OPINION No. 9804
Courtroom 1 “Fernandez de Kirchner, Cristina y otros s/ encubrimiento” [*on cover-up*] (cassation file).
Court File No. CFP777/2015/CFC1
Fiscalnet: 10789/15

APPEAL DISMISSED

In this Court,

I, Javier Augusto De Luca, General Prosecutor before the Federal Court of Cassation in Criminal Matters, in charge of Prosecutor’s Office No. 4, in the case entitled “Fernández de Kirchner, Cristina y otros s/ encubrimiento” [*on cover-up*] (cassation file), kept on file at Courtroom 1 of the Federal Court in Cassation Matters, Court Case No. CFP777/2015/CFC1, Fiscalnet: 10789/15, hereby state as follows:

1) Background.

This file was referred to me as a consequence of the appeal to the court of cassation filed by the representative of the Public Prosecutor’s Office before the lower court, against the ruling passed by Courtroom 1 of the Court of Appeals in Federal Criminal and Correctional Matters for the City of Buenos Aires, which decided —by a majority vote— to uphold the decision appealed against, which dismissed the accusation that gave rise to these proceedings on the grounds that there was no offence (section 180 of the Argentine Code of Criminal Procedure), and ordered that relevant copies of the file and of the confidential documents be forwarded to Federal Court No. 9, Clerk’s Office No. 18, to be added to case file No. 11,503/14 kept by that court.

In his appeal to the court of cassation, the prosecutor before the court of appeals

stated that the decision appealed against was inconsistent with the appropriate legal solution for the case, since the line of reasoning contained therein was the result of excessive formalistic strictness to the point of distorting the essence of the instruments and legal concepts in question. He described the arguments provided by the Court of Appeals as being dogmatic, which unlawfully prevented access to a judicial investigation that might make it possible to prove the hypothesis suggested in the accusation.

a) The events reported.

These proceedings were initiated on 14 January 2015 as a result of the accusation presented by the prosecutor then in charge of the Prosecutorial Investigation Unit handling the bombings of the AMIA building perpetrated on 18 July 1994, Mr. Alberto Nisman.

It is clear from such accusation and from the subsequent request for the investigation stage of the proceedings to begin —submitted by the prosecutor then handling the case— that the subject-matter of these proceedings is the purported investigation of an alleged "sophisticated criminal plan" claimed to have been designed, negotiated and implemented by Cristina Elisabet Fernández de Kirchner –President of the Argentine Republic–, together with Héctor Marcos Timerman –Argentine Minister of Foreign Affairs and Worship–, Andrés Larroque –Argentine Congressman–, Jorge Alejandro "Yussuf" Khalil, Héctor Luis Yrimia –lawyer and former Prosecutor–, Luis Ángel D´Elia, Fernando Esteche and an individual identified as "Allan" who, as indicated by the evidence collected, appears to be Ramón Allan Héctor Bogado; all of whom allegedly conspired to secure the impunity of the Iranian nationals accused in the case dealing with the AMIA bombings, by helping them to avoid investigation and escape Argentine justice.

That goal was allegedly achieved through the signing of a treaty known as "Memorandum of Understanding between the Government of the Argentine Republic and Government of the Islamic Republic of Iran …", which took place on 27 January 2013, in the city of Addis Ababa, Ethiopia.

Said instrument purportedly led to the achievement of the goal of impunity through two main elements: first, the establishment of a "Truth Commission", whose secret purpose allegedly was the creation of a new enemy —introduction of a false hypothesis— and the resulting disassociation of the accused Iranians from the case and, second —and allegedly Iran's chief interest in the signing the Agreement— the negotiation by the Argentine State of the removal of the "red notices" which were issued by Interpol at the request of the judge hearing the case in 2007, against five of the accused Iranians —namely, Imad Fayez Moughnieh, Ali Fallahijan, Mohsen Rabbani, Ahmad Asghari, Ahmad Vahidi and Mohsen Rezai— and which are still in effect. This was purportedly reflected in Article 7 of the abovementioned Memorandum.

Those actions —described as criminal— were purportedly inspired by the intention of the Argentine State to re-establish trade relations with Iran, with a view to satisfying the energy needs that Argentina had at that time.

The facts and hypotheses on which the accusation is based were summarized and maintained in the request for the investigation stage of the proceedings to begin, which was filed on 12 February 2015 by the prosecutor that took over the accusation made by Nisman in January.

b) The Trial Court's Decision.

On 26 February 2015, the judge in charge of Court No. 3 in Federal Criminal and Correctional Matters for the City of Buenos Aires decided to dismiss the accusation that gave rise to these proceedings on the grounds that there was no offence (section 180, third paragraph, Argentine Code of Criminal Procedure), and ordered that copies of the relevant parts of the file and of the transcripts of the wiretapped conversations be forwarded to Court No. 9 in Federal Criminal and Correctional Matters, Clerk's Court No. 18, so that they would be added to case file No. 11,503/2014 —in the context of which Ramón Allan Héctor Bogado is being investigated in connection with the alleged commission of crimes that may be prosecuted by the State on its own motion— in accordance with the guidelines

laid down in the decision.

In order to reach this decision, upon analyzing the accusation and the evidence produced and suggested, the court concluded that the facts reported did not constitute a crime, but that, on the contrary, all the evidence categorically disproved the existence of the hypothesis formulated by the prosecutor in the accusation.

With respect to the implications of the creation of the "Truth Commission", the court held that there was no commencement of execution and, thus, it could not be relevant from the perspective of criminal law. It noted that the accusation contained a glaring contradiction since, on the one hand, it stated that the creation of that Commission was the foundation stone of the plot to give impunity to the accused and, on the other, it recognized that, due to the lack of time and other obstacles, the Commission would never be constituted and would never operate.

As regards the alleged intention of the Argentine government to remove the red notices, the court asserted that such fact was relied upon as one of the main arguments of the accusation and as an essential element of the cover-up, since the prosecutor that presented the accusation referred to such intention approximately fifteen times in the filing. The Court found it odd that no evidence was produced to back such an important statement.

This was coupled with the fact that such assertion was categorically denied by Ronald Noble, who held the position of Secretary-General of Interpol for 14 years. In this respect, the Court stated that Ronald Noble denied, at least twice, that the intention of the Argentine government was to remove the red notices and maintained that, on the contrary, its intention had always been to bring the Iranian citizens to justice. Among other statements, it cited Noble's words as published by the newspaper Página 12: "*Prosecutor Nisman's statement is false. No official of the Argentine Government has ever tried to cancel the Interpol red notices. In the last two days, I have been completely surprised to hear such false statements attributed to Mr. Nisman, who I knew, in his accusation. On the contrary, Mr. Nisman, the Argentine Foreign Minister, Héctor Timerman, and each*

Government official who I met with and talked about this topic, always had the same view: Interpol red notices against the Iranian citizens had to remain in effect".

The federal judge placed emphasis on the fact that the intention of the Argentine government was reflected in the exchange of letters between the Argentine Foreign Minister and the Secretary-General of Interpol after the signing of the memorandum of understanding. The official letter sent to Interpol specifically referred to the issue of the red notices as follows "*…any modifications to the international arrest warrants which were timely issued to INTERPOL from Argentina in relation to the serious crimes investigated in the AMIA case may only be made by the Argentine judge with authority over such case*". Furthermore, it stated that the future entry into force of the Treaty "*ha[s] no effect whatsoever on the applicable criminal procedure, nor on the status of the abovementioned international arrest warrant*" (emphasis in the original).

The Counsel of Legal Affairs of Interpol, Joel Sollier, asserted that "…*said agreement implies no change whatsoever in the status of the red notices published in connection with the crimes investigated in the AMIA case*" (emphasis in the original).

In view of the foregoing, the court reached the conclusion that neither of the two hypotheses formulated by the prosecutor in his request for the investigation stage of the proceedings to begin may be deemed to constitute a crime.

Furthermore, the court dismissed that the "summit of Aleppo" was the starting point of the impunity plan, due to the lack of evidence and, specifically, because of the fact that the ambiguous —and succinctly ratified— statements of a journalist about "something" (it is unknown whether it was a document, a cable or a paper, and there is no information about its origin) that he "allegedly saw" were not sufficient evidence.

Moreover, the court carried out a detailed analysis of the transcripts of the wiretapped conversations provided as evidence of the crime in relation to each of those identified as being responsible for the plot and concluded that there was no proof

evidencing such participation.

c) <u>Trial-court prosecutor appeal</u>

In the appeal against that decision the prosecutor repeated his line of argument. He said there were two opposed points of view (one was that of the accuser and the other was the trial judge's), so it was appropriate to open the evidentiary stage in the investigation to know who was right.

The prosecutor stated that the decision appealed against was premature because some evidence still had to be furnished to be able to hold that the Truth Commission had no criminal relevance or that there had not been acts targeted at removing red notices.

He made a legal analysis of the difficulties to differentiate a preparatory act from execution commencement and repeated that it was necessary to investigate to rule out that the creation of the Truth Commission was not an act characterized under the "assistance" mentioned by section 277 of the Criminal Code.

Regarding red notices, he said that in his interpretation of section 81(2) of Interpol's Rules on the Processing of Data there would be at least one option under which the removal of a red notice would not be conditioned to the decision of the judge hearing the case. He asserted that the position of the accuser would have been based on that assumption.

In order to make Mr. Ronald Noble's statements less convincing, he said that it was not valid to dismiss an accusation based on emails and newspaper articles as evidence when such elements had not been ratified in court.

He added that there were still serious doubts about the reasons why such seventh section had been added to the Memorandum of Understanding, which was operative, and that it was appropriate to investigate whether such section could have objectively been considered "assistance" to the Iranian indictees, as they could resort to such section to remove the red notices.

d) <u>Decision of the Court of Appeals</u>

It is a decision made up by three different opinions.

The first of the judges took distance from the trial-court judge's reasoning, as he considered that the instrument had gone through all the steps required in the Republic

(execution and ratification by Congress through law No. 26843).

He stated that the different Memorandum sections regulating the formation and powers of a "Truth Commission" could and have been subject to different questions (*amparo* for the declaration of unconstitutionality and which is part of case No. CFP 3184/2013/CFC1, currently pending before the Federal Criminal Cassation Court). That, however, in that case the possibility that signing such instrument could be considered grounds for cover-up had not even been suggested: *"This Court, the private accusers or even the prosecutor of the case, who is an accuser herein, did not find any sign in the text of the agreement of the alleged cover-up crime which has only now been reported."*

The judge stated that *"No accusation intended to be based on the mere objective expression of the Treaty may seriously be considered the basis of a criminal investigation… The Memorandum was, in the opinion of this Court, unconstitutional, but it was not the instrument of a criminal act"*. So he understood that revisiting the criticism against the Memorandum would be analyzing a matter which has already been decided and which was discussed in another case.

He listed the reasons alleged by the accusers to introduce in an original manner such criminal hypothesis as late as in 2015, which would be explained by the fact that *"we did not have the elements we have today, which would reveal the illegitimate intent hidden in the words of the Memorandum"*. However, the appellate judge said that such "new" measures were two: a newspaper article by José "Pepe" Eliaschev entitled "Argentina negocia con Irán dejar de lado la investigación de los atentados" (Argentina negotiates with Iran to dismiss the investigation of the attacks) published on Perfil newspaper in March 2011 (and which was based on an unofficial document); and the wiretapping of telephone communications accessed by the accuser in his capacity as prosecutor of the case regarding the investigation of the AMIA bombing. Most of that wiretapping had taken place in 2013 (after the Memorandum was executed in February that year).

He refuted the reasoning of the prosecutors involved regarding the fact that the conversations obtained through wiretapping would establish that the main purpose in executing the Memorandum would have been the removal of red notices by Interpol and that such hypothesis would be based on the parliamentary ratification by Iran, which would be due to Timerman's failure in negotiating with Interpol Secretary General to remove the

notices. In fact, in that respect, the judge stated that if the Memorandum provided for a series of measures benefiting only Iranian indictees, it did not make any sense that the mere "frustration" by the removal of the red flags would have caused such State to lose interest in the ratification thereof. Because, according to the accusation, Iran was interested in the creation of a Commission which—always according to the accusation—could introduce a new (and false) hypothesis which would definitely release Iranians from any liability. If Iran was the only beneficiary, why didn't Iran ratify it?, the judge asked himself.

In turn, he mentioned serious contradictions in the connection of information regarding the commencement of the negotiations considered "illegitimate", as sometimes the year was 2011, then 2010 and even 2006. He prepared a detailed analysis of the content of the conversations on which the accusation was based (whose main interlocutors were Luis Angel D'Elia, Jorge Alejandro "Yussuf" Khalil and Ramon "Allan" Hector Bogado) and the facts which were publicly known, and highlighted that, far from being evidence of a criminal act, those acts established their untimely nature, as many conversations took place after the information provided by newspaper articles which had even been mentioned in the accusation.

He also highlighted the logical contradictions in the accusation's reasoning. He said that, on the one hand, the accusation stated that *"… Iranian officials had communicated their historical interest to trade. They did not care about the approval or rejection of the Memorandum of Understanding"* and, then, the contrary was stated: that Iran was indeed interested in executing the agreement.

The judge mentioned the official communication sent by Mr. Hector Timerman to Interpol Secretary General on 15 February 2013 where he stated that the execution of the Memorandum and its possible effective date would not cause any change whatsoever in the status of the international arrest requests. As well as the emails sent after Mr. Ronald Noble filed his accusation against Mr. Hector Timerman and two journalists. And he concluded: *"Inferences versus statements; suspicion versus documents; speculations versus events. The scales are undoubtedly tipped against the success of the accusation."*

Answering the argument of the appellant, who had stated that the statement of the lower court was false relative to the fact that only the judge of the case may order the removal of the red notices, he explained that while it is true that Interpol's internal

regulations may give grounds to remove the notices, *"the prosecutor does not provide a single datum from which it can be deduced that someone from the Argentine government, or even the Iranian government, performed an act intended to 'force' the activation of such power of the Secretary General of Interpol"*. He concluded that there is no element exceeding the words of the regulation.

Regarding the alleged creation of a fictitious hypothesis to be introduced by the "Truth Commission", the judge drafting the first opinion said that the accusers failed to detail which that hypothesis or the specific contribution of the indictees would be. And he added that while the appellant said that the wiretappings would support such statement, he had not assigned evidentiary value to the wiretappings, as he qualified them as "mere circumstantial evidence". It is worth highlighting that in this first opinion the judge of the Federal Criminal and Correctional Court of Appeals questioned the arbitrary linking (without respect for any kind of chronology of dates and times, and linked by ellipsis, as if they were continuous) of wiretappings, which were transcribed by the accuser and which, in turn, were *"combined with others made in different months"*, with the sole purpose of leading to think that mention was made of the alleged cover-up.

In the transcriptions of the wiretappings, the interlocutors described a *"small table"* of negotiation, but, however, they reproduced the different news which took place *"or a made-up idea of being operators without conviction"*. And then: *"It could be claimed that the Memorandum of Understanding was a failure for Argentine diplomacy, an error for legislative records, a disappointment for those who thought that its text showed progress in the investigation into the attack, but it is farfetched to consider that it gave rise to a Machiavellian plan to cover up those responsible for the hundreds of victims of the AMIA bombing"*.

Finally, the judge explained that the accusers are trying to open an investigation to obtain evidence of something the accuser himself does not know. He explained that the facts and evidence of an alleged crime had to be incorporated when demarcating the subject matter of the proceedings, so as to avoid that the investigation becomes what is know as a *"fishing expedition"*, and he cited a precedent of the very same Court where the following was stated: *"we would face the paradox that, instead of investigating further to confirm or rule out a suspicious circumstance that may be relevant in criminal and legal terms, we*

would do it 'just in case', in order to find any suspicious element. The destruction of the logical order of surveys is what happened in this case (…) a thorough and detailed examination is requested… with the hope that, at any time, it provides the basis for suspecting the commission of a crime. And there the cycle begins again. Devising new procedures that, in due course, will generate others, with the consequence of violating constitutional guarantees".

And he categorically concluded: *"the appellants insist in keeping a criminal action open and ongoing, with the hope that, at some time, something may show that the Memorandum was inspired by a criminal intent. Strictly speaking, in the light of the background information reviewed above, the term for such an endeavour can only be one: a perpetual case. Because if nothing existed in 2013, if nothing was alleged in 2014, and today, in 2015, nothing could be brought, what hope is there that the lapse of time will reverse this situation? On the contrary, the farther one is from the time in which the alleged criminal plan might have occurred, the lesser can be the expectation of obtaining something the accusers can hold on to, in order to keep their case open".*

In turn, the second judge issued a concurring opinion substantially agreeing with the opinion of the preceding judge, so the decision of the Court of Appeals was obtained by a majority.

He opposed the opinion of the preceding judge in that this judge had remarked the lack of commencement of execution of the alleged criminal plan.

He believed that the creation of the Truth Commission could not be in itself a way of "assistance" in the terms of the cover-up crime, as there would be no improvement in the procedural situation of indictees based on that.

But in the hypothesis of the prosecutor that assistance would have to do with the denaturalization of the legitimate purpose assigned to the "Truth Commission", to be performed through its members (the identity of whom is unknown, as the Commission has never been created), who would fail to perform according to the powers granted and would falsely hold a hypothesis which would be imposed with the purpose of deviating the investigation of the bombing.

He mentioned the fallacious argument of the prosecutor in trying to prove a hypothesis by linking different conversation extracts which had in turn been the starting

point of such hypotheses, as well as the contradictions incurred by the prosecutors in holding alternative hypotheses simultaneously. At this stage, he remarked that the accusation had been filed by a representative of the Public Prosecutor's Office, so it is an act of government which, as such, had to be adjusted to the pertaining formal requirements.

Finally, in connection with the facts relevant hereto, the judge reminded that signing a treaty with a foreign power is one of the powers granted by our National Constitution to the Executive and that such behaviour could not constitute a crime *per se*, unless there was serious circumstantial evidence which could lead to suspect otherwise. And he remarked that it is not up to a court to review the merit, desirability or timeliness of an act of another branch of Government.

The judge who dissented, in turn, stated that all facts appearing as realistic or "possible" have to be investigated. He said that the hypothesis of the prosecutor had been arbitrarily dismissed when it appeared to be realistic.

He agreed with the argument of the prosecutor in that it was difficult to categorically establish the division between a preparatory act and the commencement of execution and that, after dismissing the possibility of investigating the facts, it could never be known whether the fact, if any, had been subject to commencement. He added that with the evidence requested by the prosecutor when requiring the investigation the intention behind the execution of the Treaty would be known more accurately.

He added that there still were some hypotheses to be revised before dismissing the accusation such as, for example, the reasons for the inclusion of section 7 in the Memorandum of Understanding; the fact that in 2004 Interpol Executive Committee had annulled the red notices of several indictees' arrest orders at the request of Iran and notwithstanding Argentina's opposition; the reasons why an agreement had been reached only regarding the indictees who had red notices and not with respect of the rest; and the reasons of the different treatment in the creation of the "Truth Commission" in the Memorandum of Understanding regarding other bodies such as this recognized by the international legal tradition.

He finally cited some telephone calls and said that such calls could not be plainly dismissed, but on the contrary, they should be investigated.

e) <u>Prosecutor's cassation petition</u>

The prosecutor preceding me in representing the Public Prosecutor's Office repeated the arguments of his preceding prosecutor, and added: "*It should also be clear that I am in no position to issue opinions, here and now, regarding the criminal nature of the facts mentioned or about their harmlessness from the point of view of criminal law; in my capacity as representative of the Public Prosecutor's Office, I just want to deepen the investigation of the facts mentioned in the investigation request with the only purpose of removing any doubt which may be held in regard to them…*".

2) <u>Decision which may amount to a final judgment</u>

A decision dismissing a complaint or rejecting a prosecutor investigation request may amount to a final judgment, because it entails that the same facts reported, under the same assumptions, may not be investigated by the person intending to do so. While the dismissal of an accusation does not entail the same procedural nature as *res judicata*, the effects are similar from this point of view, as the grounds to dismiss are based on the fact that the facts reported are not crimes. Similarly, see *mutatis mutandi*, CFCP, Division III, case No. 5994 "Fernandez, Maria Beatriz e Inda, Tomas Juan A. s/ recurso de casación" [on cassation petition], petition decided on 15 February 2006, record No. 43/2006. The decision on the merits is dated 6 January 2007, record 44/07.3.

3) <u>Considerations on the case</u>

a) <u>Two lines of argument (factual and legal)</u>

There are two lines of argument in regard to the prosecutor's claim. One is of procedural nature, evidentiary, consisting of the request to initiate an investigation to prove different facts included in the accusation because it is considered that the rejection of the request for the commencement of the investigative stage of the proceedings is premature.

The other line is of legal and criminal nature, and consists in determining whether those facts, even if they were proven, constitute a crime or not.

I will begin with the second of these lines, because if it does not apply in the case, we cannot venture into the procedural aspect.

b) The prosecutors' obligation to investigate

Prosecutors have an obligation to use criteria that lead to the maintenance of criminal proceedings and not to their termination (Resolutions Nos. 3/86, 25/88, 96/93, 39/95, 20/96, 82/96 of the Attorney General's Office, Resolutions Nos. 27/99, 39/99 of the Public Prosecutor's Office, Resolution No. 32/02 of the Attorney General's Office, among others). However, it is clear that the proceedings to be maintained must be criminal, i.e., they must have arisen out of a crime. Therefore, if from the beginning of the accusation or *notitia* it can be incontrovertibly concluded that the facts brought to light do not constitute a crime, there is no criminal case to try or maintain.

The Constitution forbids initiating and maintaining criminal proceedings to determine whether a crime has been committed or not, when the conduct in question does not constitute a crime at first sight. This assumes that what is intended to investigate is a crime, whose commission is not certain yet, but in no way can an investigation begin into the circumstances of something that is not considered a crime. What is required to be demonstrated is whether or not this or that a crime could have been committed and, to such effect, the crime must be legally possible.

If it is not legally possible, judges do not have constitutional or legal jurisdiction to investigate anything because such events are outside the scope of our authority (Section 19 of the Argentine Constitution). And this is why one of the judges refers to a "fishing trip", because pursuant to our legal system we do not have jurisdiction to investigate the conduct of people just for the sake of it, we can only investigate illegal conduct.

And in this case, even though all the hypotheses of the accusation, the request for the commencement of the investigative stage of the proceedings, the appeal and the appeal of annulment are considered again and again, there is no crime to investigate and prove.

The extensive and timely arguments of the trial judge and the concurring judges in the decision of the court of appeals have not been refuted. They demonstrated through various means that no crime was committed or attempted with all sorts of arguments, whether alternative, subsidiary or complementary.

But I must add some considerations.

c) The factual hypothesis is not a crime. The Legislature, in exercising its

constitutional jurisdiction, cannot commit crimes.

[C.1]. The signing of an International Treaty between two sovereign powers and the motivations or ulterior motives of the different actors involved in previous negotiations, drafting and enactment, approval or ratification can never be the factual or legal basis of a crime (Sections 27;. 74 (24) and 99 (11)). Whether they are correct, convenient or mistaken is not the Judiciary's business, because such matters are political and non-justiciable, since, otherwise, it would affect the duties of the other branches.

Legislators, advisors, staff members of the Executive, etc., may commit crimes in their personal capacity during the law-making process, but not by enacting and approving a law in itself.

The alleged spurious intention to cancel or remove Interpol's "red notices" by the Argentine government and the creation of the so-called "Truth Commission" to build a false investigation hypothesis cannot, either objectively or legally, be considered to be the "assistance" defined in Section 277 (1) (a) of the Argentine Criminal Code, or any other crime.

Claiming that the signing of a treaty constitutes a criminal scheme is absurd from a legal point of view. If the subscription of this international agreement could be understood (with some effort and imagination) as a material aid to the fugitives of the "AMIA case", whether already provided or attempted, this would not be a crime either because it would fall within the non-justiciable constitutional authority of the Argentine Executive and Legislative Branches.

It should be noted that the creation of the "Truth Commission" and the notice served upon Interpol on the subscription of the international agreement are clearly written in the same agreement and were ratified by the Argentine Congress. That is, our legislators, in the exercise of their constitutional powers, drafted these provisions. Nothing can be claimed about covert operations or the existence of hidden motives, because everything is evident.

Moreover, the crimes of inside dealing or related offenses that may have been committed in the course of these events bear no legal relationship with the alleged cover-up scheme, precisely because these crimes deal with the conduct of people having false influence. Such conduct is being investigated in the case created to such effect in previous instances.

[C.2.] Let us pick up where we left off. An international treaty, in regard hereof, has the same constitutional status as domestic laws (Section 31 of the Argentine Constitution). There are endless provisions of treaties signed by the Argentine Republic establishing procedures, institutions and rights that extend or restrict the scope of Argentine laws.

Therefore, it must be remembered that, except in the cases of Section 29 of the Argentine Constitution, the Argentine Congress (that is, the legislators, its members) cannot commit a crime when exercising its constitutional powers, as it is sovereign, the body which decides what is a criminal act and what is not (Section 75 (12) of the Argentine Constitution). The Argentine Executive Branch is part of the complex law-making process, involving domestic laws and treaties with foreign powers. Acting within the scope of this constitutional jurisdiction, they may criminalize a certain conduct and decriminalize acts that are currently considered illegal. For example, Law No. 23,521 on Due Obedience (regardless of the fact that it was declared unconstitutional and later null and void) gave at the time impunity to several hundred people, and it is not possible to consider that this was a cover-up plotted by those who drafted the bill, the legislators who enacted it, the president who approved it and the judges who applied it in cases submitted to their jurisdiction.

At the federal level, in addition, national legislators are the ones who establish the proceedings to be held to enforce criminal law. They may establish one or several different proceedings, including after the facts of the case (to be applied while they do not adversely affect the rights acquired by the parties). For example, the regime of prison release can be amended and its immediate application can result in hundreds of people in custody immediately regaining their freedom but still being subject to prosecution (Laws Nos. 23,050, 23,070, 24,390, etc.).

The traditional and unexceptional practice of extradition treaties is framed within said context, which treaties leave out of their provisions a range of people and crimes, especially those with minor sentences; so for those accused of such crimes a request for extradition will never be admitted when the crime has been committed abroad and the offender is in our country (for instance, the extradition treaty with the Republic of Italy, ratified by Law No. 23,719, Section 3, punishment whose maximum term is less than two years).

Thus, there is nothing abnormal in enacting laws amending criminal proceedings

and through them, or through substantive criminal laws, providing benefits to the accused and convicted or directly giving them full impunity. This has been said regardless of the instant case.

It can be noted that it is incorrect, from a legal point of view, to consider that these mechanisms and constitutional provisions are types of assistance or personal benefit granted to the offenders. It is for the Legislature in conjunction with the Executive in the complex process of enacting and promulgating laws to decide on the impunity of those they deem appropriate, and they have many ways to do so (Section 44 of the Argentine Constitution, because Congress is vested with the legislative power, because it can approve treaties with foreign powers, Section 75 (22) and (24) of the Argentine Constitution, which are administered by the Argentine Executive, Section 99, (11) of the Argentine Constitution); all this pursuant to the general procedure set forth in Sections 77-84 of the Argentine Constitution which explain how laws are made and enacted, in accordance with Section 99 (3) of the Argentine Constitution, which indicates that they must be approved by the Argentine Executive Branch; because it may criminalize and decriminalize certain conduct when approving criminal law, Section 75 (12) of the Argentine Constitution; because it may also grant general amnesties, Section 75 (20) of the Argentine Constitution; because the Executive may grant pardons and commute sentences, Section 99 (5) of the Argentine Constitution, which has been admitted by the Supreme Court in regard to indictees, when considering that the exercise of this power does not breach Section 109 of the Argentine Constitution which forbids the Argentine Executive from interfering in judicial functions, etc.

In short, although this Memorandum gave impunity to the fugitives, which I am not asserting, it could have been done by those who signed it in the exercise of constitutional powers.

d) Red notices

Only judges may request Interpol to issue and cancel international arrest warrants of people suspected of crimes, leading to an Interpol's regulated procedure. The orders issued by the judges in charge of the respective proceedings of the countries where these people are suspected and considered fugitives are a necessary, but not sufficient requirement. The

other branches of the respective States have no specific power to be involved in Interpol's internal process in this regard or to issue or cancel such warrants. In turn, this body has reserved a certain degree of discretion or power to decide whether to admit the arrest request and then to intensify such arrest by issuing a red notice. And the same applies to its removal, for which it also provides for a procedure with hearings, etc. That is, none of this is automatic, but it is clear that there is no mechanism of requests or orders of the executive or legislative branches of the States, which simply appoint representatives to the body.

If the agreement establishes that Interpol will be notified of its subscription, this may or may not influence it; the same influence the lobbying power of any State may have, whether involved in the case or not. Furthermore, it would not have any impact on the development of the case pending before an Argentine judge, who would maintain or not the arrest warrants until he deems it relevant, because he has no power to maintain red notices in force; he can only remove them by communicating that he is no longer interested in arresting this or that person, because the purpose of such warrants has been fulfilled or for any other procedural reason of the case.

The procedure to issue or remove red notices is even different from that of extradition and international cooperation treaties, where the Argentine Executive Branch has constitutional powers to refrain from admitting a request for extradition made by an Argentine judge in respect of an indictee who is abroad or, conversely, to refrain from admitting a request for extradition made by a foreign judge (through the respective executive branch of his country) in respect of a person who is in our country.

e) <u>The meaning of the Memorandum in the criminal proceedings</u>

It cannot be denied either that in the existing federal criminal procedural system governing this case it is not possible to proceed to subject a person to it and then make him stand trial without said person being previously summoned to personally appear to testify or refuse to testify before the trial judge (Sections 294, 295, 306, 307, 346, and related sections of the Argentine Code of Criminal Procedure). This testimony currently has a dual nature: it is an act of defence and a necessary stage of criminal proceedings. If a person accused of a crime (for which certain requirements of objective and reasonable suspicion, based on legal evidence, must be met) does not appear before the judge to testify, the only

thing left to do is for the judge to order his arrest and declare him to be in contempt of court, because it is considered that he does not conform to law. And the proceedings are indefinitely halted until such person appears to testify voluntarily or compulsorily (Sections 288 et seq. of the Argentine Code of Criminal Procedure). It is possible to continue investigating and gathering evidence, but the case will not move to another procedural stage.

It may be noted that this is the current status of the case in relation to the people for whom international arrest warrants have been requested.

This is where the Memorandum is placed within the system, which is administered by the Executive and ratified by the Legislature, regarding indictees that have been summoned to testify, but who refuse to appear before the judge. They have failed to comply with the order to appear before the court. An arrest warrant has been issued against them and they have been held in contempt of court. The proceedings are halted in a stage well prior to the trial and no progress can be made. In this context, it is clear by reading the Memorandum that the agreement has no other purpose than for the fugitives to be taken to trial to testify before the judge, exercise their right of defence and, therefore, for the proceedings to move forward.

I repeat the same concept. These people, at the moment, do not wish to voluntarily submit themselves to the jurisdiction of the Argentine courts and the Argentine Judiciary does not have the power to make them do so. Whatever the name given to this procedural act in the Treaty, whatever the interpretation of the Iranian government or the Iranian law, the truth is that for us it is a pre-trial interrogation, because a statement made by an indictee before the trial judge may not be otherwise interpreted. And it must be remembered that it is sufficient that the indictees simply appear before the judge; it is not necessary that they testify to consider that the requirement has been met. Now, if pursuant to the Memorandum, other people may attend the interrogation and ask questions, it can be construed as an amendment to the proceedings, but in that case, it is within the powers of the Argentine Congress and the Executive Branch.

Argentina's judicial history has seen many "creative" government criminal policy solutions for the furtherance of the goals pursued by procedural law (which is considered to be mainly instrumental). This is so because these are not a set of rules that are carved in

stone; this is about the implementation of constitutional principles with a view to materializing criminal law in each specific case. The competent government branches will seek to establish a mechanism to unlock a specific situation and which will allow advancing the aspiration of unveiling the procedural truth. Therefore, using a mechanism other than the usual one is not extraordinary at all. We are in the presence of the quintessential difference between the desirable and the possible, the ideal and the real. And the solution could be criticized by politicians, by legal scholars, by the parties, etc., but it is the solution that those who run the Argentine Republic's foreign and criminal policies had the knowledge and ability to secure.

In fact, by reading the Memorandum it is possible to infer that the judge and the prosecutor leading the investigative stage of the proceedings are not bound by the actions and findings of the Truth Commission, which do not have any impact on the process as they are subject to the independent decisions made by the judges hearing the case. Those actions and findings may not be considered "assistance" in the terms of section 277 of the Criminal Code. The Commission's participation has no more value than that of the endless opinions, studies, investigations and conclusions that the various players (journalists, analysts, investigators, judges) have been offering on the attack since the very first day it occurred.

This makes it apparent that the executive and the legislative branches of government, by executing this agreement, with that specific language, have in no way hindered the conduct of the criminal process which, I insist, in Argentina is in the hands of a judge who belongs to a different branch of government, completely independent from the other two.

f) Scheming or conspiring does not amount to the "assistance" required for cover-up

In Argentine criminal law —unlike the Anglo-Saxon tradition— there is no crime of conspiracy, which, generally, would be the agreement of two or more persons to do something unlawful (though not necessarily a crime) or something lawful but using unlawful means (though not necessarily crimes).

The only provisions in Argentine criminal law that contemplate conspiracy are the crime of treason to the nation (section 216, Criminal Code), the crime of rebellion or sedition (section 233, Criminal Code) or to commit certain crimes by military officers

(section 241 bis (4), Criminal Code). That is to say, there is always the intention to commit a crime and it must be the specific crime referred to in the relevant section.

Not even the crime of criminal association (section 210, Criminal Code) is similar to conspiracy because Argentine positive law requires being a member of a gang that is somewhat permanent and was formed for the purpose of committing crimes in general (not a specific one).

The relevance of these remarks in the case at hand is determined by the fact that conspiracy punishes behaviours that take place before the crime they relate to is committed. This, however, should not be confused with the attempt to commit these offences (section 42, Criminal Code).

This confusion is in fact observed in several reasonings of the prosecution's arguments and in the dissident vote issued by the one of the judges of the Court of Appeals in Federal Criminal and Correctional Matters, as they consider that a series of actions which would evidence agreements among two or more people to materialize arrangements with a foreign country for purposes of benefiting a group of fugitives would configure attempted cover-up or cover-up proper, and would therefore warrant that the applicable investigation be conducted. As can be observed, these negotiations or talks do not amount to a crime in Argentina because the criminal code does not provide for the crime of conspiracy for cover-up or to achieve something that is not a crime, as the goal is to attain something that the executive and the legislative branches are constitutionally entitled to do.

This is so because the verb "assist" included in the description of the crime of cover-up in section 277, Criminal Code, which punishes the crime committed by providing a personal benefit, may never be construed in the imprecise and broad way it is used in the Request for the commencement of the investigative stage of the proceedings. The verb must have a clear definition and operate within a system where there is a large number of other provisions that must remain effective. In this line of thought, any group of people who submits a bill to repeal a crime, since such bill would benefit any person accused or convicted of that specific crime (retrospective nature of the more favorable criminal law), should be considered guilty of cover-up for helping those criminals elude the action of the judicial system. And this would also apply to whoever participated in the debate and drafting of the bill, who should already be punishable for alleged cover-up.

4). <u>Final considerations, answers and consequences</u>.

a). The national and international arrests of the suspects were ordered by the judge hearing the case, not by any other authority.

b). It is irrelevant whether one of the reasons for entering into the agreement was to re-establish or intensify commercial or other kind of relationships with the Islamic Republic of Iran.

c). The conduct reported in the accusation cannot be considered an act of conspiracy solely due to the fact that it was developed in a confidential manner because diplomatic relations, on account of their nature, are developed in the strictest confidentiality. Thus, if they are not revealed it is not because of their spurious subject-matter, but because of their confidential nature.

d). If an individual decides to appear before the courts —irrespective of the mechanism through which he finally decided to do so—, the immediate consequence of this action is that the arrest warrant issued in respect of such individual must be removed and, in this case, the red notices as well. This could only happen after the completion of the hearings at which the indictees are to declare before the judge hearing the case.

If this is so, it is contradictory with the above to argue that Iran's interest in the agreement had declined and that, on account of this, it had not ratified the agreement.

The communication sent to Interpol informing of the agreement has no significance in Argentine criminal procedure. Furthermore, it is not part of a procedure established by Interpol to cause the removal of the red notices. Interpol's procedure for the issuance and removal of red notices does not require such a communication, i.e., the communication in itself is not sufficient to remove the notices. The communication is provided for in the agreement because Interpol had been involved in the settlement of the dispute through negotiations (see, for example, Interpol's official notices dated 14-Sep-2009, 3-Oct-2009, and 10-Mar-2010).

Neither the Argentine Republic nor the Islamic Republic of Iran by themselves, nor the agreement entered into by both countries, can automatically cause the removal of the red notices. Hence, all the arguments built on the basis of the fact that this was the core of the agreement fall apart.

e). If, after being subject to questioning, and upon the determination of their procedural situation, the indictees flee again, the disobedience declaration and the national and international arrests should be issued again by the judge hearing the case, which would cause the reinstatement of the red notices that had been previously removed. Thus, everything would start again because in Argentina it is not possible to subject an absent party to trial. Hence, the Memorandum and the acts preceding it have no greater scope than that of any procedural conduct by any party subject to a trial in any case being heard in Argentina.

f). The "Truth Commission" has no power to issue legal rulings, nor any influence on the case apart from its opinion, which the judge may take into account. Therefore, there is no point in building arguments on the basis of stating that the Commission's conclusions are pre-arranged to generate a false hypothesis.

g). As stated above, it is not important to consider whether the reported acts are preparatory, execution, or consummation acts of the crime of cover-up because, in order to do so, the existence of all the objective elements of such crime should be determined first. As I have stated before, this is not the case because the purported "help" does not have the legal objective result of facilitating the evasion of justice.

h). The case does not fall within the group of investigations whose closing is considered untimely because the present case aims at investigating certain conduct that does not constitute a crime.

i). Both the prosecutors who acted before me and the dissident vote have raised a deceptive argument which consists in maintaining that the hypothesis of the accusing party may point to the existence of a crime or to a non-crime. This requires further investigation for its determination.

What this reasoning omits is that the legitimization of an investigation to determine whether in a given situation there was a crime or not is not, in *some* cases, only a matter of evidence, but in *all* cases it is a necessary requirement to clearly determine which is the crime that constitutes the subject-matter of the investigation. In the phrase "I want to know if this or that crime was committed" the information is implied and there is no doubt that what the accusing party is intending to prove effectively constitutes a crime, which, as can be seen, does not happen in this case. If reports such as "they are dealing narcotics in the

house next door" or "this guy killed that other guy", or a report informing that a purse was stolen are received, we must investigate them on the basis that dealing, killing someone or stealing are crimes. But if the report aims at trying to prove whether a man is being unfaithful to his wife because he has a concubine, such investigation is not admissible because adultery is no longer a crime in Argentina (former article 118 of the Argentine Criminal Code).

In this case, as was stated above, the alleged attempt to have the red notices removed and the creation of a commission that was to issue an opinion on the case cannot constitute the basis of a crime because they are not instances of the "help" established in article 277 of the Argentine Criminal Code, as they fall within the powers granted by the Constitution to the other branches of Government, which are beyond the scope of the Judiciary.

According to the principles of no crime or punishment without prior law, the principle that everything which is not forbidden is allowed, and the principle that actions can only be punished when they harm others (articles 18 and 19 of the Argentine Constitution), Argentine law requires that the reported and investigated conduct constitute a crime and not just any act (articles 174, 176, 183, and 188, among many others, of the Argentine Criminal Procedural Code). In keeping with this, article 180 of said Code provides for the dismissal of the accusation and article 195 provides for the rejection of the request for the commencement of the investigative stage of the proceedings only in respect of acts that do not constitute crimes.

This explains why one of the appellate judges expressed that the aim of the request for the commencement of the investigative stage of the proceedings and of the appeal was to keep an investigation ongoing *in eternum*, not because the facts could not be proved but because what they are trying to demonstrate are facts that cannot constitute a crime.

j) All the evidentiary measures proposed by the first instance prosecutor, as well as those suggested by the dissident appellate judge, fall within the scope of the above. They are totally inappropriate because their application would only lead us to the same point in which we are today, and to the confirmation of hypotheses that do not involve crimes.

k). Finally, it is not necessary to deal with the accusation of the alleged appraisal of evidence submitted by the Argentine Treasury Attorney General's Office because, to solve

the case in keeping with the reasoning that has been followed here, such evidence is of no significance.

5) Final considerations

As can be seen, it is not possible to move forward with the procedural proposals aimed at proving some facts of the accusation because such facts do not constitute crimes.

As a consequence, since the requirements of article 193 *et seq* of the Argentine Criminal Procedural Code are not met, and as the judge has the power to reject the prosecutor's request for the commencement of the investigative stage of the proceedings made in this case (article 195 of the Argentine Criminal Procedural Code), I resolve to dismiss with good reason the recourse filed by the fellow prosecutor who acted in the preceding stage (article 443 of the Argentine Criminal Procedural Code).

Prosecutor's Office No. 4, 20 April 2015.