

In May 2014, two judges of the Argentinean No. 1 Federal Court of Appeals on Criminal Cases upheld a petition filed by Jewish Argentinean organizations - Asociación Mutual Israelita Argentina (AMIA) and Delegación de Asociaciones Israelitas Argentinas (DAIA) - ruling that the Memorandum of Understanding signed between Argentina and Iran in January 2013 concerning the establishment of a “Truth Commission” to investigate the 1994 bombing of the AMIA Jewish center in Buenos Aires, contravened the Argentinean Constitution. The Federal Court of Appeals also held that the Argentinean government should refrain from complying with the agreement, until all judicial remedies had been exhausted (according to procedural law, the Court of Cassation and the Supreme Court of Justice have jurisdiction to review any appeals against this ruling).

The Memorandum of Understanding had been ratified by the National Congress of Argentina through Bill n° 26.843, which was struck out by this judgment.

In the course of its judgment, the court made it clear that procedurally there was no obstacle to a federal criminal court considering a constitutional injunction or proceedings to uphold a constitutional right.

In the principle opinion the Court analyzed the nature of the “Memorandum of Understanding” (MOU) signed by Iran and Argentina. As a matter of international law, it was regarded as an agreement subject to fewer formalities than a common treaty, and designed to govern matters of an operational or technical nature. Nonetheless, despite deciding that the instrument need not be registered according to Article 102 of the UN Charter, the federal court concluded that the MOU was a bilateral treaty or agreement, a source of rights and duties under international law, and that it had been signed by competent bodies and confirmed by the relevant domestic authorities.

Concurrently, the court noted that, according to its terms, the MOU excluded any collaboration or cooperation between Iran and Argentinean judicial authorities, and emphasized that Iran had evidence and information concerning the *AMIA case* which had not been produced to date.

The court added that a plain reading of its terms showed that the MOU would not improve the existing *statu quo* in relation to the *AMIA case*. On the contrary, the MOU would indefinitely delay the process, as it made the progress of the process subject to the recommendations of a “Truth Commission”, the nature, powers and goals of which would enable it to interfere with the judicial process, activities of the public prosecutors and rights of the victims.

More concretely, the federal court thought that there was a clear risk of the request for judicial cooperation issued by the Argentinean authorities becoming moot or ineffective. It noted that this risk was serious, concrete and imminent, and likely to affect the independence of the judiciary and the rights of the victims.

The court also dealt with the constitutional law question raised by the Constitution of Argentina, and in particular its 1994 Amendment. As a matter of law some treaties are on the same legal level as the Constitution itself, while others are not. The latter are positioned above general legislation, yet below the Constitution, and therefore are the only statutes that are capable of being deemed unconstitutional. The federal court held that the MOU was a treaty placed higher than bills of Congress on the legal hierarchy but one which did not reach the constitutional level, and that therefore the court could rule on its constitutionality.

The judgment stated that the functions of the so called “Truth Commission” were almost identical to those of a court of law in a criminal case. This was true in connection with both its investigative and trial functions, with the exception of the rendering of the verdict itself and the application of criminal sanctions.

After engaging in a close reading of the MOU, the federal court concluded that the Truth Commission would interfere with functions of a judicial nature, while deterring or adversely affecting the work of the Argentinean courts already dealing with the criminal case arising from the terrorist attack committed on July 18, 1994.

Consequently, the judgment noted that despite resolving the conflict arising between the two countries, in view of the failure to respond to the Argentinean judges’ request for judicial assistance, the two parties had agreed to follow a different path.

As the findings of fact and determination of criminal responsibility were exclusively within the province of the judicial authorities of Argentina, as a matter of its constitutional law, it would hold invalid any clause enabling the foreign relations of the country - as implemented by the executive and legislative branches of government - to indirectly manage the outcome of an already open judicial case. Such a clause would entail a grave and clear violation of the principle of the separation of powers (a principle similar to that applied in American law).

The judgment addressed approximately seven issues arising from the MOU that raised concerns regarding the validity of the agreement. Among the issues was the fact that the Truth Commission had no defined term of operation, thus opening the possibility that the criminal case would be indefinitely delayed while waiting for the Commission’s findings. It was noted that there was no way to guarantee the impartiality of the appointed Commissioners and that no clear arrangements for coordination had been established between the Commission and the Argentinean judges and prosecutors, who had mandatory jurisdiction over the criminal case in question.

A detailed passage in the judgment was dedicated to showing how the Commission’s structure was invalid, as it was unlike any “truth commission” established in the past. To reach this conclusion, the judgment defined these bodies as being of an official, temporary, and fact-finding nature, created as a valid alternative to criminal prosecutions in societies where the various conflicts prevented the establishment of a well ordered criminal justice system, also called transitional societies. The main goal of these commissions was to address the claims of the victims and they concluded their work with the submission of a final report. The judgment listed about thirty such commissions in 28 countries, between 1974 and 2007, and after considering these characteristics, concluded that the Truth Commission, anticipated in the MOU, was unlike any of the earlier commissions. Underlying this conclusion was the understanding that the goal of a truth commission would be to protect the rights of the victims, giving them a framework in which they could participate in order to attain the “truth”. Far removed from this, the Truth Commission created by the MOU did not arise from any institutional instability that would preclude the judicial authorities from acting, and moreover was not aimed at addressing the victim’s circumstances, in a situation where crimes against humanity seemed to have been committed. In particular, the federal court gave a lengthy explanation about the “right to the truth” held by the victims, and showed that the MOU was not meant to protect or uphold this relevant right.

Passages in the judgment were dedicated to the parliamentary proceedings in the Argentinean Senate, where some senators drew a comparison to the *Lockerbie case*. The judgment noted that it would be a mistake to compare the *Lockerbie* and *AMIA cases*, considering that after the hijacking of the Pan Am flight in 1988, no Truth Commission had been established integrating members from Libya. Instead, the persons accused in the *Lockerbie case* were placed on trial in a neutral state, The Netherlands, and the proceedings were carried out in a manner consistent with the regular jurisdiction of that state's courts.

The judgment also noted that the Argentinean senators were mistaken about the intervention of UK Judge Royce, when former Iranian Ambassador and suspect Hadi Soleimanpour was detained in Britain in 2003, and in particular with regard to the reasons as to why the British authorities refused to grant his extradition. A close and detailed examination of the relevant reasons showed that there were no irregularities in the AMIA criminal case that would justify the need for a Truth Commission.

Discussing the extradition proceedings, and after examining the criminal case, the federal court stated that the case had in fact developed in a very different manner to that described by the senators during the sessions leading to the ratification of the MOU. Thus, the federal court explained that Soleimanpour had been detained in the United Kingdom in August 2003 and that subsequently he filed an application to the High Court of Justice, Queen's Bench Division, to be freed. On September 12, 2003 the accused was freed on bail. In making this ruling, Judge Royce took into consideration the Extradition Treaty between the United Kingdom and Argentina and the fact that Argentina had a two month period, which could be extended, to provide complete evidence, sufficient to support the extradition request. The British court took into consideration other circumstances regarding Soleimanpour and his family's ties to the United Kingdom. The judge also considered the Iranian government's guarantee of 500,000 pounds for bail.

So, the application to be freed was not definitively dismissed, as the Argentinean senators seemed to believe and the remand for further proceedings did not mean in any way that the application to be freed was void *ab initio* or invalid in any way whatsoever. This was because the charges had not been lifted by an acquittal, but rather a "discharge" had been given that had no effect on the innocence or guilt of Soleimanpour. That was why the denial of extradition issued in November 2003 by the UK Under-Secretary of State was not judicial in nature, but rather political, showing the precise reasons for the decision which had nothing to do with the performance or failures of the Argentinean judiciary.

Another passage in the judgment dealt with the issue of the division of powers in the Argentinean legal system, and its clear violation by the MOU. In this passage, the court explained the constitutional framework, showing that the MOU not only affected the powers of the judicial authorities of Argentina, but also those of the "Public Ministry", comprising prosecutors and public attorneys, according to Articles 27, 1, 116, 118, 99, Section 11, 75 Section 22, 18 and 120, of the National Constitution. Briefly, judicial power is vested in the courts and cannot be exercised by any other public authorities, for example, a Truth Commission created by the MOU.

In a final consideration, the court stated in the primary opinion, which was not approved by the second judge, that it was in the best interests of justice and the victims of the terrorist attack for an "in absentia" judgment to be given. Although this type of proceeding was not contemplated in Argentinean procedural criminal law, it was considered a good route through which to fulfill the needs of justice. Moreover, it was explained that where crimes against humanity were concerned (as the AMIA attack was declared to be in the criminal case), there would be no violation of the judicial rights or guaranties of the accused, if they were to be judged

in this way. It was also thought that this process would strengthen future extradition requests made by Argentinean authorities.

The second judge concurred with the main points of the principle judgment, albeit in a shorter opinion. The third judge was recused from participating in the decision.