Implementation of Human Rights as an International Concern: The Case of Argentine General Suarez-Mason and Lessons for the World Community

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The Implementation of Human Rights as an International Concern: The Case of Argentine General Suarez-Mason and Lessons for the World Community

by Mark Gibney*

I. INTRODUCTION

One of the most vexing problems facing countries undergoing democratization is how to bring to justice those who were responsible for political terror under a previous regime. Although this same question has confronted other countries in the past and is now being addressed in various ways in former Eastern bloc countries, such as the former East Germany, Romania, Hungary, Czechoslovakia and elsewhere, nowhere has this problem proven to be more intractable than in Latin America.

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2 For a description of the successful prosecution in Greece of the military junta see Harry J. Psoniades, Greece: From the Colonels' Rule to Democracy, in From Dictatorship to Democracy: Coping with the Legacies of Authoritarianism and Totalitarianism (John H. Herz ed., 1982). Similar efforts occurred in Portugal when the new provisional government exiled, imprisoned and purged former officials of the military regime. See, Kenneth Maxwell, The Emergence of Portuguese Democracy. In the Philippines, the Aquino government initially set up a commission to investigate human rights abuses by the Marcos regime, but the committee dissolved because of internal and external political considerations. Naomi Roht-Arriaza, State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law, 78 CAL. L. REV. 449, 511 n.341 (1990).

3 The unified Germany has focused much of its attention on having former communist chief Erich Honecker returned from the Soviet Union to stand trial for murder. John Tagliabue, Honecker's Arrest Sought in Berlin Wall Shootings, N.Y. TIMES, Dec. 2, 1990, at A23. At first, the Soviets balked at this demand, citing Honecker's health. Id.

In addition, several of the most senior leaders of the former East Germany, former Prime Minister Willi Stoph, former Defense Minister Heinz Kessler, former Secretary of the National Defense Council Fritz Streletz, and Hans Albrecht, a former member of the Defense Council; have been arrested for murder in their role in the shootings of those attempting to escape the country. John Tagliabue, 4 Ex-Officials of East Germany Arrested, N.Y. TIMES, May 22, 1991, at A3. Criminal proceedings have already been brought against four former border guards who have been charged with killing Chris Geoffroy as he attempted to flee East Germany in February, 1989. John Tagliabue, Berlin Wall Guards Accused of Shooting Escapes, N.Y. TIMES, June 16, 1991, at A6 (Geof-
American. In the past decade, countries such as Brazil, Uruguay,

froy was the last person trying to flee to the West before the Wall fell.); Stephen Kinzer, Honecker is Focus at Trial in Berlin, N.Y. TIMES, Sept. 18, 1991, at A9.

As in the other Eastern European countries, the quintessential question is how far these prosecutions should go. Stephan Kinzer, Communist Skeletons Haunt Ruling German Party, N.Y. TIMES, Dec. 19, 1991, at A9 (discussing how the Christian Democrats might try to proceed against party members who had collaborated with the Communist government of the former East Germany).


In Hungary, criminal charges have been filed against former Slovak President Peter Colotka and Miroslav Stepan, the Chief of the Czech Communist Party. FBIS, June 21 & 25, 1990. In addition, “Parliament has decided to permit trials of all those accused of murder and treason between December 1944 and May 1990 whom the Communist government had protected from being brought to trial.” Judith Ingram, Coming Trials May Try the Hungarians’ Soul, N.Y. TIMES, Nov. 13, 1991, at A4.

Like several other former Eastern bloc countries, Hungary has begun to face another legacy of decades of political terror: the systematic confiscation of land and personal property, first by the Nazis and then by the Communists. One of the biggest obstacles to be faced is how far back in time the compensatory program should go. Celestine Bohlen, Hungarians Debate: How Far Back to Go to Right Old Wrongs, N.Y. TIMES, April 15, 1991, at A1. To date, such efforts have met with great resistance, the rationale being that the country cannot afford a “witch hunt” at this time. Celestine Bohlen, Victims of Hungary’s Past Press for an Accounting, but With Little Success, N.Y. TIMES, Aug. 4, 1991, at A3; See generally Clifford J. Levy, East Europeans in U.S. Reclaiming Lost Estates, N.Y. TIMES, Aug. 13, 1991, at A7 (discussing the effect of changing laws on reclaiming estates by former residents); Katie Hafner, The House We Lived In, N.Y. TIMES MAG., Nov. 10, 1991, at 68.


The new governments in Bulgaria and Poland have also filed legal proceedings against former government officials. See Chuck Sudetic, Bulgaria’s Ousted Dictator Agrees to Face His Accusers, N.Y. TIMES, July 19, 1990, at A6; Poland Arrests 2 Police Generals in ’84 Killing of Reformist Priest, N.Y. TIMES, Oct. 9, 1990, at A8.

For a stirring and sensitive account of the heroic efforts to uncover the truth of the terror in Brazil and Uruguay see LAWRENCE WESCHLER, A MIRACLE, A UNIVERSE: SETTLING ACCOUNTS WITH TORTURERS (1990). See also IAIN GUÉST, BEHIND THE DISAPPEARANCES: ARGENTINA’S DIRTY WAR AGAINST HUMAN RIGHTS AND THE UNITED NATIONS (1990).

Most of the political terror in Brazil occurred from 1964, when the military came to power, to 1975. Human rights abuses decreased after 1975, despite the continuation of military rule for another decade. In 1979, President Figueiredo announced a blanket amnesty for any security agents who might become liable for charges arising from their commission of human rights violations. Weschler comments: “Indeed, his edict was drafted in such a way as to foreclose even the possibility of any future official investigations into the behavior of the security forces between 1964 and 1979. Bygones were to be by bygones: the book was closed.” Weschler, supra note 8, at 14. The section of Weschler’s book dealing with Brazil describes the clandestine efforts to publish BRASIL: NUNCA MAIS (BRAZIL: NEVER AGAIN) which used direct court testimony to document the terror.
Chile, and Argentina have made the slow and very unsteady transfor-

Despite the transformation to civilian rule, and despite the fact that those responsible for the torture are now known publicly, no criminal convictions have followed. The 1979 amnesty has precluded this. *Id.* at 7-8.

Weschler points out that the situation in Uruguay was considerably different from what it was in Brazil. For one thing, the level of political terror in Uruguay was much greater and it affected far larger numbers of people. Weschler estimates that more than ten percent of the Uruguayan population fled into exile during the terror between 1973 to 1985. In addition, "one in fifty citizens" had been interrogated and "one in five hundred imprisoned." Weschler comments: "The sheer scope of this emigration, detention and incarceration . . . only begins to suggest the extent of the military's absolute mastery of Uruguayan daily life during this period." Weschler, *supra* note 8, at 86-88. Military rule ended on March 1, 1985. One week later, President Sanguinetti signed a bill that granted amnesty for all political prisoners, but which explicitly excluded torturers and other military violators of human rights. Almost immediately, Uruguayans began filing complaints against specific individuals alleging torture, kidnapping, rape, murder and so on. As these cases made their way through the judicial system, the Congress passed the Law Declaring an Expiration of the State's Punitive Authority. In response to this law, which was in effect a blanket amnesty, a referendum procedure began. Against nearly insurmountable odds and in the face of veiled threats from the leaders of the military, nearly one third of the country's population signed a petition in favor of holding a national referendum on the Law of Punitive Authority. The referendum was held in April 1989 and the amnesty was upheld. To date, there has been no public accounting or acknowledgment in Uruguay of the torture and disappearances. *See generally id.* Weschler reflects on the Brazilian and Uruguayan experiences this way:

The transition in both countries has been mired in the muck of forced compromise, bad faith, self-delusion, betrayed hopes, and abandoned responsibilities. In both of these instances, the little success that was achieved was at best provisional (there were no trials in either country, no expressions of justice; torturers whose prior conduct was thoroughly documented in *Brasil: Nunca Mais* didn't even necessarily lose their jobs; in Uruguay, the referendum finally lost and the issue was largely set aside).

*Id.* at 245.

Weschler concludes, however, that something positive had occurred:

Still, in both cases, thanks to herculean efforts of relatively small sectors of the population (in the case of Brazil, of an infinitesimally small sector), the interests of truth were served. Facts were established, and the actual history was inscribed in the common memory.

*Id.*

In March, 1991, President Patricio Aylwin issued a report describing "more than 2000 killings by the secret police during the 17 years of military rule under General Augusto Pinochet." *Chile Details Over 2,000 Slayings Under Pinochet*, *N.Y. Times*, Mar. 6, 1991, at A8. In presenting the report on national television, President Aylwin apologized to the families of the victims in the name of the country, and announced moves to help them with pensions, health, and housing. Aylwin also asked the Supreme Court to insure that cases of human rights abuses be heard as soon as possible. What remains to be seen is whether the military, under the leadership of Pinochet, will allow these cases to go forward. Nathaniel C. Nash, *Response to Chile Human Rights Report is Violent*, *N.Y. Times*, Mar. 24, 1991, at A10; Nathaniel C. Nash, *Pinochet Assails Chilean Rights Report*, *N.Y. Times*, Mar. 28, 1991, at A3; Nathaniel C. Nash, *Chile: Most Want the Past to Sleep, A Few Still Live in Nightmares*, *N.Y. Times*, Apr. 7, 1991, at E2. This is not to say that the judiciary has not been involved in confronting the crimes of the past. In September 1991, under court order, the Chilean government began exhuming and trying to identify the remains of more than 120 people who died in the first three months of Pinochet's military rule in 1973. Nathaniel C. Nash, *Graves Without a Name Yield Secrets*, *N.Y. Times*, Sept. 19, 1991, at A4. In addition, there have been some noteworthy developments in the case of Orlando Letelier, Chile's former ambassador to the
mation from rule by repressive regimes to fragile democracies. These democracies are fragile because the new governments and the nation's populations dare not peer too deeply into the horrible past. The governments are also fragile because there is a chance that their military forces may refuse to allow them to investigate past atrocities even if they wish to.\footnote{13}

The subsequent process of attempting to come to terms with the horrors committed by a previous regime has not been undertaken in the same fashion in each of these countries.\footnote{14} However, in each instance, the ultimate outcome has been remarkably similar: those who ordered political terror as well as those who carried out the torture, the rapes, the disappearances, and the brutal killings have not been held accountable for their crimes.\footnote{15}

This article focuses on Argentina, but it also attempts to draw some larger conclusions from the Argentine experience which might be useful to other countries undergoing democratization. Part II provides a brief overview of the so-called "dirty war" in Argentina from 1976 to 1982; the subsequent process of reconciliation and democratization that began with the election of President Alfonsin; and the halting attempts to bring criminal charges against those who were responsible for the terror that previously had seized this country. By now, this story is fairly well known,\footnote{16} and the denouement for those who masterminded or carried out the terror much too predictable and unfortunate.

One reason why there has been so little success in bringing the perpetrators of terror to justice in Argentina and elsewhere is that, with rare exception,\footnote{17} the attempt to do so has been limited to pursuing domestic

\textsuperscript{12} See generally Guest, supra note 8, at 345-56.

\textsuperscript{13} Although a general amnesty provision has been promulgated in El Salvador, there has been a nascent movement to investigate some of the political terror of the past. Shirley Christian, Survivors of Massacres in '81 Press for Salvadoran Inquiry, N.Y. TIMES, Nov. 23, 1991, at A1.

\textsuperscript{14} See supra notes 9-11.

\textsuperscript{15} Id.

\textsuperscript{16} Guest, supra note 8.

\textsuperscript{17} In June 1988, the Inter-American Court of Human Rights issued an unprecedented ruling
remedies. Part III examines the role (albeit a fleeting one) that a U.S. federal district court played in the effort to bring one of the most notorious violators of human rights — former Buenos Aires Police Chief Carlos Guillermo Suarez-Mason — to justice. After fleeing Argentina following the fall of the junta, Suarez-Mason furtively sought refuge in California. A few years later, several former victims discovered his presence in the United States and brought suit under the Alien Tort Statute. However, during the course of litigation, Suarez-Mason was extradited to Argentina to face criminal charges in that country. Once there, General Suarez-Mason was pardoned by the newly elected Peronist government before he was brought to trial, and he has never been held to answer for the terror that he allegedly directed.

In issuing this pardon, the Argentine government failed to carry out its obligations under international law. For this it should be faulted. Yet, it is too easy to place all of the blame for this exoneration on Argentina. Part IV questions the non-response of other countries, particularly the United States. It is suggested that the community of nations, along with Argentina, has been engaged in a conspiracy of silence concerning these matters. As signatories to certain international instruments, such as the Convention against Torture, other countries have obligated


One case that has received some scholarly attention involves former Argentine Captain Alfredo Astiz who was captured by the British during the Falklands war. Astiz allegedly participated in torture, illegal executions, and kidnappings while stationed at the Naval School of Mechanics in Buenos Aires. After his capture, French and Swedish authorities made inquiries about Astiz concerning his role in the disappearances of nationals of those countries, although a formal request for extradition was never made. Astiz was eventually returned to Argentina where he has since been pardoned and released. For a discussion of whether Astiz should have been extradited, see Michael A. Meyer, Liability of Prisoners of War for Offences Committed Prior to Capture: The Astiz Affair, 32 INT'L & COMP. L.Q. 948 (1983); Nigel S. Rodley, The International Legal Consequences of Torture, Extra-Legal Execution, and Disappearances, in NEW DIRECTION IN HUMAN RIGHTS 167-194 (E. Lutz et al. eds., 1989). Telephone Interview with Alejandro Garro, Professor, Columbia Law School (June 7, 1991) (stating that a criminal court in Paris purportedly has convicted Astiz in abstentia).

See discussion infra Section III.

See discussion infra Section III, E.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punish-
themselves to press for the prosecution of human rights violators; yet this has not occurred. Instead, these same nations have been content to view this problem as lying solely within the domestic province of other countries, in this case Argentina.

The argument presented here is that this outdated and inadequate concept of sovereignty needs to be abandoned, and replaced by one that recognizes that the implementation of human rights is an international concern. Part V continues this theme, examining how international and regional fora might also be used for these purposes. Finally, Part VI attempts to draw some larger lessons from the Argentine experience which might prove useful to other countries currently undergoing democratization.

II. BACKGROUND

A. The Dirty War

During the early 1970s, Argentina suffered from a wave of violence carried out primarily by the leftist Montoneros movement. In response to this, security forces and a terrorist group from the extreme right, the Argentine Anti-Communist Alliance, undertook a counterattack aimed at known or suspected left wing terrorists, as well as those considered to be leftist sympathizers. When the violence persisted, President Isabel Peron declared a state of seige in November 1974. In 1975 the Peron government concluded that police and security forces were not capable of preventing terrorist activities. The government then issued Decree No. 2770/75 which established the Council of Domestic Security comprised of the President, the Cabinet and the commanding officers of the armed forces. Decree No. 2772/75, issued the same day, gave the armed forces the task of carrying out whatever “military and security operations they deem necessary to annihilate subversive elements throughout the country.”

Despite a dramatic downturn in incidents of left-wing violence at the beginning of 1976, in March of that year the commanders of the armed forces staged a successful coup. Soon thereafter, the military...
embarked on a *guerra sucia*, or dirty war, against so-called left wing subversives and sympathizers. During the course of this "war," a minimum of 8,961 persons disappeared, and tens of thousands of people were detained without being charged with specific crimes. Iain Guest comments: "[n]ever before had the resources of a state been geared to systematic torture and murder. The Junta turned disappearances into a government policy and in so doing gave new meaning to the concept of state terror. It was as deliberate, methodical, and calculated as collecting tax . . . ."

In 1979, the ruling junta declared victory in the war against subversion. In the face of growing domestic and international opposition later that year:

[T]he military government issued a law [declaring that] those who had been reported missing during the previous five years were to be [considered legally] dead. . . . By 1981 the military [junta was] facing growing demands from all quarters asking for information about the 'disappeared'. . . . Also at this time the military government was met with greater opposition from restless trade unions and political parties. What ultimately caused the downfall of military rule, however, was the disastrous Falklands-Malvinas war with Great Britain in 1982.

By 1983 a transitional junta was established to set the stage for a return to civilian democracy; but not however, before attempting to exonerate the deeds of the military. On April 28, 1983, the government published the "Final Document on the War Against Subversion and Terrorism." This report conceded that human rights abuses had occurred, but that such actions, "were in the line of duty." In September 1983 the military government enacted the Law of National Pacification which granted immunity from prosecution to suspected terrorists and members of the armed forces for human rights violations committed between May


32 *Id.*
33 *Id., supra* note 8, at 32.
34 *Id.* at 299.
35 *Id.* at 300.
36 *Id.* at 301.
37 *Id.* at 300.
25, 1973 and June 17, 1982. Finally, the military junta issued Decree No. 2726/83 which ordered the destruction of all documents relating to the "dirty war." Free elections took place on October 29, 1983, after the state of siege was lifted. Civilian President Raul Alfonsin was inaugurated two months later.

B. Democratization

One of Alfonsin's first official acts was to issue Decree No. 158/83, ordering the arrest and prosecution of the nine military officers who comprised the three military juntas from 1976 to 1983. The decree provided that under new legislation, which was to be submitted to Congress, such prosecutions were to be initiated before the Supreme Council of the Armed Forces. However, the Decree also provided that any judgment by the Supreme Council was subject to review by the federal courts of appeal. The jurisdiction of the Supreme Council was reasserted by the passage of Law No. 23049. One of the most noteworthy aspects of Law 23049 was a provision that authorized federal appellate courts to take away jurisdiction from the Supreme Council if there was unjustifiable delay in the prosecution of these cases.

As this was going on, the government also faced the problem of the existence of the junta's self-amnesty law. In December 1983 the Congress passed Law No. 23040 nullifying the amnesty provisions. The Federal Argentine Court of Appeals subsequently upheld the constitutionality of Law No. 23040 and at the same time declared the junta's self-amnesty law unconstitutional.

During that same month, charges were brought against the nine military commanders who had served in each of the three military juntas. By June 1984, however, the Supreme Council had made little progress in determining the outcome of these cases. In October, the Council reported its inability to estimate when the criminal proceedings would be completed. In addition, the Council also indicated that, in its view, "mil-

39 Garro & Dahl, supra note 23 at 301.
40 Id.
42 Garro & Dahl, supra note 23, at 306.
43 Id.
44 Id.
45 Id. at 320.
49 Id.
itary operations against subversion were unobjectionable." The report pointed out that the testimony of victims and their relatives was so biased as not to be credible. In response, the Federal Appeals Court issued a resolution announcing that it was assuming jurisdiction over the proceedings against the military commanders. In early 1985, the Court issued a series of indictments and placed several of the former leaders under rigorous preventive detention.

The trial of the military commanders finally began on April 22, 1985 and lasted five months. During this time more than 800 witnesses testified. On December 9, 1985, the Court convicted and sentenced five of the former commanders and two former Presidents, Generals Jorge Videla and Roberta Viola. These verdicts were subsequently upheld by the Argentine Supreme Court, which slightly modified the sentences of Viola and Agosti.

Soon after the trial of the junta leaders, the prosecution began pursuing charges against other military officers for their part in the dirty war. However, in the face of growing unrest within the ranks of the military, the Congress passed Law No. 23492, called the "Full Stop Law." Article 1 of the Law stated that the time had come for "the armed forces to take part in rebuilding a democratic society." Accordingly, this law imposed a 60 day deadline on the filing of any complaints or charges against alleged torturers. Although the obvious intent of the law was to impede, perhaps preclude, further criminal proceedings, the prosecution was able to file over three hundred summonses before the February 22, 1987 deadline.

By March 1987, fifty-one military and police officers had been arrested in connection with human rights cases, although only twelve had been convicted and sentenced. An important event that occurred at this time was Major Ernesto Guillermo Barreiro's refusal to appear before the Federal Appeals Court in Cordoba. He instead sought refuge

50 Id.
51 La Prensa (Argen.) Sept. 26, 1984 at 1.
55 Guest, supra note 8, at 389.
58 Id.
59 Id.
60 Garro & Dahl, supra note 23, at 336.
61 Id. at 337.
with his army unit and the commander of the unit subsequently announced that Barreiro would not be turned over to the court. An insurrection followed, in April 1987, which became known as the Easter Rebellion.

In response, President Alfonsin made a dramatic trip to talk with Colonel Aldo Rico, the leader of the insurrection. As a result, the rebellion collapsed and many of its leaders were arrested. In the face of this military opposition, the Congress passed Law No. 23521, the law of “due obedience” on June 4, 1987. This law created an irrebuttable presumption that military personnel accused of committing human rights abuses were acting under orders and also were unable to question the legitimacy of these orders. The irrebuttable presumption protected all military officers below the rank of Brigadier General. The law even barred the judiciary from undertaking any case-by-case analysis to determine if a defendant’s actions were self motivated. As a result, over 400 officers were effectively immunized from prosecution. Guest writes of the due obedience law: “Alfonsin’s long balancing act aimed at healing the national trauma without humiliating the military was finally over. It would be left to his Peronist successor, Carlos Menem, to bring the curtain down on the final act.”

It took a very short period of time for this to occur. In October 1989, shortly after assuming office, President Menem issued a broad pardon covering nearly 280 people. Some of those covered had taken part in various military rebellions against the Alfonsin government; others who were exonerated had been accused of committing criminal offenses in carrying out the dirty war. A year later, the tragedy was completed: Menem pardoned and released the military junta leaders who directed the war, including Jorge Videla, Roberta Viola, Emilio Massera and former army General Carlos Suarez-Mason, who is the focal point of the next section.

III. THE ODYSSEY OF SUAREZ-MASON

A. Role in the Dirty War

Pursuant to secret directives 1/75 and 404/75 issued by the Defense
Council to the armed forces in 1975, Argentina was broken down into five military zones. In January 1976 [General] Suarez-Mason was designated as head of Zone One, which included the capitol city, Buenos Aires. In the Argentine military hierarchy, this command responsibility placed Suarez-Mason directly below the military junta. It is estimated that some 5,000 people disappeared in Zone One.

In his command capacity, Suarez-Mason was personally responsible for the issuance of Secret Operational Order 9/77 which set forth in detail the manner and means by which the war against subversion was to be carried out. The order also specified that the selection of targets and the authorization of raids were to come directly from the Zone One commander. In addition, Suarez-Mason directed the establishment and administration of approximately 20 secret detention centers where those abducted were interrogated, often tortured, and frequently killed.

Following democratization, Suarez-Mason was summoned, in March 1984, by the Supreme Council to answer for his role during the dirty war. Rather than appear, Suarez-Mason fled the country. Pursuant to a provisional arrest warrant requested by Argentina, Suarez-Mason was arrested, in January 1987 in Foster City, California. At that time, he was also served a complaint in a civil action brought by Alfredo Forti and Deborah Benchoam, two Argentine citizens who were residing in Virginia at the time.

B. Suit Filed in the Federal District Court

The plaintiffs' complaint alleged that Forti, his mother, and his four brothers, had been seized at Buenos Aires' Ezeiza International Airport on February 18, 1977, and then held at Pozode Quilmes detention center in the Buenos Aires' province. The complaint further alleged that sixteen year-old plaintiff Debora Benchoam and her seventeen year-old brother were abducted from their Buenos Aires home early on July 25, 1977 by civilian clothed military officials. After being held in various
places for a month, she was eventually imprisoned in the Devoto Prison in Buenos Aires for more than four years without ever being charged.\textsuperscript{84} Benchoam's brother, his face severely disfigured due to blows, was returned to his family the day after his abduction. He later died of internal bleeding from bullet wounds.\textsuperscript{85} As a result of domestic and international pressure, Benchoam was eventually given the "right of option" to leave the country which she did almost immediately after getting out of prison on November 5, 1981.\textsuperscript{86}

The plaintiffs' suit against Suarez-Mason was predicated principally on the Alien Tort Statute,\textsuperscript{87} and alternatively on federal question jurisdiction.\textsuperscript{88} The plaintiffs sought compensatory and punitive damages for "violations of customary international law and the laws of Argentina, the United States, and California."\textsuperscript{89} Their complaint specified eleven grounds for relief: torture; prolonged arbitrary detention without trial; cruel, inhuman and degrading treatment; false imprisonment; assault and battery; intentional infliction of emotional distress; conversion; "causing the disappearances of individuals"; "murder and summary execution"; wrongful death; and a survival action.\textsuperscript{90}

\textbf{C. The Alien Tort Statute and Case Law Arising Thereunder}

The Alien Tort Statute provides that federal district courts shall have "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."\textsuperscript{91} Although passed by the First Congress in 1789, the Alien Tort Statute was essentially moribund until the Second Circuit's landmark decision in the 1980 \textit{Filartiga} case.\textsuperscript{92} \textit{Filartiga} was a suit brought in U.S. federal district court in New York by the heirs of Joelito Filartiga, a Paraguayan citizen.\textsuperscript{93} The plaintiffs alleged that on March 29, 1976, Joelito had been tortured and killed in Paraguay by Americo Norberto Pena-Irala, the Inspector General of Police in Asuncion, Paraguay.\textsuperscript{94} Legal proceedings against Pena-Irala were brought in Paraguay, but halted when the attorney representing the Filartiga family was imprisoned for his actions in the case.\textsuperscript{95} In July 1978, Pena-Irala sold his home

\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id. at 1538.
\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{92} Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).
\textsuperscript{93} Id. at 878.
\textsuperscript{94} Id.
\textsuperscript{95} Id.
in Paraguay and entered the United States on a visitor’s visa. Almost immediately, Dolly Filartiga, the sister of the deceased, had Pena-Irala served with a summons and a complaint, the suit being brought principally under the Alien Tort Statute. The district court upheld Pena-Irala’s motion to dismiss the suit, but the appellate court overturned the decision. The court held that official torture is now prohibited by the law of nations, and that the Alien Tort Statute provides a cause of action for an alien alleging such human rights violations. In the words of Judge Kaufman:

In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest. Among the rights universally proclaimed by all nations . . . is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become — like the pirate and slave trader before him — hostis humani generis, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.

The Court of Appeals remanded the case to the district court which then awarded the plaintiffs a $10 million judgment which has yet to be satisfied.

Although most federal courts have adhered to Judge Kaufman’s reading of the Alien Tort Statute in Filartiga, some courts have refused to accept jurisdiction because of the existence of factual distinctions or the implementation of procedural limitations. The leading case contravening Filartiga is Tel-Oren v. Libyan Arab Republic. Tel-Oren involved an armed attack on a civilian bus in Israel in March 1978. The plaintiffs, mostly Israeli citizens, filed suit in the Federal District Court for the District of Columbia. The named defendants were the Libyan Arab Republic, the Palestine Liberation Organization, the Palestine Information Office, the National Association of Arab Americans, and the Palestine Congress of North America. The district court dismissed

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96 Id.
97 Id. at 879.
98 Id. at 880.
99 Id. at 876.
100 Id. at 887-88.
101 Id. at 890.
103 Filartiga, 630 F.2d at 887-88.
104 Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984).
105 Id. at 776.
106 Id.
107 Id. at 775.
the action for lack of subject matter jurisdiction.\textsuperscript{108} The Court of Appeals unanimously affirmed the dismissal, but the three circuit judges differed widely in their analysis.\textsuperscript{109}

Judge Edwards' opinion came closest to Judge Kaufman's decision in \textit{Filartiga}. While acknowledging the viability of hearing tort suits brought by aliens in U.S. federal court, and while also affirming that terrorism violates the law of nations, Edwards concluded that the law of nations did not impose the same responsibility or liability on non-state actors (such as the PLO) as it did on states and persons acting under color of state law.\textsuperscript{110} As a result, Edwards held that the situation posed in \textit{Tel-Oren} was distinguishable from that in \textit{Filartiga}.

Judge Bork also concurred in the dismissal of the case, but he presented a much different and much more narrow vision of the Alien Tort Statute than did Judge Edwards.\textsuperscript{111} In Bork's view, a judicial pronouncement on the PLO's attack would violate the principle of separation of powers, particularly the act of state doctrine and the political question doctrine.\textsuperscript{112} Bork also expressed the opinion that the only torts that might have been intended to be brought into federal courts under the Alien Tort Statute were those that were violations of the law of nations in 1789 when the statute was enacted into law.\textsuperscript{113} Bork then quoted Blackstone to the effect that these torts would be: violations of safe-conducts, infringements on the rights of ambassadors, and piracy.\textsuperscript{114} Finally, Bork argued that international law did not create a cause of action that private parties could enforce in municipal courts.

Judge Robb's concurring opinion was premised on what he perceived to be a lack of judicial capacity.\textsuperscript{116} One element of this was the difficulty he envisioned courts having in dealing with issues involving "foreign affairs."\textsuperscript{117} Moreover, Robb was concerned that given the level of human rights violations in the world, there would be no logical stopping point in terms of the amount of litigation that might possibly be brought in American courts.\textsuperscript{118}

The victims of international violence perpetrated by terrorists are spread across the globe. It is not implausible that every alleged victim

\textsuperscript{109} \textit{Tel-Oren}, 726 F. 2d 774.
\textsuperscript{110} \textit{Id.} at 791-795.
\textsuperscript{111} \textit{Id.} at 798-823
\textsuperscript{112} \textit{Id.} at 801-801.
\textsuperscript{113} \textit{Id.} at 813.
\textsuperscript{114} \textit{Id.}
\textsuperscript{115} \textit{Id.} at 816-20.
\textsuperscript{116} \textit{Id.} at 824-826.
\textsuperscript{117} \textit{Id.}
\textsuperscript{118} \textit{Id.} at 826.
of violence of the counter-revolutionaries in such places as Nicaragua and Afghanistan could argue just as compellingly as the plaintiffs here do, that they are entitled to their day in the courts of the United States . . . . Indeed, there is no obvious or subtle limiting principle in sight.\textsuperscript{119}

D. Judge Jensen's Decisions in Forti

Faced with the two competing lines of cases in \textit{Filartiga}\ and \textit{Tel-Oren}, Judge Jensen's decision in \textit{Forti} rested squarely on the former.\textsuperscript{120}

The court . . . interprets 28 U.S.C. Sec. 1350 [Alien Tort Statute] to provide not merely jurisdiction but a cause of action, with the federal cause of action arising by recognition of certain "international torts" through the vehicle of Sec. 1350. These international torts, violations of current customary international law, are characterized by universal consensus in the international community as to their binding status and their content. That is, they are universal, definable, and obligatory international norms.\textsuperscript{121}

Jensen concluded that the claims of official torture, prolonged arbitrary detention, and summary execution all constituted "international tort" claims that could be adjudicated under the Alien Tort Statute.\textsuperscript{122} However, Judge Jensen initially rejected the claim that causing disappearances, and cruel, inhuman and degrading treatment lacked the requisite elements to qualify as violations of the law of nations.\textsuperscript{123}

Judge Jensen then went on to address the defendant's legal defenses, particularly the argument that the actions in question were protected by the act of state doctrine.\textsuperscript{124} As noted by the court, the act of state doctrine emerged in the jurisprudence of the United States as early as the

\textsuperscript{119} Id.

\textsuperscript{120} For an argument that the \textit{Forti} decision may be the last of its kind see Alison J. Flom, Note, \textit{Human Rights Litigation Under the Alien Tort Statute: Is the Forti v. Suarez-Mason Decision the Last of its Kind?} 10 B.C. THIRD WORLD L.J. 321 (1990). For a related discussion concerning the changed position of the Executive branch with regard to the Alien Tort Statute see David Cole et al., \textit{Interpreting the Alien Tort Statute: Amicus Curiae Memorandum of International Law Scholars and Practitioners in \textit{Trajan}o v. Marcos,} 12 HASTINGS INT'L & COMP. L. REV. 1 (Spring 1989).

\textsuperscript{121} Forti, 672 F. Supp. at 1538.

\textsuperscript{122} Id.


\textsuperscript{124} The defendant claimed that suit should be barred by Rule 19(b) of the Federal Rules of Civil Procedure relating to indispensable parties and also that the statute of limitations had been tolled. The court rejected both of these arguments.
18th century. The classic statement of the doctrine occurred in Underhill v. Hernandez, a case in which an American citizen attempted to sue for alleged tortious conduct committed in Venezuela by an army commander under the revolutionary government of Venezuela. The Supreme Court held that the suit was barred by the act of state doctrine:

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

More recently, the Supreme Court has had occasion to limit the scope of the act of state doctrine, basing it on the constitutional underpinnings governing the proper distribution of power among the branches of government. In Banco Nacional de Cuba v. Sabbatino, the court articulated the following criteria for determining whether to apply the doctrine:

It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.

Applying the Sabbatino standard, Judge Jensen concluded that the act of state doctrine did not preclude adjudication of the plaintiffs' claims.

Plaintiffs allege acts by a subordinate government official in violation of fundamental human rights lying at the very heart of the individual's existence. These are not the public official acts of a head of government, nor is it clear at this stage of the proceedings to what extent defendant's acts were "ratified" by the de facto military government. Further, plaintiffs have submitted evidence that the acts, if committed, were illegal even under Argentine law at all relevant times. It may

125 Forti, 672 F. Supp. at 1544.
127 Id. at 252.
129 Id.
130 For an argument that Judge Jensen should have applied the act of state doctrine but recognized a human rights exception, see Remedying Foreign Repression, supra note 123.
thus result that the Court's inquiry will be directed to the factual question whether certain acts were committed, rather than to the legality of those acts under Argentine law.\footnote{Forti, 672 F. Supp. at 1546.}

The court thereby denied the defendant's motion to dismiss.\footnote{Id. at 1546-47.} Before the case could proceed to trial, however, Judge Jensen granted Argentina's request for extradition.\footnote{In re Suarez-Mason, 694 F. Supp. at 676, 679 (N.D. Cal. 1988). Consequently, the district court entered a default judgment against the defendant pursuant to the plaintiffs' motion. \textit{Forti}, 694 F. Supp. at 709 (N.D. Cal. 1988). Naturally, "Suarez-Mason has failed to answer and the case remains open until the court can hear an appeal" Flom, \textit{supra} note 120, at 323. "A determination of the damages to be awarded the plaintiffs has not yet occurred." \textit{Id.}}

\section*{E. Suarez-Mason's Extradition}

Argentina sought the extradition of General Suarez-Mason on 43 counts of murder, 24 counts of unlawful deprivation of freedom and 1 count of forgery of a public document.\footnote{Id. at 702.} In his defense, Suarez-Mason asserted that extradition should be barred by both the military offense and political offense exceptions to the extradition treaty between Argentina and the United States.\footnote{Id. at 676.}

The court granted extradition on 39 counts of murder and on the forgery charge.\footnote{Id. at 702-03.} In addressing the defendant's defenses, the court first dismissed the military offense exception on the grounds that the crimes that Suarez-Mason was charged with were common crimes and not military crimes such as desertion.\footnote{Id. at 703-07.} The court also concluded that Suarez-Mason's extradition was not barred by the political offense exception.\footnote{Id. at 704.} The court reasoned that the political offense exception was intended to protect acts of rebellion, and that to extend the exception to a former government official who was supposedly suppressing a rebellion would be to stand the doctrine on its head.\footnote{Id. at 704-05.} In addition, the court held that the exception was designed to prevent defendants from being returned to face unjust trials, but that the political question doctrine should not be used to protect officials from being justly called to account for their illegal actions while in power.\footnote{Id. at 676.}

On April 27, 1988, Judge Jensen granted Argentina's request for extradition.\footnote{Id. at 679.} Approximately a year and a half later, in December 1990,
General Suarez-Mason was pardoned and released from prison, never having to answer for his crimes.\footnote{142}

IV. THE NON-RESPONSE OF OTHER NATIONS

A. Alien Tort Statute Litigation in the United States

It has been more than a decade since the Second Circuit's landmark decision in Filartiga, a case that propelled a revolution of sorts in terms of human rights litigation in this country.\footnote{143} Most courts (such as Forti) have adopted Judge Kaufman's reading of the Alien Tort Statute: U.S. federal courts have jurisdiction to hear claims brought by foreigners for torts committed in violation of the law of nations, even if the tortious actions occurred in another country.\footnote{144} Other courts (as evidenced by Judge Edwards's opinion in Tel-Oren\footnote{145}) have agreed with the holding in Filartiga, but then have gone on to distinguish the case that was before them from Filartiga.\footnote{146} In only a few instances, the opinions of Judges Bork and Robb in Tel-Oren\footnote{147} in particular, has a court given a completely contrary reading to the Alien Tort Statute.

Despite its rather widespread acceptance, however, the viability of Filartiga remains in question.\footnote{148} For one thing, the Executive Branch has completely reversed its own position in the course of a decade.\footnote{149} While the Carter administration had urged Judge Kaufman's reading of the Alien Tort Statute, the Reagan administration attempted to have the judiciary read the statute much more narrowly.\footnote{150} In Relation to this,

\footnotesize{\begin{enumerate}
\item \footnote{142} Id.
\item \footnote{145} Supra note 110 and accompanying text.
\item \footnote{147} See supra notes 111-118 and accompanying text.
\item \footnote{148} Cole, supra note 120.
\item \footnote{149} Id.
\item \footnote{150} See id. at 1.
\end{enumerate}}
some commentators have pointed to the "Reaganization" of the federal courts, and the important influence this might have on Alien Tort Statute litigation in the future.\footnote{151 See Howard Tolley, Jr., Interest Group Litigation to Enforce Human Rights: Confronting Judicial Restraint, in \textit{World Justice? U.S. Courts and International Human Rights}, supra note 143, at 140.}

Beyond this, a more basic question needs to be addressed: does Alien Tort Statute litigation, even apparently successful litigation, accomplish anything? To date, no winning plaintiff has been able to collect on a judgment. The \textit{Forti} case is typical. Prior to his extradition, General Suarez-Mason was able to hide his assets in the United States and the plaintiffs, Forti and Benchoam, have not been able to collect on the default judgment that they were eventually awarded.\footnote{152 Flom, supra note 120 at 323 (noting an interview with Kathleen Comfort, clerk for Judge Jensen of the Federal District Court of the Northern District of California).} In response, human rights scholar Howard Tolley has described these situations as "hollow victories."\footnote{153 Tolley, supra note 151 at 140-143.}

Notwithstanding these shortcomings, however, the opposite result is just as unacceptable. For the individual who has been tortured, or the family whose daughter, son, mother, or father has been "disappeared," litigation in a U.S. court might well be the only means of attempting to redress the terrible wrong that has been committed. Andrew Scoble has made a similar point, stating: "[T]he importance of human rights demands their effective enforcement. United States courts in particular already perform an unwavering role in the protection of individual and minority rights. To deny courts any ability to enforce individual rights recognized under customary international law would foreclose a critical avenue of redress."\footnote{154 Andrew M. Scoble, Note, \textit{Enforcing the Customary International Law of Human Rights in Federal Court}, 74 Calif. L. Rev. 127, 176 (1986).}

In the face of the judiciary's uncertain interpretation of the Alien Tort Statute, legislation has been proposed in Congress, entitled the Torture Victim Protection Act (TVPA),\footnote{155 H.R. 1417, 100th Cong., 1st Sess. (1987); S.824, 100th Cong. 1st Sess (1987). On October 5, 1988 the House of Representatives unanimously passed this act. \textit{134 Cong. Rec. H9692} (daily ed. Oct. 5, 1988). However, no successful action was taken in the Senate and the bill died. During the 101st session of Congress, the Torture Victim Protection Act, H.R. 1662, once again passed the House (October 2, 1989), but similar legislation in the Senate, S. 1629, was never able to make it out of committee.} which would explicitly provide a cause of action to victims of torture.\footnote{156 For a discussion of this proposed legislation, see Matthew H. Murray, Note, \textit{The Torture Victim Protection Act: Legislation to Promote Enforcement of the Human Rights of Aliens in U.S. Courts}, 25 Colum. J. Transnat'l L. 673 (1987).} This act would essentially codify the ability of a torture victim to bring suit in a federal court against her
torturer.\textsuperscript{157} This, however, raises the same question noted earlier: how effective would litigation pursuant to this Act be? An initial problem is obtaining jurisdiction over the defendant.\textsuperscript{158} In order to do so, the torturer must be present in the United States, and obviously his presence must be known to his victims, who also must be present in this country.\textsuperscript{159} The prospects of all of these events occurring at the same time are slim. Beyond that, even if this jurisdictional hurdle has been passed, there is the continuing problem of judgment proof defendants. In short, even if the TVPA was to become law, it is by no means certain that victims would be in any better position to pursue the perpetrators of political terror than they are presently.

\textbf{B. The Need for Criminal Proceedings}

Unlike most other countries, a rather sharp distinction is made in the United States between civil and criminal law.\textsuperscript{160} Criminal law deals with violations that ostensibly are against the state itself, although in almost every instance the victims are private individuals.\textsuperscript{161} Civil suits, on the other hand, are usually between two private individuals (or an individual and a corporate-type "person"), although the laws of the state are invariably involved here as well.\textsuperscript{162}

Although Alien Tort Statute suits are brought against individuals alleged to have committed human rights abuses of a criminal nature, consider the fact that approximately 5,000 Argentine citizens were murdered or "disappeared" in Zone One under General Suarez-Mason's command.\textsuperscript{163} Still, the proceedings themselves are merely civil in nature; that is, a suit between one or more individual plaintiffs and the defendant.\textsuperscript{164} The fact that criminal proceedings are not also brought against individuals like Pena-Irala or Suarez-Mason is difficult to explain.\textsuperscript{165} In his \textit{Filartiga} opinion, Judge Kaufman likened the modern day torturer to the pirate of old: both were \textit{hostis humani generis}, the enemy of all mankind.\textsuperscript{166} The comparison to piracy is an instructive one. Historically in England, actions against pirates were heard by a special court, the Court

\begin{flushright}
\textsuperscript{157} \textit{Id.} at 675.
\textsuperscript{158} \textit{Id.} at 680.
\textsuperscript{160} JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 1 (1987).
\textsuperscript{161} \textit{Id.}
\textsuperscript{162} Murray, \textit{supra} note 156.
\textsuperscript{163} 694 F. Supp at 683.
\textsuperscript{164} \textit{Id.} at 682.
\textsuperscript{165} Compare with, Harold H. Koh, \textit{Civil Remedies for Uncivil Wrongs: Combating Terrorism Through Transnational Public Law Litigation}, 22 Tex. Int'l L.J. 169 (1987) (arguing that, given the ineffectiveness to date of Alien Tort Statute litigation, criminal proceedings might complement, or be substituted for, civil suits).
\textsuperscript{166} Filartiga, 640 F.2d at 890.
\end{flushright}
of Lord High Admiralty, which treated such cases as having both a civil and criminal component.\textsuperscript{167} In the United States, piracy has been treated solely as a criminal violation,\textsuperscript{168} however, even Judge Bork is of the opinion that the crime of piracy would enable the victim to file a civil suit under the Alien Tort Statute.\textsuperscript{169}

There is little question that criminal sanctions could be applied against those who commit human rights abuses.\textsuperscript{170} Article I section 8 of the Constitution grants to Congress the power "to define and punish Piracies and Felonies committed on the high Seas, and offences against the law of nations."\textsuperscript{171} While piracy and other acts of international terrorism have already been made criminal by treaty or by municipal law,\textsuperscript{172} Congress has not explicitly done likewise with respect to other acts offensive to the law of nations, such as torture.

Is the lack of a statutory basis dispositive of the issue? That is, could criminal proceedings be brought against those who commanded or carried out acts of torture in the absence of a statute? Professor Bodansky recently has suggested that American courts (but really domestic courts all over the world) could do so under the principle of universal jurisdiction.

Universal jurisdiction exists when international law establishes individual responsibility for a violation of human rights. In such instances, a domestic court can apply the international norm to hold the offender liable and need not impose its own domestic standards and policies.\textsuperscript{173}

\begin{itemize}
\item \textsuperscript{167} Edwin D. Dickinson, \textit{Is the Crime of Piracy Obsolete?} 38 Harv. L. Rev. 334, 340 (1925).
\item \textsuperscript{168} 18 U.S.C. §§ 1651-1661 (1988).
\item \textsuperscript{169} Tel-Oren, 726 F.2d at 813.
\item \textsuperscript{171} U.S. Const. art. I, § 8.
\end{itemize}
Under the principle of universal jurisdiction, then, criminal proceedings might have (and, in retrospect, should have) been brought against General Suarez-Mason while he was in the United States, in addition to any civil litigation that he might be subjected to as well.\textsuperscript{174} There are a number of advantages to this. The most obvious advantage is that the one whose violation of the law of nations is criminal in nature, such as General Suarez-Mason, will be tried in a criminal court of law. Beyond this, the prospects that justice will be served are also much greater if there is also a criminal proceeding. Rather than merely being "saddled" with a default judgment which in all likelihood will remain unsatisfied, General Suarez-Mason could have (again, should have) been handed a very stiff prison sentence in the United States if convicted for the crimes that he allegedly committed.

When the United States becomes a party to the U.N. Convention Against Torture\textsuperscript{175} the question of criminal jurisdiction will become much clearer in this country. The Torture Convention requires parties to enact municipal laws against torture, wherever the torture occurred.\textsuperscript{176} Moreover, if a state finds an alleged torturer within its territory, it must prosecute this individual unless either the state where the torture occurred or the torturer's state of nationality seeks extradition.\textsuperscript{177} Finally, the Convention blends together civil and criminal law by obliging the state parties to provide judicial recourse to the victims of torture and other human rights violations.\textsuperscript{178} At the present time, the United States is a signatory to the Convention, and the Senate has provided the requisite "advice and consent."\textsuperscript{179} However, ratification of the treaty will not occur until implementing legislation is passed and this has not yet occurred.

C. Questions About the Extradition

The underlying premise behind a request for extradition is that the nation seeking extradition will prosecute. In 1988 General Suarez-Mason was extradited from the United States to Argentina, but he was never prosecuted or punished.\textsuperscript{180} One question this raises is whether the U.S.

\textsuperscript{174} See In re Suarez-Mason, 694 F. Supp. at 683.
\textsuperscript{176} Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, supra note 175, art. 5.
\textsuperscript{177} Id. art. 7.
\textsuperscript{178} Id. arts. 12-14.
\textsuperscript{179} Denouncing Torture Does Some Good, N.Y. TIMES, Nov. 19, 1990, at A18.
\textsuperscript{180} Supra notes 141-142.
government knew or should have known that prosecution would not follow, and thus, whether the extradition was lawful or not.

A nation that grants extradition still maintains an interest in the defendant even after jurisdiction over that person passes to the requesting nation. For example, the “specialty” doctrine limits the crimes for which the extradited defendant subsequently can be prosecuted for. Likewise, the “political offense” exception is itself based on the premise that a country will not extradite an individual to a country where he will face an unjust tribunal. Along these same lines, the “non-inquiry” principle recently has come under attack on the grounds that it often does not sufficiently protect the interests of the defendant or those of the requested state. In this light, when the United States granted Argentina’s request for Suarez-Mason’s extradition, presumably it did so with the understanding that the defendant would be prosecuted for murder and forgery. This did not occur. If, at the time extradition was requested, Argentina had no intention of prosecuting Suarez-Mason, the extradition would have been unlawful. There was, however, no indication of this.

This does not necessarily answer the question of the legitimacy of Suarez-Mason’s extradition. While there was no direct evidence indicating that the request for extradition was not a bona fide request, there were some strong indications that prosecution would not follow. Suarez-Mason’s extradition occurred only months after passage of the “due obedience” law. Although he would not have benefitted from this amnesty provision, the decided trend toward non-prosecution in Argentina was more than evident at that time. This murky state of affairs should have caused American officials to pause and think before granting extradition. What is being suggested is the recognition of something akin to the political offense exception to extradition, but only in reverse. For example, extradition should be denied if it appears that the defendant will not stand trial or be punished if convicted because of the nature of the offense or because of who is charged.

Consider another situation. Let us say that after General Noriega’s

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183 Dinah Shelton, The Relationship of International Human Rights Law and Humanitarian Law to the Political Offense Exception to Extradition, in NEW DIRECTIONS IN HUMAN RIGHTS, supra note 18.


186 Id.
capture by D.E.A. agents, but before his trial in the United States on drug trafficking charges, Panamanian officials had requested his extradition to face similar charges in that country. Let us also assume that Noriega was returned to Panama, but then subsequently pardoned without a trial. There seems little doubt that the United States government would take the position that the extradition was illegal. In fact, in all likelihood there would be serious attempts to re-extradite Noriega. Thus, at the very least, the United States government should have publicly questioned Suarez-Mason's pardon and release by the Argentine government, and perhaps have taken some steps toward re-extradition. Of course, in the situation that we are speaking of there was no indication that U.S. authorities intended to prosecute Suarez-Mason themselves as would have been the case with Noriega.

D. What Should Have Been Done?

The simplest response to this question is to argue that Argentina should have honored its commitments under international law. On September 24, 1986, Argentina ratified the Convention Against Torture.\(^{187}\)

As noted earlier,\(^{188}\) this Convention requires states that are parties to submit to prosecution or extradite all suspected torturers under its jurisdiction.\(^{189}\) Argentina has not done this, although the U.N. Committee on Torture has determined in three cases that the Convention only applies with respect to acts of torture that occur after a state becomes a party.\(^{190}\) Argentina had already signed and ratified the Convention when the “due obedience” law was enacted, but the Convention did not come into force until after its enactment. Notwithstanding this decision, Argentina has other duties under international law. As a party to both the American Convention\(^{191}\) and the Covenant on Civil and Political Rights,\(^{192}\) Argentina has an obligation to remedy human rights violations

\(^{187}\) Torture Convention, supra note 21.

\(^{188}\) Id.

\(^{189}\) Id. at art. 7(1).


such as torture. It has not met this duty,\textsuperscript{193} nor is there any indication that it intends to do so.

It is easy to target Argentina. But what about the non-response of other nations? Why were other countries diplomatically mute following the pronouncement of the various amnesty laws and the wholesale pardons in 1989 and 1990? Why haven’t other countries taken stronger measures to hold Argentina to its international obligations? What kinds of efforts were made to assist Argentina in prosecuting those who committed large-scale human rights abuses? In short, why has the entire burden of bringing these terrorists to justice fallen on the newly democratized and still fragile Argentine government?

The questions raised above do not yet have an intuitive ring because we are still accustomed to relying on the old sovereignty principle.\textsuperscript{194} In essence, how Argentina and other countries deal with human rights violations are their own business. However, it is important to point out that it was exactly this same point of view that allowed other nations to ignore the terror in Argentina in the first place.\textsuperscript{195} In fact, by their silent acquiescence, other nations also have participated in these shameful pardons. In particular, nations that are parties to the Torture Convention have not fulfilled the spirit, perhaps even the letter, of the law. For example, to my knowledge no attempt has been made by countries that are signatories to the Convention to press Argentina to either “prosecute or extradite” those who were responsible for committing torture.

Aside from Argentina itself, no country deserves more blame than the United States. Consider the fact that a general who allegedly is responsible for the deaths of over 5,000 people is discovered in this country, yet he is merely subjected to a civil suit brought by a group of private citizens. Moreover, Suarez-Mason is extradited to Argentina and subsequently pardoned, all without a diplomatic protest by the U.S. government. Would Saddam Hussein receive the same kind of treatment if he was under U.S. jurisdiction? If not, why this result for another political terrorist?

\footnotesize
\textsuperscript{193} For an extended discussion of Argentina’s duties under international law, see Rogers, Argentina’s Obligation to Prosecute Military Officials for Torture, 20 COLUM. HUM. RTS L. REV. 259 (1989); Orentlicher, supra note 1; but see Nino, The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina, 100 YALE L.J. 2619 (1991).

\textsuperscript{194} Sovereignty can, at times, be conveniently ignored. When the United States first pressed Colombia to extradite drug lords to this country the Colombian government protested that its sovereignty would be infringed. However, U.S. interests ultimately prevailed. See generally Mary Ellen Welch, Note, The Extraterritorial War on Cocaine: Perspectives From Bolivia and Columbia, 12 SUFFOLK TRANSNAT’L L.J. 39, (1988).

\textsuperscript{195} Guest, supra note 8.
V. THE USE OF REGIONAL AND INTERNATIONAL FORA

The argument set forth in the previous section was for the recognition that the implementation of human rights is an international concern. One step in that direction is the Torture Convention itself. However, if the Argentine experience is any indication, nations will give a very limited reading to their obligations under this Convention. Another means of accomplishing this goal would be to rely on international and regional fora designed for these purposes. In the case of Argentina, one hopeful prospect might be proceedings before the Inter-American Commission and Inter-American Court on Human Rights. In addition, strong consideration should be given to the creation of an international court of criminal justice. Finally, aside from the issue of prosecution, it is suggested that some international mechanisms ought to be in place which would provide special compensation to the victims of political terror.

A. A Revitalized Inter-American Court of Human Rights

In July, 1988, the Inter-American Court of Human Rights issued an unprecedented ruling.\(^\text{196}\) The Court held the government of Honduras liable for the disappearance of student activist Manfredo Velasquez Rodriguez, and ordered the Honduran government to compensate his family.\(^\text{197}\) In its unanimous holding, the Court found that between 1981 and 1984 Honduras had engaged in a systematic practice of disappearances.\(^\text{198}\) The Court held that this violated articles 4, 5 & 7 of the American Convention: respectively, the right to life, human treatment, and personal liberty.\(^\text{199}\)

One of the most noteworthy aspects of the Velasquez Rodriguez case is the Court’s broad reading of Article 1.1 of the American Convention. This article requires state signatories to guarantee within their territory the “free and full exercise of those rights and freedoms recognized by the Convention.” The Court interpreted this Article as imposing an affirmative duty on a state to take reasonable steps to: 1) prevent human rights abuses;\(^\text{200}\) 2) conduct a serious investigation, identify those responsible, and punish those who violate these rights;\(^\text{201}\) and 3) compensate victims of human rights abuses.\(^\text{202}\) Under the Court’s interpretation of Article 1.1, a state could be held liable for violating the Convention even in cases where there was no direct evidence linking the government to the disap-

\(^{196}\) Velasquez Rodriguez case, Case No. XX Inter-Am. C.H.R. XX par. 147 (1988).
\(^{197}\) Id.
\(^{198}\) Id. par. 148.
\(^{199}\) Id. par. 162-63.
\(^{200}\) Id. at 71, par. 171.
\(^{201}\) Id.
\(^{202}\) Id.
pearances. Article 1.1 would still be violated if the state had not exercised due diligence to prevent "the violation or to respond to it as the Convention requires." 203

It is not clear what effect the Velasquez-Rodriguez ruling will have on the Argentine situation. At the present time, several cases involving Argentine citizens already have been brought before the Inter-American Commission of Human Rights. 204 Although the details are still murky, apparently the Commission has drawn up a resolution condemning the amnesties and pardons by the Argentine government; however, the Commission has not published these results. 205 In addition, there are no assurances that these cases will ever proceed before the Court itself.

B. Creating an International Court of Criminal Justice

The creation of an international court of criminal justice has been proposed for decades, 206 but has begun to receive much more attention recently. 207 In fact, there already have been some moves in that direction. In 1988 and again in 1989, the U.N. General Assembly requested the International Law Commission to report on the establishment of an international criminal court to prosecute persons engaged in the international trafficking of drugs. 208 Pursuant to this, a committee of international law experts prepared a draft statute that was submitted to the Eighth United Nations Congress on Crime Prevention and the Treatment of Offenders held in Havana, Cuba, in August and September 1990. 209 The United Nations Congress then endorsed this proposal. 210

One of the leading proponents of an international criminal court is Professor Bassiouni 211 who has suggested that, without such a court, do-

203 Id. at 71 para. 172.
204 Letter from Argentine columnist/attorney Octavio Carsen to Columbia Law Professor Alejandro Garro (November 18, 1991) (copy on file with author).
205 Id.
211 See Bassiouni, supra note 207, at 1.
mestic pardons will continue to be the norm.

The political problem is obvious. Heads of State and senior government officials have historically wanted to shield themselves from any form of international accountability. Their successors and even their opponents so frequently cover up for them for fear that they too may find themselves in a similar situation, or because they feel that domestic political peace may warrant it. . . .212

Along these same lines, Bassiouni has questioned the resolve of the community of nations to bring the perpetrators of political terror to justice.

[W]hile the world community expresses abhorrence of some of these crimes, and outrage about others, little if anything is done, other than pious denunciations, and occasionally, some condemnatory resolutions by the United Nations and other international bodies.213

With the end of the Cold War, the time is ripe for creating an international court of criminal justice. Such a court should go far beyond merely prosecuting drug traffickers or those who engage in individual acts of political terror. Instead, it should also assist in prosecuting state terrorists such as Suarez-Mason. Finally, there is a pressing need for such a court at the present time. Without it, the halting and incomplete efforts experienced by a country such as Argentina will be the rule rather than the exception.

C. Compensating Victims Through International Institutions

Unlike the other proposals that have been presented thus far, the final approach does not focus on pursuing those who have committed gross violations of human rights. Instead, it recognizes that under certain circumstances this might not be possible. It attempts to offer some small measure of compensation for those who have suffered from the political terror. Ellen Lutz recently has set forth a model compensation program for victims of human rights abuses; however, her focus is exclusively on domestic remedies.214 The Argentine government has in fact adopted a compensation program for the victims of political terror,215

212 Id. at 12.
213 Id.
214 ELLEN L. LUTZ, After the Elections: Compensating Victims of Human Rights Abuses in NEW DIRECTION IN HUMAN RIGHTS, supra note at 18.
215 The compensation program is described in a reply from the Argentine government found in the Report of the Committee Against Torture U.N. GAOR, 45th Sess., Supp. No. 44, at 114-115, U.N. Doc. A/45/44 (1990). On October 30, 1986, the National Congress adopted Act No. 23,466. Under this Act, a non-contributory pension is awarded to relatives of missing persons. The beneficiaries of this pension are children under 21 years of age who produce evidence of the enforced disappearance of one or both parents (which occurred before December 10, 1983). The benefit also extends to the spouse, or a person cohabiting in apparent matrimony for at least five years immediately prior to the disappearance, together with minor children if any; parents and/or siblings who
but international remedies need to be considered as well.216

One proposal that might be pursued would be to have international lending institutions earmark a certain portion of money to the victims of political terror. In addition, countries that provide bilateral economic assistance such as the United States might also establish a fund for similar purposes.217 Rather than carrying on business as usual, the international community should be making its own statement about the past horrors in Argentina and elsewhere. One method of accomplishing this would be to directly assist those who suffered under the old regime.

VI. LESSONS FROM THE ARGENTINE EXPERIENCE

The Argentine experience is an important one. Its recent history provides a vivid example of the perversion of government218 and, concomitant with that, the systematic abuse of human rights.219 Unfortunately, this much is not unique to Argentina; it is a phenomenon that has been all too common throughout the world.220 What is unique to Argentina, however, is the democratization that ultimately followed, and the attempt, albeit a halting one, to bring the perpetrators of this past terror to justice. While Argentina is noteworthy in its own right, beyond this, there are some broader lessons that emerge, some of which are touched upon below. These are lessons that should be very useful to other newly democratized countries which are also attempting to come to terms with the past, as well as for nations seeking to avoid sinking into a pattern of gross human rights abuses.

A. Democracy Versus Justice?

One of the most striking things that emerges more broadly from the Latin American experience is how readily democracy and justice have been juxtaposed as being incompatible ends, rather than as complements

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217 See supra notes 1-13.
218 Id. at 356-364.
219 Id.
220 See supra notes 1-13.
to one another. That is, in one country after another, what emerges is the premise that the pursuit of justice must at times be sacrificed for the greater end of achieving democracy. This has then been translated into amnesties, pardons, and a general desire to turn away from the past which has marked much of the Southern Cone.

It is obvious that particular sectors of society benefit from this subjugation of justice, particularly certain factions of the military and others intimately involved in the terror. As a result, it is not surprising that these groups are firmly resistant to any attempts to delve in the horrors of the past. What is more noteworthy is the reaction of society at large. For example, Iain Guest describes the growing resistance within Argentina to the remarkable human rights movement, the Mothers of the Plaza de Mayo. “Outside Argentina . . . the Mothers are still feted and revered: it is almost as if their supporters abroad share the Mothers’ fear of losing a cause. But inside Argentina they are an uncomfortable reminder of a past that most people want to forget.”

What needs to be understood is that there can be no democracy without some attempts to achieve justice and an effort to come to terms with the past. That is, as long as the new regime is held hostage to the forces and the thinking of the old, there will be no true democracy. This is not meant to suggest prosecutions for everyone from the previous regime. As will be suggested below, there are important reasons for placing some limitations on criminal prosecutions. What this does mean, however, is that the pursuit of justice must be valued as an integral part of the democratization process, rather than a hinderance to it.

B. Prompt Prosecutions

One of the major shortcomings in Argentina’s prosecution of those responsible for the “dirty war” was the protracted nature of the process. Although there were thought to be sound political reasons for originally lodging jurisdiction of these cases with the Supreme Council of the Armed Forces, this body proved to be far more interested in protecting military personnel and far less zealous in pursuing justice. Although jurisdiction over these cases ultimately was removed nearly a year later, the delay did much to erode some of the initial public enthusiasm for pursuing those responsible for the terror. Furthermore, however, the impertinence displayed by the Supreme Council emboldened what had

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221 For a description of Brazil and Uruguay, see Weschler, supra note 8.
222 See supra notes 8-12.
223 Id.
224 Guest, supra note 8, at 407.
225 See supra notes 42-52 and accompanying text.
226 Latcham, supra note 217, at 358.
been a weakened military.\textsuperscript{227} What might have been a nation-wide catharsis and search for truth became instead a never-ending chess game between the Alfonsin government and the military.\textsuperscript{228} Under these trying circumstances, it is not surprising that much of the Argentine public believed the process to be unproductive.\textsuperscript{229}

Newly democratized countries need to walk a fine line between sweeping history aside on the one hand, and on the other hand, being able to deal with the horrors of the past in order to focus on the future. In the next section it is suggested that prosecutions be brought only against a limited number of people. What also needs to be understood is that the timing of these prosecutions is important. In essence, there is nothing to be gained, and much to be lost, in having these prosecutions drag on. Not only does the public become less interested in righting wrongs from an ever-distant past, as occurred in Argentina, but delay also enables splintered opposition forces to coalesce.

\section*{C. Limiting the Scope of Prosecutions}

The Argentine experience provides another important lesson: a newly democratized society should be selective in terms of whom it prosecutes. In this regard, the decision by the Alfonsin government to bring charges initially against the former junta leaders was generally a good one (although perhaps a greater distinction could have been made between the various juntas leaders themselves). What was more problematic was that there was little apparent attempt subsequently to prosecute those most responsible for committing gross levels of human rights abuses.\textsuperscript{230}

A better way of proceeding would be to focus on prosecuting those who were most responsible for the human rights abuses of the old regime. This would include government officials who directed the terror, and also those intimately involved in the worst kinds of human rights abuses. What this means, of course, is that many middle and lower level personnel will be exempt from prosecution. There are, however, trade-offs that need to be made and one of the most essential factors involves not pursuing some of the more peripheral actors in order to achieve some measure of finality and proportionality.\textsuperscript{231}

\textsuperscript{227} Id. at 360.
\textsuperscript{228} Supra notes 48-70 and accompanying text.
\textsuperscript{229} Latcham, supra note 217 at 358-59.
\textsuperscript{230} See supra notes 57-60.
\textsuperscript{231} This is not meant to suggest that the actions of these individuals remain hidden. If nothing else, the names of those who participated in the political terror should be made public. In addition, these individuals should be discharged from the military and their pensions revoked.
D. **Re-examing the Role of the Military**

It is essential for countries that have experienced political terror to examine their political systems in order to understand how such a phenomenon might have arisen in the first place. One primary concern ought to be the role that the military plays in the affairs of the country. For Argentina (as well as for many other countries) several questions need to be addressed: How is it that the military came to wield so much power? What steps can be taken to reduce the military's power in the political life of the country? What kind of civilian control over the military exists? What percentage of the country’s gross domestic product is devoted to military matters?, and so on.

One of the few encouraging steps in this direction can be found in the recent peace agreement between the Salvadoran government and the guerilla forces. Under its terms, the Salvadoran army is to “be cut almost in half and a reviewing panel approved by the rebels is to purge officers found to be excessively brutal or corrupt. [In addition,] Paramilitary and civil defense forces and the military's intelligence directorate are all to be disbanded.” Finally, military training will be based on the premise that the armed forces’ mission will not include the prosecution of an enemy within.

E. **Strengthening the Judiciary**

What the newly democratized countries of the Southern Cone have been slow to realize is that the terrors of the past simply cannot be attributed to the actions of a few people. Instead, what has occurred in so many of these countries is a breakdown in the political system itself, a breakdown that has enabled the government to make war on its own people. One manifestation of this institutional failure is the collapse of the judicial branch of government. Alejandro Garro comments on the Argentine judiciary in these terms:

> The courts have proven essentially powerless to deal with the problem of the disappeared. Out of fear for their personal security, or lack of diligence in the performance of their duties, or personal conviction that state terrorism is the only means to deal with subversion, judges have not taken exceptional steps to clarify the situation of the disappeared.

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233 *Id.*
234 *Id.*
236 *Id.* at 334-35.
Garro goes on to say that:

An independent judiciary should be able to swiftly correct any abuse of authority committed by the Executive. However, the experience of Argentina supports the observation that judicial control of arbitrary government action is ultimately doomed to failure when judges work under the stress of such phenomenon as chronic instability, personal threats, and almost continued suspension of constitutional guarantees.\(^{237}\)

The failure of the judiciary is not only endemic to Argentina. In fact, in country after country, the judiciary has sided with the actions of the terrorists in power, and in doing so they have given legitimacy to their actions.\(^{238}\) One of the most important tasks for newly democratized countries to is to create a system of government where an independent judiciary is ensured. Again, without a focus on these kinds of institutional features, any prospect of achieving democracy or justice is not likely.

F. The Need for International Involvement

The final lesson from the Argentine experience has been discussed previously,\(^{239}\) so it will only be touched on here. It is the need to recognize that the implementation of human rights is an international concern. As the situation in Argentina and other countries should make clear, newly democratized countries are not in a strong position to pursue those who were responsible for the commission of gross human rights violations. The world community needs to recognize this fact and offer assistance in bringing these terrorists to justice.

VII. CONCLUSION

One of the most basic tenets of international law, underscored by the Nuremberg prosecutions,\(^{240}\) is the principle of *nullum crimen sine poena*, no crime without a punishment. This paper has focused on former Argentine General Suarez-Mason, a man who is allegedly responsible for

\(^{237}\) *Id.* at 337.


\(^{239}\) See *supra* Section IV.

directing the disappearance of approximately 5,000 people in his role as commander of Zone One during the so-called "dirty war," who has never been tried or punished for his crimes. When democratization began in Argentina, Suarez-Mason fled the country and took up residence in the United States. When his whereabouts there became known, Suarez-Mason was made the defendant in an Alien Tort Statute action, a civil suit brought in U.S. federal district court by two Argentine torture victims. Although Suarez-Mason's attempt to have this suit dismissed was denied, and the plaintiffs awarded a default judgment, this judgment has never been satisfied. In 1988, Suarez-Mason was extradited back to Argentina, ostensibly to stand trial for murder and forgery, but his case never came to trial and months later he was pardoned by President Menem. He is now a free man.

The argument presented here is that the community of nations has a responsibility to assist countries like Argentina in bringing perpetrators of gross violations of human rights abuses to justice. This article asks why all nations, and not just Argentina, apparently are so willing to forgive and forget. Why is it, for example, that other nations have not pressed Argentina to either prosecute or extradite? Aside from Argentina, the country most at fault has been the United States. After all, Suarez-Mason lived in this country for nearly four years, and it was American authorities who turned him over to the Argentine government, only to have him pardoned for the extraordinarily serious crimes that he was being extradited for. According to international law, there is no crime if there is no punishment, but this is not true. There has been a crime against all humanity, and it is all humanity that should seek to ensure that some measure of justice is achieved.