98. Nuclear Weapons, UNODA, <https://www.un.org/disarmament/wmd/nuclear/> (last visited Sept. 18, 2019).

99. Memorial of the Government of the Republic of Nauru I, Advisory Opinion, at 35 (Sept. 1994), <https://www.icj-cij.org/files/case-related/93/8792.pdf>.

100. *Id.*

101. U.S. ARMS CONTROL AND DISARMAMENT AGENCY, WORLDWIDE EFFECT OF NUCLEAR WAR (2007).

years.<sup>102</sup> Though the severity of the fallout hazards of nuclear explosions depends on a variety of factors, including the design of the weapon, the force of the explosion, and the weather, the sheer time required for radiation to dissipate speaks to its prolonged and destructive effects.<sup>103</sup> Given the hazards associated with nuclear radiation, it follows that no court would deny the “extremely dangerous” nature of nuclear fallout that results from a strike by the United States on North Korea, and the causal relationship that would clearly exist between the act and the harm.

Despite strong evidence to the contrary, the United States has adamantly opposed the validity of neutrality law in cases that involve collateral damage resulting from military strikes taken against, but within the geographical limits of, belligerent states. In 1993, the World Health organization requested from the ICJ an advisory opinion on the following question: “In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?”<sup>104</sup> In its written response, the United States took the position that the law of neutrality did not apply to the use of nuclear weapons.<sup>105</sup> Specifically, the United States claimed that the law of neutrality protects neutral territories only from “military invasion or bombardment,” meaning that only a direct use of force by belligerent parties on neutral states violates the law of neutrality.<sup>106</sup> The term collateral damage refers to harm inflicted by belligerents on unintended targets or non-combatants during legal military operations, for which the belligerents assume liability without fault.<sup>107</sup> If the United States plans to assume no fault for unintended harms caused during warfare, then the United States must respect the legal definition of collateral damage through its’ conduct, rhetoric, and policy.

However, the United States contradicts its’ position in its written response to the ICJ through its own military policies. In the

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102. *Id.*

103. Annie Bersagel, *Nuclear Weapons and Their Third Parties*, ILPL (Sept. 2014), <http://nwp.ilpi.org/?p=2621>.

104. Written Statement to ICJ, *supra* note 78.

105. U.S. DEP’T OF ARMY, *supra* note 79, at 184.

106. Written Statement to ICJ, *supra* note 78.

107. U.S. DEP’T OF AIR FORCE, AFPAM 14-210, USAF INTELLIGENCE TARGETING GUIDE (1998).

United States' Army Land Warfare Manual, the United States asserts that the law of neutrality forbids any unpermitted entry into neutral territories, whether it be through waters or airspace, by soldiers, or by "instrumentalities of war."<sup>108</sup> Furthermore, in the United States' Army's Combat-Related Special Compensation Program, war veterans are entitled to receive compensation for injuries sustained by "instrumentalities of war."<sup>109</sup> The program provides a list of situations that constitute a valid basis for compensation for injuries to veterans resulting from fumes, explosions, gases, vehicles, materials, and most importantly, exposure to radiation.<sup>110</sup> Remarkably, under its own military program, the United States considers radiation an instrumentality of war, which if used to enter a neutral territory, would be considered a violation of neutrality law.<sup>111</sup> Radiation, no less than the blast of an explosion, is used to kill enemy troops. Just as a bomb that explodes in neutral territory violates neutrality, so does the explosive effects of a weapon. The position taken by the United States regarding neutrality law is contradictory, at best.

Interestingly enough, the United States retreated from its initial statements during oral arguments before the ICJ, concluding that the legality of the use of nuclear weapons could only be assessed on a case-by-case basis depending on the facts of the case at hand.<sup>112</sup> Indeed, the position taken by the United States leaves spectators with more questions than answers. At the same time, it appears that by assessing the legality of nuclear weapons in relation to neutrality law on a case-by-case basis, the United States implies that it *may* be liable for radioactive fallout that results from a nuclear strike on North Korea. Though the Warfare Manual and Compensation Program are not binding under international law, South Korea may utilize the document and program to support its neutrality law claims against the United States if the United States ever decides to engage in a preemptive nuclear strike on North Korea.

As a practical matter, the United States should also avoid engaging in a preemptive strike against North Korea because a

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108. U.S. DEP'T OF ARMY, *supra* note 79.

109. *Id.*

110. Combat-Related Special Compensation (CRSC) 10 U.S.C. § 1413(a) (2004).

111. U.S. DEP'T OF ARMY, *supra* note 79.

112. Written Statement, *supra* note 78 at 27, 32.

military error that affects a neutral creates state responsibility in the same way that collateral damage affecting a neutral would. According to the United States' statements to the ICJ, there are no international law cases that hold a belligerent state liable to a neutral third-party for damages resulting from military strikes taken against and within belligerent territories,<sup>113</sup> though the United States destruction of the Chinese Embassy in Serbia during the NATO bombing Belgrade certainly shines a suspicious light to the claim.<sup>114</sup> In the context of using nuclear weapons, the United States is correct, simply because there are only two cases in which nuclear weapons were used during warfare—the two atomic bombs deployed by the United States on Japan during World War II.<sup>115</sup>

However, the United States is incorrect in the context of neutral third-party damages resulting from the use of conventional weapons, particularly with regards to the topic of collateral damage. During World War II, the United States, intending to target Germany, unintentionally bombed Switzerland, a neutral third-party.<sup>116</sup> As a result of these neutrality law violations, the United States had to compensate Switzerland approximately 20 million dollars,<sup>117</sup> or 62 million Swiss francs, for damages “resulting from bombing raids on German targets close to the border, or from misunderstandings regarding the geography on the part of the pilots.”<sup>118</sup> In “The Diplomacy of Apology: U.S. Bombings of Switzerland During World War II,” author Jonathan E. Helmreich notes that the unintentional bombings occurred mainly due to a combination of factors including machinery malfunctions, bad weather, and the unskillfulness or overconfidence of troops.<sup>119</sup> Despite the unintentional nature of the bombings, the United States still compensated Switzerland for damages.<sup>120</sup> Surprisingly, the compensation included damages not only for dropped bombs, fuel tanks, or crashed aircrafts, but also

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113. KOPPE, *supra* note 62, at 302-303.

114. *Id.* at 263.

115. See generally Atomic Bomb History, HISTORY (May 16, 2019), <https://www.history.com/topics/world-war-ii/atomic-bomb-history>.

116. Johnathan E. Helmreich, *The Diplomacy of Apology: U.S. Bombings of Switzerland During World War II*, AIR U. REV. 20 (May-June 1977).

117. *Id.* at 22.

118. KOPPE, *supra* note 62, at 303.

119. Helmreich, *supra* note 116, at 21-22.

120. *Id.*



for damages “resulting from actions over belligerent territory but the effects of which were felt on the Swiss side of the boundary.”<sup>121</sup> More specifically, they included damages for the “shock-waves” caused by the explosions.<sup>122</sup> At a minimum, the Switzerland case reveals that belligerents may be held liable under neutrality law for failing to prevent the deaths or injuries of unintended targets, even for damages resulting from mere shock-waves. By logical extension, harmful radioactive fallout resulting from the United States’ use of nuclear weapons on North Korea will provide South Korea recourse under neutrality law, particularly when injury is unintended. The only real difference that would exist is that the collateral damage in Switzerland resulted from the unintended use of conventional weapons rather than nuclear weapons. The difference is discounted because the Switzerland case illustrates how unintended damage resulting from the miscalculated use of *any* force on a neutral state would trigger liability under the law of neutrality. Surely then, under a logical approach, if the Swiss were compensated for the “shock-waves” of an unintended conventional attack, then South Korea must be compensated for the harmful radioactive fallout that results from an unintended nuclear attack.

Though unlikely, the United States may be able to avoid neutrality law liabilities for a preemptive nuclear strike on North Korea, but only if the effects of the strike can be controlled with enough certainty to avoid collateral damage. Specifically, the United States must design nuclear weapons that can be deployed with more control, precision, and predictability. It appears that the United States is keen on improving such functionality, at least based on its stance in the latest United States Nuclear Posture Review, which calls for more “usable” nuclear weapons.<sup>123</sup> Some scholars argue that the United States already has the technological capacity to account for collateral damage. In the article, “U.S. Air Force Uses New Tools to Minimize Civilian Casualties,” Colonel Hudson asserts that new military technologies such as the “FAST-CD” system, can dispel concerns of collateral damage and help military personnel make difficult decisions prior to and during a

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121. KOPPE, *supra* note 62, at 304.

122. *Id.*

123. U.S. DEP’T OF DEF., *supra* note 7, at xv.

strike.<sup>124</sup> The FAST-CD system, also referred to as the “Fast Assessment Strike Tool – Collateral Damage,” identifies the weapon that will be used on a target, assesses the surrounding area, estimates the distance and angle of the attack, and calculates a “probable damage field” in the form of an image similar to that of a bug which has collided at high speed with a car windshield, hence the code name “bug splat.”<sup>125</sup> It appears then that if the United States can fully account for collateral damage when using nuclear weapons, the United States may avoid legal liabilities under neutrality law.

Yet some intelligence analysts have cautioned against the approach of using new nuclear weapons because the fallibility of human pilots and the likelihood of machinery malfunction dramatically increases the risks of a failed attack.<sup>126</sup> As Colonel Hudson noted, the technology in new weapons must provide its *users* with more control, precision, and predictability.<sup>127</sup> The unpredictability of weather also adds to the uncertainty of how far radiation can drift with the wind.<sup>128</sup> Judge Weeramantry, who issued a dissenting opinion to the International Court of Justice’s Advisory Opinion on the Threat or Use of Nuclear Weapons, argued that the most significant threat to neutral nations is radioactive fallout and that the use of nuclear weapons should be unlawful *per se* given its inherent uncontrollability.<sup>129</sup> To support the argument, Judge Weeramantry cited the Chernobyl disaster, which resulted in a blast of one twenty-fifth the size of the Hiroshima bomb.<sup>130</sup> Even scientists responsible for investigating the case failed to calculate the time that it would take for the radiation to dissipate.<sup>131</sup> Even after all these years, an exclusion zone still exists, which highlights the grave “uncertainties

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124. *U.S. Air Force Uses New Tools to Minimize Civilian Casualties*, DEFENSE AEROSPACE (Mar. 18, 2003), <http://www.defense-aerospace.com/article-view/feature/18894/usaf-plans-to-minimize-civilian-casualties.html>.

125. *Id.*

126. *Id.*

127. *Id.*

128. Bersagel, *supra* note 103.

129. Advisory Opinion, *supra* note 2, at 266.

130. *Id.* at 253.

131. *Id.* at 254.

associated with radioactive contamination.”<sup>132</sup> Given the uncontrollable risks associated with nuclear fallout, it is unlikely that the United States can foresee the true extent of damage that results from the use of nuclear weapons. In effect, any preemptive nuclear strike on North Korea, especially one against protests from South Korea, would provide South Korea an opportunity for compensation because “a right without a remedy is no right at all.”<sup>133</sup>

The United States must seriously consider negotiating with South Korea a no-first-use agreement with respect to North Korea. South Korea’s express abstention from the war would effectuate a claim of neutrality, thereby requiring authorization before the United States can cross into South Korean territories by land, air, sea, or instrumentality of war. Additionally, without South Korea’s consent, any drift of radioactive fallout over South Korean territories resulting from the use of nuclear weapons on North Korea would be considered an attack on neutral territories. A no-first-use policy would authorize the United States to protect South Korean territories only in response to a first-use by North Korea, and any subsequent use of nuclear weapons would not violate South Korea’s neutrality rights. Moreover, having the policy in place would allow the United States to maintain its military operations and bases in South Korea, a position that has proven to be vital, in terms of economic and military control in the East.<sup>134</sup> South Korea is a valuable ally to the United States. Accordingly, South Korea should continue to apply pressure on the United States to negotiate a no-first-use agreement.

#### IV. A NO-FIRST-USE AGREEMENT WITH SOUTH KOREA WOULD PROVIDE POLITICAL BENEFITS

A no first-use agreement between the United States and South Korea effectively eliminates any possibility of a preemptive

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132. Alexis Madrigal, *Chernobyl Exclusion Zone Radioactive Longer Than Expected*, WIRED (Dec. 15, 2009, 2:32 PM), [www.wired.com/wiredscience/2009/12/chernobyl-soil/](http://www.wired.com/wiredscience/2009/12/chernobyl-soil/).

133. Michael Reisman, *Compensating Collateral Damage in Elective International Conflict*, FAC. SCHOLARSHIP SERIES 2 (2013).

134. MARK E. MANYIN ET AL., SOUTH KOREA: BACKGROUND AND US RELATIONS (2019), <https://fas.org/sgp/crs/row/IF10165.pdf>; MARK E. MANYIN ET AL., U.S.- SOUTH KOREA RELATIONS (2017), <https://fas.org/sgp/crs/row/R41481.pdf>.

nuclear strike on North Korea, which places the United States in general compliance under the law of war and the law of neutrality. Moreover, the agreement would help ease trepidations held by enemy states regarding the chances of inadvertent or accidental first-use of nuclear weapons. Unlike China, the United States should draft its no-first-use agreement to dispel any concerns that United States' allies may have, particularly with regards to reduced protections in the East, as some allies like South Korea and Japan have historically relied on the concept of first-use implied in the Nuclear Umbrella policy.

The United States' no-first-use agreement with South Korea must differ from China's Sole Doctrine policy in order to prevent allies from producing their own nuclear weapons, in fear of weakened nuclear protections in the East under the United States' Nuclear Umbrella program. In 1964, China became the first country with nuclear weapons to adopt the Sole Purpose doctrine, a policy under which China pledged to never be the first to use nuclear weapons under any circumstance, even in response to an initial biological or chemical weapons attack on its territories.<sup>135</sup> As part of the policy, China promised to maintain its small nuclear arsenal solely for defensive purposes.<sup>136</sup> However, if the United States adopts the Sole Purpose doctrine, it effectively weakens the Nuclear Umbrella program, which implicitly authorizes the first-use of nuclear weapons as a deterrence strategy.<sup>137</sup> In effect, countries such as South Korea and Japan would be inclined to produce nuclear weapons of their own, just as they threatened to produce nuclear weapons in the past in response to United States' actions that weakened United States' protections in the East. For example, in the 1970s, President Park Chung Hee initiated a program to develop nuclear weapons in response to a proposal by the United States to withdraw troops from South Korea.<sup>138</sup> Under

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135. Hui Zhang, *China's No-First-Use Policy Promotes Nuclear Disarmament*, DIPLOMAT (May 22, 2013), <https://thediplomat.com/2013/05/chinas-no-first-use-policy-promotes-nuclear-disarmament/>.

136. *Id.*

137. Eric Gomez, *Revisiting the Value of the U.S. Nuclear Umbrella in East Asia*, WAR ON THE ROCKS (Mar. 6, 2018), <https://warontherocks.com/2018/03/revisiting-value-u-s-nuclear-umbrella-east-asia/>.

138. William Burr, *Stopping Korea from Going Nuclear, Part I*, NAT'L SEC. ARCHIVES (Mar. 22, 2017), <https://nsarchive.gwu.edu/briefing-book/nuclear-vault/2017-03-22/stopping-korea-going-nuclear-part-i>.

immense pressure, the United States withdrew from the plan and thereafter, South Korea ceased to pursue its own nuclear deterrents.<sup>139</sup>

The United States' relationship with Japan is similar. Under the Japan-United States Security Treaty established in 1967, the United States promised to maintain its Nuclear Umbrella in exchange for Japanese agreement to not possess, produce, or permit entry of nuclear weapons into its country. As noted, United States' allies in the East rely heavily on the protections that the Nuclear Umbrella provides. If the United States wishes to keep nuclear weapons out of the hands of its allies, the United States must maintain the strength of the Nuclear Umbrella program. As such, the United States should formulate a no-first-use policy that differs from the Sole Purpose Doctrine adopted by China since it needs the ability to protect its allies even though the United States itself might not have suffered the nuclear attack.

The United States would be able to maintain its alliances in the East and preserve its Nuclear Umbrella program by amending, adjusting, or qualifying its no-first-use agreement with South Korea as necessary. On its face, the Sole Purpose Doctrine adopted by China only addresses nuclear attacks directed at the policy holder's domestic territory.<sup>140</sup> To that effect, South Korea and Japan should rightfully be concerned if the United States adopts the same policy. However, the United States is not required to take the same approach as China. The United States may condition a nuclear response if North Korea attacks a particular United States ally. The condition would merely provide reassurance on a topic the United States already addressed in its' 2010 Nuclear Posture Review, in which the United States asserts that it will continue to use nuclear weapons as a deterrent against attacks on the United States and its allies.<sup>141</sup> Similar positions are taken by Russia, the United Kingdom, and France, as they leave open the possibility of using nuclear weapons in response to invasion or attacks on their territories or their allies.<sup>142</sup> Moreover, the conditions of the no-first-use agreement can be amended in the future to accommodate for new allies or to adjust to the ever-

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139. *Id.*

140. U.S. DEP'T OF DEF., *supra* note 7, at vii.

141. *Id.*

142. BEATRICE HEUSER, NATO, BRITAIN, FRANCE, AND THE FRG NUCLEAR STRATEGIES AND FORCES FOR EUROPE 105 (1997).

changing geopolitical climate. Most importantly, the United States would be able to maintain its nuclear stockpile, which would not only reinforce protections provided under the Nuclear Umbrella, but also help the United States maintain relationships with its allies in the East.

The creation of a credible no-first-use agreement with South Korea would also help alleviate international criticisms regarding the United States' massive nuclear arsenal. The United States agreed, under Article Six of the Treaty on the Non-Proliferation of Nuclear Weapons, "to negotiate in good faith to stop the nuclear arms race and to negotiate for complete elimination of nuclear weapons."<sup>143</sup> It is commendable that of the 70,000 warheads produced since 1945,<sup>144</sup> the United States currently only holds approximately 4,000.<sup>145</sup> However, the international community has and will demand further reductions in the stockpile so long as the United States and Russia continue to hold nearly 90 percent of the world's nuclear weapons.<sup>146</sup> Executing a credible no-first-use policy would allow the United States to demonstrate that its nuclear weapons serve as deterrents and as instruments of peace. The agreement also allows the United States to continue developing more usable and modernized nuclear weapons in accordance with its latest Nuclear Posture Review. The United States would also have a valid reason for not signing the International Atomic Energy Agency's 2005 proposal for a comprehensive ban on fissile material,<sup>147</sup> and the Treaty on the Prohibition of Nuclear Weapons.<sup>148</sup> Thus, the agreement would help the United States eliminate substantial roadblocks to more

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143. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

144. *Id.*; Hans Kristensen & Robert Norris, *Global Nuclear Weapons Inventories*, BULL. ATOMIC SCIENTISTS, July-Aug. 2010, at 79.

145. Hans Kristensen & Robert S. Norris, *United States Nuclear Forces*, 74 BULL. ATOMIC SCIENTISTS, 2018, at 120.

146. Kelsey Reichmann, *Here's How Many Nuclear Warheads Exist, and Which Countries Own Them*, DEFENSE NEWS (June 16, 2018), <https://www.defensenews.com/global/2019/06/16/heres-how-many-nuclear-warheads-exist-and-which-countries-own-them/>.

147. Sharon Squassoni et al., RS22474, *Banning Fissile Material Production for Nuclear Weapons: Prospects for a Treaty (FMCT) 4* (2016), <https://fas.org/sgp/crs/nuke/RS22474.pdf>.

148. Treaty on the Prohibition of Nuclear Weapons, *opened for signature* Aug. 9, 2017, 729 U.N.T.S. 161.

support in the international community for its nuclear weapons program.

It is important to note that if it were not for the United States' own military concerns, the United States would be in a prime position to adopt China's Sole Purpose Doctrine, at least for the sake of its allies, which further supports the argument for an amendable no-first-use policy. In fact, both South Korea and Japan's recent interests mirror those of international organizations promoting nuclear disarmament.<sup>149</sup> In fact, the positions taken by Japanese leaders in the past stand in stark contrast from those held by Japanese leaders today. For example, in 1965, Prime Minister Taro Aso posited that a no-first-use policy taken by the United States would not contribute to global disarmament, implying that it would not be in Japan's best interests if the United States adopted such a policy.<sup>150</sup> In contrast, by 2009, the Democratic Party of Japan expressed desire for the United States to adopt a no first use policy.<sup>151</sup> Then, in 2010, a letter issued on behalf of 204 Japanese Diet members urged President Obama to declare "sole purpose," stating that Japan likely would not pursue a nuclear weapons development program if the United States adopted a no-first-use policy.<sup>152</sup> Based on these implications, the United States should not have reservations about executing a no-first-use policy, at least with respect to concerns that its allies will threaten future nuclear weapons development.

South Korean leaders and leaders of other nations are also likely to respond positively to a no-first-use proposal by the United States, even if it means lessened protections in the East. For example, in 1991, President George H.W. Bush unilaterally withdrew all tactical nuclear weapons globally, which included the 100 nuclear weapons stationed on South Korean territories.<sup>153</sup>

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149. Maso Takubo, *Japan's Challenges and Dilemmas Over Nuclear Disarmament*, ACRONYM (Aug. 1, 2009), <http://www.acronym.org.uk/old/dd/dd91/91mt.htm>.

150. *Id.* ("In international society, there exist large arsenals including nuclear forces... It could disturb the deterrence balance and undermine security to have a discussion separating nuclear weapons from other weapons.").

151. *Id.*

152. MIKE MOCHIZUKI, *NUCLEAR DEBATES IN ASIA* 88 (Mike Mochizuki & Deepa M. Ollapally eds., 2016).

153. Don Oberdorfer, *U.S. Decides to Withdraw A-Weapons from S. Korea*, WASH. POST (Oct. 19, 1991), <https://www.washingtonpost.com/archive/politics/1991/10/19/us-decides-to->

Thereafter, President Woo of South Korea proclaimed the Declaration on the Denuclearization of the Korean Peninsula, which prohibited South Korea from producing, possessing, or using nuclear weapons.<sup>154</sup> The United States' withdrawal of nuclear weapons in the East also prompted Soviet President Gorbachev to proclaim a reduction in his nation's nuclear capabilities.<sup>155</sup> In addition, the Declaration prompted North Korea to sign the South-North Joint Declaration on the Denuclearization of the Korean Peninsula, under which both North Korea and South Korea agreed to stop developing nuclear weapons and even nuclear enrichment facilities.<sup>156</sup> Although North Korea eventually failed to comply with its legal obligations under the Non-Proliferation Treaty, these events show that United States' actions initiated by peace will not only bring North Korea to the negotiation table, but may also prompt other nations to act similarly. A no-first-use agreement between the United States and South Korea would likely operate in similar fashion.

This research paper does not address the obligations that the United States may have to countries other than South Korea and Japan, specifically with regards to its Nuclear Umbrella policy. However, as evidenced through history, a strategic international move motivated by peace may produce positive results. In contrast, punishments imposed to weaken states into economic submission have only provoked states in the past, as evidenced by North Korea's aggressive nuclear response to United States' sanctions. Thus, the United States should strongly consider negotiating a no-first-use agreement with South Korea. If the agreement provides lasting results, it would not only be a true testament to the power of peace but would also revolutionize the international legal framework with respect to nuclear weapons defenses and help further other meaningful developments within international law generally.

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[withdraw-a-weapons-from-s-korea/3759ee3f-e9bf-4944-bfdf-2f9ea727b546/?utm\\_term=.8349b80c3c45](https://www.dhs.gov/withdraw-a-weapons-from-s-korea/3759ee3f-e9bf-4944-bfdf-2f9ea727b546/?utm_term=.8349b80c3c45).

154. *Id.*

155. *Id.*

156. *Id.*



## V. CONCLUSION

As the possibility of a preemptive strike by the United States on North Korea lingers, so does the need for the United States to adequately address the legal uncertainties surrounding the use of nuclear weapons by carefully considering all of the potential consequences involved, particularly in the context of international law. Current international law fails to provide adequate authority to restrict nation states from using nuclear weapons. Similarly, international law falls short of establishing clear legal guidelines for situations where a state may use force in self-defense. The prolonged and polarized international debate on the issue only encourages nuclear states to continue the development of nuclear weapons, which in turn, undermines aggressive efforts by world organizations to promote denuclearization and non-proliferation. The history of contradictory rhetoric by the five major nuclear powers under the Non-Proliferation Treaty only adds to the complexity of the issue. North Korea's newfound willingness to negotiate with the United States is ultimately positive. However, the parties still stand worlds apart from a realistic deal,<sup>157</sup> which reinforces the need for the United States to consider other viable strategies, such as the no-first-use agreement, in order to denuclearize North Korea. In no way does the establishment of a no-first-use agreement between the United States and South Korea render a perfect solution to the North Korean problem. However, the plan has the potential to redefine the meaning of nuclear deterrence as one driven by peace rather than by aggression and hostility.

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157. Jung H. Pak, *The Good, the Bad, and the Ugly at the US-North Korea Summit in Hanoi*, BROOKINGS (Mar. 4, 2019), <https://www.brookings.edu/blog/order-from-chaos/2019/03/04/the-good-the-bad-and-the-ugly-at-the-us-north-korea-summit-in-hanoi>.