INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

JOSE ALFREDO A. MARTINEZ DE HOZ

v.

THE REPUBLIC OF ARGENTINA

COMPLAINT FOR VIOLATIONS OF

THE AMERICAN CONVENTION ON HUMAN RIGHTS

December 19, 2012

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DECEMBER 19 VERSION

To the Members of the
Inter-American Commission on Human Rights ("IACHR")
1889 F Street, N. W., Washington, D.C. 20006, USA

I, José Alfredo Martínez de Hoz (Jr.), in my capacity as petitioner, attorney-at-law and son of the victim of the facts that will be described hereinbelow, respectfully address this Commission to formally file this complaint, as follows:

SECTION I

DATA

A. Petitioner

(1) José Alfredo MARTÍNEZ DE HOZ (Jr.); an Argentine citizen, holder of Argentine I.D. (DNI) No. 13.416.886, domiciled at Suipacha 1111, piso 18, Buenos Aires, Argentina; telephone (54-11) 4114-3017; Email: jmh@pagbam.com.ar.

B. Victim

(2) José Alfredo Martínez de Hoz; an Argentine citizen, holder of Argentine I.D. (LE) No. 4.218.909; domiciled at Florida 1065, piso 4º, departamento G, Buenos Aires, Argentina (hereinafter referred to as, "Martínez de Hoz"; or "my father").

(3) Hereinbelow, I provide a short outline of the victim's biography:

José Alfredo Martínez de Hozwas the Minister of Economy of the military government of Argentina, between 1976 and 1981. He graduated as a lawyer in 1950, summa cum laude, from Universidad de Buenos Aires Law School, and later obtained the Doctor of Science in Law degree from the same University.

He also received a Master of Comparative Law degree from Cambridge University in the United Kingdom. Throughout his life he was awarded several distinctions, among them, the Sylvan Gotshal Medal for "exceptional service in the field of International Arbitration" (New York, 1968). He was chair Professor of Agricultural Law at Universidad de Buenos Aires and chair Professor of Natural Resources Law at El Salvador University, where he also served as vice-dean of the Law School. He published five books, among which some were edited in Argentina and some in the U.S.A., most of them related to economic topics. In the private sector he served as president of the following: *Consejo Empresario Argentino* (Argentine Business Council), the Inter-American Commercial Arbitration Commission, *Centro de Investigaciones Económicas* (Center for Economic Investigations), and the Argentine Section of the Inter-American Council for Trade and Production.

The appointment of José Alfredo Martínez de Hoz as Minister of Economy of Argentina in 1976 was not his first high-responsibility office in government. He had already served as Minister of Economy in the democratic government of President José María Guido back in the 60s. Previously, he had served as Secretary of State for Agriculture, President of the National Grain Board and Minister of Economy, Finance and Public Works in the Province of Salta, Argentina. He was also a member of the 1961 Argentine Trade Mission to the United States.

All of my father's referred personal credentials, coupled with Argentina's critical economic shape found by the military who took office at that time, were decisive for the military junta offering him to serve as Minister of Economy in 1976, and for him to accept such nomination in the belief that he was in a position of making a positive contribution to his country. But precisely, his technical, intellectual and academic profile placed him very far from any involvement in, or awareness of, any military or security operations.

C. <u>State denounced</u>

(4) The Republic of Argentina

D. List of violations of rights acknowledged in the American Convention on Human Rights (the "Convention")

(5) Preventive detention (*prisión preventiva*) imposed on and the initation of new charges against my father as from May 4, 2010 in violation of the "*res judicata*" standard (the Convention, Article 8.4); in an unnecessary manner; with malice and cruelty (the Convention, Article 5.2); in breach of the guarantee of equality before the law (the Convention, Article 24) and of due defense rights (the Convention, Article 8.2; b and c); maintained for a non-reasonable period of time within an exorbitantly lengthy legal process (the Convention, Article 8.1), in breach of the presumption of innocence standard (the Convention, Article 8.2); by courts that fail to ensure, in this case, the guarantee of independence and impartiality (the Convention, Article 8.1).

E. Exhaustion of domestic remedies

1. The Argentine Supreme Court decision denying review of the preventive detention exhausted the remedies under domestic law.(Article 46, paragraph 1. a) of the American Convention on Human Rights).[1] (Article 31, paragraph 1 of the Rules of Procedure of the Inter-American Commission on Human Rights)[2]

(6) All domestic remedies have been exhausted with the Argentine Supreme Court's (hereinafter the "Supreme Court") decision dated July 10, 2012 and notified on July 11, 2012, denying reversal of the

[1] The Convention, Article 46: section 1.a: "Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements: a) that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law".

[2] IACHR Rules of Procedure, Article 31, para. 1: "In order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law."

preventive detention. Pursuant to Article 116 of the Argentine Constitution and Article 14 of Argentine Law No. 48 ("Law 48"), the extraordinary appeal taken to the Supreme Court is the adequate and effective remedy –of last resort- to challenge any decision that clashes with any article of the Argentine Constitution. The American Convention on Human Rights was incorporated into the Argentine Constitution in its 1994 amendment, therefore any violation of the rights and guarantees acknowledged by such Convention, constitute, in turn, a breach of the articles of the Argentine Constitution.

(7) The measures that are being denounced in this complaint are those that have led to maintain, in a final and non-appealable manner on a domestic basis, the preventive detention ordered against my father, all such measures amounting to violations of the standards of innocence and *non bis in idem*, equal treatment before the law, prohibition of cruel, inhuman and degrading treatment, due defense rights and of the right to be tried by an independent and impartial tribunal within a reasonable time frame. All such transgressions committed against my father led to the imposition and affirmation of his preventive detention (with the features that are also denounced herein); a process which steps were finally decided by the Argentine Supreme Court on the date mentioned in the previous paragraph.

2. The Supreme Court's denial also closes the opportunity of obtaining my father's release

(8) Although my father's release was requested in April 2010, such request was denied on the grounds that the facts of the case having been legally characterized as a "crime against humanity" by the May 4, 2010 preventive detention court order, such characterization bars

release. [3] That is to say, under Argentine laws applicable to the case (Code of Criminal Procedure, Law No. 2.372/1888 and its several subsequent amendments[4]) the legal characterization made in the preventive detention court order (*auto de prisión preventiva*) governs the admissibility or non-admissibility of the release. More specifically, until the "crime against humanity" legal characterization is not reversed by way of a higher court's decision revoking or partially amending the preventive detention order, my father will not be granted his release pending trial because, if such characterization were to be maintained, he will never be the beneficiary of a suspended sentence (*condenación condicional*) pursuant to Article 26 of the Argentine Criminal Code. Thus, for the purpose of compliance with the "domestic remedies exhaustion" requirement, the date to be taken into account is the one on which the Supreme Court resolved to deny the Extraordinary Appeal taken from the second preventive detention order dated May 4, 2010, and consequently, turned the "crime against humanity" characterization final and non-appealable. Whilst the chance to amend or reverse the "crime against humanity" characterization contained in the preventive detention court order was still open, the chance to obtain my father's release was open. Such chance was closed by the Supreme Court's decision to refuse review of such preventive detention order, because no other domestic remedy is available against such decision.

(9) Moreover, the case does not only involve the issue related to my father's release, but also the fact that he has been charged again (in 2010) based upon the same set of facts and the same alleged conduct for which he was exonerated on the merits more than twenty years ago. This case involves the challenge of each and every constitutional

[3] *See* **Documentation Exhibit No. 1**.

[4] *See* **Argentine Legislation Exhibit.**

and international requirement, which, if respected, would have prevented the adoption and affirmation of the order challenged hereby; i.e. the actual preventive detention imposed immediately after the reopening of a case that had already been finally adjudicated more than 20 years ago. In sum: if the characterization made in the preventive detention order is maintained, my father will continue imprisoned for several years given currently the case is only at the preliminary investigation procedural stage (*etapa instructoria*) and that the full trial stage is still pending, i.e. accusation, defense, evidence and sentence (and any prospective appeals!). At the age of 87, as in the case of my father, this amounts to turning the preventive detention (ordered in violation of the "*ne bis in idem*" standard) into an actual conviction in advance, thus destroying its essence, as has been acknowledged by the Inter-American Court on Human Rights as a violation of Article 8.2 of the Convention (See IACHR Report No. 35/07).

3. Procedural Steps

(10) As reflected below, my father's defense lawyers pursued and, as described above, exhausted all remedies under domestic law, namely:

- On May 4, 2010 Federal Judge Oyarbide issued the preventive detention order, subject matter hereof, against my father.[5]
- On June 14, 2010 an appeal was taken from such order and the grounds for appeal were set forth in an appellate brief.[6]
- On July 12, 2011, the Federal Criminal Appellate Court (the "Federal Appellate Court") affirmed the court's order.[7]

[5] *See* **Documentation Exhibit No. 1**.

[6] *See* **Documentation Exhibit No. 2**.

[7] *See* **Documentation Exhibit No. 3**.

- On August 1, 2011, an extraordinary appeal (*recurso extraordinario*) was taken from such court order to the Federal Appellate Court.[8]
- On October 6, 2011, the Federal Appellate Court allowed the appeal as admissible on procedural grounds, granted it, and forwarded the case record to the Supreme Court.[9]
- On July 10, 2012 the Supreme Court denied the extraordinary appeal as inadmissible, service of such denial was made upon my father's defense lawyers on July 11, 2012.[10]

(11) Thus, the extraordinary appeal filed with the Supreme Court was the last adequate and effective appeal available against the preventive detention order.

F. Timing of the petition (Article 46, paragraph 1, b. of the American Convention on Human Rights[11] and Article 32, paragraph 1 of the Rules of Procedure of the Inter-American Commission on Human Rights)[12]

(12) This petition is filed before expiration of the six month-threshold calculated as from the referred date of the Supreme Court's last decision, in compliance with Article 46 de the Convention.

[8] *See* **Documentation Exhibit No. 4**.

[9] *See* **Documentation Exhibit No. 5**.

[10] *See* **Documentation Exhibit No. 6**.

[11] Convention, Article 46: paragraph 1. b.: "Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements: … / b) that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment."

[12] IACHR Rules, **Article 32: "Statute of Limitations for Petitions:** /paragraph 1. The Commission shall consider those petitions that are lodged within a period of six-months following the date on which the alleged victim has been notified of the decision that exhausted the domestic remedies."

(13) The final outcome of the process is independent from this petition, because the preventive detention enforced on an 86-year old person, in violation of the Convention's guarantees, for a lengthy period, becomes, and amounts to, an actual punishment, causing harm *per se*.

G. Other international proceedings (Article 46, paragraph 1.c. of the American Convention on Human Rights[13] and Article 33, paragraph 1.a. of the Rules of Procedure of the Inter-American Commission on Human Rights).[14]

(14) No other complaint has been filed in any other international proceeding.

[13]Convention, **Article 46.** / paragraph 1. "Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:…/ c) that the subject of the petition or communication is not pending in another international proceeding for settlement".

[14] IACHR Rules, **Article 33. Duplication of Procedures**/ 1. "The Commission shall not consider a petition if its subject matter: / a. is pending settlement pursuant to another procedure before an international governmental organization of which the State concerned is a member".

H. Admissibility of this petition and competence of IACHR and, as the case may be, of the Inter-American Court of Human Rights (Article 33, paragraph a and b.[15] and Article 46[16], Article 62, paragraph 3 of the American Convention on Human Rights[17] and Article 27 of the IACHR Rules of Procedure)[18]

(15) This petition filed with this Honorable IACHR is admissible because the Articles of the Convention mentioned in sub-section D of this Section have been, and continue being, violated by the Argentine State; all adequate and effective judicial remedies available under domestic law for this situation have been exhausted and the six month-threshold calculated as from the decision issued in the last of such remedies has not elapsed. Additionally, my father has not resorted to any other international forum and no other proceeding is pending seeking to obtain a result similar to the one sought hereunder.

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[15] Convention **Article 33. "**The following organs shall have competence with respect to matters related to the fulfillment of the commitments made by the States Parties to the Convention: / a) the Inter-American Commission on Human Rights, referred to as the Commission".

[16] Convention. **Article 46.** Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:

a) that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;
b) that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment;
c) that the subject of the petition or communication is not pending in another international proceeding for settlement; and
d) that, in the case of Article 44, the petition contains the name, nationality, profession, domicile, and signature of the person or persons or of the legal representative of the entity lodging the petition.

[17] .Convention **Article 62…**/3. "The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement".

[18] IACHR Rules. **Article 27. "**The Commission shall consider petitions regarding alleged violations of the human rights enshrined in the American Convention on Human Rights and other applicable instruments, with respect to the Member State of the OAS, only when the petitions fulfill the requirements set forth in those instruments, in the Statute and in these Rules of Procedure".

SECTION II

SUMMARY

(16) This petition is filed as a consequence of the arrest and preventive detention of José Alfredo Martínez de Hoz Esq., lawyer, S.J.D., aged 87, who served as Ministry of Economy of Argentina from 1976 to 1981.

(17) This petition denounces (i) the violation of the "*non bis in idem*" standard by the Argentine Government upon reopening a criminal case and issuing a preventive detention order impairing my father's freedom, disregarding a prior decision of the Federal Appellate Court that had exonerated him from liability and had revoked, in a final manner, a prior preventive detention order, and retroactively re-characterizing the facts in a more onerous manner in order to make such reopening possible; (ii) the arbitrariness involved in the re-characterization of the imputation infringing upon due process guarantees; (iii) the exorbitant and inhuman length of the criminal proceeding to which the victim was, and continues to be, subjected; (iv) the unnecessary, arbitrary and unreasonable length of the preventive detention violation of the presumption of innocence standard; (v) the cruel, inhuman and degrading treatments; and (vi) the disregard of the right to be tried by an independent and impartial court. All the foregoing elements have had a direct influence on the decision to enforce and maintain the preventive detention, or, if the case may be, arise directly from their application.

(18) All the decisions that led to the preventive detention were adopted inconsistently with precedents of the same courts, where like cases were decided differently, as will be evidenced in the relevant section herein. Consequently, the guarantee of equal treatment before the law

has also been violated. The aforementioned precedents referred both to the "*non bis in idem*" standard as well as to the assessment of the impartiality and to the preventive detention *per se*.

A. Summary of the Facts

(19) *"If ... Martinez de Hoz's precedent is upheld, this will come as a blow to the rule of law, and nobody will be protected from political revisionism upon each change of government."* So says an editorial in La Nación newspaper (one of the two most important newspapers of Argentina), on May 6, 2010.[19]

(20) In 1988, José A. Martínez de Hoz was exonerated on the merits for the same cause for which he is now charged. The initial investigation of Martínez de Hoz, which began in 1984 lasted for four years. This investigation was by all accounts exhaustive. In 1988, an appellate court (the Federal Chamber), reviewed the sufficiency of these charges. As explained below, in a written opinion, the Federal Chamber made a formal finding that Martínez de Hoz "lacked involvement" in the crimes charged. This finding was never challenged or appealed, and became "final" as a matter of Argentinian law.

(21) More than twenty years later—and at the urging of the President of Argentina—charges against Martínez de Hoz were re-instituted (this time for the offense of crimes against humanity) based upon the very same facts for which he was previously exonerated. As explained herein, the ordinary rules and procedures that apply to criminal defendants in the Republic of Argentina have simply been disregarded as a matter of expediency. Martínez de Hoz is being subjected to extraordinary and unlawful measures simply because he is a

[19] *See* **Press Exhibit No. 55.**

convenient political target for the current administration in Argentina. Under any objective standard, the re-institution of charges against him (and other actions detailed herein) violates both Argentine law and the American convention.

(22) Now 87 years old, José A. Martínez de Hoz lives under home arrest. He is elderly, in poor health, politically unpopular, and the subject of public scorn. This petition represents his last chance to secure freedom in his lifetime and the guarantees of due process afforded by the American Convention. That he once served as the Economic Minister of the military government does not alter this basic premise.

(23) The only purpose of this absurd and baseless re-characterization lies in the illegal attempt- which to date has been successful for the government- of re-imposing upon my father a preventive detention that had already been reversed in a non-appealable manner.

(24) The re-characterization of the facts as a crime against humanity had two evident purposes: (i) to ensure the reopening of the case that was already barred by the statute of limitations, by way of preventing the application of the statutory limitation as a consequence of the nature of the imputed criminal offense; and (ii) to ensure my father's actual detention.

(25) Executive Order No. 2840 of November 5, 1976 ordered the detention -under powers vested by state of siege- of Messrs. Federico and Miguel Gutheim for non-performance of a cotton export to Hong Kong. My father did not sign such executive decree and had nothing to do with the detention that was falsely attributed to him as a

consequence of a trip he made, in his capacity as minister, to Southeast Asia. A business delegation travelled from Hong Kong to Buenos Aires to negotiate with Messrs. Gutheim, with whom no agreement was concluded. All this was investigated as an "extortive kidnapping" (the court alleged that the minister had "a personal interest" therein) during four years. In April 1988 the then acting judge issued the first preventive detention order against my father. But in July 1988, the Federal Appellate Court unanimously revoked such preventive detention and ordered my father's release from public jail. Some time later, in 1989, former President Menem granted a presidential pardon to my father and to several other officials and terrorists, thus, my father's case was dismissed with prejudice (*sobreseimiento definitivo)* in 1989.[20] My father publicly protested against such presidential pardon, because the Federal Appellate Court had already held that he was unrelated to the facts and that he was entitled to dismissal.[21] Nearly 18 years later (in 2006) the presidential pardon was annulled and the case was "reopened", without any new facts.[22]Without even taking into account the 1988 Appellate Court's acquittal decision (that had become final; that was prior to the presidential pardon and that to the date hereof has neither been revoked nor vacated)[23], my father was re-tried and a second preventive

[20] Some time after such acquittal court decision, that became final and non-appealable, the record was remanded to the court of first instance to issue the dismissal of Martínez de Hoz. Unfortunately, former President Carlos Menem's presidential pardon arrived first, whereby he pardoned -by a series of executive decrees- several former officials (most of them, military) and former terrorists. My father was included in the list of former officials. He protested against such presidential pardon in a letter published by the newspaper *La Nación*, but that was all he could do, because Argentine law does not allow the possibility of rejecting such benefit. A copy of the publication of such letter is attached as **Press Exhibit No. 1. This petition does not assert the validity of the pardon.**

[21] *See***Press Exhibit No. 1**.

[22] In 2006, the referred presidential pardon was annulled at the motion of the incumbent President Néstor Kirchner, who in a public address repeatedly insulted my father and expressly exhorted judges against him (*See* the section on the Judiciary's lack of independence herein).

[23] In fact, when the presidential pardon decree was annulled (No. 2745/90) the Supreme Court affirmed the Federal Appellate Court's decision dated April 15, 2008 which in turn affirmed the Court of first instance's decision dated April 9, 2006 where the following was ruled "the annulment of the procedural actions ... namely: "the order of dismissal on pages 1492 and 1584

detention order was issued against him, for a "crime against humanity" that resulted in his imprisonment for a second time and to his current home detention as from May 4, 2010, after many mistreatments ordered by non-impartial judges condescending with the government of the day.[24]

(26) Later herein we will provide further details of the above -not for the purpose of seeking a re-analysis of the facts by IACRH but to show:

- That my father's current imprisonment from May 2010 results from a retrospective "reinterpretation" as a "crime against humanity" of exactly the same facts over which my father was exonerated in 1988 for being "unrelated" to them;
- That the court rulings issued as from the reopening of the case in 2006, have disregarded (i) the categorical exonerating judgment entered by the Federal Appellate Court in 1988 (which is final and non-appealable since to date it has neither been revoked nor vacated, and which is prior in time to the presidential pardon) and (ii) the clearing of my father from the facts for which the first preventive detention was imposed on him. That is to say, such court rulings infringed the "*ne bis in idem*" principle.

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and the Appellate Court's decision on page 1545 and related ones" that is to say that the Federal Appellate Court's decision dated July 14, 1988 that exonerated Martínez de Hoz remained unchanged (page 915).

[24] At any event, the presidential pardon's annulment should have triggered –at the most- the rewinding of the legal case back to the procedural stage immediately prior to the granting of the presidential pardon, i.e. the revocation of the preventive detention by the July 1988 Federal Appellate Court's order, which decided that my father was unrelated to the facts under investigation and consequently ordered his release. In a worst case scenario –and even so objectionable- the reopening of the court case closed in 1989 could have triggered the resumption of the investigation to determine whether any fresh evidence would have emerged subsequent to the 1988 court order acquitting Martínez de Hoz. , de 1988. Instead of this, on May 4, 2010 and upon exhaustion of the appeals against the presidential pardon's annulment, the first action taken by the trial judge hearing the reopened case,was to re-issue a preventive detention order against my father, without any new evidence being ever added to the original court record.

- That the retroactive re-characterization as a crime against humanity of exactly the same facts for which my father had been exonerated more than 20 years ago, obeyed to the obvious purpose of eluding the statute of limitations of the criminal action which had already operated[25] and ensuring his detention by way of incriminating him now with a criminal offense that will deprive him of his liberty during the pendency of the trial; and
- That having been declared "unrelated" to the facts he is thus immune to any subsequent re-characterization, such status is not changed. Since my father is unrelated to the facts, the legal characterization of such facts is irrelevant.

(27) For the sake of clarity, the farfetched re-characterization as a crime against humanity of the same facts for which my father was tried more than 20 years ago, is mentioned solely to show the purpose of the Government to imprison him, and not because we seek to argue before the IACHR that crimes against humanity are time barred. Our case, as we shall see, does not rely on this argument. See ¶ 193 and 197 at seq. below.

(28) Before providing a detailed analysis of the facts, two significant issues must be highlighted: the applicable criminal procedural regime and the history of the case and courts involved.

B. Criminal Procedural Regimes

(29) Two criminal procedural regimes have been in force in Argentina since 1889 for the federal criminal courts and for the City of Buenos Aires ordinary criminal courts:

[25] *See* ¶ 188-189 below.

- The first Code of Criminal Procedure was enacted on October 17, 1888 (Law No. 2,372) and became effective on January 1, 1889.
- The second Code was enacted by Law No. 23.984 and became effective on September 5, 1992.

(30) For the purpose of the instant case both regimes are substantially different:

1. 1889 Code (Law No. 2,372)

- The proceedings are mainly written.

a) First Instance

- Stages:

(i) Preliminary Stage (*Sumario)*: (Article 195/42) conducted by the so-called *juez de Instrucción* in charge of this initial stage.

Inquisitorial Procedure: there are no debates or defenses (Articles 9 and 180).

Termination: either by dismissal or closing of the Summary Stage (429/432).

Precautionary: The preventive detention order is the harshest measure imposed upon an accused that has been subject to interrogation and indicted (363/375).

Freedom: for lack of merit, exemption of imprisonment, release (376/398).

(ii) Plenary Trial Stage (*Plenario)*: (Articles 459/497). Conducted by another judge different from the preliminary stage judge.

Contradictory procedure divided into the following phases: accusation, defense, broad evidence, oral report and sentence.

b) Appellate Instance: Articles 501/556)

Higher collegiate instance before an Appellate Court divided into the following phases: grounds for appeal, answer, evidence, oral reports and sentence.

c) Extraordinary Remedy:

Available only when a constitutional provision has been violated, this remedy is heard by the Argentine Supreme Court (Article 14, Law No. 48).

2. 1992 Code (Law No. 23.984)

- The proceedings are mainly oral and the regime accusatory.

a) First Instance

- Stages

(i) Preliminary (174/353). conducted by a district attorney controlled by a judge.

Termination: by dismissal with prejudice (*sobreseimiento total*) or without prejudice (*partial*) or by the district attorney's request of trial (334/346).

Precautionary: Indictment (310) with or without preventive detention of the accused (312/314).

Freedom: lack of merits, exemption of detention, release 316/333).

(ii) Oral trial: (354/404) heard by a panel of three judges.

- Public and oral procedure (Debate)
- Defense
- Evidence
- Closing Arguments
- Sentence
- Enforcing Judge: control of conviction sentences.

b) Appellate Instance:

Higher instance conducted by a collegiate Appellate Court.

c) Criminal Cassation National Appellate Court

Collegiate court with jurisdiction throughout Argentina that hears cases involving non-compliance with, or the erroneous application of, substantive rules or the rules of the Code of Procedure (Article

456 *et seq*). The Criminal Cassation Appellate Court is excluded from cases where proceedings are heard under the rules of the 1889 Code of Criminal Procedure.

d) Extraordinary Remedy

Heard by the Supreme Court in cases of constitutional violations (Article 14, Law No. 48).

3. Option

(31) Given that pending cases existed on the date of effectiveness of the 1992 Criminal Code of Procedure (Law No. 24,121 was passed to create the Criminal National Cassation Appellate Court (*Cámara Nacional de Casación Penal)* Article 12 thereof established that pending cases were to be heard by the courts and/or appellate courts of origin and that the defendant or accused party was entitled to elect either to continue with the procedural rules established in the 1889 Criminal Code of Procedure or with those provided under the new Code created by Law No. 23,984. In other words: either to continue with the written procedure or, as the case may be and according to the stage of the case, to submit to the oral procedure. In my father's case, he elected the written procedure, which is still applied today.

4. The preventive detention order

(32) This is the harshest personal precautionary measure that may be imposed upon the accused. Such measure may be imposed on anyone who has been previously indicted in a criminal case. The ruling ordering the preventive detention seeks both, depending on the criminal offense, to ensure the defendant's appearance in court throughout the case, as well as to guarantee compliance with any

prospective imprisonment that may arise from a conviction sentence.[26] Preventive detention is subject to the condition of existence of elements which may *prima facie* create the assumption that the accused may be sentenced to imprisonment.[27] The state of preventive detention commences from the time such order is issued by the judge and lasts throughout all the stages of the case.[28] Preventive detention has the following consequences: detention and imprisonment of the accused (or continuation thereof if he is already detained); attachment of his assets to cover damages and court and litigation expenses and notification thereof sent to public registries.[29] Preventive detention terminates upon reversal of the respective court order either by the same court that issued such order or by the Appellate Court reviewing the order, as was the case with the revocation of my father's first preventive detention order issued in 1988.

C. Brief Outline of the criminal case against José Alfredo Martínez de Hoz

(33) The case against my father commenced in 1984 for events that occurred back in 1976. Former Argentine President Jorge R. Videla and his former Home Secretary, Albano Harguindeguy, were also incriminated in such case. Given that the defendants were public officials and that their actions were performed during their tenure in public office, from its outset the case was heard, and continues to be heard, by federal courts, a jurisdiction that consolidates the investigation of all offences involving Argentine public officials.

[26] *See* Dálbora, Francisco J., *Código Procesal Penal de la Nación*, (The Federal Code of Civil Procedure in Argentina) Ed. Abeledo Perrot, Bs. As. 2009.

[27] *See* 1889 Code, Article 379 in the Argentine Legislation Exhibit.

[28] *See* id. Article 366

[29] *See* id. Articles 376/380; 411.

(34) The following judges were involved in the case throughout its different stages:

First Period	**First Instance Stage** (1984-1988) -Judge Martín Irurzún (currently on Panel II of the Argentine Federal Criminal Appellate Court). **Appellate Stage** (1988) -Judge Wagner G. Mitchell, -Judge Juan P. Cortelezzi and -Judge Horacio Cattani (currently on Panel II of the Argentine Federal Criminal Appellate Court
Second Period	**First Instance Stage** (2006-2012) -Judge Norberto Oyarbide (currently replaced by Judge JuliánErcolini by decision of the Federal Appellate Court that admitted the recusation of Judge Oyarbide at the motion of a co-defendant). **- Appellate Stage** -Judge Eduardo Freiler, -Judge Martín Irurzún (disqualified himself); -Judge Horacio Cattani (hearing the case, his self-disqualification was denied) and -Judge Eduardo Farah - **Argentine Supreme Court**: Justices that heard the case: Ricardo L. Lorenzetti, Juan Carlos Maqueda, Carmen Argibay, Raúl Zaffaroni and Elena Highton de Nolasco

(35) After a lengthy investigation, in 1984 - 1988 Federal Judge Martín Irurzún issued the first preventive detention order against my father as "co-perpetrator" of the crime of extortion and unlawful deprivation of

liberty (April 27, 1988).[30] My father was imprisoned because the crime he was charged with was not eligible for pre-trial release. On July 14, 1988, the Federal Appellate Court revoked the preventive detention order as regards my father on the grounds that he was "unrelated to the facts" (*ajeno a los hechos)*.[31] The Federal Chamber's decision was never appealed by the state, and became final as a matter of Argentina law.

(36) My father regained his freedom on that same day. The case was remanded to the court of first instance. Then, on December 29, 1990, President Menem passed Presidential Pardon Executive Decree No. 2745/90[32], as results thereof on April 8, 1991 the court issued –with the prosecutor's consent- the dismissal of the case with prejudice (*sobreseimiento definitivo*).[33]

(37) Thus, for nearly 18 years, my father's exoneration remained final, complete, and uncontested. Then,in 2006 at a motion made by then incumbent President Kirchner in a speech delivered to Congress,[34] on September 4, 2006 Judge Oyarbide declared the presidential pardon NULL AND VOID.[35] Such court ruling was upheld by the Federal Appellate Court on April 15, 2008[36] and by the Argentine Supreme Court on April 27, 2010.[37] The case having been remanded to the court of first instance, on May 4, 2010 Judge Oyarbide issued the second

[30] *See* **Documentation Exhibit No. 7.**

[31] *See* **Documentation Exhibit No. 8.**

[32] *See* **Documentation Exhibit No. 9.**

[33] *See* **Documentation Exhibit No. 10.**

[34] *See* **Press Exhibit No. 2.**

[35] *See* **Documentation Exhibit No. 11.**

[36] *See* **Documentation Exhibit No. 12.**

[37] ***See*** **Documentation Exhibit No. 13.**

preventive detention order against my father, thus, re-triggering his imprisonment as from May 4, 2010 to the date hereof.[38]

(38) The preventive detention order was appealed and affirmed by the Federal Appellate Court on July 12, 2011.[39] On October 6, 2011 the Federal Appellate Court granted an extraordinary remedy (*recurso extraordinario*) taken from the ruling that affirmed the preventive detention –on the grounds that it was procedurally admissible.[40] However, on July 10, 2012 the Argentine Supreme Court denied the extraordinary remedy as inadmissible, therefore the second preventive detention order became final and non-appealable, as earlier described.[41]

(39) On August 9, 2011, and before the Supreme Court had adjudicated on the extraordinary remedy, the Federal Court of First Instance's Prosecutor, Federico Delgado, filed the accusation requesting that my father "be sentenced to 10 years of imprisonment, special disqualification and legal accessories" as perpetrator of the crime of extortive kidnapping.[42]

(40) Current Procedural Status: The case has to progress to the plenary trial stage (*juicio plenario)* with the following actions: raising of defenses, defense, evidence, closing arguments (oral report), judgment of the Court of First Instance, Appellate Court and Supreme Court.

[38] *See* **Documentation Exhibit No. 1, earlier cited.**

[39] *See* **Documentation Exhibit No. 3 earlier cited.**

[40] *See* **Documentation Exhibit No. 5 earlier cited.**

[41] *See* **Documentation Exhibit No. 6 earlier cited.**

[42] *See* **Documentation Exhibit No. 14.**

SECTION III

FACTS

A. Exculpatory judgment and reopening of the case 18 years later

(41) In July 1988, the Federal Appellate Court composed of three judges nominated by the Administration of President Raúl Alfonsín - the Hon. Horacio Cattani, Juan Pedro Cortelezzi and Gustavo Mitchell- revoked the first preventive detention that had been imposed on my father and ordered his immediate release from public jail where he had been held, for considering that he was unrelated to the facts of the case.[43]

(42) Eighteen years after such court ruling, a federal judge, Norberto Oyarbide, reopened the case. After a lengthy proceeding where the legality of such reopening was debated, on May 4, 2010 (only five days after the Supreme Court remanded the case record after affirming the nullity of the presidential pardon and without adding any fresh evidence) Judge Oyarbide issued for a second time the preventive detention against José A. Martínez de Hoz for exactly the same facts as regards which, as earlier described, he had been declared unrelated back in 1988.

(43) The Federal Appellate Court's 1988 ruling, that had been prior in time to the presidential pardon, was neither vacated nor reversed. Such ruling was simply ignored, as if it would have never existed, and a new preventive order was issued, without any fresh evidence having been incorporated to the file.

[43] *See* the decision in the **Documentation Exhibit No. 8.**

(44) The higher courts affirmed the preventive detention without either vacating or reversing the 1988 ruling. Thus, such ruling was ignored once again.

(45) Consequently, the violation of the *non bis in idem* standard is twofold in this case. On the one hand, the *res judicata* was infringed by incarcerating my father in spite of the 1988 exculpatory court ruling on the merits (which is final and non-appealable) that had ordered my father's release after the examination of the same facts on the basis of which the 2010 preventive detention order was issued. The only difference being that such same facts, to which no new detail or fresh evidence was added, were at this new stage characterized as a "crime against humanity", a re-characterization that, apart from being retrospectively unlawful, is absurd as to the merits of the case.

(46) The re-characterization of the facts in a more burdensome manner has two obvious purposes: (i) ensuring the reopening of the case that was already barred by the statute of limitations by preventing the application of the statutory limitation due to the nature of the crime imputed; and (ii) ensuring my father's detention by this former reason.

(47) On the other hand, the reopening of the investigation in itself, regardless of the preventive detention, is also in breach of the *non bis in idem* standard pursuant to domestic and international legal rules. No new facts or fresh evidence have been added to the record and they could not have been added, because they do not exist. But even with this certainty in his hands, any citizen is entitled not to be indefinitely disturbed by the judiciary of a State and deserves under the law the right to see the proceedings of a case incriminating him closed. This is not only related to freedom but also to the right to honor and privacy to

which all human beings are entitled to merely for the sake of being human beings.

(48) Additionally, during all these proceedings, the judges where exhorted by the government to act in the way they did and thus, they lacked both independence and impartiality to adjudicate on the issue.

B. The facts imputed on José Alfredo Martínez de Hoz

(49) The facts that led to this situation started on November 5, 1976, when the Executive Branch of the military government that took office on March 24, 1976 passed -by means of Decree No. 2840 under the authority arising from a state of siege declaration- a detention order against Messrs. Federico and Miguel Gutheim, who remained detained for approximately five month until their final release.[44]

(50) My father, who at that time served as Minister of Economy, neither countersigned the executive decree ordering the detention of Messrs. Gutheim nor had any relation whatsoever with such detention, as the Federal Appellate Court concluded in 1988. In Argentina, as in other countries, executive decrees are signed by the president and countersigned by the ministers whose ministries were involved to some extent in the preparation thereof.

(51) The detention executive decree consisted in an order issued within the frame of the State of Siege -that was expressly authorized by the Argentine Constitution (according to the text not amended by the *de facto* government)- and which, different from other methods that were used during the military government, did not involve (and in fact

[44] *See* Executive Decree 2840/1976 **Documentation Exhibit No. 15**.

did not involved) a clandestine imprisonment and, less still, the disappearance of persons or tortures or pressures, even when the motives invoked by the referred executive decree could be questionable.

(52) The grounds for the original criminal incrimination, rested upon three central allegations: a) the belief that my father had requested for the detention of Messrs. Gutheim as a consequence of a trade default; b) the presence of a representative of the Ministry of Economy during the negotiations held between Messrs. Gutheim and a Hong Kong delegation, in order to renegotiate an export agreement during their detention; y c) an alleged personal benefit that Martínez de Hoz would obtain with the detention of Messrs. Gutheim.

(53) Such were the arguments used by the first instance criminal judge, Martín Irurzun, to incriminate my father in 1984 and to later impose on him the first preventive detention for extortion and unlawful deprivation of liberty, as results of which my father was imprisoned until the Federal Appellate Court revoked such measure, as earlier explained above.

(54) But as explained below, in a detailed decision on the merits, the Federal Chamber analyzed and rejected each and every one of these allegations against Martínez de Hoz.

(55) As to the first presumption, the reason why it was originally suspected that my father could have some kind of involvement in the

detention of Messrs Gutheim, was a trip to China that the then Ministry of Economy had made some time before such detention together with government officials of other areas of government. During such trip, Martínez de Hoz received complaints about a contractual non-performance incurred by the company SADECO, owned by Messrs. Gutheim, vis-à-vis Hong Kong importers.

(56) However, it was evidenced in the case record that there were other areas of government involved in such trip as well as several channels of information. Thus, it was finally evidenced in the case record that the Argentine Consulate in Hong Kong -under the control of the Ministry of Foreign Affairs- actually had an "active" involvement therein. The Federal Appellate Court especially assessed such circumstance and held that a document –a note from the Ministry of Foreign Affairs and Cult informing about the status of SADECO's (Messrs. Gutheim's company) default with Chinese importers- had suspiciously disappeared (to the detriment of Martínez de Hoz's defense); such note evidenced that the Minister was unrelated to the detention.

(57) The Federal Appellate Court held:

> "Certainly the Argentine consulate in Hong Kong had an active participation in the events, which is obviously subject to the control of the Ministry of Foreign Affairs and Cult (see testimony of Di Fiori – page 568- and the declaration of Pazos – page 557-). The Hong Kong firms would have acted through the Argentine Consulate".
>
> […]
>
> "Additionally, in Minutes No. 4, one of Hong Kong representatives referred to an invitation made by the Consulate to resolve the conflict, a further piece of evidence proving the intervention of this diplomatic channel in the controversy. (This coincides with Di Fiori's testimony – page 568-, who declared that Mr. Cosimano, at that time General Consul in Hong Kong, would have, at his own motion, invited Mr. Fang and Mr. Lo to Argentina in order to

resolve the conflict, in light of the difficult situation that had been created. The possibility existed that Hong Kong would declare a trade boycott to Argentina)."

(58) I hereby clarify that, at that time, the Ministry of Foreign Affairs was under the control of the Argentine Navy.

(59) The second presumption on which basis my father was criminally charged, was the presence of officials of the Ministry of Economy during the negotiations held in Buenos Aires between Messrs. Gutheim and the Hong Kong delegation that travelled to the city of Buenos Aires during the period when the Gutheims were detained. This argument was also refuted by the Federal Appellate Court in 1988, supported precisely in the testimony that the victims themselves rendered in court after democracy was re-established. In fact, Messrs. Gutheim themselves were the ones who declared under oath that they were the ones (see, for example, testimony rendered on March 25, 1988, on page 697), who being detained by presidential order, requested the presence of an official from the Ministry of Economy during the negotiations and that, also at their request, such negotiations were conducted at their own offices, witnessed by their notary public and their lawyer. The purpose of Messrs. Gutheims' request was precisely the need of guaranteeing their freedom of negotiation. As corollary, it should be noted that Messrs. Gutheim did not agree to any of the claims made by the Hong Kong delegations, this was also evidenced in the case record.

(60) In fact, the presence of Mr. Pazos, an official of the Secretary of Commerce, in turn dependent of the Ministry of Economy, during the negotiations, had already been considered by the Federal Appellate Court in 1988, when it deemed that certain testimonial declarations,

among them, the ones rendered by Federico Gutheim himself, were true. The Federal Appellate Court held *verbatim* that:

> **"**On this matter we must refer again to the testimony rendered by Fraguío on page 207, who after mentioning that he was concerned about the fact that the Gutheims would not suffer any kind of pressure during the negotiations to be held, he stated that he had told Pazos to supervise 'that the Gutheim were not subject to pressure of any kind and that they were to feel free to negotiate'. On page 697 Federico Gutheim declared that the meetings were attended by a public official, at Gutheim's own express request, his lawyer, a notary public of his choosing and a translator designated by himself. According to Minutes No. 3 and the testimony rendered by Notary Public Oks (pages 21/22), the actions of the public officials thereat were restricted to enable the meeting and invite to a conciliation "without making any judgment". This coincides with the testimony rendered by Pazos in his respective depositions (page 557). According to minutes 1, 2 and 3 the officials left the meeting once the negotiations started. We must point out and take especially into account, given the meaning thereof, the gratitude recorded in Minutes No. 3 that Gutheim expressed in favor of the Government for allowing such negotiations to be carried out.[45]
>
> Pazos's testimony - page 30- before the Prosecutor's Office was already commented on".

(61) As to the third presumption: i.e. my father's alleged interest in benefitting the firm Dreyfus with SADECO's cotton export quota, it was evidenced that:

- Martínez de Hoz had NO RELATION at all, at any time, with Dreyfus;
- SADECO's cotton quotas were not revoked for Dreyfus's benefit, a company that did not even trade cotton at that time, since it had ceased conducting such trade 13 years earlier (in 1964);

[45] **Documentation Exhibit N° 8, earlier cited.**

- It was senseless to speak about "quotas" because my father had precisely freed all exports from the onset of his economic plan, in 1976, thus such quotas no longer existed. There were no quotas.

(62) Thus, in its 1988 ruling, the Federal Appellate Court held:

> "… the original denunciation was not corroborated by the investigation, since there could be no interest in obliging Federico Gutheim to assign the export quota that had been granted to SADECO given that export restrictions and quotas had been freed at that time". (Emphasis added).

(63) Notably, while the Federal Chamber exonerated my father on the merits, it did not do so with respect to other defendants. Thus, Whilst my father was released, generals Jorge Rafael Videla and Albano Harguindeguy remained in custody, Videla for having signed the detention order against Messrs. Gutheim in his capacity as President and Harguindeguy for having counter-signed as Minister of Home Office.

(64) The falsehood of the presumptions tentatively used to link my father to the detention of Messrs. Gutheim was thus evidenced by the Federal Appellate Court in 1988; a firm and non-appealable court conclusion that has not been reverted, to the detriment of the "*non bis in idem*" guarantee.[46]

(65) The case was then remanded in 1988 from the Federal Appellate Court to the court of first instance Inthe meantime, a new Administration took office and my father, among many others, was

[46] Although the procedural rules authorized Messrs. Gutheim to become the accuser party (private accusers) in the legal action against my father, they did not elect to do so. Furthermore, in the 80s they filed a civil action against the Argentine state (that is still pending) however they did not join my father as co-defendant.

"benefited" with a presidential pardon granted by former President Carlos Menem.

(66) In fact, the then incumbent President Menem pardoned, by means of series of executive decrees, several former government officials (mostly, military) and former terrorists. The Federal Executive by means of Executive Decree No. 2745/90, dated December 29, 1990, also pardoned my father.

(67) The Attorney General's Office, in view of the presidential pardon executive decree, moved for dismissal of my father's case without challenging the pardon and the federal judge Martín Irurzun issued the dismissal. The dismissal was expressly consented to by the two prosecutors: the then head of the *Fiscalía Nacional de Investigaciones Administrativas* and the prosecutor involved in the case.

(68) Martínez de Hoz protested against the presidential pardon by means of a letter published in the newspaper *La Nación*. This was all that he could do, since in Argentina there is no chance to reject a presidential pardon.[47]

(69) In the photocopy of the page of the Official Bulletin (*Boletín Oficial*) where the presidential pardon granted to Martínez de Hoz was published, one can notice that there are other presidential pardons which "PREAMBLES" start saying that the beneficiary of the presidential pardon had requested for such pardon, however, such wording is not included in my father's presidential pardon executive decree, no mention is made to such request because such request

[47] *See* **Press Exhibit No. 1**.

was never made or desired. [48] Indeed, even now, this petition does not assert the validity of the pardon.

(70) The invalidity of the pardon has no effect whatsoever on the validity of the Federal Chamber's 1988 decision that was issued prior to the presidential pardon and has never been reversed or annulled. However, the circumstance that the immediate antecedent of the dismissal had been a presidential pardon was used as from 2006 by the Argentine government of the day and by obedient judges to try my father once again, disregarding the rest of the investigation and the conclusions thereof and ignoring, above all, the 1988 preventive detention revocation.

[48] *See* **Documentation Exhibit No. 9.**

C. Public Instigation made by President Kirchner to imprison José Alfredo Martínez de Hoz

(71) In fact, on March 24, 2006, in a public speech made at the Argentine Congress, the then incumbent President Néstor Kirchner, whose wife, Cristina Fernández de Kirchner, continues governing, exhorted the Judiciary to strike down the presidential pardons and instigated the punishment of Martínez de Hoz. (The evidence showing these aggressions and pressures exerted on the Judiciary are described hereinbelow). In the referred speech, the then president said:

> "The dictatorship's economic model had a brain, with a name and a surname, that we Argentines should never erase from our memory, and I hope that memory, justice and truth will arrive. His name was José Alfredo Martínez de Hoz".

And he added:

> "Unfortunately, the true owners of such model have suffered no punishment at all". (Emphasis added).

(72) On that same day, leftist groups attacked the building where my father lives and caused serious damage to such building's entry and facade, without the police doing, or willing to do, anything to prevent it.[49]

(73) President Néstor Kirchner continued with his verbal and public aggressions until July 10, 2006, date on which the judge sitting on the Federal Argentine Criminal and Correctional Court No. 5, Judge Norberto Oyarbide, annulled the presidential pardon at the government's motion.

[49] *See* **Press Exhibit No. 3**.

(74) Although the annulment of the presidential pardon should not have created any concern for Mr. Martínez de Hoz, in the field of mere legal theory, it was known that in the current political context coupled with the warnings and pressures exerted by the President, such annulment would trigger the outbreak of a new and endless harassment against the former minister. Thus, all relevant appeals were taken from such measure to each and every judicial available stage, all of which ended up affirming annulment of the presidential pardon, as earlier described.

(75) At the time when the Supreme Court issued its ruling affirming the referred presidential pardon's annulment, one of its Justices made a declaration to the press –without revealing his own name, which is very serious- and said in reference to my father: "Now he can be tried again, and end up in jail", as is evidenced herein in the section on lack of independence of the judiciary in Argentina by a newspaper clip from the "Buenos Aires Herald".[50]

[50] *See* **Press Exhibit No. 4.**

D. Second preventive detention and new imprisonment

(76) On April 29, 2010, the case record was remanded from the Supreme Court to the Federal Court No. 5. Upon receipt of the record, the first step taken by Judge Oyarbide was to issue a restraining order against my father prohibiting him to leave Argentina. Five days later, on May 4, 2010, without the incorporation of any new fact or fresh evidence into the case, Judge Oyarbide ordered the effective preventive detention of my father. At such time, Judge Oyarbide re-characterized the facts, which had already been investigated more than 20 years ago, labeling them as "crimes against humanity".[51]

(77) It is precisely this re-examination of the same facts—that constitutes a violation of the principle of "*non bis in idem*".Judge Oyaribe considered no new evidence or facts—and indeed there are none. Rather, he relied upon the same facts and evidence that were scrutinized by the Federal Chamber in its 1998 decision. The relabeling of the charges as those of a crime against humanity does nothing to amerliorate or excusethis violation.

(78) Even a cursory examination of Judge Oyarbide's decision reveals the depth and flagrancy of the violation of double jeopardy. This decision makes no attempt whatsoever to reconcile that a prior court made opposite conclusions regarding the very same facts which were the basis of my father's prosecution back in 1984. The facts and allegations that were used to prosecute my father in 1984, are the same that were again used reopen the case. Judge Oyarbide's decision simply ignores the prior ruling of the Federal Chamber in 1988, even though it was never appealed, never reversed or challenged, and remains good law.

[51] *See* ruling cited in **Documentation Exhibit No. 1**.

(79) The above is reflected in the following chart that compares the decision adopted in 1988 by the Federal Appellate Court and the one adopted in May 2010 by Judge Oyarbide in his preventive detention ruling:

COMPARISON BETWEEN THE CONCLUSIONS OF THE FEDERAL APPELLATE COURT IN 1988 AND THE CONCLUSIONS OF JUDGE OYARBIDE IN 2010	
FEDERAL APPELLATE COURT (1988)	**JUDGE OYARBIDE (2010)**
There is no evidence *"Certainly, the spectrum of presumptions under analysis is far from creating the internal conviction required to uphold the court of first instance's criterion, and thus, this appellate court believes that the preventive detention ordered against Martínez de Hoz must be revoked.*	***There is prima facie evidence*** *I will attribute the perpetration of the described facts to Martínez de Hoz on the basis of the elements that I will describe herein and which inexorably lead to support with the prima facie evidence required by this procedural stage, his criminal involvement and contribution.*
No deprivation of liberty can be ordered with the elements contained in the case record *After a global assessment of all the circumstantial evidence gathered in the case record, a significant condition of doubt arises, that does not allow, for elementary prudence reasons, propitiating the upholding of the court of first instance's decision as regards Martínez de Hoz since one must take into account both the implication of such decision, i.e. depriving the defendant of his freedom and the procedural time when it was issued (i.e. nearly four years after the commencement of the case and more than 11 years after the occurrence of the facts).*	***Certainty is not necessary to deprive from liberty*** *At this stage of the proceedings the procedural provisions do not attempt to obtain, or require, apodictic certainty for issuing a binding ruling on the merits, on the contrary and as provided in paragraph 3 of Article 366 of the Code of Criminal Procedure, the existence of sufficient and consistent circumstantial evidence suffices.* *The elements of conviction gathered in the case exceed such statutory requirement.*
It was unquestionably evidenced that Martínez de Hoz was unrelated to the events.	***According to Comissioner Colotto's testimony, Martínez de Hoz gave opinions that could result in a***

As regards the Colotto episode, it should be noted that they do not mention that the detention originated or responded to an initiative of the Ministry of Economy. As to the circumstantial evidence: it has been conclusively evidenced that there exists, also, a large spectrum of circumstantial evidence that leads to a conclusion that is absolutely opposite to the aforementioned one, that is to say that Martínez de Hoz is unrelated to the events charged upon him. *In light of the above, it is obvious that we cannot take into account only the circumstantial evidence against the defendant to support the preventive detention order and disregard all the other elements in favor of the defendant, gathered and neatly raised by the defendant's defense lawyers.*	***personal benefit.*** *According to Commissioner Colotto's testimony, the freedom of Federico and Miguel Gutheim is not one of a government official decided, at least, to act walking on the corniche of legality, but precisely one that seems to lead to some personal or functional/institutional benefit, without noticing in any manner that such behavior scandalously involve committing incredibly serious crimes.*
The presence of an official of the Ministry of Economy at the interviews have no relation with the detention of the Gutheims *In sum, up to date there is no sufficient circumstantial evidence showing that Martínez de Hoz would have ordered, requested or suggested the detention of the Gutheims. The scarce presumptions appear as mere conjectures and they are challenged by other presumptions that unrelate him to such measures.* *Moreover, there is no sufficient circumstantial evidence showing that Mr. Martínez de Hoz would have participated in any manner of the purpose of making them pay, deliver monetary amounts or cause them to sign any document*	***The detention of the Gutheims cannot be unrelated to the required intervention of the Minister of Economy at the interviews*** *We cannot accept under any circumstance, first, that the detention of the Gutheims is unrelated to the intervention required from the Ministry of Economy due to the referred contractual defaults. The alleged neutrality of the ministry ...was not such, on the contrary the referred Minister of Economy apart from acting as the essential motor of the interviews, through the Secretary of Foreign Trade, had the purpose of encouraging a solution in line with the interests of the foreign exporters.* *The articulation of the extortion plan allows us to presume, the existence of interests much more relevant, significant, and why not, hidden, of*

involving monetary amounts against their will during their detention. The mere presence of a representative of the Ministry of Economy at the interviews do not allow supporting such event. *…* ***Exports had been freed and quotas no longer existed*** *"… the original report was not corroborated by the investigation, the (alleged) interest in obliging Federico Gutheim to assign the export quota granted to SADECO could not exist because export restrictions and quotas had been freed at such time".*	*those who could naturally find themselves involved in a contractual default of an international nature.* ***The attributed personal benefit refers to the export quotas***
The method applied to involve Martínez de Hoz is prohibited by the Code of Criminal Procedure *The [only fact that] has been directly evidenced is the detention of the Gutheims, and such detention resulted from an executive decree issued by the Federal Executive. Through circumstantial evidence it was concluded that the motive underlying such detention was a trade default incurred by the Gutheims with businessmen of Hong Kong. On such basis, and again drawing conclusions on a string of assumptions, it was deemed evidenced that Martínez de Hoz had a decisive involvement in the decision of such detentions. This is nothing more than a double chain of assumptions. A fact is proven by circumstantial evidence. Starting from the circumstance of having such fact proven by*	***[The judge] affirms Martinez de Hoz liability in a dogmatic manner and expressly declines to conduct any further investigation on the relations that [The judge] also dogmatically attributes to Martínez de Hoz with foreign companies*** *Despite the foregoing, it is true that the lapse of time in this case is against the elucidation of such issues, and that in view of the magnitude of the already evidenced crimes with the degree that the stage requires for, it is laborious to introduce the analysis of the complex intertwining of relations that may be inferred, of the groups and foreign companies and their prospective connection with the accused. Under no circumstance may it be deemed that Martínez de Hoz is unrelated to the referred actions, moreover and on the contrary, I will hold him as the principal person liable for the facts which have been prima facie evidenced.*

circumstantial evidence, another more unrelated fact is deemed also proven by circumstantial evidence. And this is so because if it were not have been deemed evidenced that the detention of the Gutheim brothers resulted from the contractual default, then it would have been impossible to have attached liability upon Martínez de Hoz for such detention, who would have been totally discharged from liability in this case. This double chain of circumstantial evidence is directly in violation of paragraph 7 of the referred Article 358.	

(80) Not satisfied with the described arbitrariness and in an utmost bout of inconsistency, Judge Oyarbide stated in his ruling:

> "The consequence of the referred decision [the annulment of the presidential pardon] is to retrospectively rewind the procedural status of José Alfredo Martínez de Hoz back to the stage existing prior to the dismissal that arose from the presidential pardon …"

(81) However, against its own words, the Judge did not rewind the case back to the procedural stage existing "prior to the dismissal arising from the presidential pardon". Precisely, the situation immediately prior to the presidential pardon has been the revocation of my father's first preventive detention and his release in 1998, as earlier described.

(82) As results of the new precautionary measure and in violation of the presumption of innocence principle, Judge Oyarbide denied the release supporting his decision on the nature of the facts imputed on Mr. Martínez de Hoz, failing to consider that the Federal Appellate Court had already declared him unrelated to them.

E. Other arbitrarities incurred to deny the release of José Alfredo Martínez de Hoz

(83) Moreover, on July 15, 2010, the Federal Appellate Court, with its new membership, also denied my father's release by means of a divided judgment where the majority vote cited absurd precedents, totally unrelated to the case. For example, the Federal Appellate ruling referred to the interference created by the so-called "Full Stop Law" (*Ley de Punto Final)* and "Due Obedience Law" (*De Obediencia Debida*) passed during President Alfonsin's Administration nearly 20 years ago. It is clear that my father had nothing to do with the passing of such laws, given that they were passed by Federal Congress. Additionally, on the date of enactment of such laws, my father had left office more than ten years ago.

(84) According to such Federal Appellate Court's ruling in its new membership, the second preventive detention of Martínez de Hoz was addressed at avoiding new obstacles, such as the one resulting from the passing of such laws; something that is patently unrelated to the detainee's condition. Likewise, such court ruling stated that there was the chance of "*the investigation being hindered by the network of relationships that the detainee had, and may continue having, with certain circles of power*" [sic].[52]

(85) We do not understand to which power does the Federal Appellate Court refer: if it is the current power in Argentina, it is patent and obvious that Martínez de Hoz not only lacks any influence, but moreover, he has been declared a "public enemy". If the power

[52] *See* Ruling of the Federal Appellate Court dated July 15, 2010 affirming the denial of the petition for release of imprisonment in **Documentation Exhibit No. 16.**

referred to is the one that was composed by the members of government where my father held office more than 40 years ago, they are either dead, octogenarian or detained. The Federal Appellate Court did not justify either how can my father's imprisonment be influenced by the hypothetical and false influence that is attributed to him. The Argentine Supreme Court refused to review the Federal Appellate Court's decision.[53]

(86) On the other hand, no explanation was provided as to the manner in which Martínez de Hoz could obstruct the procedure, considering that –at that time- he was 84 years old, and that he had never left Argentina throughout many decades of persecution, even when the threats of the political power made it clearly foreseeable what would come. Moreover, the Federal Appellate Court did not even explain what would constitute a prospective obstruction of an exhaustive investigation conducted and completed nearly 20 years ago.

(87) As a further violation of the due defense principle –one of the fundamental rights acknowledged in the Convention- the re-characterization of the facts and the new preventive detention were adopted without giving the taking the accused in to render a new investigatory declaration (*declaración indagatoria*). It is universally accepted that such declaration is a measure of defense because the accused is given the opportunity to declare anything related to his defense in front of the judge. Such measure cannot be replaced by the opportunity that the accused has to take an appeal from such ruling, because by then he is already suffering the detriment of a preventive detention imposed "*inaudita parte*".

[53] *See* Ruling of the Argentine Supreme Court dated June 23, 2011 **under Documentation Exhibit No. 17.**

F. Inhumane and Degrading Treatment

(88) Additionally, the measure was followed by actions of spectacular features, intended to please the Federal Executive and the organizations that pleaded for my father's imprisonment in a common jail.

(89) At the time of his detention, Martínez de Hoz was literally plucked out from his apartment, sick and in an ambulance, by order of Judge Oyarbide. Although initially my father was taken to the "Los Arcos" Clinic, in the City of Buenos Aires, in view of his serious medical condition- *inter alia* serious back spine injuries that had been the cause of several prior surgeries— shortly thereafter the Judge ordered, **against the physicians' warnings**, that my father be transferred to the Ezeiza prison, where he was carried on a stretcher, without any consideration of his critical medical condition. Moreover, the Judge refused to visit Martínez de Hoz at the clinic, thus paying no heed to his family's request for examination seeking that the judge could check on the detainee's serious medical condition. (See, cable of DyN agency published in several newspapers, such as *La Voz*, as per the link provided in the footnote).[54]

(90) The above took place in spite of the fact that Law No. 26,472 (amending Law No. 24,660)[55] provides for the home detention of detainees older than 70.[56] Although the wording of the relevant legal provision vests the judge with the authority to grant home detention, it

[54] http://www.lavoz.com.ar/noticias/politica/oyarbide-rechazo-visitar-martinez-de-hoz. *See* **Press Exhibit No. 5**.

[55] *See* **Argentine Legislation Exhibit.**

[56] *See* **Argentine Legislation Exhibit.**

is clear that no power vested in public authorities can be exercised in an unreasonable manner.

(91) The judge denied the request for home detention which sought that my father be placed under arrest at his apartment, as should be the case given his age and medical condition.

(92) In such ruling the Judge directed that my father be transferred to the Ezeiza prison, ordering that:

> "Transfer that shall be made effective once it may be reasonably conducted, in light of the clinical evolution of the referred person at the place where he is currently hospitalized".

(93) However, the Judge even failed to abide by his own decision, since the Federal Prison Service officers (*Servicio Penitenciario Federal*), after several telephone consultations with the court, insisted on immediately transferring my father [to prison], against categorical medical certificates, which stated as follows:

> "The patient must not be transferred from the clinic, as I have expressly stated in his medical record, until his treatment is completed. Not doing so would involve high risks for his physical integrity". (medical certificate signed by Dr. Miguens on May 19, 2010 (Last paragraph).[57]

(94) Without awaiting for my father's surgical operation and the necessary post-operation period, in a brutal manner and urged by the Executive's political needs (on May 25, 2010 the Argentine Bi-Centennial Independence was to be celebrated), Judge Oyarbide contradicted his own written order, and on May 20, 2010, he orally

[57] *See* **Documentation Exhibit No. 18.**

directed the prison officers to take my father by force to a common prison. Copy of the court ruling is attached.[58]

(95) Fortunately, by means of a *habeas corpus* action, the on-duty acting Judge Alberto Baños entertained the family's petition and accordingly ordered that Martínez de Hoz be immediately restored to the clinic. Subsequently, by decision of the Federal Appellate Court and with the D.A.'s favorable opinion, my father was granted home detention. Precisely, the referred habeas corpus contains the report addressed to the Prison Service authorities when my father entered into the Ezeiza prison:

> "Regular general condition, loss of weight, prostrated, depending on others for his basic needs, oriented in time, without a fever, anxious, distressed, with pain in his back injury. He is scheduled for surgery on May 26, 2010 at 10:00 am." (Emphasis added).

(96) Next, the prison medical authorities' report stated that the prison facilities lacked both adequate infrastructure and human resources to treat the sick detainee and advised that he be transferred to a specialized health care center or to the place of origin.

(97) On May 21, 2010, at 5:00 p.m., Dr. Luppi, the forensic physicianwho examined my father at the Ezeiza Prison by order of Judge Baños informed the court, by telephone, that my father:

> "…could not be confined in such prison unit due to his delicate health condition, given that such prison unit lacks the appropriate staff both in terms of training to provide the necessary care and in terms of number to provide the permanent attention required by his health condition. The laboratory lacks adequate material to conduct prospective tests that his condition may require during week-ends. Furthermore, a surgery is scheduled for May 26, 2010. [The physician] advises immediate reinstatement so that

[58] *See* **Documentation Exhibit No. 19**.

[the detainee] can receive the adequate pre-surgery treatment to undergo surgery".[59] (Emphasis added).

(98) Judge Baños ruling held in one of its paragraphs:

"…on noticing any gross action or omission that may clearly and patently infringe a constitutionally protected guarantee, the judge, a judge -the relevant one- must forthwith remedy such situation, even when such situation was caused by another judge.

[…]

"I believe that the situation involves an undue aggravation of the conditions of detention".

[…]

"The noticeable deterioration of the petitioner's physical condition coupled with his old age and the severity of the forensic medical report that has been submitted to me, persuade me that, before forwarding the report to the Judge that I deem has jurisdiction over the matter, it is convenient to order the cessation of such conditions, which in my opinion aggravate the conditions of the accused". (Emphasis added).

(99) The reports on my father's medical condition are expanded in the specific chapter.

(100) The writ of habeas corpus was affirmed by the relevant ordinary Court of Appeals, i.e. a court different from the Federal Appellate Court hearing the merits of the case.

G. Epilogue. The Supreme Court refuses to review the violations of the constitutional guarantees

(101) The preventive detention was, of course, appealed to the Federal Appellate Court, the same one that in 1988 —now composed of different judges- had revoked such measure. In the appellate brief

[59] Appears in the Habeas Corpus Court Record.

providing the grounds for the appeal, Martinez de Hoz's defense lawyers stated, among many other things:

> "The retroactive re-characterization of the facts patently contradicts the decision adopted by such Hon. Federal Appellate Court on July 14, 1988, decision that has been baselessly disregarded. Thus, the court of first instance has simply re-characterized the same facts that have already been assessed by the Appellate Court to dissociate the defendant from this case and order his release. The contradiction –by breaching the *non bis in idem*- is manifest and amounts to sufficient grounds to vacate the preventive detention order issued.
> The defendant was tried more than 20 years ago for exactly the same facts and with the same evidence existing to date, Your Honor having concluded that he was "unrelated" to such facts. Therefore, we hereby raise the *ne bis in idem* to the current attempt of trying him again 'with another point of view'".[60]

(102) It should be noted also that two judges of the Federal Appellate Court, in its new membership, had been recused; one of them —Judge Horacio Cattani— because he had self-disqualified himself acknowledging that it was inconvenient for the case to be heard by him bearing in mind that he had pre-opined at the prior stage and that he believed that he could not be impartial. The other one —Judge Eduardo Freiler— on the ground of ideological enmity with José Alfredo Martínez de Hoz and close links with an organization that makes public its hate for the former minister, and thanks to which such judge hold his tenure. Details of the foregoing shall be provided in the section on lack of independence and impartiality of the judges.

(103) Neither the self-disqualification nor the recusations were allowed and the challenged judges ruled against my father's petition seeking revocation of the second preventive detention order.[61]

[60] *See* **Documentation Exhibit No. 2, earlier cited.**

[61] *See* Federal Appellate Court ruling dated July 12, 2011 affirming the preventive detention of Martínez de Hoz under **Documentation Exhibit No. 3, earlier cited.**

(104) An extraordinary appeal was taken to the Supreme Court from the Federal Appellate Court's ruling seeking the review thereof.[62] The Appellate Court granted the appeal on the grounds of procedural admissibility and forwarded the record to the Supreme Court.[63] On July 10, 2012, after nine months awaiting on the Supreme Court's docket, a two-sentence decision was rendered denying the extraordinary appeal on the grounds of inadmissibility, thus affirming in a final and non-appealable manner the preventive detention of Martínez de Hoz.[64]

(105) The extraordinary appeal was denied providing no reasoned grounds to support such denial, instead the Supreme Court adjudicated in two sentences, invoking Article 280 of the Code of Civil and Commercial Procedure, which in its relevant part prescribes that:

> "When the Supreme Court is called to decide by way of an extraordinary appeal, receipt of the case shall involve that the case is ripe for entering judgment (*llamamiento de autos*). The Supreme Court, at its discretion, and solely invoking this legal provision, may deny the extraordinary appeal, for lack of sufficient federal harm, or when the issues raised are unsubstantial or lacking significance"**.** (Emphasis added).

(106) A case where the freedom of an individual is encroached upon by means of violation of the double jeopardy prohibition and by means of a preventive detention that, given the age of the accused, may be equated to a final judgment, with so many violations of the Argentine Constitution that would constitute the subject of a full "casebook", is denied with two sentences for lack of sufficient federal harm!.

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[62] *See***Documentation Exhibit No. 4, earlier cited.**

[63] *See* Ruling dated October 6, 2011, **Documentation Exhibit No. 5, earlier cited.**

[64] *See* Ruling of the Argentine Supreme Court.**Documentation Exhibit No. 6**, earlier cited.

(107) As later described, some Argentine Supreme Court justices are severely politically committed with the government and do not conceal their close relations both with the Executive as well as with declared enemies of my father (See section related to the lack of independence and impartiality of the Judiciary hereinbelow).

(108) My father currently continues placed under home detention, in a semi-prostrated condition, and from the reopening of the case, he has undergone several new surgeries. Though more than two years have lapsed since his second preventive detention in May 2010, this detention has been extended.[65]

(109) The feeling of being deprived of freedom, no matter how minimum may his movements be, as well as the always existing threat of a new incarceration in a common jail and the erosion resulting from the endless reopening and continuation of an investigation of which he had already been cleared, contribute enormously to impairing his emotional condition and to loosing his remaining vitality.

H. Age and Health Condition of José Alfredo Martínez de Hoz

(110) My father is 87 years old and was aged 84 when Judge Norberto Oyarbide ordered my father's detention in May 2010.

(111) In the first report pertaining to his hospitalization in a clinic, on the day of his detention –May 4, 2010— his family physician certified:

[65] See ¶ 244 below.

"The referred patient was admitted to the clinic *Sanatorio de Los Arcos* on Tuesday, May 4, 2010, with a high blood pressure crisis and acute lumobsciatic pain. From that moment onwards his problems have been clinic and they have not allowed to focus therapeutically on his pain syndrome. Initially treatment was focused on controlling his high blood pressure crisis, that has required for the simultaneous administration of 4 (four) different drugs and for the management of pain killers. Both approaches have triggered serious secondary effects. Forty-eight hours ago he had an electrolyte/Fluid imbalance featured by a marked and sudden drop of sodium in blood plasma. This is a lethal condition if it goes undetected and is not corrected on time, and sodium dropped to 118 m Eq/L, a very low figure. This alteration together with the drop in potassium altered the heart rate, as documented in yesterday's (May 8, 2010) electrocardiogram. None of these problems has been resolved. In these 6 days the patient has suffered many clinical up and downs that have prevented any therapeutic approach to his lumbosciatic pain and that have seriously deteriorated his general condition. (Emphasis added). [66]

(112) This health condition was confirmed by the Physician of the Prison Office (*Procuración Penitenciaria de la Nación*),[67] which excerpt is hereby transcribed:

"Immediate antecedents of the latest hospitalization: increase of his lumbosciatic pain, a month ago, which failed to respond to an analgesic-anti-inflammatory treatment and that resulted in the functional impotence of the lower limbs. X-rays evidenced a protrusion (hernia) and foraminal compression on the right at the 4th lumbar disc with the 4th right root and spondylolisthesis at the 4th lumbar vertebra. The pain condition caused the descompensation of figures, thus he was medicated on anti-hypertensive and diuretic drugs, which in turn resulted in electrolyte disturbance (hyponatremia and hypokaliemia). Concurrently and very likely due to the referred disturbances, he had heart rhythm disorders. Due to the lack of response to pain-killer treatment a functional block of the 4th right root was conducted, twice. At that moment the patient was transferred to CPF I (Ezeiza) circumstances related to a new imbalance of high blood pressure rates (200/100 mm Hg) due to the caused *distress* and the persistence of pain.

[66] **Documentation Exhibit No. 20.**

[67] **Documentation Exhibit No. 21.**

"Evolution during his last hospitalization: The patient suffered from dizziness due to orthostatic and instability while standing on his two feet. The patient continues suffering from acute pain in the lumbosciatic and sacroiliac regions with functional impotence, that result in the patient being bedridden, (*en debecito dorsal*). The patient is medicated on: amlodipine besylate-benazepril, chlorthalidone, pentroprazol, ergotamine tartato, vitamins B1-B-6-B12, bromazepam, quinine sulphate.

"On May 28, 2010 (date of the interview of the AM of the PPN) a nucleoplasty of the 4th lumbar discs was conducted with 6 radiofrequency shots and anesthetic block under tomographic control. During the procedure the patient had bradycardia of 33 heart beats/minute that ceded with the administration of atropine." (Emphasis added).

(113) My father's health continued worsening as time went by, as reflected by the several medical studies conducted on him, as well as his surgeries and hospitalizations during these last two years. Some are cited in the various reports.

(114) Thus, on July 1, 2010 his general physician and orthopedic doctor certified that:

From his hospitalization in last May, several complications arose as described in prior reports. His hypertension required the administration of four drugs to be controlled and as results thereof he developed a severe hyponatremia (drop of sodium concentration in blood plasma) with changes in his senses and cardiac arrhythmia. Such problems initially restricted our capacity to focus on the sciatic pain and the motor inability. Once he was clinically stabilized, two radicular blocks were made under tomographic control, initially without corticoids and later with corticoids of deposit which, proving to be ineffective for controlling the sciatic pain, thus a nucleoplasty by radiofrequency became necessary.

"The treatment plan was hindered and delayed by non-improvement of his instability and by a neuropathic pain in the right inferior limb for which he began being treated with Pregabaline, a calcium channel blocker with anticonvulsant effects

and antinociceptive, that is to say the interferes in the pain perception mechanisms.

"In the weeks following his hospitalization, although he has improved in some specific issues–hypertension, stability of the internal medium and the normalization of sodium concentration in blood which had reached very low levels, which if undetected and early treated, could have resulted lethal and the sciatic pain could have caused inability -, his health condition has been changing and the dominant issue at this time is his instability, his staggering and at times ataxic and uncoordinated, his severe muscular atrophy, his fall propensity, and his deficient nutritional condition-. He currently weighs 51.5 kg".

Current condition:

"In view of the prolonged pain and particularly due to the instability that incapacitates him a medical inter-consultation was made with two physicians who are members of the National Medicine Academy.

"One of them, Dr. Leopoldo F. Montes visited the patient last June 30th. He certified: (i) the patient's severe instability condition; and (ii) neuropathic pain on the right foot. …".

"The other physician that was consulted was Dr. Miguel de Tezanos Pinto, general physician and hematologist, also a member of the National Medicine Academy. Such inter-consultation is based in the need to identify (i) the causes underlying the prolonged instability that affects the patient, as well as (ii) the status of his C hepatitis, his liver injury with portal hypertension (increase in the pressure in the porta vein).

"Dr. Tezanos Pinto examined the patient thoroughly on the date hereof. On the one part, he confirmed the "great instability with loss of the biped station and back and lateral deviations". This means that the patient cannot remain standing or walk around unattended. In relation to such condition, Dr. Tezanos Pinto requested for a brain computed tomography and magnetic resonance.

"On the other hand, he indicated that his liver condition needed to be assessed, as well as the condition of his portal vein system in relation to his C virus hepatitis. To such end an abdominal ecography was requested as well as laboratory tests.

"Conclusion.The patient's current condition is that of an undernourished elderly man, with significant muscular atrophy, serious balance disturbances and propensity to falls, which he has suffered prior to this hospitalization and which have caused several multiple costal fractures." (Emphasis added).[68]

(115) Nearly one year later, on March 16, 2011, physicians informed as follows:

"I paid him my latest visit last March 11 and found some unfavorable changes that motivate this document. He suffers from edemas (swollen ankles due to excess of water and salt) and a general worsening of his functional class. The latter means that upon making small daily life efforts, such as going to the bathroom attended, or being bathed, he agitates due to a difficulty in breathing feeling, called dyspnea. Both symptoms –edemas and dyspneas– evidence heart insufficiency due to malfunction of the heart muscle of the blood that the heart retakes by the vein system, that is to say the diastolic dysfunction documented by means of the heart ecodoppler and mentioned in the prior report. In view of this NYHA Class 2-3 (extent of heart failure) a scale used both universally and in Argentina- I have had to resort to the regular use of diuretics. Such drugs were not well tolerated in the past and were the cause of a serious complication that my father had during his hospitalization at clinic Sanatorio de Los Arcos, the significant drop in sodium concentration in blood, i.e. hyponatremia.

"Concurrently, his urinary pathology has not improved. Later, the tests conducted in December showed a bladder of a very low capacity."

"The cares given to the patient, even with modern medicine means and in the tranquility of the apartment where he is placed under home detention (with monthly monitoring by a social assistant) or in the clinic where he was hospitalized for 90 days in 2010, relieved his pain but were insufficient to calm it down completely, to such an extent that in April 2012, he had to undergo new risk surgeries on his back, as evidenced by the risk certificates incorporated to the case record".[69] (Emphasis added).

[68] *See* **Documentation Exhibit No. 22.**

[69] The medical report is attached in **Documentation Exhibit No. 23**.

(116) Thus, in relation to this new surgery, his physician issued the following diagnosis:

> "In reference to my medical certificate dated March 5, 2012, [March 5, 2012] where I informed about the worsening of the patient's lumbosciatic right pain and the request for repetition of the magnetic nuclear resonance of the bone *raquis lumbosacro*, I inform you that the test was conducted at the clinic Sanatorio Mater Dei, on March 20, 2012. [March 20, 2012]. Such test shows a slight worsening of the 4th lumbar disc, which had been treated on in May 2010, with very good results. This slight worsening is the result of the natural evolution of his disease. What is worrisome in the images and that is in line with such worsening, is the appearance of a disc hernia extracted at the level of the 5th lumbar disc, that is in touch with the roots of lumbar 5 and sacra 1. In spite of resorting to 2 infiltrations, the condition still persists, with lumbosciatic right pain" (Emphasis added).[70]

(117) Another medical certificate explains that the images of the date of admittance revealed bone injuries of a non-reversible nature: a fracture crushing "T12 y T11", the two dorsal vertebras, clearly a consequence of his recent falls, since they were not there in previous tests. Such fractures increase his limitations and cause pain even when in bed. The tests also revealed brain changes which together with metabolic factors mentioned above justify his cognitive changes." [71]

(118) Thus, hereinbelow we provide more medical information on the update of the aggravation of my father's health condition:

> "On March 30, 2012 we requested for authorization to conduct an invasive therapeutic procedure on the patient of reference given the critical situation that the patient was undergoing. We base our decision in his clinical condition, dominated by a medically untreatable pain, in his progressive deterioration and in his repeated and dangerous falls with documented fractures, even in the context of help and support of his collaborators and relatives and in the results arising from the images studies that we hold. In spite of its risks, his worsening left us without any other option.

[70] *See* **Documentation Exhibit No. 24.**

[71] **Documentation Exhibit No. 25.**

[….]

> "The procedure was conducted, on Tuesday April 10, 2012 at the clinic Sanatorio Mater Dei, and consisted in a double *nucleolisis* of discs 4º and 5º". (Emphasis added).[72]

(119) Moreover, on June 2012 my father had to be readmitted into hospital for pneumonia. The fact is that his condition worsened, to which several falls contributed, as explained by the physicians themselves:

> "On June 19 at 11 pm I was called to the domicile of the referred patient due to the fact that he was suffering from breathing problems, severe asthenia and confusion syndrome.
>
> "As immediate antecedent, in addition to those already in possession of the Court, ten days ago Mr. Martínez de Hoz fellwhilst he was taken from his wheelchair to his bed and injured his ribs, since then he is in severe pain when mobilized and when breathing. On the night of June 18-19 he had a similar fall, but apparently less serious.
>
> "Upon examining him on the night of June 19th I found that he was dyspneic and had a fever, tachycardia and high blood pressure. Oxygen saturation was of 92% and the most relevant data of the examination was a condensation syndrome on the left base compatible with bacterial pneumonia. The absence of coryza, dysphonia and faringitis suggested a typical pneumonia caused by pneumococci or by hemofilus. …
>
> "Given his condition I decided to immediately hospitalize him in the "Shook Room" of the clinic Sanatorio de Los Arcos since early treatment is essential to obtain a favorable result. In the emergency myself and one of his family members personally took him to the clinic. There examination evidenced a fever condition, a significant deficiency in blood oxygenation, a high rate of white blood cells, a drop in serum sodium and an unequivocal pneumonia in the chest tomography". (Emphasis added). [73]

[72] **Documentation Exhibit No. 26.**

[73] **Documentation Exhibit No. 27.**

(120) In spite that my father overcame this emergency, his health continues being extremely fragile. This is evidenced by a new medical certificate dated June 27, 2012:

> "On the date hereof, and due to the patient's partially favorable evolution of his pneumonia and which led to his hospitalization 7 days ago, I have decided to allow his discharge from the clinic to continue with his treatment at home. Although his condition continues to be critical the prolongation of his stay in the clinic is non-advisable, and limits his recovery. Moreover it exposes him to the risk of hospital infection with multi-resistant germs."
>
> […]
>
> "On Sunday, June 24th he suffered from paroxysmal supraventricular tachycardia, with a heart rate of about 160 impulses per minute and hypotension, a feverish condition, hyponatremia –drop in sodium- and hypokalemia. The condition receded with antipyretics and an infusion of potassium chloride."
>
> […]
>
> "From his admission he has been confused and with episodes of delirium. He is completely disoriented and lost in time and space and his speech is gibberish, incoherent and at times absolutely unintelligible. This condition should improve, at least partially with his return to his home and exposure to known and familiar people and faces".
>
> "From the above description it is clear that he is still an extremely fragile patient, in a critical condition and who at his home will be needing specialized nurses, clinical, orthopedics and urinary attention. Certainly his dependence in terms of personally basic hygiene, feeding and minimum mobility is total and I have ordered that he be provided by the necessary support". (Emphasis added).[74]

(121) In August/September 2012, my father fell twice and was againhospitalized, as evidenced by the medical certificates attached hereto:

[74] **Documentation Exhibit No. 28.**

"After being discharged on June 27, 2012 from the clinic where he was hospitalized for a bacterial pneumonia, the patient was attended by the undersigned at his home. A permanent urinary catheter was maintained and he continued suffering from antibiotics related diarrhea. At times he suffered from confusion maybe related to the drop in blood sodium.

We were twice called for heart palpitations that clinically obeyed to self-limited events of paroxysmal supraventricular tachycardia which he had already suffered from during his hospitalization. Two weeks later the catheter was removed, however, as from such removal he has suffered from significant urinary disturbances suggesting a neurogenic bladder.

On the night of August 23rd he fell in his bathroom as a consequence of his significant instability, this being one of his several falls in the last two years with variable consequences, as result of such fall he cut himself without neuro-sensorial immediate consequences.

However, 4 days following the fall he had a fleeting double vision episode (diplopia), which did not worry him. Three days later such condition relapsed but this time it lasted several minutes and we were called in. Due to this condition we decided to examine and assess him for neurological purposes, and apart from the stability problems and radiculopathies we did not detect any disturbance in his nervous system. On Friday night of September 7th he had a new vision episode that lasted 40 minutes. Due to such condition, we have decided to examine him neuro-ophthalmological". [75]

[…]

Nine days later, he required medical assistance once again:

"Today, [September 19, 2012] at 9.30 pm I was called to assist the patient in reference to a fall. He was feverish, confused and with inadequate oxygenation (80'% saturation). Clinically it appeared as an acute breathing condition. Therefore I immediately transferred him to the clinic Clínica y Maternidad Suizo Argentina, located at Pueyrredón 1441 in the City of Buenos Aires where laboratory tests were run, supplementary oxygen was given to him and he was treated with antibiotics."[76] (Emphasis added).

[75] *See* **Documentation Exhibit No. 42.**

[76] *See* **Documentation Exhibit No. 43**

(122) His current condition is described by the most recent medical certificate:

> "On the date hereof [October 1, 2012] and given the favorable evolution of the bilateral pneumonia suffered by the patient, and that, according to my prior report, resulted in his hospitalization on September 19th, I have decided to discharge the patient from the clinic to continue treating him with oral antibiotics (Levofloxacina) at his home. Hereinbelow I provide a summary of his illness, as follows:
>
> 1) On September 19 the patient was with a fever and suffering from mental confusion, which appeared during the course of the afternoon, and fell from his own height. Upon examining him at his home I found semiology compatible with pneumonia, high fever and significant oxygen under saturation. I immediately decided to hospitalize him in the clinic Clínica Suizo Argentina.
>
> 2) The pneumonia was documented by a chest tomography that evidenced its bilateral nature together with pleura spill. As results of bad oxygenation he became oxygen-dependent and could not do without the oxygen until September 28th. The under saturation was very significant, since upon his admission it was of 73% and it remained for many days at 80 and 83%. I initially treated him with two antibiotics (Intravenous Ceftriaxona + Claritromicine) but he continued running a fever with episodes of bacteremia and profuse sweating. On the 4th day of such medical treatment and noticing that he had no clear improvement I conducted a new tomography, and noticed that he was significantly worse so I rotated the antibiotics to Piperacilina/tazobactam and Oselfamivir, keeping the Claritromicine.
>
> 3) These 3 antibiotics triggered his improvement and the thermal curve slowly corrected throughout the days. Concurrently, his oxygen requirements were decreasing. During all this time he remained in bed, without an appetite and with occasional episodes of confusion, attributable to the infection, the lack of oxygenization and the drop in blood sodium.
>
> 4) His movements and muscular tone suffered a perceptible deterioration and in the course of the next weeks our goal

> will be focused in consolidating the cure from the pneumonia, strengthening his nutrition and correcting, to any possible extent, his potential muscular atrophy with kinetic measures.

I am very especially concerned with the fact that this is the second serious pneumonia in 3 months, this surely reflects deglutition disorders and micro-aspiration of food and an immunity deficiency associated with old age, the multiple treatments and medications that he has to receive and the stress that his condition generates on him. He will continue in his home with regular medical attention, permanent nursery and breathing and movement assistance. His condition is one of an extremely fragile patient who is vulnerable by any unforeseen event."[77]

[77] *See* **Documentation Exhibit No. 44.**

SECTION IV

VIOLATIONS OF HUMAN RIGHTS

ACKNOWLEDGED IN INTERNATIONAL LAW

A. Violation of the "res judicata" standard. Non bis in idem (Convention, Article 8.4).

1. Legal Standard

(123) The Convention, in its Article 8, paragraph 4, establishes that *"An accused person acquitted by a non-appealable judgment shall not be subjected to a new trial for the same cause"*.

(124) This rule, known in international law as "*non bis in idem*", must be broadly construed, in line with the guarantees with which the Convention seeks to protect persons. Therefore, the prohibition contained therein involves not only final and non-appealable judgments and acquittals, but also rulings on certain aspects of a legal proceeding that are susceptible of altering the guarantees or benefits which the accused enjoys, such as the principles of innocence and freedom.

(125) In the case of Alan García, former president of Perú, against whom the government reopened a case for unlawful enrichment, the Inter-American Commission has pointed out, in its Report No. 1 of February 7, 1995 (Case No. 11.006), that the case involved an attempt to investigate the same facts, in violation of the *res judicata* principle. In this case, the Hon. Commission clarified that the term "judgment", for the purpose of assessing the existence of *res judicata*, must be broadly construed and must be understood as any procedural act that is fundamentally jurisdictional in nature and non-appealable. Such is the

instant case, where my father's preventive detention had been revoked in 1988, in a final and non-appealable manner, on the grounds that he was unrelated to the facts of the case. Thus, as the report of the Inter-American Commission on Human Right states, a ruling that decides that there is no sufficient grounds to open a criminal case against a person –for non-existence of the crime, for example- upon exhaustion of the appeal remedies or upon expiration of the statutory periods, becomes *res judicata*.[78] In the Alan García case, a non-appealed decision issued by the prosecutor assessing the inadmissibility of the criminal proceeding, was deemed sufficient to qualify the reopening of the case as "double criminal jeopardy". The citation of Report 1/95, although long, is worth transcribing in its relevant portion due to the similarity –in its essence- with the circumstances of this presentation:

> "In the final analysis, it is for the Commission to determine whether the second trial instituted for the crime of illegal enrichment is based on the same facts that were the grounds for the first criminal prosecution.
>
> "The impeachment that found grounds for the prosecution of Alan García was based on four facts alleged to constitute the crime of unlawful enrichment. When the articles of impeachment were presented to the Attorney General of the Nation, the latter instituted a criminal case against the former President based on just one of those articles and eliminated the others on the grounds that they were only suspicions that did not constitute the crime of unlawful enrichment and did not prove liability.
>
> "The Commission considers the Attorney General's decision to dismiss criminal proceedings on the grounds that the incidents brought before it did not objectively constitute a crime since they are not so defined in any criminal law, as an act that is essentially jurisdictional in nature and --like all actions taken by the Attorney General's Office in the proceedings-- once final, cannot be repeated and is uncontestable, having the effect of *res judicata*. Thus, the judicial decision is final, and accordingly it has the effect of banning future actions being brought based on the same material facts of the judgment.

[78] IACHR Report No. 1/95 at section V, B, 3.

> "In the case under review, as was indicated earlier, the prosecutor, in his decision, on the one hand dismissed three of the acts included in the impeachment, and on the other hand, brought criminal proceedings for the remaining act. During the proceedings, neither the petitioner nor the government have indicated whether the prosecutor's decision to dismiss the case was appealed to a higher court. For that reason, the Commission must assume that, since the prosecutor's decision was not appealed, it was consented to, and accordingly became final.
>
> "Therefore, based on the foregoing, the Commission concludes that the prosecutor's decision, which dismissed three of the initial charges because they do not constitute crimes, became final and concluded the State's criminal proceedings for the acts that were set forth in the judgment. Initiation of a new criminal prosecution based on the same charges brought previously violates the principle prohibiting multiple criminal prosecutions, and accordingly, subparagraph 4, article 8 of the American Convention".[79]

(126) The report of the Hon. Commission in the "Alan García" case also contains a concept that is very significant for this presentation, and that is the extent of the phrase "non-appealable judgment" for *res judicata* purposes:

> "The Commission considers that the expression "non-appealable judgment" in subparagraph 4 of Article 8 of the Convention should not be interpreted restrictively, that is, limited to the meaning given to it by the domestic law of the States. In this context, "judgment" should be interpreted as any procedural act that is fundamentally jurisdictional in nature, and "non-appealable judgment" as expressing the exercise of jurisdiction that acquires the immutability and incontestability of res judicata."[80]

(127) As to the doctrine contained in the referred report, I must make a clarification as regards my father's case. Such same ruling of the Federal Chamber of 1988, is a non-appealable judgment in the strictest sense of the term and, thus, a second preventive detention could have

[79] Case 11.006 of *García, Alan v. Peru* Report No. 1/95 of the IACHR, at section V, B, 3

[80] Loc.cit.

never been lawfully imposed on my father for the same facts which had been already subject of investigation.

(128) In the case of "*Genie-Lacayo vs. Nicaragua*" (1997) the Inter-American Court of Human Rights resolved -although in reference to the hypothetical review of a prior ruling issued by the Inter-American Court itself- that "*res judicata*" covers both final judgments as well as interlocutory ones and that any remedy of review[81] filed against them "*must be based on material facts or situations that were unknown at the time the judgment was issued[82]"*. (Emphasis added).

(129) The exceptional elements that justify the review, cited by such order, are namely:

> "…documentary or testimonial evidence or confessions subsequently declared false in a judgment that has acquired the authority of *res judicata*; when there has been prevarication, bribery, violence, or fraud, and facts subsequently proven to be false, such as a person having been declared missing and found to be alive".[83]

(130) Moreover, in the case of "*Loayza Tamayo v. Perú*", the Inter-American Court on Human Rights explains the broadness of the *non bis in idem* guarantee:

> "This principle seeks to protect the rights of individuals who have been prosecuted for specific facts from being subjected to a new trial for the same facts. Unlike the formula used by other international human rights protection instruments (for example, the United Nations International Covenant on Civil and Political Rights, Article 14(7), which refers to the same "crime"), the American Convention uses the

[81] IACtHR, case of *Genie-Lacayo v. Nicaragua*, ruling dated January 13, 1997, at para. 11.

[82] IACtHR case of Genie-Lacayo v. Nicaragua, ruling dated January 13, 1997, at para. 12.

[83] IACtHR, case of *Genie-Lacayo v. Nicaragua*, ruling dated September 13, 1997, at Section III, paras.11 and 12.

expression "*the same facts,*" which is a much broader term in the victim's favor.[84]

(131) As it may be clearly noticed, the Inter-American Court expressly states that that the protection is not addressed only at protecting a person against trial for the same crime, but also at protecting such person from double jeopardy for the same facts, whatever might have been the legal characterization used to label such facts. Thus, it is unlawful to attempt to reopen a case by the mere device of characterizing the same facts as a "crime against humanity", as has been my father's case. In "*Loayza Tamayo*", the civil courts of the State of Peru had re-tried, even in a proceeding of a different nature, the same facts that had already been assessed by a military tribunal. The application of this principle is more obvious still in a case like the instant one where the same courts that assessed the facts are the ones that attempt to reverse their own conclusions!.

(132) The Supreme Court of Chile, held in the case "*Linck Kuperman*":

> "In general terms *res judicata* is the effect produced by final judgments or non-appealable interlocutory rulings, so that the party in whose favor a right has been adjudicated in a trial may seek its enforcement and prevent that the same tried matter be again resolved in the same trial or in a different one".[85] (Emphasis added).

(133) In very appropriate words that seem to have been tailored for this complaint, the Supreme Court of Australia, when referring to the guarantee of prohibition against double jeopardy held, on December 5, 2002, in the case "*The Queen v. Carroll*":

[84] IACtHR case of *Loayza Tamayo v. Peru*, ruling dated September 17, 1997, at para. 66.

[85] Chilean Supreme Court, in re: Jaime Linck Kuperman, of September 30, 1980. *Revista de Derecho y Jurisprudencia*; Volumen 77, Nº 1, Editorial Jurídica de Chile, 1980, p.149.

"Without safeguards, the power to prosecute could be readily used by the Executive as an instrument of oppression".[86]

(134) On the above phrase, legal scholar Dan Rogers observed that "This risk would be increased for persons that the State particularly dislikes".[87]

(135) Among the many arguments raised against the review of the *"res judicata"* principle, is the one made by the same Australian court:

> "The power and the resources of the State as prosecutor are much greater than those of the individual accused and that the consequences of conviction are very serious".[88]

(136) What the Australian court has tried to say and results, also, from pure common sense, is that whilst States have nearly inexhaustible resources to prosecute and resume once and again the prosecution of individuals considered to be their enemies, citizens have very limited resources and power to defend themselves from cases they deemed terminated. This is the reason why the resumption of closed cases constitutes a serious violation of human rights.

(137) The Rome Statute, ratified in Argentina by Law No. 25,390, recepted *res judicata* in favor of an accused person if the proceedings against such person were heard, as in this case, by judges in an independent and impartial manner (20.3). In fact, pursuant to Article 20, b) of the Statute, the International Criminal Court only accepts to review an investigation whenever:

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[86] High Court of Australia. *The Queen v. Carroll*; December 5, 2002: *"Without safeguards, the power to prosecute could readily be used by the executive as an instrument of oppression";* at para. 22. It may be consulted at: http://www.austlii.edu.au/au/cases/cth/HCA/2002/55.html

[87] ROGERS, Dan. *Double Jeopardy: Resolving the Conflict between Competing Rights and Interests*, at: http://www.robertsonogorman.com.au

[88] *"The power and resources of the State as prosecutor are much greater than those of the individual accused and that the consequences of conviction are very serious".* "The Queen v. Carroll": at para. 21.

"it was not conducted independently or impartially in accordance with the norms of due process recognized by international law and was conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."

2. *Non bis in idem* in Argentina

(138) This is a constitutional guarantee derived from the due process guarantee and the legal certainty stemming from the rule of law, to which every person against whom the criminal power of the State is exercised is entitled, whereby the accused cannot be "incriminated" "prosecuted" and less still "convicted" twice for the same conduct. That is the American Convention's doctrine and any State Party must follow it, whatever theprovisions of its domestic Law. Anyway, the Argentine Constitution incorporated the American Convention as if it were its own text.[89]

(139) The referred guarantee, even though it was not expressly included in the Argentine Constitution of 1853 from the beginning, has been acknowledged as such in several Argentine Supreme Court rulings[90] that deemed it a federal right that deserves immediate protection *"because the guarantee not only prohibits the application of a new sanction for a fact previously punished, but also the exposure that such may happen by subjecting to a new trial any person who has already undergone such trial for the same fact"*.[91] In another case, the Supreme Court added that: *"the constitutional guarantee under examination protects individuals against double jeopardy for the same fact regardless of the different labels that may be attached to such*

[89]Article 75 (22) of the National Constitution.

[90]*See*: Argentine Supreme Court Opinions Exhibit (*Fallos de la Corte Suprema de Argentina*) 258:220; 299:221; 308:84; 314:377 and 315: 2680.

[91]*See*: Argentine Supreme Court Opinions Exhibit (*Fallos de la Corte Suprema de Argentina*) 314:377, 299:221, 315:2680 and 319:43. (Emphasis added).

fact".[92] In "*Peluffo*" and in many other cases, the Supreme Court held that the institutional guarantee of *ne bis in idem* forbids public powers to initiate a new legal action for such same fact, since the guarantee also protects against the mere exposition to the risk that this may happen.[93]

(140) In the "*Polak*" case, tried in 1998, the Argentine Supreme Court confirmed the *non bis in idem* existing doctrine adding valuable considerations. Practically all of them are applicable to the proceeding instituted against my father. Some paragraphs of such opinion establish that:

> "...the prosecutor cannot manipulate the first trial in order to avoid a potential acquittal so as to keep open the 'chance' of a new trial against the accused, so that the guarantee against double jeopardy also includes in its basis, that the State is not entitled to a new trial when the State is the one originating such mistakes...".[94]

....

> "When the procedure has been regularly conducted, in compliance with the essential formalities of the trial and the reasons that gave way to the nullity are not attributable to the accused, rewinding the trial back to already closed past stages involves an impairment of due defense rights..." (Opinion of Justice Vázquez in the already cited *Polak* case).

(141) The Martínez de Hoz case is a case where the 1988 Federal Appellate Court's ruling ordering his release was not even declared null and void. Such ruling was simply disregarded, as if it never existed. Thus the doctrine of the above paragraph is also applicable.

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[92] *See* Argentine Supreme Court Opinions Exhibit: 311:67. (Emphasis added).

[93] *See* Argentine Supreme Court Opinions Exhibit: 319:43.

[94] Case *Polak, Federico Gabriel s/violación de los deberes de funcionario público s/casación* (Polak, Federico Gabriel re: breach of public officers duties s/cassation – case Nº 174 – 4/95. *See*: Argentine Supreme Court Opinions Exhibit.

> "Although rulings that declare procedural nullities, in principle, do not amount to a final and non-appealable judgment in terms of Article 14 of Law No. 48 (Adla, 1852-1880,364), an exception can be made to such general rule to the extent that, on the basis of insufficient procedural considerations, regular steps of a criminal case have been set aside and the appellant has invoked the guarantee of *non bis in idem* against double jeopardy in a criminal case for the same facts". [95]

(142) It is unquestionable that in my father's case steps regularly conducted in a criminal case were set aside, because none of the measures and evidence that led to his release in 1988, were refuted by the current judges and, notwithstanding so, my father is again being subjected to a criminal proceeding.

(143) Finally, the Supreme Court also held that *"once a specific legal category has been elected it is not valid to subsequently try to re-characterize the facts under a different category because the initially elected one failed".*[96] Concurrently held by Justice Petracchi in his vote in the case of "*Plaza, Oscar J*" by stating that the guarantee at stake "*bars any renewal of the chance of a criminal prosecution that has already expired".*[97] This being so because –as held- it would be patently violatory of the guarantee under examination if the state would be allowed, through its multiple resources, to try once and again the same event under the protection of successive labels to see –as in this case- which results to be the most successful one.[98]

(144) The amendment of the Argentine Constitution in 1994, reformed Article 75 paragraph 22 incorporating therein, *inter alia,* the

[95] Polak case, earlier cited (emphasis added).

[96] *See* Argentine Supreme Court Opinions Exhibit: 319:43. **(**Emphasis added).

[97] *See* Argentine Supreme Court Opinions Exhibit: 308:84.

[98] Legal Scholar Carrió, Alejandro, p. 448.

international treaties such as the American Convention on Human Rights (Pact of San José, Costa Rica) and the International Pact on Civil and Political Rights which respective Articles 8.4 and 14.7 expressly embody such guarantee. Thus, today the constitutional protection against double jeopardy is in force in Argentina as a constitutional principle of maximum hierarchy.[99]

(145) The guarantee prohibiting criminal double jeopardy is also embodied in the two single Codes of Criminal Procedure that were in force in Argentina, as earlier described. In fact, Article 7 of the 1889 Code (Law No. 2.372 as amended by Law-Decree No. 2021/63, ratified by Law No. 16.478) provides that "*no one can be indicted or convicted but only once for the same fact*". In turn, the new Code of 1992 (Law No. 23.984) in its Article 1 prescribes as follows: "*No one can be … criminally persecuted more than once for the same fact*".[100] It can be noticed that the second formula is broader than the first one, in spite of including it; and in case of doubt as to the scope of both formulas, the second one must be applied because it is the most benign criminal law. The most benign law standard is enshrined by Article 15 of the International Pact of Political and Civil Rights and, as explained, the protections afforded therein obtained constitutional hierarchy in Argentina by way of Article 75 para. 22 of the Argentine Constitution.

(146) The prohibition encompasses the mere criminal persecution, in a broad sense, which is logical because persecution, even without reaching to trial, involves an aggression to the accused that, in this case, even involves his deprivation of physical liberty.

[99] Emphasis added.

[100] *See* **Argentine Legislation Exhibit.**

(147) Thus, an intermediate ruling that has ordered the release of a person in a case based on the ground that the accused was unrelated to the facts on a non-appealable manner, enjoys the protection of the Convention.

(148) This has also been the doctrine accepted by the Argentine Supreme Court when holding that the incrimination of a criminal fact or the circumstance of being subject to investigation suffices for the *ne bis in idem* mechanism to come into play, since given that the facts are the same, the principle protects both the accused and the respondent, without it being necessary for the accused to legally qualify as an accused party (see, doctrine of *Fallos 299:221*). As earlier pointed out, in *"Peluffo"* and in many other cases, the Supreme Court held that the institutional guarantee of *ne bis in idem* bans public powers from commencing a new proceeding for such same fact, since the guarantee also protect against the mere exposure to the risk of that happening.[101]

3. Decisions adopted by the Argentine State

(149) The actions of the Argentine State that are being denounced in this section as violations of the *non bis in idem* guarantee, although closely intertwined, constitute three different violations of the *res judicata* principle. They are:

a) The re-charging of my father for new crimes based upon the same set of facts thatsupported his previous exoneration.
b) The re-characterization of the facts that had already been investigated, now as crimes against humanity with, the political

[101] *See* Argentine Supreme Court Opinions Exhibit: 319:43.

goal of imposing a preventive detention on my father, as already explained.[102]

c) The imposition of a preventive detention that had already been revoked in a final and non-appealable manner by the Federal Appellate Court, in 1988,based upon the same set of facts. It should be noted that the 1988 Federal Appellate Court ruling was never reversed or vacated; it was simply ignored. This led to an incredible event: that whilst the ruling ordering the immediate release of my father was still standing because it was not vacated, another ruling was issued ordering his preventive detention.

(150) It is important to recognize that the State of Argentina had obvious motivations in attempting to re-label the charges as those of a"crime against humanity." Charges against my father were otherwise time barred.[103] By bring new charges (in violation of the non ibis in idem guarantee) the state was able to unlawfully imprison my father again, in a case where he had already been released by means of a final and non-appealable decision.

(151) After the re-characterization of the facts, my father –as earlier described- was not summoned to render a new investigatory declaration (*declaración indagatoria*), as should have been the case according to Argentine procedural laws, given that the investigatory declaration is considered a means of defense and is mandatory whenever an incrimination against a person is extended or modified. Such declaration continues to be mandatory even when the facts continue being the same, since a legal re-characterization of any fact

[102] *See*¶ 23-24 and 27 above and 188-189 below.

[103] See 188-189 below.

constitutes a new situation from which the accused has the right to defend.

(152) The denunciation against my father was fabricated, already in the 80', on assumptions that were proven to be false and, thus, dismantled by the Appellate Court. Incredible enough, the case was reopened in 2006 and Martínez de Hoz was detained under the same false argumentsthat had already been then discarded by a court of second instance.

(153) The Federal Appellate Court upon revoking the first preventive detention order back in 1988 concluded, as earlier pointed out:

> "Certainly, the spectrum of presumptions under analysis is far from creating the internal conviction required to uphold the court of first instance's criterion, and thus, this appellate court believes that the preventive detention ordered against Martínez de Hoz must be revoked".
>
> "In sum, to date no sufficient circumstantial evidence exists as regards the fact that Martínez de Hoz would have ordered, requested or suggested the detention of the Gutheims. The scarce presumptions appear as new conjectures and they are opposed by others that dissociate him from such measures". (Emphasis added).

(154) Both conclusions drawn by the Federal Appellate Court established that my father was "unrelated" to the facts imputed on him. The unrelated status is immune to any subsequent re-characterization: that is to say it is not modified. Because if a person had nothing to do with a crime, *i.e.* is unrelated to the facts, the legal characterization of such facts is irrelevant.

(155) Actually, the "unrelatedness" established by the Federal Appellate Court substantially amounts, in this case and for the effects it triggered,[104] to a final and non-appealable exculpatory (acquittal) judgment on the merits of the case as regards the facts imputed in the first preventive detention, even when it was rendered upon reversing a precautionary measure.

(156) It cannot be disputed that the 1998 decision was a final decision on the merits. The Republic of Argentina had ten days within which to appeal the Federal Chamber's ruling. See Art. 30 Decree 1285/58 governing the organization of the federal court system (text in force in 1988). "There shall be no other appeal against the rulings of the national appellate courts or their panels, other than those authorized by laws [to be filed] before the Supreme Court"; Art. 257 of the Federal Code of Civil Procedures (providing with regard to certiorari or "recurso extraordinario" before the Supreme Court that: "The extraordinary appeal shall be presented in writing, based on arguments in accordance with article 15 of Law 48 before the judge, tribunal or administrative body that issued the resolution that gives rise [to the appeal], within ten days from it being notified..."). When it failed to do so, the decision became final. See Case 11.0006 at 25 ("the IACHR must assume that, since the prosecutor's decision was not appealed, it was consented to, and accordingly became final").

(157) The fact that the Federal Chamber's decision did not put an end to the trial, does not alter its res judicata effect. As the IACHR has explained, nonappealable judgment" in subparagraph 4 of Article 8 of the Convention should not be interpreted restrictively, that is, limited to the meaning given to it by the domestic law of the States. In this context, "judgment" should be interpreted as any procedural act that is

[104] *See* Argentine Supreme Court Opinions Exhibit: 308:84 "Plaza".

fundamentally jurisdictional in nature, and "non-appealable judgment" as expressing the exercise of jurisdiction that acquires the immutability and incontestability of res judicata. (" Garcia v. Peru, Case 11.006, Report No. 1/95, Inter-Am. C.H.R., OEA/Ser.L/V/II.88 rev.1, Doc. 9 at 71) (1995).

(158) Thus, the Federal Appellate Court's ruling that revoked the first preventive detention, constitutes *res judicata, both formal and substantial* since it involved a ruling that contained and contains a "final and non-appealable" court decision since it was not reversed or vacated after the "reopening" of the case. Such conditions bar the re-edition of a new prosecution since the prior one precludes such prosecution.

(159) . What the May 2010 ruling that ordered the second preventive detention of the defendant only did was to reinterpret EXACTLY THE SAME FACTS AND EVIDENCE assessed the judgment issued by the Federal Appellate Court' July in 1988. Moreover, the first instance judge issued the second preventive detention order only five days after receiving the record, once it was remanded by the Supreme Court after affirming the presidential pardon's annulment, without adding any evidence that would justify disregarding the decision issued two decades ago. Section III herein contains a chart that compares the considerations on the facts and on the evidence made by the Federal Appellate Court in 1988 with those made in the second preventive detention, that categorically prove the absolute identity of facts and evidence.[105]

[105] *See* ¶ 78 *supra.*

(160) The fact that the Republic of Argentina charged different offenses in 2010 than it did in 1988 does not alter this double jeopardy analysis. The guarantee of *non ibis in idem* protects against double jeopardy for successive charges based upon the same set of same fact, regardless of the particular offenses charged.(See cases "*Loayza Tamayo v. Perú*" and "*Alan García*", cited earlier herein).

(161) In the instant case, after the 1988 Federal Appellate Court ruling, my father maintained his right to be presumed innocent. Something that, as we have seen, never occurred. Thus, the court's declaration that my father had nothing to do with the facts ("unrelated to the facts") triggers the operation of the guarantee under analysis because it terminated the case.

(162) Additionally, the Federal Chamber's decision is not one which can be ignored under applicable international law. It does not involve either any of the circumstances provided under the Rome Statute to revise an investigation. Pursuant to Article 20, paragraph b) of the Statute, the International Criminal Court only accepts to review an investigation whenever:

> "it was not conducted independently or impartially in accordance with the norms of due process recognized by international law and was conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."

(163) The 1988 Federal Appellate Court's ruling was a final and conclusive decision, from which –as earlier described- no appeal was ever taken alleging a flaw in the will of any of the judges, all of them appointed by a democratic government and who rendered their decision in times of democracy. Thus, the second preventive detention against the defendant was a decision that clashed with the Federal

Appellate Court's referred ruling, which –additionally, never was vacated.

(164) Whatever the legal formula that one may apply in relation to the *ne bis in idem,* it is evident that my father was not only submitted to prosecution twice for the same fact, but that his second prosecution, as will be evidenced, has been ordered as a consequence of an implacable political persecution from the governments of Néstor and of Cristina Kirchner; persecution that was followed by Judge Oyarbide to issue his second prosecution (preventive detention order).

(165) If what has been sought was to multiply the single fact, by way of a more grievous legal characterization, this also infringes the guarantee because my father has been persecuted for a second time: it is evident that the separate prosecution (after 20 years!) of the single fact on the basis of a different legal characterization amounts to a violation of the constitutional prohibition against double criminal jeopardy.[106] It must be noted that the Argentine Supreme Court itself, in its current membership, has expressly upheld this doctrine in all other cases, thus making the persecutory intention clear enough.

(166) What has been done in the instant case is, under the application of a characterization that is more grievous than the initial one, to unconstitutionally retroact the prosecution. The Supreme Court has held that after a case has been prosecuted in a legal manner, the accused is entitled to obtain –in the shortest possible time- a ruling that

[106] *See* Argentine Supreme Court Opinions Exhibit: 327:3219 y 319:43.

will end the criminal prosecution as quickly as possible, in line with the Inter-American Court cases.[107]

(167) The opposite happens in this case: from the first preventive detention order (1988) until the second one (2010) more than 20 years have elapsed.

4. Violation of domestic and international rules

(168) The 1988 Federal Appellate Court's ruling was a final and conclusive decision, against which no remedy was ever filed alleging a flaw in the will of the judges, all of whom, as earlier stated, had been designated by a democratic government and who issued their decision in times of democracy. Therefore, the second preventive detention against my father was a decision contrary to the Federal Appellate Court´s prior ruling, which was never vacated.

(169) The measure denounced by means of this complaint violates, -as earlier stated – above all, Article 1 of the Code of Criminal Procedure of the Republic of Argentina, currently in force and that constitutes the most benign law, which provides that no one can be criminally persecuted more than once for the same fact.[108] It should be noted that the legal provision says "persecuted" and not "tried", because double jeopardy and, moreover, the reversal of final and conclusive decisions, involves a serious damage to the essential rights of a person.

[107] *See* CIDH "*Petruzzi Castillo"*, 4.9.98, LL 1999-D-170 and other cases cited in the relevant section.

[108] *See***Argentine Legislation Exhibit.**

(170) Double criminal jeopardy also clashes with Article 8, paragraph 4 of the Convention and with the Inter-American Court of Human Rights decisions that have been cited in this chapter under the heading “Legal Standard”.

(171) This involves, thus, the illegality of the second preventive detention; because if in 1988 Martínez de Hoz had nothing to do with the facts of the case and the preventive detention measure was revoked, the courts could not now, without the existence of any exceptional conditions established by IACHR in the case of “*Genie-Lacayo v. Nicaragua*”, automatically reopen the case, and less still issue as a first step, the preventive detention order.

(172) In addition to such infringement of a universally acknowledged principle, as is the “*non bis in idem*” —and moreover, in order to perpetrate such infringement— the Argentine courts reinterpreted the facts of the case and re-characterized them under the category of “crimes against humanity”, so that they could be declared exempted from the statute of limitations. Something that is really incredible.

(173) I insist: apart from the *per se* illegality of a retrospective more onerous re-characterization of the same facts, another abuse was committed. There can be no clearer instance of a violation of the principle of non-ibis in idem than the one thatisdescribed in the preceding sections.. The re-characterization of facts already decided twenty years earlier is exactly the type of abuse the principal of *non ibis in idem* is meant to avoid. It is the arbitrary and unfair exercise of state authority,that resurrects long-dead factual disputes for the sake of political expediency. That such re-characterization (as a crime against humanity) occurred without even reference to the still-valid and never appealed 1988 ruling of the Federal Chamber, make such violations

still more evident. He was “unrelated” to such facts, regardless of their characterization

(174) Moreover, the violated guarantees include –as I repeat herein- the lack of an investigative declaration (*declaración indagatoria)* subsequent to such incredible re-characterization. That is to say, he was deprived of such elemental means of defense, that consists in the direct communication of the judge with the accused of the facts for which such person is being investigated, facts that although identical to the ones already investigated, were reinterpreted with a much more grievous characterization. In this manner, Dr. Martínez de Hoz was also deprived from the possibility of raising defenses against such new characterization.

(175) It is irrelevant thatthe Federal Chamber in 1988 examined the facts to adopt a decision in relation to a preventive detention, because 1988 ruling was final judgment on the facts and the evidence.So if the file had returned to that same tribunal in those days, the Federal Chamber would have not been able to issue a decision that was different than its July 1988 ruling. Such ruling was definitely final and conclusive, at least as regards the evidence gather until that time in the court record. And no other evidence was ever incorporated either in the meantime, during 25 years, or subsequently.

(176) When an intermediate ruling affects the freedom of an 87-year old person, such ruling turns into a final and conclusive judgment, apart from violating the principle of innocence, because what it is actually doing is imposing a punishment in advance to someone who due to his old age, will face a conviction for the rest of his life.

(177) As stated by the European Court of Human Rights, the presumption of innocence "*must be interpreted in such a way as to guarantee rights which are practical and effective as opposed to theoretical and illusory".*[109]

(178) The Argentine Supreme Court's denial to apply its own precedent in the "Martínez de Hoz" case amounts to a violation of the principle of equality before the law.

(179) Therefore, neither international legal scholars, nor Argentine laws or Argentine or international court decisions allow what has been done to my father, in violation of his right not to be persecuted twice for the same facts.

B. Inadmissible re-characterization of the criminal offense as a crime against humanity for the sole purpose of avoiding statutory limitations and thus, enabling, a new preventive detention of the accused. Erroneous consideration of the context element (Convention, Articles 9 and 7)

1. Legal Standard

(180) Article 9 of the Convention recognizes the principle of *nullum crimen nulla poena sine legepraevia* in criminal law, prescribing that:

> "No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom."

[109]Eur. Court HR, Case of Allenet de Ribemont v. France, judgment of 10 February 1995, Series A, Nº 308, p. 16, para. 35.

(181) On the other hand, the first three paragraphs of Article 7 of the Convention establish that:

> 1. Every person has the right to personal liberty and security.
>
> 2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
>
> 3. No one shall be subject to arbitrary arrest or imprisonment.

(182) In turn, there are plenty IACHR's cases holding that preventive detentions must strictly abide by the *nullum crimen nulla poena sine legepraevia* principle,and that they cannot be arbitrary or used as a means of punishment. Thus, for example, in the case of "*García Asto y Ramírez Rojas*", which in turn cites previous cases, states that:

> "The Court understands that preventive detention is the most serious measure that can be applied to someone accused of a crime, wherefore its application must be exceptional, as it is limited by the principles of *nullum crimen nulla poena sine legepraevia*, presumption of innocence, need, and proportionality, which are essential in a democratic society. In this regard, the Court has stated that preventive detention is a precautionary measure, and not a punitive one."[110].

(183) In the same case, the IACHR has also held:

> "187. The Court has held that under the Rule of Law, the principle of freedom from *ex post facto* laws governs the actions of all State agencies, in relation to their respectiveduties, particularly when they must exercise their punitive power.

[110]IACtHR, case of *García Asto y Ramirez Rojas vs. Perú*, ruling dated November 25, 2005, at para. 106.

"188. Concerning the *nullum crimen nulla poena sine lege praevia* principle of criminal law, the Court has asserted that definitions of crimes must clearly describe the criminalized conduct, establishing its elements, and the factors that distinguish it from other forms of conduct that are either not punishable or punishable with non-criminal measures.

"189. The American Convention requires States to make ever effort to apply criminal sanctions with strict respect for people's basic rights, after carefully ascertaining the actual existence of illegal conduct.

"190. In this regard, it is incumbent upon the criminal judge, upon applying criminal law, to strictly abide by the provisions thereof and be extremely rigorous when likening the accused person's conduct to the criminal definition, so as not to punish someone for acts that are not punishable under the legal system.

"191. Pursuant to the principle of non-retroactivity of unfavorable criminal laws, the State must not exercise its punitive power by applying, retroactively, criminal laws that impose heavier penalties, establish aggravating circumstances or create aggravated definitions of the crime. Likewise, this principle implies that a person may not be convicted of an act that, at the time of its commission, was not criminalized or punishable."[111]. (Emphasis added).

(184) And under paragraph 206 of such order, the Inter-American Court established that *"the description of an act as wrongful and the formulation of its legal effects must precede the conduct of the individual deemed to be liable for an infringement".* (Emphasis added).

(185) But additionally, observes the inconsistency existing between the two legal categories that were imputed on the petitioners of the case before the Inter-American system: being members of a terrorist organization and collaborating with terrorism.

[111]IACtHR, case of *García Asto y Ramirez Rojas vs. Peru*, ruling of November 25, 2005, at paras.187 to 191.

(186) Prior to the ruling, the arguments of the honorable members of the IACHR were as follows:

> "…The sentences imposed on Wilson García-Asto and Urcesino Ramírez-Rojas "as well as the new proceedings brought against them on the basis of the application of the same rules [...], under the reinterpretations [required] from Peruvian judges by the case law of the Constitutional Court of January 3, 2003, violate the *nullum crimen nulla poena sine lege praevia* principle …[112]" [Brackets in the original. (Emphasis added].

2. Decision adopted by the Argentine State

(187) As earlier explained, in order to re-open a case closed decades ago and issue a new preventive detention order against my father, the judge re-characterized the facts that had already been examined and discarded by the Federal Appellate Court. Thus, facts that were initially characterized as an extortive kidnapping were re-characterized as a "crime against humanity".

(188) Such re-characterization was neither prescribed by law nor by court decisions in Argentina at the time of occurrence of the facts. And, as earlier explained, such retroactive harsher re-characterization labeling the facts as a crime against humanity was made with the obvious purpose of avoiding the statute of limitations which had already run out on the criminal action, and thus, ensure my father's detention by charging him with a crime that would bar his freedom during the pendency of the trial in spite of the fact that during more than 30 years he always appeared in court when summoned by the courts.

[112]IACtHR, case of *García Asto y Ramirez Rojas vs. Perú*, ruling of November 25, 2005, at para.176 a), citing the arguments of the IACHR.

(189) The only crime for which my father was investigated was time-barred by the statute of limitations when the case was re-opened in 2006. In fact, pursuant to Article 62 sub-section 1 of the Argentine Criminal Code the statute of limitations of criminal actions is of 15 years in the case of crimes carrying a penalty of imprisonment or perpetual imprisonment (*reclusión o prisión perpetua*). This is the maximum period of limitations that the state has for the prosecution of serious crimes.

(190) On September 4, 2006, sixteen years after the case was closed, the nullity of the procedural actions ordered by Executive Decree No. 2745/90, namely: "*the dismissal order of page 1584 [of the case record]"* (dated April 8, 1991) issued as a consequence of the presidential pardon and related issues. The nullity, as we have already mentioned, did not include previous procedural actions, and thus the Federal Appellate Court ruling of July 14, 1988 that revoked the first preventive detention of the defendant, became final and non-appealable.

(191) As to international precedents and customary international law, even the false attribution of facts that the Argentine State asserts against my father does not fit the parameters of the crime against humanity.

(192) The re characterization of the allegedly punishable conduct was unexpected and adopted 18 years after my father had been investigated, questioned, detained and then released for the same facts.

(193) The argument raised by the judge hearing the case, which was later affirmed by appellate stages, was exclusively based on the circumstance that the detention of Messrs. Gutheim was perpetrated during a military government that perpetrated other serious violations of human rights, and this second time, the judges did not even make an effort to invoke any statutory or case law precedent whatsoever to support such re-characterization.[113]

3. Violation of domestic and international rules

(194) The contents of the so-called principle of legality –i.e. *nullum crimen nulla poena sine legepraevia*- is universally accepted. This guarantee encompasses not only the impossibility of being tried under a statutory criminal category that did not exist at the time when the facts under investigation were committed, but also that no harsher or more burdensome effects penalty can be imposed on the accused than those that existed at the time of the commission of such facts. This is precisely was is confirmed by the doctrine of the Inter-American Court, as held in the referred case of "*García Asto y Ramírez Rojas":*

> "…the characterization of a *fact* as unlawful and the determination of its legal effects must be pre-existing to the conduct of the subject deemed to be the perpetrator".[114]

(195) The new characterization, against my father, carries much more harsher legal effects, among them, the imprescriptibility and the refusal to release the accused, based, precisely, in the serious re-characterization of the fact investigated as a crime against humanity. Thus, the re-characterization has introduced, against Martínez de Hoz,

[113] *See* preventive detention order dated May 4, 2010. *See* **Documentation Exhibit No. 1, earlier cited.**

[114] IACtHR, Caseof *García Asto y Ramirez Rojas vs. Perú*, ruling dated November 25, 2005, at paragraph 22.

harsher consequences that are not supported in any domestic, national or international rule, and which, moreover, did not exist at the time of the facts.

(196) Although the circumstances in "*García Asto y Ramírez Rojas*" differ in many aspects from the instant case, both have many elements in common: in both, the case was re-opened after having been closed and having remained inactive; in both cases the legal characterization was reinterpreted, as highlighted by the honorable IACHR and additionally, in both cases, *García Asto and Ramírez Rojas*, on the one hand, and *Martínez de Hoz*, on the other, the incrimination of crimes that are inconsistent between themselves have been added up, for the sole purpose of keeping the defendants imprisoned.

(197) Setting aside the "lack of involvement" of my father and no matter how repugnant an extortive kidnapping may be, the charges as formulated against him are not compatible with a crime against humanity.

(198) Crimes against humanity require a systematic attack against a civilian population and the awareness of criminal actions as part of the attack. A portion of the legal doctrine considers a discriminatory element as part of the definition; that is, the requirement that the offense was committed on the grounds of political hatred, racial, ethnic, national o religious.[115]

[115] The doctrine laid down in the *Tadic* case by the International Tribunal for the former Yugoslavia requires the existence of the discriminatory element for a charge of a crime against humanity to be admissible.

Professor Mahmoud Cherif Bassiouni, once nominated for the Peace Nobel Prize and whom many consider the *father* of the International Criminal Law due to his extensive works in this field, provides a clear characterization of the actions that may be classified as crimes against humanity:

(199) The above paragraph does not mean that a kidnapping for extortion can never constitute a crime against humanity, but the purpose of the extortion should be connected to the objectives of the attack, not withan individual benefit. May be this could happen, for example, during a long confrontation, if somebody kidnaps families of fighters against a government or government opponents in order to force the rebels to lay down their weapons or the opponents to subdue.

(200) Setting asidethe scholarly opinions, the fact is that my father was never accused of participating in the Gutheim's detentionwith the purpose of aiding or achieving a successful an attack against certain sector or the population.

(201) It's true that after the case was re-opened, the Judge as well as the Prosecutor, argued that the Gutheim's detention took place in the context of such an attack. But when they invoke "the context", they refer exclusively to the period <u>in which the events occurred</u>; that is during the military government.

"…the nature of the crime [against humanity] presupposes that multiple murders will occur, and the overall conduct of the perpetrators is intended to generate a certain quantum of human harm. It is, therefore, a collective attack by state actors and non state actors against members of a collectivity, a civilian population, which is the product, result, or outcome of a given policy". (BASSIOUNI, M Cherif. Crimes Against Humanity. Historical Evolution and Contemporary Application; New York, Cambridge University Press, 2012)

In a following chapter, Bassiouni moves forward in his characterization of the category of crimes against humanity:

"The victim Group must be a civilian Group specifically targeted, as in the cases of persecution or gender identity, or as in the case of Article 3 of the International Criminal Tribunal for Rwanda which identifies national, political, ethnic, racial, and religious in a manner reminiscent of the elements of genocide. But the civilian Group does not have to be identified in any particular way. For instance, a violent totalitarian regime can indiscriminately target a civilian Group with the intention of instilling terror in the population at large but without the intention of targeting that civilian Group. More commonly, the violence is used against any opponents or would-be opponents of the regime".

Bassiouni clearly explain:

"Discrimination, as required in a crime against humanity, is the exclusion, without valid legal justification, of a Group of persons from the protection afforded to others, by national laws, or the subjection of that identified group of persons to laws from which others are exempted, with the result that harm befalls the targeted Group. […] The element of discrimination evidences the collective nature of the crime and its scope should not be defined in a way that excludes certain groups because of their particularity".

(202) In the Martínez de Hoz case, the new ruling of the Federal Appellate Court in 2008 that annulled the presidential pardon, adopts the Supreme court arguments, and held through Judge Horacio Cattani's majority opinion:

> "…the facts that are under investigation were part of an attack suffered by the Argentine population during the 1976-1983 period, given that the victims of such acts have suffered the effects of state terrorism, that violated their rights during their unlawful detention, and where specifically net commercial measures were also sought to be obtained from them …"[116]

(203) A characterization of a context exclusively by the time in which the facts occur is insufficient and absurd. In addition, this reasoning opens the door for allowing that any public official who served at that time be charged with a crime against humanity only because the events occurred between 1976 and 1983.

(204) We must note the danger involved, the legal uncertainty created and the lack of guarantees arising from the pure discretion and the possibility, for the courts, to force the criminal characterization only according to the context when the events took place. This kind of conduct violates the principle of "no crime without a law", given that a crime does not consist in a generic doing.[117]

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[116] Emphasis added. *See***Documentation Exhibit No. 12** (particularly the third paragraph of page 11 of such Exhibit). Horacio Cattani was the Judge who had excused himself in this case because he had admitted that his opinion would not be impartial. Notwithstanding, not only he was not separated from the case; moreover, he opined in the first place against my father. In Argentina, the first argument frequently leads the other Judges' opinion. See ¶ 37 and 373-374 above.

[117] (Argentine Legal Scholar) Soler, Sebastián, DERECHO PENAL ARGENTINO (ARGENTINE CRIMINAL LAW), Buenos Aires, TEA, 10º Full Reprint, pages 321 and 322.

(205) Apart from the demonstration of the lack of involvement of my father, as acourt had stated by anunchallenged resolution, even the purposes they attributed to my father in order to involve him have no connection with a crime against humanity.

(206) On the other hand, regardless of the purpose sought, the procedures employed in the conduct under investigation did not respond either to the parameters of a crime against humanity. In a country where thousands of forced disappearances were perpetrated, a detention that lasted approximately five months in prison premises resulting from a formal executive decree, passed and recorded in the exercise of a constitutional authority under a declared state of siege, without the communications of the detainees being curtailed in any manner –and who actually contacted their lawyers, notary public etc.- cannot be deemed to amount to a crime against humanity. It should be noted that Messrs. Gutheim never alleged to have suffered any mistreatment or torture. One can of course argue that the detention was unfair, but characterizing such criminal offense as a crime against humanity involves forcing reality, and moreover, underestimating the true nature that crimes that motivated the creation of international tribunals had and have.

(207) From the Nuremberg Principles onwards, crimes against humanity have a specific nature. Precisely, Nuremberg Principle VI has defined crimes against humanity to be:

> "Murder, extermination, enslavement, deportation and other inhumane acts done against any civilian population, or persecutions on political, racial, or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime."

(208) The Inter-American Court has taken such Nuremberg Principles as the legal framework to define the referred crime. In the case of "*Almonacid Arellano*", the IACtHR has held in order to characterize the "context" in Chile:

> "Widespread repression against alleged opponents to the regime (*infra* para. 82(6)) was a standard State policy from that date until the end of the military rule on March 10, 1990".[118]

(209) Professor Larry May, in his book: *"Crimes against humanity: a normative account"*, provides a detailed analysis of the features of this category of crimes, which must meet three elements in order to be characterized as such: 1) be directed against a civilian population; 2) be part of a State or group policy; and 3) be systematic or widespread.[119]

(210) The author offers an explanation regarding the term "population", with reference to civil population which is affected by a crime:

> "The 'population' element is intended to imply *crimes of a collective nature* and thus exclude single or isolated acts… the emphasis is not on the individual victim but rather on the collective. The individual is being victimized not because of his individual attributes but rather because of his membership in a targeted civilian population"..[120](Emphasis in the original).

(211) And Prof. May adds:

> "When individual acts of murder, torture, or rape are said to be directed against a civilian population, there must be a clear causal connection between what the accused individual did and what

[118] IACtHR, *Case* of *Almonacid Arellano* et al *v. Chile*, ruling dated September 26, 2006, at para. 82.4

[119] MAY, Larry. *"Crimes against humanity: a normative account"*; Cambridge, Cambridge University Press (UK), 2005; Cap.7.II (Three uncontroversial elements of crimes against humanity).

[120] MAY…*op.cit…*; Cap.7.II.A:

happened to that civilian population. It would not be sufficient for the victim of murder, torture, or rape merely to be a member of a larger civilian population. Not every attack on a member of a group is also an attack on the group itself. As will be explored later, when the intentions of a perpetrator are personal –for instance, attempting to seek revenge for a personal slight. An attack on a member of a civilian population may be merely an attack on that persona alone. For an assault by an individual to be directed at a civilian population, more is needed than merely showing that the person attacked was a member of a population group".[121] (Emphasis added)

(212) Moreover –and even if in this case it goes without saying –for the action to be characterized as a crime against humanity,the individual action must also be connected with a specific manner and not in any manner with the general plan:

> "...it is not sufficient to show that the individual's act is indeed a part of that plan. For an individual act to manifest the group plan, the individual must do something so that the plan can be characterized as his or hers. Otherwise, the case could be an individual act that forms part of a larger action only by coincidence".[122]

(213) The Argentine Supreme Court itself holds something very similar to characterize crimes against humanity, a criterion that contradicts the position currently adopted by the Argentine Judges in the case of my father against which we are resorting to this international jurisdiction.. In fact, in the case "*Derecho, René Jesús"*, the Supreme Court held that:

> "…crimes against humanity, as well as crimes against persons, both involve harming the fundamental rights of human beings. The distinction is based on the fact that crimes against humanity not only harm the victim whose basic rights are injured by the crime, but harm, also, humanity as a whole. This is the feature that justifies, *inter alia,* the universal jurisdiction of this category of

[121] MAY…*op.cit…* Cap.7.II.A:

[122] MAY…*op.cit…*; Cap.7.II.B.

> crimes. The perpetrator commits a crime against humanity as a whole, not just against its direct victim. Accordingly, legal scholar Satzger explains that, the perpetrator of a crime against humanity, with his conduct, rebels himself against a minimum standard of rights of humanity as a whole. The legal category of crimes against humanity protect the interests of individual persons only in a secondary manner".[123]

(214) Also, the Argentine Supreme Court itself holds that, in the case of crimes against humanity, the criminal categories protect the interests of individual persons only indirectly, because protection is actually being afforded to political, racial or religious groups, from a systematic persecution. Whatever the right doctrine on this subject might be,the charges against my father contradict the criteria followed by the Supreme Court in relation with other cases, is noticeable.

(215) Curiously, in this case, neither Messrs. Gutheim nor the 1984 first instance court order imposing the preventive detention of my father, nor the current order that imposed the second preventive detention of him, contend that the detention of Messrs. Gutheim were related in any manner to their political affiliation or membership of any racial or religious group.

(216) The detention of Messrs. Gutheim, as evidenced in this case, was ordered under the authority arising from a state of siege declaration and exercising presidential powers vested by Article 23 of the Argentine Constitution. As earlier stated and I repeat herein, this detention may be challenged as arbitrary, but this does not turn it *per se* into a "crime against humanity". Actions were neither underground nor committed in secrecy, Messrs. Gutheim were neither disappeared; nor subjected to tortures or ill-treatments.

[123] *See* Argentine Supreme Court Opinions Exhibit: 330:3074 (René Jesús Derecho).

(217) The authority to place individuals at the disposal of the Federal Executive was used in many periods, even for crimes or economic and financial scandals,[124] and even by democratic governments, such as the Alfonsín Administration. That is to say, the detention of Messrs. Gutheim was totally unrelated to the human rights abuse of the military government period, and was not motivated for ideological, religious or racial reasons, they were never "disappeared", and they, themselves, never alleged to have been tortured or been subjected to ill-treatment. Thus, the crime charged upon my father fails to meet the "generality" requirement necessary to qualify as a crime against humanity.

(218) The requirements established by Article 7 of the Rome Treaty, as widespread and systematic attack against a civilian population,do not apply either.[125]

Even Judge Oyarbide's expressly states in the preventive detention order, that:

> "That the true motive of such detentions is the alleged non-performance incurred by SADECO S.C.A., a firm of which Federico Gutheim was the titleholder, by failing to deliver approximately 4,760 tons of cotton fiber, destined to importers headquartered in the City of Hong Kong; there being no other employment or operation relation with the son of Mr. Federico Gutheim, Miguel Ernesto Gutheim, with the exception of being the holder of the shares of the referred exporting company".[126]

(219) It is impossible to characterize these facts in the context of "*a widespread and systematic attack*". Concurrently, the International Criminal Court has concluded that: *"This requirement excludes an isolated inhumane act committed by a perpetrator who acted on its*

[124] *See* in the original record the testimony of former Home Minister Harguindeguy on pages 472 and 459.

[125] *See* **Argentine Legislation Exhibit**.

[126] ***See*** **Documentation Exhibit No. 1.**

own initiative and directed to one single victim" (International Criminal Tribunal for former Yugoslavia).

(220) The application of a criterion different from the one stemming from the Argentine Supreme Court precedents, for the sole purpose of keeping my father imprisoned, involves a violation of the principle of equality before the law and constitutes a further element that evidences the partiality and lack of independence of the Argentine judiciary, a matter that will be analyzed in detail later below.

(221) Finally, re-characterizing under a harsher category and in a retroactive manner, a set of facts that have already been assessed by the courts and moreover, without having interrogated the defendant after such re-characterization, constitutes in itself a violation of the human rights and the guarantees protected by the Convention.

C. Violation of the right to be tried within a reasonable period (Convention, Article 8.1) and the principle of presumption of innocence (Convention, Article 8.2). Cruel, inhumane and degrading treatment (Convention, Article 5.2.)

1. Legal Standard

(222) Article 8, para. 1 of the Convention recognizes the right to be heard within a reasonable time, which the decisions of the Inter-American Court have construed as the right to be tried within a reasonable time.

(223) Additionally, the referred Article of the Convention, establishes in its para. 2:

> "Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law."

(224) In the case of "*Genie Lacayo v. Nicaragua*", the Inter-American Court of Human Rights held that[127]:

> "Article 8(1) of the Convention also refers to a reasonable time period. This is not an easy concept to define. In defining it, one may invoke the elements underlined by the European Court of Human Rights in various decisions in which this concept was analyzed, given that this article of the American Convention is equivalent in principle to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. According to the European Court, three elements must be taken into account in determining the reasonableness of the time period within which the trial must be conducted: a) the complexity of the matter; b) the procedural steps taken by the interested party; and c) the behavior of the judicial authorities"[128].

[127] IACtHR, Case of *Genie Lacayo v. Nicaragua*, ruling of January 29, 1977, Section VII, paragraph77.

[128] *See,inter alia, Eur. Court H.R., Motta judgment of 19 February 1991*, Series A no. 195-A, para. 30; *Eur. Court H.R., Ruiz Mateos v. Spain judgment of 23 June 1993*, Series A no. 262, para. 30.

(225) Legal scholar Augusto Medina Otazu has written as follows in reference to the time period of the investigation stage of crimes against humanity.[129]

> "In no way can we mix up the exemption from statutory limitations (*imprescriptibility)* of a crime, with the possibility that its investigation, once started, may last *ad infinitum.* Article 8.1 of the American Convention on Human Rights establishes that: "*Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal…"*[130]*.*

(226) The European Court of Human Rights, in the case of *"Motta v. Italy*" held in para. 17 of its February 19, 1991 judgment that:

> "Article 6 paragraph 1 (Article 6-1) of the Convention guarantees to everyone the right to a final decision within a reasonable time in the determination of any criminal charge against him or of his civil rights and obligations.
>
> "The Court points out, under its case-law on the subject, that the reasonableness of the length of proceedings is to assessed in light of the particular circumstances of the case. In instance the circumstances call for an overall assessment [...]
>
> "As regards the criminal proceedings, the Court notes that the case was not a complex one. [....] The proceedings, at the first instance stage took three years and eight months, from 20 October 1979 to 20 June 1983. Subsequently, three years elapsed from the delivery of the Court of Appeal's judgment on 6 April 1984 until the record was forwarded to the Court of Cassation on 27 April 1987, and a further seven months before the subsequent judgment were employed in the registry, thereby enabling the civil proceedings to be resumed. In these circumstances, in the instant case, the Court cannot regard that a lapse of time involving more

[129] http://www.pensamientopenal.com.ar/01122010/doctrina06.pdf

[130] MEDINA OTAZU, Augusto. *La imprescriptibilidad de los delitos de lesa humanidad y las obligaciones del Estado Peruano con la Comunidad Internacional (*The imprescriptibility of crimes against humanity and the obligations of the State of Peru vis a vis the International Community)

than seven and a half years is "reasonable".[131] (Emphasis added).

(227) A similar situation came again to the consideration of the Inter-American Court on Human Rights in the case of *"Bayarri v. Argentina*", which relevant portion is cited hereinbelow (the footnote hereto also cites the words of the Inter-American Court order)[132]:

> "105. The Court has established that "the reasonable time referred to in Article 8(1) of the Convention should be assessed in relation to the total duration of the criminal proceedings against an accused, until the final judgment is handed down" and that, in this regard, the time begins to count when the first judicial decision is taken charging a particular individual with being the person probably responsible for a specific criminal offense[133].
>
> 106. As the Court has determined (*supra* para. 59), Mr. Bayarri's detention took place on November 18, 1991. In addition, the file shows that, on December 20 that year, Court of First Instance No. 25 issued a committal order against him (*supra* para. 71) and the judgment of first instance sentencing Mr. Bayarri to life imprisonment was handed down on August 6, 2001[134], that is, approximately 10 years later. The appeal filed by the alleged victim was decided in a judgment of the Federal National Criminal and Correctional Appeals

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[131] 17. Article 6 paragraph 1 (Article 6-1) of the Convention guarantees to everyone the right to a final decision within a reasonable time in the determination of any criminal charge against him or of his civil rights and obligations.

The Court points out that, under its case-law on the subject the reasonableness of the length of proceedings is to be assessed in the light of the particular circumstances of the case. In this instance the circumstances call for an overall assessment (*See*, mutatis mutandis, the Obermeier judgment of 28 June 1990, Series Ano. 179, p. 23, para. 72).

As regards the criminal proceedings, the Court notes that the case was not a complex one. Moreover the applicant caused hardly any delay in its examination and indeed on four occasions applied for dates to be set for the hearings (*See* paragraph 9 above, under nos. 22, 23 and 24). The proceedings at first instance took three years and eight months from 20 October 1979 to 20 June 1983. Subsequently, three years elapsed from the delivery of the Court of Appeal's judgment on 6 April 1984 to the delivery of that of the Court of Cassation on 27 April 1987 and a further seven months before the latter judgment was filed with the registry, thereby enabling the civil proceedings to be resumed. In these circumstances the Court cannot regard as "reasonable" in the instant case a lapse of time of more than seven and a half years.

[132]IACtHR, Caseof *Bayarri v. Argentina*, paras.105 to 107.

[133] IACtHR, Case of *Suárez Rosero*, *supra* note 56, para. 70; Case of *Baldeón García v. Peru.Fondo, Reparaciones y Costas,* ruling of April 6 2006, series C No. 147, para 150; and, Case of *Ximenes Lopes vs. Brasil*, *supra* note 79, para. 195.

[134] Judgment of August 6, 2001 rendered by Federal Judge Rodolfo Canicoba Corral, (evidence for best adjudication filed by the State, exp7176cuerpo30_92.pdf, pages 85 *et seq.*).

Chamber of June 1, 2004, acquitting him and ordering his release[135]. 98 The Court observes that this judicial proceeding lasted approximately 13 years, the period during which Mr. Bayarri was subjected to preventive detention (*supra* para. 71).

"107. In previous cases, when analyzing the reasonableness of the duration of the proceedings, the Court has assessed the following elements: (a) the complexity of the matter; (b) the procedural activity of the interested party, and (c) the conduct of the judicial authorities[136]. Nevertheless, [in the instant case,] the Court finds that there was a notorious delay in the abovementioned proceedings, with no reasonable explanation. Consequently, it is not necessary to examine these criteria. Bearing in mind, also, the acknowledgement of the facts that was made (*supra* paras. 29 and 30), the Court finds that, with regard to the said criminal case, the State violated Article 8(1) of the American Convention to the detriment of Juan Carlos Bayarri."

(228) The Inter-American Court judgment, in *"Bayarri"*, correctly links the unjustified delay with the preventive detention of the accused and the violation of the presumption of innocence, thus it resolved as follows:

"110. This Court has established that, since preventive detention is a precautionary rather than a punitive measure, there is a "State obligation not to restrict the liberty of the person detained over and above limits that are strictly necessary to ensure that he does not impede the development of the proceedings or evade the action of justice."[137]. Acting in any other way would be tantamount to anticipating the punishment, which violates general principles of law that are widely recognized, including the principle of presumption of innocence.[138] Indeed, on previous occasions, the Court has found that, by depriving individuals whose criminal responsibility has not been established of liberty unnecessarily or disproportionately, the State has violated the right of all persons to be presumed innocent, recognized in Article 8(2) of the American Convention.[139] The same conclusion should be reached if the State keeps a person in

[135] Judgment of June 1, 2004 rendered by Panel I of the Federal Criminal Appellate Court (file containing exhibits to the complaint, exhibit 1.7, pages 27 to 54).

[136] IACtHR Case of *Suárez Rosero v. Ecuador, supra* footnote 56, para. 70; and Case of *Chaparro Álvarez y Lapo Íñiguez v. Ecuador*, *supra* footnote 9, para. 145.

[137] IACtHR Case of *Suárez Rosero v. Ecuador, supra* footnote 56, para. 70; and Case of *Chaparro Álvarez y Lapo Íñiguez v. Ecuador*, *supra* footnote 9, para. 145.

[138] IACtHR Case of *Suárez Rosero v.Ecuador, supra footnote* 56, para. 77; and Caseof *Chaparro Álvarez y Lapo Íñiguez v. Ecuador*, *supra* footnote 9, para. 146.

[139] IACtHR Case of *Suárez Rosero v. Ecuador, supra footnote* 56, para. 77; and Case of *Chaparro Álvarez y Lapo Íñiguez v. Ecuador*, *supra* footnote 9, para. 146.

preventive detention over and above the temporal limits established by the right embodied in Article 7(5) of the American Convention (*supra* para. 70).". (Emphasis added).

(229) The "United Nations Standard Minimum Rules for Non-Custodial Measures" or the "Tokyo Rules", established by the United Nations High Commissioner and adopted by the United Nations General Assembly by Resolution No. 45/110 of December 14, 1990, establish as follows:

> "6.1 Pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim. (Emphasis added).
>
> "6.2 Alternatives to pre-trial detention shall be employed at as early a stage as possible. Pre-trial detention shall last no longer than necessary to achieve the objectives stated under rule 5.1 and shall be administered humanely and with respect for the inherent dignity of human beings."

(230) It is worth recalling the case of "*García Asto y Ramírez Rojas"*, where the Inter-American Court reinforced its doctrine:

> "The Court understands that preventive detention is the most serious measure that can be applied to someone accused of a crime, wherefore its application must be exceptional, as it is limited by the principles of *nullum crimen nulla poena sine legepraevia*, presumption of innocence, need, and proportionality, which are essential in a democratic society. In this regard, the Court has stated that preventive detention is a precautionary measure, and not a punitive one[140]*"*. (Emphasis added).

(231) On the other hand, the American Convention on Human Rights prescribes in its Article 5.2:

> "No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."

[140] IACtHR, Case of *García Asto y Ramírez Rojas v. Perú*, judgment of November 25, 2005, para. 106.

(232) Additionally, in 1989 Argentina ratified the Inter-American Convention to Prevent and Punish Torture, which Article 2 prescribes as follows:

> "For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish" (Emphasis added).

(233) Although such Convention excludes lawful measures, it expressly provides that this exclusion does not include acts referred to in the above paragraph.

(234) In the case of *"Suárez Rosero v. Ecuador"*, the Inter-American Court held that a criminal proceeding that lasted for more than 50 months was unreasonable.[141] In that same judgment, the IACtHR stated that:

> "This Court is of the view that the principle of the presumption of innocence - inasmuch as it lays down that a person is innocent until proven guilty- is founded upon the existence of judicial guarantees. Article 8(2) of the Convention establishes the obligation of the State not to restrict the liberty of a detained person beyond the limits strictly necessary to ensure that he will not impede the efficient development of an investigation and that he will not evade justice; preventive detention is, therefore, a precautionary rather than a punitive measure. This concept is laid down in a goodly number of instruments of international human rights law, including the International Covenant on Civil and Political Rights, which provides that preventive detention should not be the normal practice in relation to persons who are to stand trial (Art. 9(3)).[142]"

[141] IACtHR, Case of *Suárez Rosero v. Ecuador*, judgment of November 12, 1997, para. 73.

[142] IACtHR, Case of *Suárez Rosero v. Ecuador*, judgment of November 12, 1997, para. 77.

(235) In the already referred case of "*Genie Lacayo v. Nicaragua*", the IACtHR held that:

> "Even considering the complexity of the case, as well as the excuses, impediments and substitution of judges of the Supreme Court of Justice, the term in excess of two years that has elapsed since the application for judicial review was admitted is not reasonable; this Tribunal therefore deems it to violate Article 8(1) of the Convention. (Emphasis added).[143]

(236) In the referred case the IACtHR deemed that a term in excess of two years was unreasonable, even in the context of a complex issue. In this case, also, more than two years have elapsed since the issue of the new preventive detention order, and, additionally there is no complexity for the courts, because all the evidence existing in the case had already been examined a quarter of a century ago.

(237) In the case of the "*Masacres de Ituango v. Colombia*", submitted to the Inter-American Court, Judge Sergio García Ramírez laid down very clear guidelines on this issue:[144]

> "Justice would remain adrift, pending, unattained or illusory, if the decisions by which it is achieved were not produced promptly.".
> […]
>
> "Regarding the issue that we are now examining, the reasonableness of time must also be assessed (although not exclusively) from the perspective of the burden – from light to intolerable – that the passage of time imposes of the individual who awaits the solution of the conflict affecting him.. [Emphasis added].
>
> […]
>
> "The first official act that affects the rights of the individual is the point of reference to calculate the reasonable time, measure its

[143] IACtHR, Case of *Genie Lacayo v. Nicaragua*, judgment of January 29, 1997, para. 80.

[144] IACtHR, Case of *Masacres de Ituango v. Colombia*, paras. 23, 26 and 35.

duration, compare it with the characteristics of the issue and the reasonable diligence of the State, and assess compliance or non-compliance with the judicial guarantee of reasonable time.". (Emphasis added).

(238) The Inter-American Court judgment contains three definitions that fit the situation that motivates this denunciation: a) The illusory justice, suspended for years, indefinite without time limit in an abuse of exemption from the statute of limitations (*imprescriptibilidad*) under which the action has also been abusively re-characterized;b) The need to take into account the harm that the elapse of time causes to each individual, in light of each individual's particular circumstances. Judge García Ramírez has taken the care of clarifying, in the same vote, that this is not a mathematical formula, but that the lapse of time may result more burdensome for some individuals than for others. Such is my father's case; c) The reasonable time period must be calculated as from the first official act that has commenced affecting the rights of the individual; i.e. in this case, the commencement of the investigation, 28 years ago. "*To the contrary* —adds García Ramírez— *it would be enough to fragment the prosecution, to open-up long periods of investigation …"*, so as to frustrate one of the fundamental rights of individuals, that is the peace that everybody deserves as regards his/her legal condition.[145]

(239) It is clear then, what happens when the argument of exemption from the statute of limitations is abusively used in order to keep a proceeding open for an indefinite time. The legal device of exemption from the statute of limitations (*imprescriptibilidad*) cannot be the basis for endless re-openings of a case, so that, as in a Franz Kafka's novel, the proceeding itself is already the sentence.

[145]Report 57/00 – Case 12050.

2. Actions and omissions of the Argentine State

(240) In 2006 the Argentine State reopened the criminal casethat had been commenced against my father in 1984 and closed after a ruling rendered by the Federal Appellate Court, in 1988, deciding that José Alfredo Martínez de Hoz was unrelated to the facts of the case and that, therefore, he should be immediately released.

(241) After the re-opening and a series of steps that have been earlier described herein, in May 2010, the judge issued a new preventive detention order against my father; a measure that was thus applied for a second time in the same case and that was affirmed in all the subsequent higher court stages.

(242) No reliable circumstance was alleged for ordering this second preventive detention, apart from the alleged fear of the defendant's any hypothetical act intending to elude or obstruct the investigations.

(243) The "support" that the judge provided to deny my father's release was that: the perpetrator of the facts that were imputed on him, could also attempt to escape or to obstruct the actions of the judiciary.[146] Thus, deeming as evidenced all the facts that the courts had discarded back in 1988.

(244) Recently -and in spite of the fact that more than 2 years have elapsed since my father's detention due to the second preventive detention ordered in May 2010- on October 1, 2012, the judge hearing

[146] *See* Ruling of May 4, 2010 in **Documentation Exhibit No. 1** earlier cited (pages 2872 *et seq.* of the file)**.**

the case extended my father's preventive detention for another additional year. This decision was affirmed by the Federal Chamber on December 12 2012 which paradoxically also argued the risk of obstruction of justice in the context of a case which investigation finalized more than 20 years ago and in which the investigation period has been closed and is being sent to the final phase of arguments..[147] This without considering that due his fragile health my father is no position to obstruct any court proceeding.[148]

(245) My father is currently 87 years old, and is seriously ill, with mobility problems that have been evidenced not only by the physicians of several private clinics but also by those of the jail where he was confined until an *habeas corpus* ordered his return to the clinic where he was being treated and operated on.

(246) My father's fragile health condition can be clearly noticed from the new reports on his physical condition, some of which appear transcribed in the section herein describing his health condition.

(247) There is no "flight risk" nor risk of obstruction of justice as misleadingly portrayed.

3. Violations of domestic and international rules

(248) The unnecessary prolongation of a proceeding in which the facts have already been investigated more than 20 years ago has the sole purpose of keeping imprisoned a man that has not been convicted (and

[147] See ¶ 39 above.

[148] *See* **Documentation Exhibit No. 45.**

moreover exonerated in relation to the same facts more than 20 years ago), whose physical condition is severely damaged.

(249) The prolongation of the detention of my father contrasts with the criteria of the European Court of Human Rights that deemed that a seven years and a half term exceeded the limit of reasonableness to maintain a case open, without offering the accused any guarantees as to the final outcome. In my father's case,the proceedings commenced more than 28 years ago and were re-opened six years ago; when, even worse, in the first stage, the same higher court concluded that he was unrelated to the facts.

(250) The conduct of the Argentine State -that was already condemned by the Inter-American Court of Human Rights in the "*Bayarri*" case- is, precisely, the one that is being repeated in the case against Martínez de Hoz, since re-ordering a preventive detention that had already been declared inadmissible by the Federal Appellate Court, without incorporating any new evidence different from the one existing at that time, and to the detriment of an 80 year old man, is tantamount to a final conviction in advance, thus violating the presumption of innocence principle enshrined in Article 8.2 of the Convention.

(251) And if we exclusively focus in the time elapsed from the issue of the new preventive detention order against Martínez de Hoz on May 4, 2010, we can notice that also exclusively in relation to this stage, the State has infringed the limits of time reasonableness, in light of the IACtHR.

(252) The unnecessary preventive detention, the transfer to a common prison and the constant pressure exerted by the judge on the physicians, with complex procedures each time my father has to undergo a new operation or test outside his home, amount to a cruel, inhumane and degrading treatment.

(253) Apart from having been released in this same case more than 20 years ago, my father who is sick and afflicted by serious mobility problems, remained in Argentina from the date he left office back in 1981 (thirty years), without ever eluding the requirements of the courts. What was therefore the need to impose a preventive detention on someone who having been subjected to threats and investigations several times has lived always in his apartment –owned by him long before taking office as a Minister?.

(254) What was the need to even go as far as to dragging someone who was unfairly and twice charged in the same case, from a clinic where he was being treated, to transfer him to a common jail, if not to subject him to a cruel, inhuman and degrading treatment?.

(255) Somebody could ask what harm can a preventive detention cause to a person who has so many walking difficulties and who is currently placed under home-detention. First, it is the feeling of the unfairness involved in being imprisoned and publicly accused of actions for which one is innocent. Secondly, it is the psychological feeling of being imprisoned, and additionally, prevented from behaving as a normal person of his age would do. In fact: for a person of his age, simple every day activities mean a lot to him since they are practically the only ones that he can enjoy. A visit to the park -even on a wheel-chair- or sharing a short family outing or attending the birthday party of a

grandchild, are every day activities that one cannot sufficiently appreciate until you are banned to do them. Thus, my father could not attend the wedding of his first grandson, in spite of the fact that the wedding was celebrated at the church just in front of his home and, was deprived from sharing the family table at such significant event. The suffering is aggravated by the impotence that arises in the face of the unfairness of this case, where the defendant knows that judges who heard the case during democratic times had at that time released him in a final and conclusive manner, and that he is now enduring a new punishment that as much as cruel as endless.

(256) To the above, we must add regular complications that arise. For example, apart from his serious health problems that led to his hospitalizations or operations, Mr. Martínez de Hoz suffers from acute hypoacusi, regular pneumonia and other ailments. However, his visits to health clinics are limited, because for each outing he must first obtain prior court authorization and he must be transferred in a heavily guarded prison service vehicle. In some instances he has even been transferred by a specialized SWAT-type police staff, with the resulting security deployment in the street.[149]

(257) It is impossible that Martínez de Hoz, with his old age and back surgery, could flee and walk around the country or abroad. Moreover, in his poor health condition he could not in any way obstruct any kind of investigation. Additionally, the investigation has been exhausted more than two decades ago, and as we have seen, the investigation period has been closed. In law, it is not sufficient to toss an hypothesis into the air, such hypothesis must be supported and evidenced,

[149] *See* **Press Exhibit Nos. 5 and 104.**

particularly if the argument that is being raised is the basis for restricting a human right as essential as freedom.

(258) Now, if the Argentine state –as its officials imply and even say in different ways- contends that a person, for having collaborated providing technical services to a military government deserves to stand such an unfair treatment and undergo such unnecessary hardships, we are not talking about human rights, but about another thing. We are talking about ideological hate and vengeance, that is to say, an illegitimate use of human rights.

(259) All the precedents and decisions of the IACtHR have been violated by the Argentine State, only because this case involves a person as regards whom the Executive has decided that he does not deserve the protection that the human rights system affords.

(260) It is unnecessary to repeat here the profuse precedents of the IACtHR, in the sense that, since the preventive detention is a precautionary and not a punitive measure, it can only be applied when there are grounded motives to assume that the accused will elude or obstruct the action of the courts. The judge's argument consisting in that, precisely this could occur, would result ridiculous, were it not for the drama that it unleashes.

(261) But additionally, the alleged grounds on which the judge attempts to support such hypothesis violates in itself the presumption of innocence principle, because the court holds that whoever has committed the offenses that are imputed on Martínez de Hoz can forseeably elude the actions of the courts. Thus, apart from introducing a circular element, without the support of any prior premise,

the court is assuming, beforehand, the authorship of actions as regards which no conviction exists and, moreover, facts as regards which the Federal Appellate Court itself, in 1988, had held that were unrelated to Martínez de Hoz.

(262) Precisely, the same argument was raised by the judges in the case of "*García Asto y Ramírez Rojas*", on which the Hon. Commission and the Court issued a decision: that those who had perpetrated the crimes imputed on them could elude the action of the courts.

(263) The principle of innocence is, thus, violated twofold: because a fact that was not proved (moreover, it was discarded by the courts) is used as grounds for supporting the preventive detention and because the prolonged preventive detention, applied to a sick 87-year old person, is a punitive and final measure.

D. Violation of the right to be tried by an impartial court (Convention, Article 8.1), of the right to equality and non-discrimination (Convention, Article1)

1. Legal standard

(264) The American Convention on Human Rights prescribes in the relevant part of Article 8, para. 1) that:

> "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him …" (Emphasis added).

And Article 1 thereof prescribes that:

"The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

(265) In the well-known case *"Herrera Ulloa v. Costa Rica"*, the Inter-American Court, adopting the doctrine of the European Court of Human Rights, defined the scope of such guarantee:[150]

"170. The European Court has held that "impartiality" involves both objective and subjective aspects:

First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect. Under the objective test, it must be determined whether, quite apart from the judges' personal conduct, there are ascertainable facts which may raise doubts as to their impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to proceedings".

171. The Court considers that right to be tried by an impartial judge or court is a fundamental guarantee of due process. In other words, the person on trial must have the guarantee that the judge or court presiding over his case brings to it the utmost objectivity. This allows in turn, for courts to inspire the necessary trust and confidence in the parties to the case and in the citizens of a democratic society. (Emphasis added).

(266) Moreover, the Argentine Supreme Court itself has adopted verbatim such position in the "*Llerena*" case, on May 17, 2005, that is to say with the Supreme Court same current composition.[151]

[150] IACtHR, Caseof *Herrera Ulloa v. Costa Rica*, judgment of July 2, 2004, paras.170 and 171.

[151] *See* Exhibit of Argentine Supreme Court Opinions: 328:1491.

(267) In the case of the *"Constitutional Court (Aguirre Roca, Rey Terry y Revoredo Marzano) v. Peru*", although it involved the dismissal of the judges of such court, precisely for this reason, the IACtHR held that:[152]

> "Constitutional Court justices in Latin American countries must be guaranteed independence, autonomy and impartiality. Peru's legal system establishes that the Constitutional Court justices, as judges who control the constitutionality of the laws and, in final instance, examine the actions to guarantee or protect fundamental rights, must enjoy independence, autonomy and impartiality in the exercise of their functions;
>
> "In the instant case, the independence of the judges must be examined in relation to the Constitutional Court's possibility of delivering judgments contrary to the Executive and the Legislature, and also the role that Congress should play when it acts as judge in a proceeding to dismiss justices. Any act of the State that affects this independence and autonomy is contrary to Article 8 of the Convention…"

(268) The partiality or impartiality of a judge may also be assessed from the actions performed by the judge or the prosecutor during the case and not only by the prior circumstances thereof. This stems from the words of Inter-American Court itself in the case of "*Hermanas Serrano Cruz v. El Salvador"*:

> "…upon rendering testimony at a public hearing in this Court (supra par. 36) the prosecutor showed with its declarations that he had not been impartial in the investigation and that the investigation line of the criminal case was not independent in the defense of the State before this Inter-American Court".[153]

(269) According to the European Court of Human Rights, the presumption of innocence will thus be violated, for instance, "*if a*

[152] IACtHR, Case of *Tribunal Constitucional (Aguirre Roca, Rey Terry y Revoredo Marzano) v. Peru*, judgment of January 31, 2001. Reproduction of the arguments of the IACHR para.64, a).

[153] IACtHR, Case of *Hermanas Serrano de la Cruz v. El Salvador*, para. 103.

judicial decision concerning a person charged with a criminal reflects an opinion that he is guilty before he has been proved guilty according to law", and it is sufficient, *"even in the absence of any formal finding, that there is some reasoning suggesting that the court regards the accused as guilty*". [154]The application of this principles to the Gutheim matter yields the conclusion that the judges involved in the successive prosecution of my father, and the review of this prosecution and detention, cannot be said to be impartial.

(270) The application of this principles to the Gutheim matter yields the conclusion that the judges involved in the successive prosecution of my father, and the review of this prosecution and detention, cannot be said to be impartial.

[154] Eur. Court HR, Case of Allenet de Ribemont v. France, judgment of 10 February 1995, Series A, Nº 308, p. 16, para 36; emphasis added.

2. Constitutional issues, legal organization and lack of independence of the Judiciary in Argentina[155]

a. The Argentine Constitution mandates that the different branches of government be independent and separated

(271) The Argentine Constitution of 1853 organized the Nation under a presidential and federal government system and established the separation of powers between the branches of the Executive, Legislative and the Judiciary. The president of the Republic of Argentina is the head of the government and of the Executive Branch. In no event may the president exercise judicial powers, adjudicate pending cases or re-established closed ones.[156] The Legislative Branch resides principally in Congress (composed of two Houses) but also partially in the Executive Branch, to whom Congress may grant legislative powers.[157] The Executive may pass decrees of necessity and urgency under exceptional circumstances without following the regular procedure prescribed in the Constitution for the passing of laws.[158] The Judiciary must be institutionally independent from the Executive and the Legislative Branches.

b. Structure of the Judiciary in Argentina

(272) The Constitution establishes the organization of the Judiciary. There are, additionally, several provincial constitutions that define the

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[155] The Argentine Constitution: http://www.senado.gov.ar/web/interes/constitucional and also Argentine Legislation Exhibit.

[156] Article 109 of the Argentine Constitution, **Argentine Legislation Exhibitor link cited in the heading.**

[157] *See* Article 99 3) of the Argentine Constitution, **Argentine Legislation Exhibitor link cited above.**

[158] Article 76 1) of the Argentine Constitution, **Argentine Legislation Exhibit or link cited above.**The scope of executive decrees of necessity and urgency is restricted given that they cannot regulate issues related to criminal and tax law, and electoral and political parties' structure matters (Article 99, 3) of the Constitution).

organization of each provincial court system, together with the Constitution of the City of Buenos Aires that determines the structure of its own court system.

(273) The Federal Judiciary is composed of the Supreme Court, the Council of the Judiciary (*Consejo de la Magistratura*), the Special Jury (*Jurado de Enjuiciamiento*) and the appellate courts and courts of first instance.[159]

(274) Pursuant to the Federal Constitution, the Judiciary Branch is vested upon one Supreme Court of Justice that is the highest court of the Nation,[160] entrusted with authority to hear cases of significance involving matters governed by the Constitution, federal and national laws and international treaties, *inter alia.* The seven justices of the Supreme Court are appointed by the Executive Branch subject to the consent of the Argentine Senate.[161]

(275) The courts of appeals and the lower courts that compose the Federal Judiciary Branch (the provinces have their own court systems), may be either ordinary courts (*tribunales nacionales)* or federal courts *(federales)*. National ordinary courts are located in the City of Buenos

[159] The constitutional reform of 1994 introduced a new body, independent from the Judiciary, called the State Attorney's General Office (*Ministerio Público*). It is divided in two bodies: the State Attorney's Office for Oversight and Organization (*Ministerio Público Fiscal*) – in charge of overseeing and organizing the duties of the prosecutors – and the State Attorney's Office for Coordination (*Ministerio Público de la Defensa*) –in charge of coordinating prosecutors.

[160] Article 108 of the Argentine Constitution, **Argentine Legislation Exhibit or link cited above.**

[161] *See* Article 99 4) of the Argentine Constitution, **Argentine Legislation Exhibit or link cited above.** The Supreme Court is composed of one President, one Vice-President and five other justices, in accordance with Law No. 26.183, **Argentine Legislation Exhibit.** Prior to this reform, the Supreme Court was composed of nine members: one President, one Vice-president and seven other justices.

Aires, and federal courts, vested with federal jurisdiction, are located throughout Argentina and in the City of Buenos Aires.

(276) The Council of the Judiciary (*Consejo de la Magistratura)* is composed of 13 members, as follows: 3 judges, 3 legislators, 2 lawyers and 1 representative of the Executive and 1 representative of the academic and scientific field.[162] Prior to the latest reform, the Council of the Judiciary was composed of 20 members that included the President of the Supreme Court, 4 judges, 8 legislators, 4 lawyers, 1 representative of the Executive Branch and 2 representatives of the academic and scientific field.[163] As results of the latest reform not only was the number of judges reduced from 4 to 3, but also the President of the Supreme Court no longer sits as a member of the Council of the Judiciary.

(277) The Council of the Judiciary is entrusted with the administration of the Federal Judiciary. The Council of the Judiciary appoints national judges and exercises disciplinary powers over them.[164] It may commence motions to accuse judges before the Special Jury (*Jurado de Enjuiciamiento*).[165] The Supreme Court is vested with the oversight and discipline of the judiciary officers and employees of lower courts.

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[162] *See* Law No. 26.080, Article 1, of February 20, 2006, published in the Official Bulletin on February 27, 2006, [30854], B.O. 1, attached as **Argentine Legislation Exhibit,** amending several articles of Law No. 24.937, published in the Official Bulletin on January 6, 1998, text consolidated by Executive Decree No. 816/1999, published in the Official Bulletin on June 30, 1999, **Argentine Legislation Exhibit.***See* also "*Las Reformas al Consejo de la Magistratura y al Jurado de Enjuiciamiento de la Argentina*", (Reforms to the Council of the Judiciary and the Commission for the Trial of Judges' Misfeasances) Horacio M. Lynch, Revista del Colegio de la Ciudad de Buenos Aires, p. 23, 25, 26 and 28, www.colegioabogados.org.ar/larevista/Article.php?id=31&, Legal Scholars publications and Case Law 232 of the Plaintiff.

[163] *See* Executive Decree No. 816/1999. **Argentine Legislation Exhibit**.

[164] Article 114 of the Argentine Constitution, **Argentine Legislation Exhibit or link cited above.**

[165] *See* Article 115 of the Argentine Constitution, **Argentine Legislation Exhibit o link cited above.** The Jury for the Prosecution of Judges (*Jurado de Enjuiciamiento*) is a special jury

(278) Prior to the 1994 Constitutional Reform that introduced the Council of the Judiciary (*Consejo de la Magistratura*), national judges were appointed by the Executive Branch with the agreement of the Argentine Senate. The selection process was under criticism because it was vulnerable to political influences and some candidates were accused of failing to meet the necessary requirements to hold office.[166]

3. The Argentine Judiciary lacks independence

a. Domestic and International Diagnosis

(279) The World Bank, in its so-called report "Argentina – Legal and Judicial Sector Assessment" (the "World Bank Report on the Argentine Judicial System"),[167] concludes that the Executive Branch has eroded, either directly or indirectly, the independence of the Judiciary. In doing so, it has created significant imbalances within the federal government system, and the Judiciary itself. The reforms introduced to the Council of the Judiciary (*Consejo de la Magistratura*) –which we will be tackling later below- confirm such circumstance. The World Bank report on the Argentine Court System states that:

> "In spite that the Constitution provides for the separation of powers between the legislative, executive and the judiciary, the usurpation of the Judiciary by the Executive managed to systematically erode the trust of the people. Additionally, it created imbalances within the Judiciary itself. This situation resulted in an inefficient and

composed of legislators, judges and lawyers holding federal bar license. Before the reform the Jury for the Prosecution of Judges was a permanent body. As from the reform it is organized in the way of *ad hoc* juries.

[166] *See* "*Primer Diagnóstico sobre la Independencia Judicial*", (First Diagnosis of Judiciary Independence) Poder Ciudadano, http://www.abogadosvoluntarios.net/archivos_ftp/independencia.pdf, p. 33 and 34, **Documentation Exhibit No. 29.**

[167] *See* World Bank Report "Argentina – Evaluación del Sector Jurídico y Judicial" (Argentina-Assessment of the Legal and Court Sector), June 2001, **Anexo Documentation No. 30.**

ineffective body. Therefore, the largest motivation to adopt the Council of the Judiciary in 1994 was the desire of correcting such deficiencies and restoring the independence of the judiciary."[168]

(280) The Argentine Judicial System report prepared by the World Bank states as follows:

> "In spite that the perception of corruption is high, it is not clear if it appears as bribery or otherwise, since corruption can also be expressed by political pressure, influences, nepotism and inadequate allocation of resources. In the current Argentine court system there are delays, administrative procedures are not very clear, no detailed control of cases is carried and *inaudita parte* communications are much used; these are some of the facts that foster a corrupt conduct. It is necessary to improve the control mechanisms, to revise the rules on nepotism and the *inaudita parte communications*".[169]

(281) The Council of the Judiciary was incorporated by the latest constitutional reform of 1994 to protect the independence of the Judiciary,[170] to provide it with a more transparent mechanism for the appointment of judges and to reduce the political influences, as well as the risks of other branches of government meddling and interfering with the sphere of the Judiciary.[171]

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[168] *See World Bank Report on the Argentine Judicial System*, Summary, p. vii.

[169] *See Id.*, p. xii.

[170] The purpose of the 1994 Constitutional Reform was to establish a new balance between the different branches of government, to change the mechanism for the appointment of judges and Supreme Court justices and to separate the Judiciary from the Government, so as to make the system more effective. Article 99, 4) of the Constitution establishes that the Executive:

> *"Appoints the rest of the judges of the lower federal courts on the basis of a binding proposal of a three name list to the Council of the Judiciary, with the consent of the Senate, at a public hearing, where the qualifications of the candidates shall be taken into account.*
>
> *A new designation, preceded by the same consent, shall be necessary for any judge who has attained the age of 75 to continue in office. All nominations of judges of the referred age or older shall be made for five years and may be indefinitely repeated, by the same mechanism".*

[171] The World Bank, in its Report on the Argentine Judicial System, explained, in relation to the motive for which the Council of the Judiciary was set up, as follows: *"One of the most convincing motives for the adoption of a Council of the Judiciary is that it provides more*

(282) The Council of the Judiciary commenced operating in December 1998 and, pursuant to the provisions of Law No. 24,937 passed by Congress, the referred Council undertook its powers to nominate, promote and transfer judges and court officers, duties that were previously exercised by the Executive Branch through the Ministry of Justice.

(283) However, in 2006 Congress passed a law[172] that significantly undermined the independence of the Council of the Judiciary turning it into a body that may be easily manipulated, thus increasing the vulnerability of the Judiciary to political pressure, as evidenced by the press articles attached hereto.[173]

(284) Human Rights Watch, in its letter dated February 9, 2006 addressed to the Argentine President, made the following warning:

> "The solutions proposed, nevertheless, involve a deep restructuring of the Council that could undermine the independence of the judiciary as contemplated in the Constitution."[174]

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transparency to human resources plannification within the Judiciary. The Council provides a more transparent mechanism for the designation of judges.(…) The Argentine federal court system adopted a Council of the Judiciary to solve the criticisms made against the Judiciary, accused of lacking independence, efficiency, and transparency. The 1994 Constitutional Reform included- inter alia- *the creation of such Council of the Judiciary". See World Bank Report on the Argentine Judicial System, Summary p.vii.*

[172] *See* Law No. 26,080, ***See*** **Argentine Legislation Exhibit.**

[173] *See* "*Kirchner promulgated the law for the reform of the Council of the Judiciary within a record time*", Clarín, February 25, 2006; "*Kirchner promulgated the reform of the Council of the Judiciary*", La Nación, February 24, 2006; **Press Exhibit No. 111.**

[174] *See* "*Argentina: The bill providing for the restructuring of the Council of the Judiciary must be amended. Letter to President Kirchner,*" Human Rights Watch, February 9, 2006, **Documentation Exhibit No. 31.**

b. The reform of the Council of the Judiciary aggravated the lack of independence of the Argentine Court System

(285) This actually happened: the situation was worsened after the reform of the structure and organization of the Council of the Judiciary. As from such reform, approved by Congress in February 2006, the Council of the Judiciary's was reduced from 20 to 13 members, while increasing the proportional representation of the elected members of Congress. Thus, the ruling government[175] strengthened its influence on the Council of the Judiciary. Elected officers are now entitled to 6 out of the 13 votes (before the reform they only had 6 out of the 20 votes).[176]

(286) The reform also increased the weight that the ruling party has in the Council of the Judiciary, since before the reform the Council of the Judiciary appointed 4 out of 8 legislators and currently appoints 4 out of 6, in addition, in both cases, to the Executive Branch's representative. Thus, the ruling party currently controls –through the Executive Branch- 5 of the total 13 votes, whilst before the reform it controlled only 5 of the total 20 votes. Human Rights Watch clearly explains this situation in its aforementioned letter addressed to the President of Argentina on February 9, 2006:

> "Whereas at present the ruling party has five representatives (four legislators and one representative of the Executive Branch) out of

[175] On December 10, 2007 President Nestor Kirchner was succeeded by his wife, Cristina Fernández de Kirchner, as results of the presidential elections of October 2007. Many ministers and high rank officials serving under President Kirchner remain in office. For this motive, most of the political observers consider that the administrations of Mr. Néstor and Mrs. Cristina Kirchner may be correctly described as one and single Administration.

[176] *See* "*Opinión de la Federación Argentina de Colegios de Abogados al Proyecto de Ley de Reforma del Consejo de la Magistratura y Jurado de Enjuiciamiento de la Nación*", December 20, 2005, "*Defectos de técnica legislativa*", p.7, **Documentation Exhibit No. 32.** *See* also "*Opinión de FORES sobre el proyecto de ley de reforma al Consejo de la Magistratura y Jurado de Enjuiciamiento de la Nación (Expte. 184/04*)", FORES (Foro de Estudios Sobre la Administración de la Justicia), December 19, 2005, **Documentation Exhibit No. 33.**

> a total of twenty members, in the proposed bill it would keep exactly the same number of representatives, but now out of a total of thirteen members. In other words, if the bill becomes law, the ruling party would obtain a majority on the Council by gaining only two votes (at present it would need to gain six)".[177]

(287) Given that the decisions of the Council of the Judiciary related to the nomination and dismissal of judges are taken by a two-thirds majority (i.e, 9 out of a total of 13 votes), the current government, through the representatives of the political sector (4 legislators of the ruling party plus the representative of the Executive) will be in a position to veto candidates from the Judiciary and block removals. The ruling political party of which the incumbent President is a member controls both houses. Thus, the national courts are currently more exposed to the influence of the Executive Branch.

(288) What results more dangerous still is that the reform changed the rule governing the quorum in the Council of the Judiciary. According to the new quorum provisions, the members representing the political sector (the six legislators and the representative of the Executive) may hold all meetings without the attendance of judges, lawyers or academics.[178] In its letter to the President, Human Rights Watch, made the following warning:

> "We fully share the concern expressed by the Centre for Legal and Social Studies (CELS), the Association for Civil Rights (ADC), and other Argentine civil society monitors, who contend that, combined with the other proposed reforms, the change of quorum undermines the balance stipulated by the Constitution requiring that no sector should be able to take decisions on its own. Indeed it distorts the very purpose that inspired the creation of the Council, i.e. to ensure balance and moderation in decision-making affecting the judiciary."

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[177] *See*www.hrw.org/english/docs/2006/argent12670-txt.htm, **Documentation Exhibit No. 31, already cited.**

[178] *See* Ley N° 26.080, Article 5, **Argentine Legislation Exhibit.**

In other words, the combined effect is to create a more politicized system without pluralism or effective and independent checks.

(289) In its reply, the Head of the Cabinet defended the idea that officers elected by the popular vote should hold a majority on the Council of the Judiciary, rather than those non-elected by popular vote.[179]

(290) In sum, as Human Rights Watch states in the referred February 9 letter, the reform is not in line with the spirit of the 1994 constitutional reform and constitutes a threat to the balance that the Constitution requires in order to maintain the separation of powers:

> "Three aspects of the proposed bill affect this balance. First, it alters the relative weighting of the different sectors represented on the Council by reducing the number of members from twenty to thirteen, of which six would be legislators (at present there are eight) and six would be judges, lawyers and academic experts (at present there are eleven). Together with the single member who is appointed by the executive branch, politicians would therefore have a 7-6 majority, while the weight of professional opinion on the new body would be significantly diminished..
>
> Secondly, the bill eliminates all representation on the Council of the political sectors belonging to the second largest opposition party in Congress. Whereas at present the governing party has five representatives (four legislators and one representative of the executive branch) out of a total of twenty members, in the proposed version it would have exactly the same number of representatives, but now out of a total of thirteen members. In other words, if the bill becomes law, the governing party could hold a majority on the Council by gaining only two votes (at present it would need to gain six).
>
> Thirdly, a change in the rule governing the quorum in the Council could allow it to function without any participation at all by the judges, lawyers, or academics. Because the proposed amendment reduces the quorum from twelve to seven members,

[179] *See* "*Argentina: Nueva ley debilita independencia de la justicia*", "Argentina: New Law weakens the independence of the judiciary" www.hrw.org/english/docs/2006/02/23/argent12714.htm, **Documentation Exhibit No. 34.**

the six legislators and the representative of the executive branch could hold sessions on their own."

(291) The Argentine Federation of Bar Associations shares this point of view:

> "With 6 legislators plus one representative of the Executive Branch [the composition of the Council of the Judiciary] imbalances in favor of the political sector since it is clear that 7 out of 13 respond to such sector, additionally the representative of the Executive Branch is not elected by a popular vote. If one adds that 3 judges have more representation than 2 lawyers within the aggregate of the body, one notices the unbalanced composition [of the Council] against the Constitution".[180]

(292) The City of Buenos Aires Bar Association (*Colegio de Abogados de la Ciudad de Buenos Aires*) made similar comments.[181]

(293) These opinions were also shared by the then President of the Judges' Association (*Asociación de Magistrados*), former Judge Ricardo Recondo, who represents all national judges and magistrates of the Judiciary. He has stated that in spite of the fact that the Council of the Judiciary was allegedly created to guarantee the independence of the Judiciary, the actual results indicate the opposite: the purpose is to submit the Judiciary to the political interests.[182] Moreover, he stated that: "*Before, the selection committee members assessed not only the results of the competitive examinations of candidates but also their antecedents. Later this changed and the political members of the Council began to operate discretionally. After the second reform [2006 reform], such changes worsened, the ruling party can do and undo at*

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[180] "*Opinión de la Federación Argentina de Colegios de Abogados al Proyecto de Ley de Reforma del Consejo de la Magistratura y Jurado de Enjuiciamiento de la Nación,*" December 19, 2005, "*Defectos de técnica legislativa*", p.7 already cited. **Documentation Exhibit No. 35.**

[181] *See* **Documentation Exhibit No. 32,** earlier cited: "*Más poder al ejecutivo en el Consejo de la Magistratura* " (More power to the Executive in the Council of the Judiciary), Colegio de Abogados de la Ciudad Autónoma de Buenos Aires, (City of Buenos Aires Bar Association) November 30 2005,

[182] *See "Advierten que no se puede investigar al poder político," (Warning: political power cannot be investigated) in newspaper* La Nación, April 21 2008, **Press Exhibit No. 6.**

its convenience or, what is worse, at the Government's instructions. With this new proposal the rules are even worse." [183]

(294) In the latter sentence of the citation, Judge Recondo referred to a reform proposal for the evaluation and assessment of judges made by the ruling party representatives in the Council of the Judiciary that allows for a larger discretionally in the selection based on non-objective parameters.

(295) In addition to these serious irregularities, 20% of judges lacks stability in office.[184]

c. The Executive Branch subdues federal judges

(296) As explained by the World Bank, the influence of the Executive over the Judiciary has created an imbalance of powers in the Federal government:

> "The judges of the Argentine Judiciary declare that the institution is weak due to external factors that are beyond the control of the Judiciary itself. Judges notice that, in comparative terms, the Judiciary has less authority than the legislative and particularly less than the Executive branch." [185]

(297) Both the Argentine public and the bar perceive that the Judiciary is greatly influenced by the Executive Branch. According to a poll conducted by the Buenos Aires Bar Association (*Colegio Público de Abogados de la Capital Federal*) in 2005, 87.4% of those polled

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[183] *See "La controvertida selección de jueces," (The controversial designation of judges) in newspaper* La Nación, April 15 2008, **Press Exhibit No. 7.**

[184] See **Press Exhibit Nº 112.**

[185] *Informe del Banco Mundial sobre el Sistema Judicial Argentino*, p. 35. (World Bank report on the Argentine Judicial System).

believed that the Judiciary was not independent and that it was vulnerable to political influences.[186] A poll conducted by the University Universidad Torcuato Di Tella[187], FORES[188] and Fundación Libertad in 2006 revealed that: 83% of citizens do not trust the honesty of the Judiciary, 82 % do not trust their efficiency and 79% believes that the Judiciary lacks impartiality. If we compare the polls of 2004 and those of 2006 we notice that the lack of confidence has worsened.[189]

(298) In May 2003, when President Kirchner took office, the Executive forced, by means of an impeachment, the resignation or dismissal of the Supreme Court Justices".[190] As a consequence thereof, seven of the then nine justices were removed or have resigned from 2003 to date. The Executive finally decided to reduce the number of justices to seven, and subsequently to five.[191]

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[186] *See* Colegio Público de Abogados de la Capital Federal (Buenos Aires Bar Association), "*Perfil del Abogado argentino y situación de la justicia regional y nacional*", en "*La abogacía en Buenos Aires, 20 años de colegiación, homenaje especial a Carlos Alberti*", May-June 2005, p. 18 and 19. *See* Colegio de Abogados de la Ciudad de Buenos Aires, *"Reiteradas presiones políticas sobre el Poder Judicial"*, Revista del Colegio de Abogados de la Ciudad de Buenos Aires, Tomo 65 N° 2, December 2005, p. 134. (**Documentation Exhibit No. 36).**

[187] Torcuato Di Tella University is one of the most prestigious private universities in Argentina.

[188] FORES is a non-governmental organization specialized in the judicial reform.

[189] *See* "*Indice de Confianza en la Justicia: Julio 2008*" (Index of Confidence in the Judiciary), disponible en http://www.foresjusticia.org.ar/ . *See also* "*Escasa Confianza en la Justicia*" (Low Confidence in the Judiciary), Clarín, August 12 2006, p.28 and "*Poca Confianza en la Justicia*" (Low Confidence in the Judiciary), La Nación, August 22 2006, p.7, **Press Exhibit No. 8.***See* also "*Indice de Confianza en la Justicia: Presentación Objetivos y Metodología*" y "*Resultados Julio 2006*" http://www.foresjusticia.org.ar/investigacion-detalle.asp?IdSeccion=19&IdDocumento=68,

[190] *See* "*La estabilidad de la Corte Suprema de Justicia*" (The Stability of the Supreme Court), Colegio de Abogados de la Ciudad de Buenos Aires, June 5 2003, La Hoja/Anuario 2003. "*Argentina: Call For Chief Justice To Quit*", The New York Times, World Briefing/Americas, June 12 2003; "*Argentina: Chief Justice Leaves*", The New York Times, World Briefing/Americas, June 28 2003; **Press Exhibit No. 9.**

[191] *See* Law No. 26,183, Articles 1, 2 and 3, **Argentine Legislation Exhibit.***See also* "*Ya es ley: la Corte Suprema tendrá menos miembros,*" (Already law, the Supreme Court will have less members) La Nación, November 30 2006, **Press Exhibit No. 10.**

(299) Public opinion and the bar consider that the Supreme Court is not independent[192] and that additionally judges lack institutional stability because their removal or designation is determined by the political representatives of the ruling party, and therefore, they are particularly vulnerable to political pressure and influences. This situation was confirmed by a poll conducted in September 2006 by La Nación, one of the largest and most prestigious newspapers in Argentina: during President Kirchner's Administration 142 judges resigned, this being an historic record in Argentina. The poll reveals that judges generally declare to be "fed up".[193]

(300) In March 2007 President Néstor Kirchner publicly threatened to remove the members of the Appellate Criminal Court of Cassation by impeachment by the Council of the Judiciary, and referring to the latter the stated that: "*I know that the Council of the Judiciary will proceed".*[194] "*Now the obstacle that we have in the Judiciary is that justice is very slow; I push and push* but some pretend not to be listening.

(301) A recent and very concerning case, among the resignations of judges resulting from pressure of the government, is the one involving Judge Tettamanti, who was subject -according to his own words- to duress over his person and his family, when he had to resolve a matter that the President deemed of utmost significance in her battle with the press media. Such pressure included public statements issued by the

[192] *See* "*Reclama AEA una mayor independencia de la Justicia*", (AEA claims for more independence for the Judiciary) La Nación, August 12 2005; y "*La Corte tiene ahora mejores formas pero no es independiente*" (The Supreme Court now has better forms but it is not independent), La Nación, April 27 2006, **Press Exhibit No. 11.**

[193] *See* "*Renunciaron 142 jueces desde que asumió Kirchner*" (142 judges resigned since Nestor Kirchner took office), La Nación, September 10 2006, **Press Exhibit No. 12.**

[194] *See***Press Exhibit No. 13.**

Secretary of Justice. The Secretary of Justice also provoked the resignation of the successor judge.[195]

(302) Not satisfied with the above, the Government openly promoted the resignation of two members of the Appellate Court and recused a third one with the confessed purpose of replacing him with substitute judges recently nominated in the list of substitute judges.[196]

(303) The President of the Judges Association (*Asociación de Magistrados*) confirmed that the government uses the Council of the Judiciary to exert pressure on judges.[197] Hereinbelow we will examine some cases.

(304) In the context of a controversy for pressures of the Argentine President to obtain the resignation of the members of a Criminal Appellate Court, that resulted in two letters of concern sent by the Buenos Aires Bar Association and prestigious NGOs specialized in judicial matters[198], both the Minister of Home Affairs and the Executive designee member of the Council of the Judiciary requested the members of such appellate court to resign because "*this will save us the task.*"[199]

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[195] *See* **Press Exhibit No. 80.**

[196] *See* **Press Exhibit No. 116.**

[197] *See "Advierten que no se puede investigar al poder político," (Warning: the political power cannot be investigated)* La Nación, April 21 2008, **Press Exhibit No. 6, earlier cited.**

[198] *See* Comunicado del Colegio de Abogados de la Ciudad de Buenos Aires (City of Buenos Aires Bar Association declaration to the public) "*The CACBA repeats its concern for the unusual serious pressure exercised by government on the Judiciary"*, March 27 2007, http://www.colabogados.org.ar/larevista/pdfs/id5/revista_del_colegio_de_abogados_tomo67_nro1.pdf págs. 116-117, (**Documentation Exhibit No. 37).**and Statement by FORES (*Foro de Estudios sobre la Administración de Justicia*), *"The Judiciary is being asphixiated"*, March 29 2007. **(Documentation Exhibit No. 38).**

[199] *See* "*Casación: el Gobierno presiona para acelerar los juicios políticos,*" (Cassation, the government pressures to accelerate impeachments) Clarín, March 26 2007, **Press Exhibit**

(305) In April 2007 the Minister of Home Affairs requested the Council of the Judiciary to prosecute a judge that was investigating a corruption case that involved several government officials of the Secretary of Energy and ENARGAS.[200] This explains the statements of the President of the Judges' Association explaining that it takes (a judge) to be a "superhero" to risk himself to investigate high rank governmental officials.[201]

(306) According to the media reports in August 2007, less than 24 hours following the opening of an investigation into a Venezuelan businessman who entered Argentina carrying a non-declared amount of US$800,000 in his luggage, the judge hearing the case decided to self-disqualify herself due to the critics that the government made against her.[202] As a matter of public record, three accused admitted before a U.S. court their participation in the alleged covering that the funds illegally introduced into Argentina were destined to finance the presidential campaign of incumbent President Cristina Kirchner.[203]

(307) In May 2008 the government, through its already mentioned majority in both Houses of Congress, passed Law No. 26,376

No. 14 y "*Acusan al Presidente de querer manejar la Justicia*", (The President is accused for wanting to control the Judiciary) La Nación, March 27 2007, **Press Exhibit No. 15.**

[200] *See* "*El juez del caso Skanska dice que lo espían agentes de inteligencia*", (Judges hearing the Skanska case say they are being spied by intelligence agents) Clarín, April 20 2007, **Press Exhibit No. 16.**

[201] *See* "*Jueces bajo presión creciente"*, (Judges under mounting pressure) La Nación, May 9 2008, **Press Exhibit No. 17.**

[202] *See* "*La Jueza del caso de las valijas se apartó por presión del Gobierno*", (The judge hearing the case of the luggage resigned for pressures from the Government) La Nación, August 11 2007, **Press Exhibit No. 18.**

[203] *See* "*Third guilty plea in Venezuela spy case*", The Miami Herald, April 24 2008, **Press Exhibit No. 19,** and "*Man pleads guilty in smuggling case*", New York Times, April 24 2008, **Press Exhibit No. 20.**

authorizing the Executive to designate substitute judges to fill in more than 160 vacancies without the intervention of the Council of the Judiciary.[204] This mechanism will allow the government to continue, in practice, designating to its whole discretion which candidates fill in which vacancies. Prior to the enactment of Law No. 26,376, and due to delays in the selection of judges to fill in vacant offices, the government resorted to the "widespread use of "replacement judges" who do not offer the guarantees of independence of regular judges", according to the words of the OECD Report, page 133.[205] http://www.oecd.org/countries/argentina/40975295.pdf.

(308) In September 2008 the government, through its referred majority in the Council of the Judiciary, ordered the annulment of a contest for the selection of judges to fill-in vacant judicial seats in spite of lacking the sufficient number of votes to do so.[206] This decision, that set aside the opinion of experts that confirmed that the assessment of the candidates was not flawed, will result in allowing certain candidates who failed in the assessment to participate again in the selection process, and in displacing other candidates who passed the examination but are not supported by the current government. This event was criticized by FORES and the Judges' Association (*Asociación de Magistrados*).

[204] *See* Law No. 26,376, May 21, 2008, **Argentine Legislation Exhibit.** *See also* "*Sancionaron otra polémica reforma judicial*" (Another debatable judicial reform has been enacted), La Nación, May 22 2008, **Press Exhibit No. 21.** This law was severely criticized by judges and bar associations, *See* "*Magistrados y abogados rechazan la nueva ley (Judges and Lawyers reject the new law)*", La Nación, May 24 2008. y "*Grave retroceso institucional*" (Serious institutional step back), Colegio de Abogados de la Ciudad de Buenos Aires, 23 de mayo de 2008.

[205] *See* OECD Report, in **Documentation Exhibit No. 39.**

[206] *See* "*Los jueces denuncian el cierre ilegal de un concurso clave*", (Judges denounce the unlawful closing of a key contest) La Nación, 16 September 2008, **Press Exhibit No. 22.**

(309) The President of the Judge's Association denounced pressures.The pressures on judges who are not favorable to the ruling party have been partly uncovered –among many other evidence- by the statements of the president of the Judges' Association (*Asociación de Magistrados y Funcionarios de la Justicia Nacional*) "*related to the fear that judges have to retaliation coming from the Government if they prosecute incumbent government officials*" [sic]. A copy is attached hereto of the editorial published in the newspaper La Nación, under the heading: *"Judges under growing pressure"*, of May 9, 2008, that contains such statements.[207]

(310) It is very serious to hear the President of the Judges' Association declare that judges are fearful of governmental retaliation due to the contents of their judgments. It must be noted that such association has always been a low profile organization that makes very moderate public declarations.

(311) Concurrently, we find different journalist articles published in newspapers under headings such as: *"Warnings that political power cannot be investigated"* and *"The government exerts pressure on judges through the Council of the Judiciary"*.[208] http://edant.clarin.com/diario/2009/01/20/elpais/p-01842981.htm

(312) The Prosecutors' Association (*Asociación de Fiscales)* also denounces pressures. The president of the Council of Prosecutors, Defenders and General Advisors of the Republic of Argentina (*Consejo de Procuradores, Fiscales, Defensores y Asesores Generales de la República Argentina*) denounced the intrusion of the ruling government

[207] *See***Press Exhibit No. 23.**

[208] *See***Press Exhibit No. 24.**

into matters of the judiciary, in line with the denunciation made by the president of the Judges' Association (*Asociación de Magistrados y Funcionarios judiciales*).[209]

(313) Police State. An editorial of the newspaper *La Nación* is eloquently headed: *"Towards a Police State"* and describes how "some judges and prosecutors obsequiously respond to the political power to guarantee impunity".[210]

(314) In March 2009, the City of Buenos Aires Bar Association (*Colegio de Abogados de la Ciudad de Buenos Aires)* issued a public statement criticizing the government's interference with the Judiciary.[211] The statement expressly mentioned the Council of the Judiciary's distorting role, that keeps judges under constant investigations as a means of political pressure. It stressed the fact that nearly 210 judges are kept in such indefinite situation.

(315) Detention of the father of a judge that ruled against the government. The fears that judges have are not baseless. We attach hereto a copy of an article of the newspaper Infobae, under the heading **"***For Judge Sarmiento, the ruling against her father is a kind of "pressure" against her***"**; of March 19, 2010, that illustrates the case of a judge sitting in the Federal Administrative Litigation Court (*Contencioso Administrativo Federal*), whose father was detained immediately following a ruling rendered by such judge that barred the

[209] *See* newspaper La Nación: *"Denuncian Intromisión en la Justicia"*; (Interference in the Judiciary is denounced) April 27, 2008, **Press Exhibit No. 25.**

[210] *See***Press Exhibit No. 26.**

[211] *See* Comunicado del Colegio de Abogados de la Ciudad de Buenos Aires "*La independencia del Poder Judicial una vez más agraviada*" (The independence of the Judiciary continues being harmed), March 3 2009, **Documentation Exhibit No. 40.**

use of the monetary reserves of the Argentine Central Bank, that the government intended to such. Her father was, at that time, 85 years old and was in a wheel-chair.[212]

(316) Duress suffered by a judge that ruled in favor of freedom of the press. Another of the many examples of pressures exercised against judges was the duress against a judge who issued a ruling against the so-called "Media Law" ("*Ley de Medios*"), that was promoted by the ruling party in order to restrict freedom of expression. This is clearly illustrated in the words of Clarin, under the unequivocal heading: *"A judge who ruled against the media law was pressured"*, of March 20, 2010.[213]

(317) The fact that both examples are so close in time –one day following the prior one- shows the climate of terror that the government is trying to impose.

(318) Denunciation by the Federal Executive against a judge who was investigating a large corruption case. The lack of scruples over exercising absolute control over the Judiciary came even to the extent of denouncing a judge that was investigating the government for bribery acts. This can be read in the newspaper *Ámbito Financiero*: *"The Government denounced a judge that is investigating the Skanska bribery affair"*[214]and in newspaper *Clarín*: *"The judge hearing the Skanska case says he is being spied by "intelligence agents"*.[215] The former article starts saying: *"Judge Javier López Biscayart has his days*

[212] *See***Press Exhibit No. 27.**

[213] *See***Press Exhibit No. 28.**

[214] *See***Press Exhibit No. 29.**

[215] *See***Press Exhibit No. 30.**

counted in the Skanska affair, a case involving the investigation of alleged briberies that the Swedish building company would have paid to Kirchner Administration officials…". The latter contains a description of the denunciation made by the judge himself, as regards the contacts that such alleged agents would have had with *"former couples of him to seek private information about him"*.

(319) Espionage over judges. Much more recently, on June 10, 2012, the newspaper *La Nación* published an article under the eloquent title: "*Fear of espionage in the courts"*.[216] The article narrates the fear that judges and prosecutors have due to the pressures exerted on them by government intelligence agents:

> "…during the last year both judges and prosecutors acting in all courts are under the mounting belief that they are not only subject to surveillance, but also of intelligence operations seeking, in some cases, to force their judicial decisions either by actions or omissions; or simply warn them that they are under observation. This is an old tactic, but practices are not abandoned".
> […]
> "…they received photographs of relatives and close friends, sending thus clear message to the spied that their lives had no secrets".
> […]
> "…other articles of a pro-Kirchner newspaper mentioned that one of those judges had fought with his former wife on the phone, and that another judge had romantic dates after lunch.
>
> "Another official told that a SIDE agent who was a friend of his, took price in making more than one judge "cry" when he visited them to place on his bench a file containing his reserved stories". (Emphasis added).

(320) In September 2012, the Argentine Civil Rights Association (*Asociación de Derechos Civiles de la Argentina*) (ADC) filed a report showing that one in five judges is a substitute. ADC points out that this

[216] *See* **Press Exhibit No. 31.**

situation affects the independence of the judiciary since the substitutes depend of the Council of the Judiciary for their confirmation and that this situation is particularly relevant in the case of the federal criminal courts.[217]

(321) The pressures exerted by the government on the judiciary from October to December2012 are addressed at obtaining a favorable judgment in the pending litigation arising as a consequence of a law passed for the purpose of dismantling Grupo Clarín media group (the "Media Law"). Grupo Clarín filed a legal action challenging the constitutionality of the Media Law and obtained an interim measure enjoining any new course of action until a final judgment is rendered. However, the government managed to obtain a Supreme Court ruling setting a deadline for such interim measure, i.e. December 7, 2012, something that is unusual in Argentina. Thereafter, the president and her cabinet of ministers have kept announcing the death of the media group on "7D".[218]

(322) The Argentine government pressures on the judiciary and journalism were confirmed by the Inter-American Press Association ("IAPA") in its recent visit to Argentina, where a IAPA delegation interviewed a very large number of representatives of different sectors, and confirmed the existence of significant and serious pressures, as published in the newspaper "El Nuevo Herald" of Miami[219] and, of course, in local newspapers. [220]

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[217] *See***Press Exhibit No. 112**. La Nación, "*Uno de cada cinco jueces es suplente",* (One out of five judges is a substitute judge) September 24 2012.

[218] See **Press Exhibit 118.**

[219] Diario El Nuevo Herald.*SIP: Free Press Problems continue to exist in Argentina*; December 7, 2012: http://www.elnuevoherald.com/2012/12/07/1359861/sip-en-argentina-siguen-los-problemas.html.

[220] See **Press Exhibit 118.**

(323) In light of the imminence of a court ruling on the constitutionality of Article 161 of the Media Law, the government first recused the judge hearing the case, -who resigned shortly thereafer- next, recused the successor judge and forcedly amended the replacement mechanism until it finally managed to find a replacement judge of its satisfaction.[221]

(324) Simultaneously, the government moved its pressures on to the Federal Civil and Commercial Appellate Court – the court called to decide on the motion filed by Grupo Clarín seeking an extension of the interim measure (the "Motion for an Extension"). Such pressures involved, first, a series of public pressures that resulted in the resignation of the president and another member of the Federal Appellate Court. Then, the government filed criminal charges and accusations with the Council for the Judiciary against other three members of the referred Federal Appellate Court, who were separated from the case by way of recusal. Additionally, other three members of the Appellate Court preferred to self-excuse themselves in view of such a fearsome context. [222]

(325) In order to decide on the relevant recusals, and in view of the Federal Civil and Commercial Appellate Court dismantlement (two trial judges and eight appellate judges had been set aside), Federal Administrative Litigation Courts judges were called in to decide on the recusals and, if applicable, on the admissibility of the Motion for an Extension. Such judges, however, denied the recusals that the government had filed against the two Federal Civil and Commercial judges. The government's reaction was unprecedented. On the one hand, the Minister of Justice pressed the Judiciary in a public press

[221] See **Press Exhibit 118.**

[222] See **Press Exhibit 118.**

address intimidating them with the existence of a conflict of powers and a sort of judicial "uprising". On the other hand, in order to avoid, at any cost, a Federal Appellate Court's ruling on the Motion for an Extension before December 7th, the government recused the entire Appellate Court, on the same grounds that had already been denied.[223]

(326) A panel composed of two judges from federal administrative litigation courts –as earlier explained- denied the government's recusals, and the Federal Civil and Commercial Appellate Court judges reassumed jurisdiction over the case. They immediately denied the recusals presented by the Minister of Justice as patently inadmissible on grounds that they were nothing more than a repetition of the formerly denied ones, and they granted the Motion for an Extension filed by Grupo Clarín , thus extending the interim measure until the delivery of a final judgment on the case.[224]

(327) The judges who ruled against the Federal Executive were judges sitting on Federal Civil and Commercial courts which jurisdiction, in general, does not involve political matters. Therefore, the Kirchner Administrations had never cared about pressing and maneuvering to control such tenures, until the time when the conflict with Grupo Clarín arose. This is the reason why some independent judges were still sitting in such courts, although the Argentine Executive Branch had made all its efforts to remove them before the ruling, and in fact, it had recused the entire Appellate Court, something completely unprecedented.

[223]See **Press Exhibit 118.**

[224]See **Press Exhibit 118.**

(328) On noticing that its pressures had failed this time –a true exception- the government, through some of its legislators, threatened the judges who had ruled against the government with impeachment. [225]

(329) In this scenario, the government took an appeal to the Argentine Supreme Court against the Federal Civil and Commercial Appellate Court ruling that had granted Grupo Clarin's Motion for an Extension. Although to the date hereof the Argentine Supreme Court has not admitted such government's appeal on grounds that the procedural remedy chosen was patently inappropriate, the case is still open vis-à-vis new appeals lodged by the government.[226] In fact, in parallel, the new first instance judge in charge of the case upon the forced resignation of his two predecessors, in record time, issued a ruling on the merits up-holding the government's position on the constitutionality of the "Media Law" [227]

(330) In the meantime, the government staged a large public rally at Plaza de Mayo, attended by the President, to press the judiciary on this lawsuit.[228] Moreover, the Chief Cabinet Minister, Juan Manuel Abal Medina, in a public speech, referred to the Federal Civil and Commercial Appellate Court as "that shitty Appellate Court" (literal).[229]

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[225]Newspaper Clarín.*The judges hearing the Clarin case are being threatened with impeachment*; December 9, 2012:

http://www.clarin.com/politica/Amenazan-jury-jueces-caso-Clarin_0_825517511.html

[226] See **Press Exhibit 118.**

[227] See **Press Exhibit 118.**

[228] See **Press Exhibit 118.**

[229] See **Press Exhibit 118.**

(331) There have been other actions by the Executive Branch that confirm her despise for the separation of powers. On occasion of a criminal acquittal where a criminal court acquitted 13 defendants in a case involving people-trafficking, on December 12, 2012, the President reacted in a very harsh manner demanding that the judiciary be "democratized".[230]

(332) Argentine judges rank low in terms of independence. The aforementioned described situations and many others are closely related to a report prepared by the *Observatorio de la Unión Iberoamericana de Colegios y Agrupaciones de Abogados*, reflecting that Argentine judges are not very reliable, and that only Ecuadorian judges rank lower in terms of reliability and honesty.[231]

(333) Argentina also is internationally perceived as a country with a high level of corruption and low transparency, as evidenced by various reports. In Transparency International 2008 ranking on the levels of corruption of the public sector, Argentina ranks 109 together with Armenia, Belice, Moldavia, Salomon Islands and Vanuatu, compared to the 2006 same report where Argentina ranked 93rd.[232]

(334) These surveys include among the negative indicators of Argentina certain measures or conducts of the current Administration, such as the Federal Executive branch's excessive use of legislative powers, the reform of the Council of the Judiciary which had- as earlier described- adverse effects on the independence of the Judiciary.

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[230] See **Press Exhibit 119.**

[231] La Nación Newspaper: "*Los jueces argentinos, muy poco confiables*" (Argentine judges, not very trustworthy); July 30 2007. *See***Press Exhibit No. 32.**

[232] *See* "*Corrupción: Argentina sigue mal parada*", (Corruption in Argentina, continues to be bad standing) La Nación, November 6, 2006, **Press Exhibit No. 33.**

(335) The 2008-2009 Global Competitiveness Report of the World Economic Forum also reflects the lack of confidence in Argentine public institutions.[233] This Report ranks Argentina in the 88th position within 134 economies, but remarkably ranks Argentina in the 128th position as to the quality of its institutions. This rank is explained, among other factors, by Argentina ranking 127th on property rights protection, 132nd on the transparency of governmental decisions, 125th on the independency of the Judiciary and 126th on the indicator related to the squandering of government funds.[234]

(336) The 2008-2009 Country Report on Human Right Practices of the U.S. State Department seriously questioned the Argentine legal system and the independence of its Judiciary. It affirmed that Argentina has: "*weak public institutions and an inefficient and politized judicial system*."[235]

(337) The Inter-American Commission exhorted Argentine authorities to tolerance and respect for freedom. The vocation of hegemony of the Argentine Executive Branch has led the IACHR to call its attention as to the generation of *"a climate of more tolerance and respect for the ideas of others"*in a critical report on the state of press freedom in Argentina. Copy of attached of the information published on the

[233] El Global Competitiveness Report available in http://www.weforum.org/.

[234] *Id.*

[235] *See* "*Justicia y corrupción bajo la lupa*" (Justice and Corruption under close scrutiny), La Nación, February 27 2009, **Press Exhibit No. 34**. *See also* "*Country Report On Human Right Practices*" of 2008 issued by the US Dpt of State, available in http://www.state.gov/g/drl/rls/hrrpt/2008/wha/119145.htm .

newspaper *La Nación*, under the heading *"Critical international report on freedom of expression"*, of April 16, 2011.[236]

(338) Use of the tax agency for retaliation purposes. The lack of freedom of expression has gone as far as the President of Argentina promoting the tax agency audits against a real estate businessman and against a cinema director who dared to protest against the restrictions imposed on the dollar.[237]

(339) In spite of such recommendations, a group that is led by President Cristina Kirchner's son holds all the resorts of power. A report from the journalist Jesica Bossi, of the newspaper *La Nación*, evidences the influence exerted by the organization, the so-called "La Cámpora" —a sort of civil Pretorian guard of the President, managed by her own son— in all the divisions of government, and even in the Judiciary.[238] The name "La Cámpora" has its origin in the name of the former secretary of Juan Domingo Perón – Héctor Cámpora – who was, during a short period, president of Argentina. During his term he promoted the granting of presidential pardon to terrorists of the group Montoneros and ERP. many of the members thereof were placed in high key positions in the Government. Subsequently, Perón promoted his resignation and, after a constitutional election, Perón himself took office as President. In the attached report, you may notice a chart that reveals the influence that such group has on the Judiciary.

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[236] *See* **Press Exhibit No. 35.**

[237] *See* **Press Exhibit No. 36. http://www.perfil.com/contenidos/2012/08/24/noticia_0002.html http://www.clarin.com/politica/Cristina-AFIP-investigar-empresario-Clarin_0_734926716.html**

[238] *See "La Cámpora extiende su influencia"* (la Campora extends its influence) en **Press Exhibit No. 37.**

(340) More recently, in 2012, the Argentine incumbent Vice-President -who is subject to a corruption denunciation case- caused the removal of the judge and prosecutor from the case as well as the removal of the Attorney General. Far from taking any heed of the suggestions made by the IACHR the following action –in the attempt of trampling on the Judiciary and freedom of expression- took place. In April 2012, whilst a federal judge was trying to investigate the referred corruption case, Amado Boudou, the incumbent Argentine vice-president, made a public address -transmitted by the Argentine radio and TV station network- accusing the judge, the prosecutor and the media of fabricating an operation against him. Copy is attached of the press article published under the heading: *"Boudou denounced an operation against him by the judge who is conducting an investigation against him"*.[239] Boudou made threats against the referred persons and made revelations of alleged crimes that the Vice-President, according to his own acknowledgement, stated to know a long time ago but that, however, he did not denounce in due course.However, when everything seemed to show that the scandal, increased by the Vice-president's own statements, was to lead to an impeachment against him, the Federal Appellate Court set aside Judge Daniel Rafecas from the referred case.[240]

[239] *See* **Press Exhibit No. 38.** http://www.lanacion.com.ar/1462791-boudou-denuncio-una-operacion-en-su-contra-del-juez-que-lo-investiga.

[240] *See* "*Apartan al juez Rafecas de la causa que involucra a Boudou*", (Judge Rafecas is removed from the case involving Boudou) attached to **Press Annex Nº 39.** *See* link: http://www.lanacion.com.ar/1468623-apartan-al-juez-rafecas-de-la-causa-que-involucra-a-boudou. *See* also notes of the newspaper La Nación, who led its investigation through its journalist Hugo Alconada Mon, among thousands of notes of that and other media: "The prosecutor prepares to investigate Boudou", February 23 2012: http://www.lanacion.com.ar/1450870-el-fiscal-prepara-medidas-para-investigar-a-boudou ; Kirchnerism ratifies its support to Boudou: the media shot him'", April 11 2012: http://www.lanacion.com.ar/1464056-el-kirchnerismo-ratifica-su-apoyo-a-boudou-es-un-fusilado-mediatico ; "¿Cuánto aumentó el patrimonio de Boudou en el año que intercedió por la Ciccone?" (How much did Boudou's property increased in the year he interceded for Ciccone?), March 15 2012: http://www.lanacion.com.ar/1456771-cuanto-aumento-el-patrimonio-de-boudou-en-el-ano-que-intercedio-por-la-ciccone ; "Rafecas fue apartado del caso Ciccone" (Rafecas was removed from the Ciccone case), April 26 2012: http://www.lanacion.com.ar/1468397-rafecas-fue-apartado-del-caso-ciccone ; "Una firma extranjera, sin papeles, aportó $ 2,4 millones para Ciccone" (A foreign company, lacking

(341) The fear is provoking massive resignations of judges. The Argentine Administration's judge-persecution policy has triggered the resignation of more than 140 judges in a short time span. Such resignations were motivated by the fear imposed on judges, as reflected by several newspaper articles with eloquent titles: "*Judges resign: 142 judges have resigned since Kirchner took office", "A Judiciary of its own: 130 judges belong to Kirchner", "Torn between anguish and the feeling of threat"* (in an article signed by a prestigious former Supreme Court Justice).[241]

d. Conclusions

(342) With the reform of the Council of the Judiciary the current Government undermined the independence of the Judiciary by increasing its vulnerability to political pressure. The Government promoted the reform of the Council of the Judiciary in spite that, as Human Rights Watch explained:

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papers, contributed AR$2,4 million to Ciccone", March 17 2012: http://www.lanacion.com.ar/1457418-una-firma-extranjera-sin-papeles-aporto-$-24-millones-para-ciccone; "El fiscal investiga la relación de Boudou con Ciccone", (The prosecutor investigates the relationship Boudou-Ciccone) March 6 2012, http://www.lanacion.com.ar/1454219-el-fiscal-investiga-la-relacion-de-boudou-con-ciccone; Ciccone: surgen vínculos con el lavado en España y aquí" (Ciccone, links with the laundry in Spain and in Argentina arise), March 20 2012: http://www.lanacion.com.ar/1458046-ciccone-surgen-vinculos-con-el-lavado-en-espana-y-aqui; "La AFIP dio un beneficio única a la nueva Ciccone",(The Tax Authority afforded a benefit to the new Ciccone) March 28 2012, http://www.lanacion.com.ar/1460272-la-afip-dio-un-beneficio-unico-a-la-nueva-ciccone ; "El mapa de los vínculos de Boudou: una madeja societaria" (The map of the links of Boudou, a corporate ball of wool"), May 15 2012: http://www.lanacion.com.ar/1473388-el-mapa-de-los-vinculos-de-boudou-una-madeja-societaria; "Ciccone commences to print bills, at the request of the Government" (Ciccone empieza a imprimir billetes, a pedido del gobierno"), May 6 2012: http://www.lanacion.com.ar/1470940-ciccone-empieza-a-imprimir-billetes-a-pedido-del-gobierno; "El fiscal Rívolo fue apartado del caso Ciccone" (Prosecutor Rivolo was removed from the Ciccone case), May 16 2012: http://www.lanacion.com.ar/1473770-el-fiscal-rivolo-fue-apartado-del-caso-ciccone ; "Righi formalizó su dimisión…" (Righi formalized his resignation), April 10 2012: http://www.lanacion.com.ar/1463742-righi-formalizo-su-dimision-no-dudo-en-renunciar-pues-nada-tengo-que-ocultar.

[241] **Press Exhibit No. 40**.

> "[The bill] involves a profound restructuring of this body, that could undermine the independence of the judiciary as contemplated in the Constitution".[242]

(343) The opinion of lawyers, bar associations, lawyers, non-governmental organizations, citizens and all those who voiced their concern and warned the Argentine government that the bill jeopardized the independence of the judiciary, was ignored.[243] Additionally, several actions were filed seeking protection of constitutional guarantees (*acciones de amparo*) to prevent the reform of the Council of the Judiciary but they failed.[244]

(344) The recent reform of the Council of the Judiciary increased the Executive Branch's control over the Judiciary and thus, undermined the independence of the Argentine Judiciary.[245] As explained by Human Rights Watch in its referred letter addressed the Argentine President:

> "[T]he measures proposed to address the issue are likely to cause greater harm than good. If adopted, they would jeopardize the constitutional principles on which the council is based and seriously undermine the progress that Argentina has made under

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[242] "*See* "*Human Rights Watch Warns Kirchner for the Council of the Judiciary*", La Nación, February 12 2006, **Press Exhibit No. 41.**

[243] *See* "*Otro avance sobre la justicia*" (A new move undermining the Judiciary), La Nación, November 22 2005; "*Critican la reducción de la Magistratura*" (Criticism of the reduction of the membership of the Council of the Judiciary), La Nación, November 27 2005; "*Sin Confianza en la Justicia*", La Nación, December 16 2005; "*Fuerte rechazo en la Justicia a los cambios en la Magistratura. Por primera vez se opone un tribunal: la Cámara Civil, el proyecto no se detiene*", (Strong rejection in the Judiciary against changes in the Council of the Judiciary) La Nación, December 20 2005; "*Está en juego la independencia*" (The independence is at stake) and "*Las ONG llevarán sus quejas al Senado. Hoy se reúnen con Cristina Kirchner*", (The NGO shall take its complaints to the Senate. Today they meet with Cristina Kirchner) La Nación, December 20 2005; "*Peligra la Independencia Judicial*" (Independence of the Judiciary is endangered), La Nación, December 21 2005; y "*Grave abuso de poder" (Serious abuse of power)*, La Nación, December 23 2005. **Press Exhibit No. 42.**

[244] *See* "*Ya tiene Jueza la causa por la reforma de la Magistratura",* (The case involving the reform of the Council of the Judiciary already has a judge) Clarín, March 22 2006. **Press Exhibit No. 43.**

[245] *See* "*Abogados en Alerta*" (Lawyers on Alert), Página 12, December 12 2005, "*Modelo K para la Magistratura desafía la tormenta de críticas*" (K Model for the Council of the Judiciary faces a storm of criticism), Página 12, December 14 2005, **Press Exhibit No. 44.**

this government in consolidating judicial independence and the rule of law".[246]

(345) Judicial independence is the cornerstone of the court system and of a healthy democracy. It is a basic principle that affects the organization of the State, because the Judiciary is called upon to resolve controversies and cases that are key to civil rights and to the survival of democracy which cannot be left to the discretionary decision of the Executive, the Legislative or individual citizens. The independence of the Judiciary generates legal certainty, security, forseeability and strengthens the respect and efficiency of the rule of law.

(346) If the judiciary is not independent from the Executive Branch or from the Legislative Branch, it cannot protect citizens from the abuses of these two branches.

(347) In spite of the several attempts to protect judicial independence through institutions such as the Council of the Judiciary, the current prevailing political culture is one that subordinates the judiciary to the abuses of the political power. This culture, that is endorsed by the current Government, allows politicians to infringe on judicial independence, as illustrated by the recent approval of the law reforming the Council of the Judiciary.

(348) In the particular case of this petition all the above, as we will analyze below, has had a negative influence on my father's procedural status.

[246] *Argentina: Debe modificarse el proyecto de ley que reestructura el Consejo de la Magistratura. Carta al Presidente Kirchner*", Human Rights Watch, February 9 2006, www.hrw.org/english/docs/2006/argent12670-txt.htm.**Documentation Exhibit No. 31, earlier cited.**

4. Acts and omissions of the Argentine State in the particular case of José Alfredo Martínez de Hoz

(349) The above discussion forms the backdrop for the lack of impartiality in adjudicating my father´s case starting in 2006. In order to get a better understanding of the context in which the decisions against my father were adopted, it is necessary to examine which was the conduct of the Executive Branch during the administrations of Néstor Kirchner and Cristina Fernández de Kirchner, as regards my father and as regards the respect for the Judiciary, as well as the conduct of the judges involved in this specific case and of those that compose, in general, the federal judiciary in Argentina.

(350) There are a large number of facts that refer to the behavior and condition of the judges that were involved hearing this specific case and their relation with the political power, of which I am only going to choose some, which will be described in a nutshell.

a. The Judge of First Instance and his relation with the Executive Branch

(351) A request from the president. The first instance judge, Norberto Oyarbide, reopened the case, as we have earlier described. But he did so –as mentioned above- at the motion of the then President Kirchner. In fact, on March 24, 2006, in a public speech made at the Argentine Congress, the then incumbent president, exhorted the Judiciary to strike down the presidential pardons and instigated the punishment of my father. In such speech, he said:

> "The dictatorship's economic model had a brain, with a name and a surname, that we Argentines should never

erase from our memory, and I hope that memory, justice and truth will arrive. His name was José Alfredo Martínez de Hoz".And added: "Unfortunately, the true owners of such model have suffered no punishment at all". (Emphasis added).[247]

(352) On the same day of the presidential speech –as earlier described- leftist violent groups attacked the building where Dr. Martínez de Hoz lives and caused rampage.[248]

(353) The insults and exhortations of the President of the Republic continued. The insults and exhortations of the president continued throughout the following months and he even attacked the press for defending Martínez de Hoz.[249]

(354) On September 4, 2006, Judge Norberto Oyarbide, annulled the presidential pardon granted by president Carlos Menem in my father's favor. It has earlier been described that such presidential pardon

[247] Copies and prints of the newspaper La Nación of March 25, 2006, are attached in **Press Exhibit No. 2 earlier cited**, under the title:*"Kirchner exhorted the annulment of the presidential pardons"* (*See* link www.lanacion.com.ar/nota.asp?nota_id=791784) and *"Kirchner exhorted the Judiciary to set aside the presidential pardons"***.** The news was also published in Clarín, under the heading: *"Kirchner pidió a la Justicia que se pronuncie sobre los indultos",* (Kirchner asked the Judiciary to adjudicate on the presidential pardons) link: http://edant.clarin.com/diario/2006/03/25/elpais/p-00301.htm

[248]*See* Diario Clarín, on line, of same date, link: http://edant.clarin.com/diario/2006/03/24/um/m-01164621.htm, printed copy attached under heading *"Incidentes en un escrache contra Martínez de Hoz en Retiro"*. (Incidents against Martinez de Hoz in Retiro) Also attached equivalent news in newspaper La Nación, title: *"Quebracho attacked Kavanagh"***.Press Exhibit No. 3.**

[249]*See* Clarín[249] July 10 2006, printed version in **Press Exhibit No. 7**, from link http://edant.clarin.com/diario/2006/07/10/elpais/p-00301.htm,
under heading: *"Acto en Tucumán: críticas de Kirchner y quejas en la Iglesia".*

resulted totally unnecessary and undesired by Martínez de Hoz, as explained in the newspaper article that is attached hereto.

(355) The Minister of Justice also insults and exhorts. The Minister of Justice, himself, declared to the public on May 25, 2010, one of the two most significant patriotic dates of Argentina:

"There are many Martínez de Hoz free!"

(356) This phrase is the heading of an article published in the newspaper *La Nación* attached hereto.[250] My father was already detained, however re-admitted to the clinic after the judge allowed the *habeas corpus* and ordered his return to the hospital center. Minister Alak alluded, with such words, to *all those who are like him* [Martínez de Hoz], according to his particular but influential point of view, and he opined that they should be in jail, in an unequivocal directive to judges.

(357) The incumbent President also referred to the case. President Cristina Fernández de Kirchner herself also referred to my father and his procedural status in derogatory terms; something that does not go unnoticed by the judge hearing the case. By simply opening the web page of the Argentine Presidency one can find a record of the words of President Cristina Fernández de Kirchner, who in one of her speeches had no hesitations to make a direct mention of the procedural status of Martínez de Hoz. This is the transcript, copied from the link:

http://www.presidencia.gov.ar/discursos/3915

> "I want to tell you that such power was not that of the military, because the military today, at least the large majority of those who committed atrocious violations are dead or are being tried. Even Martínez de Hoz is imprisoned for a quite similar case related to

[250] *See* **Press Exhibit No. 45.**

> economic crimes. However, Martínez de Hoz is detained at the Kavanagh [the building where he lives] and Etchecolatz is detained at Marcos Paz.[251] These are the results of the legal status of each citizen. We are all equal but many times not so equal". (APPLAUSE FROM THE MINISTERS AND OTHER OFFICERS PRESENT AT THE SPEECH)

(358) "Day of the *Montonero*":[252] If there was anything lacking to evidence the climate that we are living in Argentina and from which judges do not escape, most of whom are fearful of the Executive Branch, the political groups aligned with the government decided to celebrate "the Day of the *Montonero*", in homage of the terrorists who kidnapped and assassinated former president Pedro Eugenio Aramburu. As it is well known, the group Montoneros considered my father an enemy, for deeming that he was allied to foreign capital, and tried to kill him several times. Montoneros also made several attempts to kill members of my father's team at the Ministry of Economy, apparently with the support of certain military sectors of the *de facto* government.[253]

(359) A judge protected and pressured by the Executive Branch. Judge Oyarbide has many requests for impeachment and his adhesion to the ruling party is a fact that is public and published in Argentina as discussed below.

(360) As a matter of public record, Judge Oyarbide has a history of currying favor with the current administration. The journalist Susana Viau, , who was a journalist of the newspaper *El Mundo* during the time

[251] Marcos Paz is a public jail known for its harsh conditions.

[252] "Montoneros": is the name of one of the two main terrorist organizations that acted in Argentina in the 1970s

[253] On these subjects, *See*: La Nación: "*Elogios a la Presidenta en el acto por el Día del Montonero*" y *"¿Qué es lo que celebran?"*. **Press Exhibit No. 108.** *See* also cited book: "Montoneros: Soldados de Massera".

when such newspaper –no longer existing today- acted in coordination with the *Ejército Revolucionario del Pueblo*, and who was a journalist in the now-officialist newspaper *Página 12*, wrote in the newspaper *Clarín*, on June 12, 2010, an article under the heading: **"***Oyarbide: that soft spot of the officialisms***"** (a copy of the article is attached hereto).[254]

(361) The journalist informs about the number of requests for impeachment that Judge Oyarbide had avoided thanks to the defense of the Kirchnerist congressmen sitting on the Council of the Judiciary, who have unconditionally defended him -even in violation of the most elementary rules of ethics- because the husband of Diana Conti, a member of the Council for the Judiciary and member of Congress who voted in favor of Oyarbide, was being, at the same time, investigated by such judge. Diana Conti is the closest member of Congress to president Cristina Fernández de Kirchner and the one who mobilizes all her requests at Congress.[255]

(362) Accordingly, two significant editorials of newspaper *La Nación* which, in spite of its centennial and known sobriety, were published

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[254] *See* **Press Exhibit No. 46.**
http://www.clarin.com/politica/gobierno/Oyarbide-debilidad-oficialismos_0_279572166.html

[255] "The referred article says, *inter alia*:

> "Conti's opinion, true enough, did not alter the result. It was a gesture, a signal that sent the message to Oyarbide that he will be defended at any price, even if to such end Article 55, para. 11, of the Code of Criminal Procedure –whereby a judge must disqualify himself whenever he has interests in the case that he is hearing- has to be disregarded. Otherwise, such judge commits the crime of "misperformance", the same crime for which Oyarbide has been again denounced before the Council of the Judiciary; the same denounce that was at stake on September 11, 2001 when the attack on flights 11 of American Airlines and 175 of United against the Twin Towers took to nearly zero the price that legislators paid to save him from removal."

In a secret session that lasted only 25 minutes the six charges against him were reduced to one.

As is happening now, the votes aligned with the Executive Branch voted against his the removal and prevented the two thirds required".

under the following headings: *"Two embarassing judges" and "The ring of Oyarbide"***.** Such editorials describe the exchange of favors with congresswoman Diana Conti and other "jobs" performed by Judge Oyarbide in favor of the government as well as the serious accusations that have been made against him and his blatant ostentation style, arbitrariness, etc.[256]

(363) Several similar journalist articles were published on the alliance between the judge and the Executive Branch. They show the defense at any cost that the government makes in favor of Judge Oyarbide.

- *"Kirchnerism saved Oyarbide from a sanction at the Council of the Judiciary"*.[257]
- *"With K votes, Oyarbide again got loose from a denunciation***".**[258]
- *"Oyarbide avoided another impeachment"*.[259] It is clear that this judge, who is constantly subject to denunciations for his lack of integrity, always saves his office thanks to the favors he makes to the official government of the day.[260]

(364) <u>The judge exchanges favors with the Federal Executive</u>. Certainly, the judge knows how to compensate the ruling parties who protect him for each step he takes. This can be noticed in the newspaper article attached hereto: *"Oyarbide manoeuvres in the case*

[256] "La Nación" editorials dated February 26 2011 and September 29 2012, *See***Press Exhibit No. 47.**

[257] Clarín, June 25 2010. *See***Press Exhibit No. 48.**

[258] Clarín, July 9 2010. *See***Press Exhibit No. 49.**

[259] Diario Ámbito Financiero, July 9 2010. *See***Press Exhibit No. 50.**

[260] Se printed version Internet, in **Press Exhibit No. 51**, taken from link http://www.lanacion.com.ar/96225-oyarbide-dijo-que-fue-a-spartacus-sin-saber-que-era.

investigating K enrichment are denounced".[261] On the one hand, he is extremely benevolent in the cases investigating corruption charges involving Executive Branch's officials. On the other, he hounds those whom the government considers its enemies or symbols of what must be destroyed.

(365) It is also a matter of public record that criminal investigations in which the ruling government has an interest tend to be assigned to Judge Oyarbide. The editorial of the newspaper *La Nación* of September 10, 2010 pointed out: *"Suggestive coincides in the federal courts"*.[262]

(366) Judge Oyarbide´s prejudice against my father is self-evident. Judge Oyarbide in the order imposing the preventive detention on my father, made explicit reference to considerations –unrelated to the case- that are offensive and harmful on the orientation of Martinez de Hoz's economic policy as former minister.

(367) The judge said in such ruling:

> "…that taking into account the feeble justifications raised by Martínez de Hoz, on the basis of the economic policies of his term of office or those that history views as oriented precisely on the opposite way, that is to say, to the destruction of the domestic production, and not to the establishment of commercial ties to foster exports, such are insignificant in view of the magnitude of the crime that was then being perpetrated, with the sole unlawful deprivation of the liberty of Messrs. Federico and Miguel Gutheim".*[263]* (Emphasis added).

[261] *See* Diario Clarín, February 27 2011, *"Denuncian maniobras de Oyarbide en el juicio por el enriquecimiento K"*.**Press Exhibit No. 52.**

[262] *See***Press Exhibit No. 53 and No. 54.**

[263] *See* again **Documentation Exhibit No. 1.**

(368) These observations have nothing to do with the merits of the case or the objective application of governing law, but everything to do with political ideology.

(369) The judge applied the preventive detention against the Federal Appellate Court 1988 effective order. The partiality of the judge, his desire for spectacularity and to satisfy the President, became evidenced by the legal aberration that he committed immediately after the Supreme Court confirmed the annulment of the presidential pardon. The expected conduct, after the annulment, consisted in taking back the case to the moment prior to the presidential pardons. Now, this meant facing the ruling issued by the Federal Appellate Court itself which, more than 20 years ago, had ordered the release of Martínez de Hoz for considering him unrelated to the facts. The judge ordered my father's immediate preventive detention. There is no legal or factual basis for such treatment.

(370) Cruel, inhumane and degrading treatment by the judge. The cruelty of the judge towards my father reached unimaginable limits. As I have stated when narrating the facts, at the time of his detention, my father had to be hospitalized at the "Los Arcos" clinic, in the City of Buenos Aires**.** Whilst he was in the clinic, the judge exerted constant pressure on the physicians for the purpose of transferring the patient to a common jail, something that he finally did, against the opinion of the physicians of the clinic, and refusing to visit the detainee, who was seriously ill, to check on his condition, as has already been proved.[264]

[264] *See* again **Press Exhibit No. 2 and No. 55.**
http://www.lavoz.com.ar/noticias/politica/oyarbide-rechazo-visitar-martinez-de-hoz

(371) Consider further that the judge does not issue detention orders against former officials who (unlike my father) are capable of obstructing his investigations. This contrast has been expressly highlighted by an editorial of the newspaper *La Nación* titled: **"***An agenda of vengeance and hate***",**[265] stating that:

> "In this case, note must be taken of Judge Norberto Oyarbide's obstination in detaining former ministry José Martínez de Hoz in jail in spite of the fact that he is 84 years of age and of his delicate health condition, as has been certified by his own physicians and by those appointed by the state. Judge Oyarbide's order contrasts greatly with the same Judge's decision allowing a former member of the Kirchner Administration, Ricardo Jaime, to leave the country pending a case against him involving illegal enrichment charges. Mr. Martínez de Hoz imprisonment in jail shortly before the commencement of the Bicentennial celebrations must surely satisfy the Government and particularly, Néstor Kirchner, who from 2006 has been claiming what Oyarbide has just resolved as regards Martínez de Hoz". (Emphasis added).

(372) Another similar case involves the former secretary of the union of bank employees, Juan José Zanola, who after having been detained for some time, was released on bailment by judge Oyarbide, in spite of having been involved in a fraud scheme of adulteration of drugs provided by his union's social works and which presumably could have caused the death of an indefinite number of people. These facts, which are unrelated to the case, serve to evidence that the judge has a special animosity against my father.

(373) As the newspaper *La Nación* states in another editorial:

[265] Copy is attached in **Press Exhibit No. 56**, Newpaper La Nación, May 22, 2010: http://www.lanacion.com.ar/1267402-la-agenda-de-la-venganza-y-del-odio.

> "Should the Martínez de Hoz precedent be confirmed, legal certainty will be in crisis and no one will be safe from political revisionism each time a new change of government occurs".[266]

b. The judges of the current Federal Appellate Court

(374) The judges of the Federal Appellate Court, the higher court that affirmed the preventive detention, can also be disqualified for partiality. One of them, Judge Martín Irurzun, fortunately disqualified himself for having been the judge of first instance who twenty years ago had ordered the first preventive detention of Martínez de Hoz.

(375) A self-disqualification denied of a judge who acknowledges his partiality. A second judge of such Appellate Court, Judge Horacio Cattani, also self-disqualified himself for having issued an opinion on the matter. He said at that time:

> "I have had the chance in this case of issuing my opinion as Vocal Judge of the Appeal on this same matter voting for the invalidity of such pardon".[267]

(376) However, the Appellate Court, composed of *ad hoc* judges Eduardo Freiler, Gabriel Cavallo and Eduardo Luraschi, on considering the matter of the two self-disqualifications, accepted Judge Irurzún's one and denied Judge Cattani's one. Voting in the minority, Judge Luraschi held that the self-disqualification of Judge Cattani should have also been accepted:

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[266] Newspaper La Nación, *"La persecución a Martínez de Hoz"*, editorial July 4 2006; *"Caza de brujas"*, editorial April 30 2010 and *"La detención de Martínez de Hoz"*, editorial May 6 2010. *See***Press Exhibit No. 55**.

[267] Page 1547 of the file.

> "…the special circumstances surrounding the case, make it unadvisable for him to be involved as a member of the Appellate Court".[268]

(377) An appeal was taken from the above decision to the Supreme Court that affirmed the decision and left the panel composed of a judge who had expressly declared that he was lacking objectivity for having pre-opined on the matter. (Take into account the case "*Herrera Ulloa*"). That is to say, the case was resolved by one single judge in spy of the fact that the court was "collegiate".

(378) An Appellate Court that benefits the ruling party. An article published in newspaper *Clarín*, on May 12, 2011, shows the judges of the Appellate Court hearing this case, as officers that are close to the ruling government. In a note, titled **"***The judges of the Appellate Court that benefitted Jaime, wink at officialism***"**, we read:

> "Panel I of the Federal Appellate Court is, of the two panels that comprise such court, the one that is closest to the judicial desires of Kirchnerism. This was evidenced in several instances …" (and continues).[269]

(379) An Appellate Court judge publishes his prejudice. One can also see, as regards the incumbent judge of the Appellate Court, Eduardo Freiler, an interview of the newspaper *Página 12*, titled with the words of the judge himself: *"It's an atrocity to release repressors"*; interview during which the referred judge opines against the possibility of restricting the period of preventive detention in cases investigating

[268] *See* ruling in **Documentation Exhibit No. 41.**

[269] *See***Press Exhibit No. 60.**

crimes against humanity, in violation of the principle of presumption of innocence.[270]

c. The Justices of the Supreme Court

(380) A Supreme Court designated after the forced removal of the prior one. Most of the current justices of the Supreme Court,were designated by former president Néstor Kirchner, with the support of senator Cristina Fernández de Kirchner, his wife, after having removed a sufficient number of justices of the former Supreme Court so as to attain the majority therein. It is not my intention to justify the performance of the former justice of the Supreme Court, but rather state a fact. I understand that the IACHR is in possession of the antecedents of such removals, therefore for the sake of brevity I will not go in detail on such circumstance.

(381) The Chief Justice of the Supreme Court adheres to officialism. The current chief justice of the Supreme Court, Ricardo Lorenzetti, has made public, in many occasions, his allegiance to the Kirchner administration´s policies regarding prosecutions of alleged the perpetrators of crimes against humanity. However, one would assume that the prosecution of those responsible for human rights violations is a matter of the resort of the Judiciary, not the Executive Branch. And if the Executive Branch interferes in such task, judges have the responsibility of placing limits on the Executive and not of praising it.

(382) The Supreme Court informs the Executive of the judicial strategy. As one of the many examples of subordination of the Supreme Court to

[270] *See* **Press Exhibit No. 61.**

the political power, one may consult the article published in newspaper *Clarín*, under the heading: *"The Supreme Court invited the Government to analyze how to speed up trials against repression"*.[271] This news, which newspapers already publish as an every day event, should be motive of scandal. A judicial court does not have to ask the Executive Branch or the Legislative Branch on how to speed up cases that are being heard by the Judiciary. It must do it, to the extent that it is possible, and nothing more.

(383) A former terrorist makes the presentation of the book written by the chief justice of the Supreme Court. As published in nearly all of the Argentine newspapers, and even informed by the Argentine state news agency: "Telam",[272] the presentation of the book on Human Rights written by Justice Ricardo Lorenzetti was made by Eduardo Anguita, a former active member of the terrorist organization "*Ejército Revolucionario del Pueblo* (ERP)", responsible for many murders and kidnappings, for example the kidnapping and assassination of the president of Fiat in Argentina, Oberdan Sallustro, an organization which, according to one of its leaders, Enrique Gorriarán Merlo, conducted approximately "30.000 terrorist actions" in Argentina.[273]

(384) In order to round up the profile of the man who presented the book written by the Justice of the Supreme Court, it suffices to say that Eduardo Anguita, himself, in his role as ERP combatant, participated in the attack and take over of the Army Health Command (*Comando de Sanidad del Ejército*), during the constitutional government of Juan

[271] A copy of the article is attached in **Press Exhibit No. 62.**

[272] *See* news of official Telam agency, of September 28, 2011, in **Press Exhibit No. 63:**http://www.telam.com.ar/nota/2543/. *See* also Newspaper Perfil of September 28, 2011, http://www.perfil.com/contenidos/2011/09/28/noticia_0003.html.

[273] GORRIARÁN MERLO, Enrique Haroldo. *Memorias de Enrique Gorriarán Merlo – De los Setenta a La Tablada*; Buenos Aires, Planeta, 2003, p.363 **(Press Exhibit No. 113).**

Domingo Perón, in 1973, which resulted in several deaths, and the now the book presenter received a prison sentence, imprisonment that he served from that time until 1984. For this issue, see the interview made to him by Gabriel Martín, in the site "Rodolfo Walsh",[274] impossible to suspect that he will try to disfavor a terrorist, where Eduardo Anguita narrates his "adventures" in such terrorist organization.

(385) If Justice Lorenzetti has chosen, as sponsor of his book, a former terrorist who served a jail sentence for an action that resulted in the death of other people, during a democratic government, and who was member of a terrorist organization who represented one of the sides that participated in Argentina's bloodshed back in the '70, it is clear that such Justice is taking sides for a political position. There are further examples of Justice Lorenzetti´s affiliation with persons who consider my father an enemy.[275]

(386) A Supreme Court justice suggested the preventive detention. If Justice Ricardo Lorenzetti was not recused, this was for fear of retaliations, since it is clear that all the recusations are automatically denied and, to the contrary, as a measure of vengeance, a new transfer to my father to a common jail is something that can likely happen. It must be borne in mind that, when Martínez de Hoz was

[274] *See* **Press Exhibit No. 64** http://www.rodolfowalsh.org/spip.php?article1812.

[275] *See*: *"La Corte quiere manejar sus fondos"*, en **Press Exhibit No. 65** http://www.lanacion.com.ar/988979-la-corte-quiere-manejar-sus-fondos.

Newspaper La Nación, October 10, 2001: *"Polémicas declaraciones de Bonafini"*; *See* **Press Exhibit No. 66** http://www.lanacion.com.ar/341895-polemicas-declaraciones-de-bonafini.

See **Press Exhibit No. 67** http://www.lanacion.com.ar/342050-verbitsky-respondio-a-las-declaraciones-de-bonafini.

See Newspaper La Nación, January 4 2008: *"Bonafini atacó a Uribe y defendió a las FARC",* en **Press Exhibit No. 68.** http://www.lanacion.com.ar/976153-bonafini-ataco-a-uribe-y-defendio-a-las-farc.

detained, it was a source of the Supreme Court the one that anonymously suggested such detention, as was exclusively revealed by the newspaper "Buenos Aires Herald" on April 28, 2010.[276]

(387) Justice Eugenio Zaffaroni is political advisor to the President of the Argentina. Inasmuch or all the more serious than the above, Justice Zaffaroni has no qualms about appearing close to the president of the Nation and provide advise to her, at the same time that he propitiates a constitutional reform in her favor. Moreover, his name began to be mentioned as his possible companion in president Cristina Fernández de Kirchner presidential ticket, if the Constitution were to be reformed to allow for a new re-election. For this reason, two members of the House of Representatives requested for an impeachment of Zaffaroni, which of course failed due to the ruling party's majority in the House of Representatives. This can be read in the article titled: *"An impeachment against Zaffaroni is requested for his failure to keep distance from the Executive"***.**[277] Hereinbelow we transcribe some paragraphs of this article published in the newspaper *El Cronista*, which are highly revealing:

> "Eugenio Raúl Zaffaroni, Justice of the Supreme Court, collected adhesions for the Kirchnerist campaign in the City of Buenos Aires and was mentioned as prospective companion in the presidential ticket of Cristina Fernández de Kirchner. For this reason, members of the House of Representatives of the Coalición Cívica party announced yesterday that they will request for an impeachment against him. They consider that the judge violated the principle of separation of powers. 'In the days prior to the date when the President chooses her candidate to mayor of the City of Buenos Aires we have read and heard in the media that Zaffaroni was advising Amado Boudou. We found this very serious', pointed out legislators Patricia Bullrich and Fernando Iglesias, who also assured that the judge "pays daily visits to President Cristina

[276] *See* **Press Exhibit No. 4, cited above.**

[277] *See* **Press Exhibit No. 69.** http://www.cronista.com/economiapolitica/Piden-el-juicio-politico-a-Zaffaroni-por-no-mantener-distancia-del-Ejecutivo-20110620-0052.html.

> Fernández at Olivos' and that he has "become a mere advisor of the Executive'. Zaffaroni admitted weeks ago to be a "friend" of the ministry of Economy [currently the Vice-president], after the press learnt that two meetings related to the campaign for the election of the Buenos Aires mayor were held at his home.. But for the representatives of the party of Elisa Carrió, his meetings with Boudou are not the only ones that the judge held lately with politicians of the ruling party. 'One of the reasons why daily meetings would be being held between the President and the Supreme Court Justice' would be 'the analysis of a constitutional reform', they assured".

(388) Supreme Court Justice Eugenio Zaffaroni has written publicly in his legal journal "*Nueva Doctrina Penal*" that those accused of crimes against humanity do not deserve the protection of constitutional guarantees. There he says:

> "Punitive power is never absolutely rational and it is neither so when it is applied to authors of crimes against humanity.[278]

(389) What is serious, in this case, is not his opinion as to the imprescriptibility, but his claim that the State must forget about the rationality of its actions as regards the concern about the guarantees, in the case of those accused of such crimes. This means nothing else than the repeal of the principle of innocence.

(390) Identical or even more serious is the fact that Justice Zaffaroni participates as lecturer at conferences in which Dr. Martínez de Hoz is

[278] ZAFFARONI, Eugenio Raúl. *"Notas sobre el fundamento de la imprescriptibilidad de los crímenes de lesa humanidad*"; en *Nueva Doctrina Penal*, 2000/B, Buenos Aires, Editores del Puerto SRL, 2001, p.440. This same opinion and others of the same author can be found in the critical article published in *Revista del Colegio de Abogados de la Ciudad de Buenos Aires*; Tomo 70, Nº 1, August 2010, and its on line version: http://www.colabogados.org.ar/larevista/articulo.php?origen=&id=109&idrevista=11**(Press Exhibit No. 114).**

directly referred to in public announcements as the exponent of "Economic Power and State Terrorism". [279]

(391) The Supreme Court denied the extraordinary appeal lodged by my father in a two-sentence decision, which is not a true trial. Finally, the Supreme Court ruling denying the extraordinary defense lodged by my father's defense lawyers, in two sentences, without the minimum consideration of the serious violations of constitutional guarantees committed. Without even attempting to explain the serious human rights violations committed against my father, constitutes a new evidence of the disregard for the Law, when the person harmed by an aberrant situation is considered an ideological enemy.

(392) This lack of supporting arguments also violates the right acknowledged by the IAHRC to be tried by an independent and impartial court, since such a ruling, in a case of such legal significance and importance, cannot be considered a true trial, less still independent and impartial.

d. The formerSecretary of Human Rights

(393) The Human Rights Secretary who promoted the case against my father made public advocation and justification of terrorism. As to other plaintiffs in the case against my father, the action was promoted, from the State, by the then secretary of Human Rights, the lawyer Eduardo Luis Duhalde, who died in April 2012. Impartiality of the prosecutor is

[279] A scandalous placard, with the reproduction of a 100 dollar bill and the face of my father in the reverse with blood on the sides announces only three lecturers: Abraham Gak, Professor at UBA; Eugenio Zaffaroni, Justice of the Supreme Corte and Luis Alem, Undersecretary of Human Rights. *See***Press Exhibit No. 115.**

mandatedby ethical rules that govern the conduct of officials of the Executive Branch, which in Argentina are prescribed in Decree No. 41 of 1999, which states *verbatim*:

> **"**ARTICLE 23.-INDEPENDENCE OF CRITERION. Public officials must not be involved in situations, activities or interests that are inconsistent with his duties. He must abstain from any conduct that may affect his independence of criterion for the performance of his duties.
>
> ARTICLE 25.-EQUAL TREATMENT. Public officials cannot carry out discriminatory actions in relation to the public or any other agents of the Administration. They must afford equal treatment in equal situations. It shall be understood that equal situations exist whenever there are no differences which, according to rules in force, must be considered to establish a precedence. This principles is also applicable to the relations that the official holds with his subordinates."

(394) In Argentina, it is public and notorious that lawyer Eduardo Luis Duhalde was the director, between 1973 and 1974, of a journal called: *"Peronist Militance for the Liberation (Militancia peronista para la liberación)*", that was the channel of expression of all the terrorist organizations that operated in Argentina and only of such organizations. From such publication, theassination of certain individuals was fostered and the crimes of such organizations were acclaimed.[280] In such publication we find, for instance, that the deceased Secretary of Human Rights:

- Celebrated the assassination of General Juan Carlos Sánchez, which he called "execution";
- Celebrated the kidnapping of the executive of Exxon, Mr-Samuelson;
- He fostered the "*elimination from these lands of the race of exploiter oligarchs*";

[280] *See* set of copies attached to this presentation in **Press Exhibit No. 72.**

- He sustained in his editorials that "*only the war of the people will save the people*";
- He advocated what he called "*final ways to do the justice of the people*"; that is to say, assassinations;
- Published a long article in favor of the actions of Islamic terrorism, holding that the organization "*Black September*" uses *"direct action in any place in the world with a blunt political efficiency*" And later added that "*some of these actions were prominent for their exemplary nature and impact among the Arab people*".

(395) This paradox of having appointed and kept Mr. Duhalde ass the Secretary of Human Rights has been highlighted by an editorial published in the newspaper *La Nación*, on May 16, 2011.[281]

> "The active participation of the Secretary of Human Rights as accuser also has a serious institutional impact. On the one hand, because the Secretary, Eduardo Luis Duhalde, was a notorious advocate of the terrorist organizations in the 70s as director of the journal *Militancia*. It is obvious that in this case, he not only acts under express instructions of the federal government, as was evidenced in the judicial presentation filed in August 2010 at the motion of the President of the Nation [if refers to another case], but also that he would have a particular interest in twisting the truth of the facts".

[281] *See***Anexo Prensa 73.**

e. The context of the subjection of federal judges in general also affects the chances of José Alfredo Martínez de Hoz obtaining an impartial trial

(396) The above description of facts expressly referred to the judges involved in the case against my father would not be adequately understood if this outline is not placed in the climate that the judiciary is currently living in Argentina and the degree of subjection that the political power imposes upon it, as we have described above.

(397) It is necessary to understand that in the face of such a intimidation on judges and prosecutors by the Argentine government, it results very difficult for a judge to act against the Executive Branch in a case against which, both the former president Néstor Kirchner as well as the incumbent president Cristina Fernández de Kirchner, raved from their stand, instigating its punishment.

5. The "***Martínez de Hoz***" case has been used and timed by the political chronometer

(398) Political "coincidences" and court rulings. An additional fact supporting the lack of independence of the Judiciary in Argentina arises from comparing the dates on which the material rulings that affected my father were issues with the serious problems that the government had and that, in Argentina, were or could be subject to large press disclosure. One needs to place oneself in a context where the Argentine government was not still so discredited as it is today, where federal authorities have nearly declared a "war" against the media that is not favorable to the government. Thus, at that time, any publication in the newspapers, negative for the government, resulted costly for the presidency.

(399) The first reference to the annulment of the presidential pardons, expressly mentioning Martínez de Hoz, was made by the then president Néstor Kirchner on March 24, 2006, a week after the resignation from office of governor Acevedo, in Santa Cruz;[282] a close ally of the Kirchners, who suddenly challenged the president for acts of corruption.

(400) On July 2, 2006, the newspapers published that the government was hastening in Congress the enactment of a law that would vest the government with "super powers", that is to say, the possibility of managing the budget on a discretionary basis and changing the destination of budget items.[283]On that same day, in a public address, Kirchner called my father the "unmentionable" and the government denounced him for another fact as to which it has already been evidenced that he had no relation whatsoever, but that, in the meantime, served to create great agitation in the written media.[284]

(401) On July 6, 2006, the then senator Cristina Kirchner voted in favor of the "Superpowers"[285] and, in view of the press reaction, on July 8, a bill was voted to deprive José Alfredo Martínez de Hoz from his pension.[286]

[282]**Press Exhibit No. 74**: http://www.clarin.com/diario/2006/03/16/um/m-01159626.htm

[283]**Press Exhibit No. 75**: http://www.clarin.com/diario/2006/07/02/elpais/p-00901.htm

[284]**Press Exhibit No. 76**: http://www.clarin.com/diario/2006/07/02/elpais/p-01601.htm

[285]**Press Exhibit No. 77**: http://www.clarin.com/diario/2006/07/06/um/m-01229017.htm

[286]**Press Exhibit No. 78**: http://www.pagina12.com.ar/diario/elpais/1-69675-2006-07-09.html

(402) On September 5, 2006, in view of the scarcity of gasoil, the fuel used by trucks and buses, the government ordered a price increase,[287] which affected the cost of food and transportation and resulted very unpopular. On that same day, Judge Oyarbide annulled the presidential pardon where my father was included.

(403) On March 22, 2007, the newspapers published that investigations were being conducted against Minister Julio de Vido —the most important, at that time, in the Kirchner's government— for the "Skanska", case, a corruption scandal involving the payment of bribes from such Swedish company to Argentine officials.[288]On March 23, Kirchner —in a public address— criticized the newspaper *La Nación*, accusing such newspaper of defending Martínez de Hoz.

(404) On July 16, 2007, the former Ministry of Economy, Felisa Micelli[289] resigned as a consequence of a scandal provoked by the finding of purse with thousands of dollars in the toilet of her office. The scandal had commenced on June 24.[290]Between July 14 and 15, the Supreme Court affirmed the annulment of the presidential pardons, such issue had great press coverage as regards the Martínez de Hoz case.[291]

(405) On August 9, 2007, a new scandal exploded as results of the discovery in the Argentine Customs of a bag containing nearly one million dollars in cash without reporting it, in the hands of the Venezuelan businessman, Guido Alejandro Antonini Wilson, who was

[287]**Press Exhibit No. 79:** http://www.lanacion.com.ar/837877-ante-la-escasez-de-gasoil-se-aplicaron-alzas-de-precios

[288]**Press Exhibit No. 81:** http://www.perfil.com/contenidos/2007/02/24/noticia_0021.html

[289]**Press Exhibit No. 82:** https://www.lanacion.com.ar/nota.asp?nota_id=926234

[290]**Press Exhibit No.: 83:** http://www.perfil.com/contenidos/2007/06/24/noticia_0017.html

[291]**Press Exhibit No. 84:** https://www.lanacion.com.ar/nota.asp?nota_id=925693

travelling with an official committee of the Argentine government.[292] On the same day, an old case record for rebellion, that had been closed many years ago, was reopened, that had been opened for the coup d'état of March 24, 1976, and the government involved my father for having held office as Ministry of Economy.[293]

(406) On December 4, 2007, an impeachment was commenced against federal Judge Guillermo Tiscornia, who had just incriminated the Ministry Nilda Garré, a strong support for Kirchnerism.[294] One day later, journalist students of the school of the newspaper *Página12*, absolutely connected with the government, fabricated an interview to Martínez de Hoz, simulating the need of preparing a final assignment for the University, and the government commenced against him an investigation for advocation to crime, with large repercussion in the press.[295]

(407) On March 26, 2008, a large crowd marched in Plaza de Mayo against tax withholdings to the farm sector, the first mass attended march against the government.[296] On the same day, the government requested for my father's detention, in the "*Casariego*" case, of which he was later dismissed.[297]

(408) On March 30, 2008, farmers returned to strike, with large agitation in the streets and routes, that progressively grew during the following

[292] **Press Exhibit No. 85:** https://www.lanacion.com.ar/nota.asp?nota_id=932992

[293] **Press Exhibit No. 86**: http://www.pagina12.com.ar/diario/elpais/1-89530-2007-08-11.html

[294] **Press Exhibit No. 87**: http://www.pagina12.com.ar/diario/elpais/1-95627-2007-12-02.html

[295] **Press Exhibit No. 88**: http://www.pagina12.com.ar/diario/elpais/1-95712-2007-12-04.html

[296] **Press Exhibit No. 89**: https://www.lanacion.com.ar/nota.asp?nota_id=998778

[297] **Press Exhibit No. 90**: https://www.lanacion.com.ar/nota.asp?nota_id=99871

weeks.[298]On April 16, 2008 the Appellate Court affirmed the annulation of the presidential pardon granted to Martínez de Hoz.[299]

(409) On May 26, 2008, three hundred thousand people marched in favor of the farms and against the government, in the City of Rosario.[300]On May 31, the "Gutheim" case (that motivates this presentation) and picketers in favor the government attacked again the house of Martínez de Hoz.

(410) On July 13, 2008 a report on the violation of transparency rules in the contract of a high-speed train that the then President Cristina Fernández de Kirchner was already projecting.[301] On that same day, Néstor Kirchner publicly attacked the representative of the farming sector, Mario Llambías, for being a cousin of Martínez de Hoz.[302] (something that is also absolutely false).

(411) On July 15, 2008, 237.000 people marched in favor of farms as results of the conflict between the rural sector and the government, in the Palermo district, in the City of Buenos Aires.[303]On that same day, Néstor Kirchner publicly declared that the march obeyed to Martínez de Hoz, something absolutely absurd.[304]

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[298]**Press Exhibit No. 91**: http://www.clarin.com/diario/2008/03/30/elpais/p-00301.htm

[299]**Press Exhibit No. 92**: http://www.pagina12.com.ar/diario/elpais/1-102517-2008-04-16.html

[300]**Press Exhibit No. 93**: http://www.clarin.com/diario/2008/05/26/elpais/p-00315.htm

[301]**Press Exhibit No. 94**: http://www.clarin.com/suplementos/zona/2008/07/13/z-03015.htm

[302]**Press Exhibit No. 95**: http://www.clarin.com/diario/2008/07/13/elpais/p-01714069.htm

[303]**Press Exhibit No. 96**: https://www.lanacion.com.ar/nota.asp?nota_id=1030652&pid=4749038&toi=6259

[304]**Press Exhibit No. 97**: http://www.clarin.com/diario/2008/07/15/um/m-01715536.htm also: http://www.lagaceta.com.ar/nota/281152/Argentina/Kirchner_dijo_respetaran_decision_Congreso_sea_cual_fuera.html

(412) On October 15, 2008, the Miami prosecutor in the Antonini Wilson case, investigated therein for alleged money laundering, referred about the potential liability of the Argentine official Claudio Uberti, member of the team of the minister Julio de Vido, and other officials involved.[305] Simultaneously, the Marval index –that measures quotations in the Argentine stock exchange- plummeted.[306]That same day, the old denunciation against Martínez de Hoz for alleged responsibility in the growth of the external debt was re-floated.[307]

(413) On December 10, 2009, 50.000 people marched in Palermo parks against the corruption of the government and to demand a better Congress.[308]On that same day, the organization "*Madres de Plaza de Mayo*", the then Minister of Defense Nilda Garré and the former Minister of Economy, Felisa Micelli (removed from office for alleged corruption), held in Plaza de Mayo a so-called, by them, "ethical trial" against Martínez de Hoz.[309]

(414) On May 4, 2010, president Hugo Chávez arrived in Argentina, in the midst of a new corruption scandal, that involved the Argentine and the Venezuelan governments and Argentine businessmen in the payment of bribes in Venezuela.[310]On May 5, the detention of my

[305]**Press Exhibit No. 98**: http://www.perfil.com/contenidos/2008/10/15/noticia_0023.html

[306]**Press Exhibit No. 99:** https://www.lanacion.com.ar/nota.asp?nota_id=1059496&pid=5217042&toi=6258

[307]**Press Exhibit No. 100**: http://www.criticadigital.com/impresa/index.php?secc=nota&nid=13692

[308]**Press Exhibit No. 101:** http://www.lanacion.com.ar/1210022-duras-criticas-a-los-kirchner-y-a-scioli-en-el-acto-del-campo-en-palermo

[309]**Press Exhibit No. 102: h**ttp://www.infobae.com/notas/489204-Otra-tarde-complicada-en-el-transito.html

[310]**Press Exhibit No. 103**: http://www.lanacion.com.ar/1261005-chavez-llega-en-medio-del-escandalo

father was ordered in the case "Gutheim", that motivates this petition, where he was plucked out of his home, sick and carried out on a stretcher.[311]

(415) On May 20, 2010, the unions began to press the government claiming salary raises.[312]On that same day, my father was transferred to a common jail.[313] Additionally, on May 25th, the Government had organized large popular celebrations for the "Bicentennial" of Argentina emphasizing the commencement of a new era.

(416) On July 25, 2011 a new scandal exploded, this time involving the Supreme Court justice Eugenio Zaffaroni, because two of his properties, which finally ended being five, were used as brothels.[314] The scandal continued and, two days later, the prosecutor issued a resolution in the "Gutheim" case against my father.

(417) The above chronicle reflects the astonishing coincidence between the timing of the decisions, public declarations and accusations that affected my father and the dates when the Argentine government had to face serious problems –most of them involving corruption charges- before the press. But moreover, it may be noticed how easily does the Judiciary lends itself to the government distraction maneuvers and reserves "its" decisions for the politically adequate moments. Finally, the contents of the actions promoted by the government and outlined in

[311]**Press Exhibit No. 104**: http://www.lanacion.com.ar/1261087-tras-la-detencion-trasladan-a-una-clinica-a-martinez-de-hoz

[312]**Press Exhibit No. 105**: http://edant.clarin.com/diario/2010/05/19/um/m-02197589.htm

[313]**Press Exhibit No. 106**: http://edant.clarin.com/diario/2010/05/20/um/m-02197930.htm

[314]**Press Exhibit No. 107:** http://www.perfil.com/contenidos/2011/07/25/noticia_0025.html

this paragraph evidence the animosity that the government has against my father.

6. Violation of domestic and international rules

(418) The outline of the facts in the above section, which has been necessarily accompanied by a criticism of each situation, exempts me from any additional comments on the violation of the guarantee to be tried by independent and impartial courts.

(419) Argentine courts, including the Supreme Court itself, have not only violated the articles of the Convention and the case law arising therefrom, as regards the independence and impartiality of the courts, but they also violated the doctrine laid down by the Supreme Court in the "*Llerena*" case, which had been adopted, precisely, to respect the criterion of the Inter-American Court.

(420) The Inter-American Court of Human Rights, in an advisory opinion in response to the Republic of Uruguay, held that in relation to the obligation of a State to place the legal resources at the disposal of its inhabitants to enforce the rights guaranteed by the Convention, it is not sufficient for such remedy to be provided by a court or a law or to be formally recognized, but it must be truly effective. And added that, a remedy that proves to be illusory due to the general conditions prevailing in the country, or due to the particular circumstances of the case, cannot be deemed effective. To such end, the Inter-American Court of Human Rights clarified that such would be the case, for example, when the Judiciary would not have sufficient independence to render impartial decisions or in any other situation that amounts to a denial of justice.[315]

[315] IACtHR, Advisory Opinion of October 6, 1987, Series A Nº 9.

(421) The evidenced animosity of the judges against my father; the unscrupulous violation of the most elementary rules of due process – such as the violation of the *non bis in idem* or the preventive detention used as punishment—; the lack of disqualification of judges who are closely related to persons who publicly have declared that my father is an enemy; the lack of any supporting arguments in the last ruling rendered by the Supreme Court in a case where the liberty of a person aged 87 is at stake; the repeated and proven trampling on the independence of the whole system, by the Argentine Executive Branch and the political synchronization of the court decisions, in line with the needs of the Presidency, are some of the very serious flaws that arouse, from the point of view of any reasonable observer, a justified fear of not receiving the equitable and impartial treatment that any accused person deserves.

SECCIÓN V

CONCLUSION AND PETITION

Conclusion

(422) All avenues of appeal available within the Argentine legal system to reverse his preventive detention have now been exhausted. Therefore, a petition to the IACHR represents Dr. Martinez de Hoz's last hope to secure freedom in his lifetime. My father remains under house arrest for more than two years and a half through an order of preventative detention, despite the fact that:

- He was exonerated on the merits twenty-four (24) years ago based on exactly the same set of facts that support Argentina's latest prosecution against him;
- Prosecution proceedings were first initiated against him over twenty-eight (28) years ago, for actions alleged to have taken place over thirty-five (35) years ago; and
- He is plainly not a flight risk given that he is elderly, in ill health, and has always appeared in person for all necessary court appearances.

(423) Dr. Martinez de Hoz is elderly, unpopular, and frail. He is the personal object of a sustained media campaign by the President of his country to demonize him. For these reasons, the ordinary rules—of due process, of protections against double jeopardy, of timely legal process, of impartiality , and of the presumption of innocence—can and have been subverted in plain daylight. Under any objective standard, the actions taken against Dr. Martinez de Hoz represent an abject failure of the rule of law and a violation of the most basic legal rights enjoyed by any citizen of Argentina, and any citizen of a member state of the Organization of American States.

(424) As La Nación has observed:

> "[Martinez de Hoz] is someone that can easily be demonized, accusing him of crimes he did not commit. These are precisely the situations when the application of …the guarantees established by the law and the rule of law must be more meticulous… Western civilization enshrined principles such as equality under the law and the presumption of innocence to avoid that the punishment or acquittal be determined on the basis of the greater or lesser adhesion that a figure may arise in the crowd. Otherwise, we would be replacing [law] by the wishes of …public opinion polls."[316]

Petition

Therefore, I hereby request to this Honorable Commission, as follows:

1) To act in accordance with the provisions of Article 30 of the Rules of the IACHR and –in view of the age and health condition of the victim— pursuant to item 4º of the referred Article;
2) To issue the report of admissibility provided by Article 36 of the Rules;
3) To declare, in the given stage, that the Articles 1, 5, and 8 paras. 1,2, and 4 of the Convention, have been violated to the detriment of José Alfredo Martínez de Hoz, with the purpose that the IACtHR issue a decision destined to obtain the immediate cessation of harmful conduct by the Argentine State, with court costs and expenses borne by the Argentine State.

Date: December _____, 2012

By: _____
José Alfredo Martínez de Hoz (Jr.)

Attorneys for José Alfredo Martínez de Hoz (Jr.)
Boies Schiller & Flexner LLP,
Matthew W. Friedrich y
Rafael Calatrava

[316] Editorial Diario La Nación, *Caza de Brujas* (Witch Hunt); April 30, 2010.

5301 Wisconsin Ave. NW
Washington, DC 20015
Telephone: 202 237 2727
Facsimile: 202 237 6131