IMPUNITY IN CASES OF SERIOUS HUMAN RIGHTS VIOLATIONS: ARGENTINA AND CHILE

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1. Introduction[1]

Any observer of the international scene today can readily see that in the last twenty–five years, violations of the human rights found in the minimum standard of treatment[2] have occurred too frequently in many countries around the world, and that the perpetrators of these violations have not been punished, nor the victims compensated in any way, nor judgments made public[3]. For proof, we need look no further than the

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1. We would like to thank the two readers asked to evaluate this paper by the *S.Y.I.L.* editorial board for their very useful observations.

2. We use the concept of human rights to refer exclusively to those rights found in what has been called the *minimum standard of treatment*. These are rights that protect legal assets such as life, physical and mental integrity and personal freedom and security. For an analysis of the evolution, nature and content of this concept, and of the problems related to its application, see: C. Jiménez Piernas, *La conducta arriesgada y la responsabilidad internacional del Estado*, Alicante, 1988, especially Chapter 2, Sections 1 and 3, pp. 113—153 y 239—246. As regards the protection granted to human beings by international law from the perspective of international humanitarian law, see A. Mangas Martín, *Conflictos armados internos y Derecho Internacional Humanitario*, Salamanca, 1990, pp. 82—84 y 139—151; also M. A. Ruiz Colomé, *Guerras civiles y guerras coloniales. El problema de la responsabilidad internacional*, Madrid, 1996, pp. 63—71.This restricted set of human rights also constitutes the small nucleus of human rights that cannot under any circumstance be derogated by States: see J. Oraá Oraá, J., *Human Rights in States of Emergency in International Law*, Oxford, 1992, passim and especially pp. 87—139 and 96—97 in which it is concluded that there are four human rights which cannot be abolished in all universal or regional treaties, and these are: the right to life, the right to be free from torture and other inhuman or degrading treatment or punishment, the right to be free from slavery or servitude, and the principle of non – retroactivity of penal laws. Furthermore, no reservations can be made on the respect for these rights: see A. Chueca Sancho, "Las reservas a los Tratados de Derechos Humanos", *Documentación Jurídica*, t. XIX (1992), 195—357, pp. 241—265 and Spanish practice on pp. 329—336; J. Quel López, *Las reservas a los tratados internacionales*, Bilbao, 1991, pp. 223—234 and Spanish Practice on pp. 235—264; C. Villán Durán, "Sigmificado y alcance de la universalidad de los derechos humanos en la Declaración de Viena", R.E.D.I., vol. XLVI (1994), 505—531, pp. 524—529. All of this allows us to sidestep any discussion on the cultural relativism of human rights which tries to give greater importance to economic and social rights than to civil and political rights. However, we fully recognize that, in practice, the lack of social, economic and cultural rights creates an atmosphere in which violations of civil and political rights frequently occur: see J. A. Pastor Ridruejo, *Curso de Derecho internacional público y Organizaciones internacionales*, 6th Ed., Madrid, 1996, pp. 249—250.

3. As regards punishment of the individuals responsible and compensation for the victims, we are simply speaking of compliance with a legal obligation imposed by international law. From this perspective, see the report filed in January 1994, by the Human Rights Commission Special Rapporteur on Summary or Arbitrary Executions B. Waly Ndiaye, E/CN.4/1994/7,

detailed information found in the reports written by the United Nations Commission on Human Rights within the framework of both specific State and the so–called thematic special public procedures, especially those related to torture, illegal, summary or arbitrary executions, or the phenomenon of disappearances. These reports offer a brief summary of the situation in every country in the world as regards that deep core of human rights found in the minimum standard of treatment[4].

Recently there have been several cases in international practice where a country has changed from an authoritarian or totalitarian regime, that showed very little respect for international rules on human rights, to democratic regimes based on constitutions which specifically list human rights and guarantee effective internal recourse against their violation. In other words, democratic regimes in which international rules are indeed applied[5]. However, even in these cases, we see that

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p. 172, in which he states that by virtue of international law, governments are required to thoroughly and impartially investigate any charge of a violation of the right to life in order to identify, bring to justice and punish the perpetrators, grant redress to the victims or their families and adopt effective measures to prevent these human rights violations from occuring in the future.

Similar statements are made by the Human Rights Committee when, in its quasi–jurisdictional role, it resolves the "individual communications": see *Selección de decisiones del Comité de Derechos Humanos adoptadas con arreglo al Protocolo Facultativo,* vol. 2, New York, 1992, pp. 239—241 *(ad exemplum)*.

Likewise, the Inter–American Court of Human Rights issued a judgment on 28 July 1988 on the Velázquez Rodríguez Case in which it stated that as regards the obligation to respect and protect the human rights imposed by art. 1.1 of the Inter–American Convention on Human Rights, States must prevent, investigate and punish any violation of the rights recognized by the Convention or, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation. See the text of this Judgment in *Revista I.I.D.H.*, vol. 8 (1988), 94—141.

4. See, for example, the latest reports of the Working Group on Enforced or Involuntary Disappearances: E/CN.4/1992/18; E/CN.4/1993/25; E/CN.4/1995/36; and E/CN.4/1996/38.

5. We are not going to discuss international practice as regards impunity in situations in which an obviously repressive government remains in power such as Iraq, nor States in which there is an almost total lack of governmental structure such as Liberia, Somalia or Afganistan because the results in these cases are quite obvious: absolute impunity. For example, as regards Afganistan, the Human Rights Commission Special Repporteur, F. Ermacora, E/CN.4/1995/64, pp. 15 *in fine* — 16, points out that there is no effective central government that is capable of respecting and guaranteeing respect for international rules on human rights due to the struggle for power that has been raging between various rival groups for many years now. Given this discouraging state of affairs, which has produced close to three million refugees in Pakistan and

there are enormous difficulties involved in effectively applying international rules on human rights when the violation of the human right was committed under a prior regime, especially as regards the punishment of the authors of these violations and redress for victims or their families. Furthermore, punishment of the perpetrators of human rights violations has become the exception and impunity the rule, given that States claim that they must allow impunity — either absolute or at least relative — in order to safeguard the process of national reconciliation, which is absolutely necessary for the effective peaceful transition to democracy and economic development[6]. But this practice[7] seems to infringe a good number of both conventional[8] and customary international rules as well as some regional conventional rules such as[9] articles 1.1, 8 and 25 of the American Convention on Human Rights. It should be pointed out that the granting of compensation to victims has suffered the same fate as criminal punishment for those responsible for violations, although in some cases, in spite of the fact that the guilty were not punished, newly constituted democratic governments have made efforts to establish some mechanisms for providing redress.

Iran, the international community has adopted an extremely passive attitude, one of almost total abandonment in this conflictive area, at least when compared with other international crises such as those that have occurred in recent years in the former Yugoslavia or in Somalia. This has only been remedied by means of important contributions of humanitarian relief channeled through the special organizations of the United Nations and the International Red Cross.

6. See Guissé and Joinet, *Informe provisional sobre la cuestión de la impunidad de los autores de los autores de violaciones de los derechos humanos,* E/CN.4/Sub.2/1993/6, pp. 32—38.

7. In this regard we can cite article 8 of the Universal Declaration of Human Rights (the right to an effective remedy), article 2 of the Covenant on Civil and Political Rights ("Each State Party to the present covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind ..."), article 4 of the Convention against Torture, the Convention against Genocide, the Convention for the Repression and Punishment of the Crime of Apartheid or the four 1949 Geneva Conventions and their 1977 Additional Protocols: see Guisse and Joinet, *Informe provisional ..., op cit.*, pp. 17—21.

8. On the development of international customary law on human rights, see T. Meron, *Human Rights and Humanitarian Norms as Customary Law*, Oxford, 1989, pp. 3—135. These are rules that, in the opinion of Carrillo Salcedo, have achieved the status of general principles of international law: J. A. Carrillo Salcedo, *Soberanía de los Estados y derechos humanos en Derecho internacional contemporáneo*. Madrid, 1995, pp. 101—106.

9. J. Kokott, "No Impunity for Human Rights Violations in the Americas", *H.R.L.J.*, vol. 4 (1993), 153—159, pp. 153—154 and 158—159.

Now, several Latin American countries are included in the group of countries described above in which serious and massive violations of the human rights that protect the life and physical integrity of human beings occurred in the 70s and early 80s. In this study we are going to focus specifically on the cases of Argentina and Chile as they are clearly representative of the problems encountered in several countries in their attempt to comply with international rules on human rights. This is true because, first, it is more difficult to explain the cases of absolute or relative impunity — to which we shall refer briefly in just a moment[10] — in States, such as Argentina and Chile, which have a long and admirable tradition of republican government and a reasonable level of economic and social development. This sets them apart from other States in other parts of the world in which, unfortunately, absolute impunity has become almost routine.

We will also briefly discuss the reaction of third States to the human rights violations committed in Chile and Argentina and the subsequent climate of impunity that seems to have become widely accepted in the last few years.

Furthermore, especially in Argentina, and to a lesser extent in Chile, a long list of Spanish nationals are among the victims of these "situations" of persistent violation of human rights in these two Latin American countries. We should also mention that Spain has important ties in the area of economic cooperation with these two countries, in addition to the more obvious cultural ties that exist. For these reasons, our objective is not only to study the situation of impunity in Argentina and Chile, but also to study Spanish practice by taking into account the legal interest that Spain has in defending Spanish nationals. Specifically, we will emphasize the recent legal debate on the international criminal jurisdiction of Spanish courts, as well as the so–called "Soria Case".

Finally, we shall comment generally on the content of State international responsibility — the cessation of the internationally wrongful act and reparation — and attempt to put the international practice studied into the context of contemporary international law. From this it can be seen that States are generally more preoccupied about their military, economic and commercial relations with other

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10. Due to space limitations and given that the events that occurred in Chile and Argentina in the last two decades are well known, we are going to deal very briefly with the practice of these two countries and emphasize those aspects that we feel to be most important, especially the recent declarations of the organs of control of the international rules on human rights.

countries than with the protection of human rights. These observations are without prejudice to the *lege ferenda* evaluations of State practice.

2. Argentina

Once the military dictatorship ended in 1983 and democracy was reestablished in Argentina, the repression that was experienced by the Argentinian people during the years 1976—1983 was documented in reports which put the the number of detentions, tortures and assassinations that took place at several thousand, more specifically around 9,000. Many of these were the so–called "*desaparecidos*" as was shown in the 1985 report published by the National Commission on Disappeared Persons (CONADEP) which was called "*Nunca Más*" (Never Again)[11]. However, as a consequence of the promulgation of laws no. 23.492 dated December 24, 1986 — the law called "*Punto Final*" (full stop)— and 23.521 dated June 8, 1987 — known as the law of "*Obediencia Debida*" (due obedience)[12] —, the only perpetrators of these atrocities who were tried and criminally punished in Argentina were the nine members of the Military Junta. However, President Menem, by means of Decree 1002 dated 7 October 1989, pardoned almost all of those tried for human rights violations with the exception of General Jorge Rafael Videla, General Roberto M. Videla, General Guillermo C. Suárez Mason and General Ramón J. Camps, all of whom were in prison at the time. President Menem then went on to apply a new round of presidential pardons which covered all those responsible for human rights violations from 1976–1983 who were still in prison. None of these pardons, however, affected the ban on holding public office which remained intact[13].

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11. CONADEP, *Informe*, Barcelona, 1985, *passim*. On doctrine see C. Jiménez Piernas, "El particular ante el Derecho de la responsabilidad internacional: los problemas previos del 'standar' mínimo y la protección diplomática", en *Cursos de Vitoria–Gasteiz*, 1987, 65—116, pp. 96—110; P.B. Hayner, "Fifteen Truth Commissions — 1974 to 1994: A Comparative Study", *Human Rights Quarterly*, vol. 16 (1994), 597—655, pp. 614—615.

12. The text of these laws can be found in *Revista I.I.D.H.*, vol. 5 (1987), pp. 171—174.

13. A summary of these rules can be seen in *Revista I.I.D.H.*, vol. 12 (1991), pp. 259—278. For a detailed analysis of the case of Argentina from the perspective of the impunity of the perpetrators of human rights violations see R. E. Norris, "Leyes de impunidad y los derechos humanos en las Américas: una respuesta legal", *Revista I.I.D.H.*, vol. 15 (1992), 47—121, pp. 71—83. On the granting of presidential pardons in the case of Argentina, see P. A. A. Barcroft,

The application of international rules on human rights in Argentina has definitely materialized from an international law point of view, in a public report on the events that took place during the years of the dictatorship, and on the trial and barring from public office of the highest ranking persons involved in human rights violations, although a series of rules quickly set these individuals free[14]. In this regard, a report prepared by the Working Group on Enforced or Involuntary Disappearances was made available in 1993 in which the number of "*desaparecidos*" cases still pending in Argentina was 3,385. The report stated that by virtue of several amnesties granted by constitutional governments, and as a result of the pardon granted in December of 1990 to the members of military juntas responsible for the disappearances, the Government had sanctioned total impunity[15]. In spite of this, it is important to point out that Argentina did adopt legislatives measures that recognized moderate compensation for the victims of human rights violations or their relatives[16].

What are the reasons that the Argentinian Government has given to justify this climate of impunity? The Argentinian Government has insisted on the need for national reconciliation in order to guarantee the consolidation of democracy and the economic reconstruction of the country, and has declared openly that there were threats of a military coup and that pressure was exerted by international financial organisms to put a stringent economic adjustment plan into practice[17].

Nevertheless, Argentina's conduct has been considered contrary to international law by the mechanisms that control the international rules

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"The Presidential Pardon – A Flawed Solution", *H.R.L.J.*, vol. 14 (1993, 381—394, p. 392 and *passim*.

14. Even in 1995, the debate still raged on over the punishment of those responsible for the repression which occurred during the Argentinian dictatorship when it was learned that many of those who were still "disappeared" were thrown into the sea from airplanes by the Argentinian armed forces. This led the armed forces to publicly acknowledge, for the very first time, the atrocities that were committed during the period known as the "*guerra sucia*" or dirty war. See *Keesing's*, 1995, pp. 40450, 40499 and 40545.

15. E/CN.4/1993/25, p. 25.

16. See the position of the Argentinian government, as transmitted to the Secretary General in the report entitled *El derecho de restitucion, indemnización y rehabilitación de las víctimas de violaciones graves de los derechos humanos y las libertades fundamentales*,. C/CN.4/1996/29, pp. 32—38.

17. For a detailed description of the position of the Argentinian Government, see the report of the Working Group on Forced or Involuntary Disappearances, E/CN.4/1994/26, pp. 32—38.

on human rights. In this regard, the Inter–American Commission on Human Rights made a decision on October 2, 1992, in which it recognized the efforts made by the Argentinian Government as evidenced by its creation of CONADEP, the prosecution and punishment of the military leaders responsible for the disappearance of thousands of people, and economic compensation granted to the victims of human rights violations or their relatives in the form of life–long pensions. However, the Commission also believed that the amnesty laws promulgated in 1987 and the decrees granting presidential pardons in 1989, were contrary to articles 1, 8 and 15 of the American Convention on Human Rights and recommended that Argentina compensate victims and initiate investigations that would lead to the prosecution of the individuals responsible[18]. It is important to point out that although the Commission confirmed that Argentina had an obligation to punish the authors of the human rights violations, it did not make any attempt to define this obligation as regards measures for its application — deprivation of liberty and/or being barred from holding public office —, or its scope or duration.

In April, 1995, the United Nations Human Rights Committee also gave its approval to the redress that Argentina was offering to the victims of human rights violations as stipulated in laws 24.043 and 24.411, although it regretted that this right to compensation was not extended to victims of torture. However, the Committee insisted that the promulgation of laws that prevented any type of judicial proceeding against the individuals responsible for human rights violations was not admissible according to the international obligations that pertain to Argentina. Nor was it acceptable that the alleged perpetrators of human rights violations continued to hold high–ranking civilian and military posts in Argentina, with no fear of being barred from those positions[19].

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18. See the text of this decision in *H.R.L.J.*, vol. 13, 1992, 336—340. We must point out that the Inter–American Commission did not accept the argument put forth by Argentina that the human rights violations had occurred prior to the entry into force in this country of the American Convention, since in the Commission's opinion the laws of amnesty and the presidential decrees were promulgated in 1986, 1987 and 1989, after the entry into force of the Convention for Argentina in 1984: *ibid*, p. 340.

19. See CCPR/C/79/Add.46, passim.

3. Chile

In 1991, the report of the Commission on Truth and Reconciliation was made public. This report attributed the death of more than two thousand persons and the torture of several thousand more to the military government in power in Chile from 1973 to 1990. A good part of these atrocities were committed between 1973 and 1977[20]. In spite of the protests made by much of Chilean society, the only people tried for human rights violations after the restoration of democracy[21] were the former heads of the Chilean secret police (DINA) Manuel Contreras and Pedro Espinoza, accused and convicted by a Civil Court in November 1993 and sentenced to prison terms of 7 and 6 years respectively in connection with the Letelier case[22]. We must remember that in 1978, the military government led by Pinochet promulgated decree 2.191 which granted a general amnesty for all of those responsible for the repression during the worst years of the dictatorship — 1973—1978. This amnesty mainly favoured members of the army and of the Chilean police force. As a result of this amnesty, the investigation of hundreds of cases was halted, thereby making it impossible to determine the whereabouts of the "disappeared" or the determination of the facts for purposes of civil actions seeking redress. The amnesty was accepted after the restoration of democracy[23]. But as

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20. For this information see J. Mera, "Chile: Truth and Justice under the Democratic Government", in N. Roht-Arriaza, (Ed.), *Impunity and Human Rights in International Law and Practice*, Oxford, 1995, 171—184, *passim*; A. Barahona de Brito, *Human Rights and Democratization in Latin American – Uruguay and Chile*, Oxford, 1997, pp. 152—188; C. Jiménez Piernas, "El particular...", *loc. cit.*, pp. 96—110; C. Medina, "Chile ...", *loc. cit.*, pp. 116—123.

21. It is a well known fact that the restoration of democracy in Chile has been very favorable for the leaders of the Pinochet military dictatorship. Pinochet himself continues to be the Commander in Chief of the Chilean Armed Forces and all of the high command of the army and the police from the old regime will continue in their posts until at least 1998. For details see C. Medina, "Chile: Obstacles and Challenges for Human Rights", *N.Q.H.R.*, vol. 2 (1992), 109—129, pp. 110—112.

22. Orlando Letelier, former Minister of Foreign Affairs in Chile, was assassinated in Washington together with Ronni Moffitt, a United States citizen. These assassinations were arranged and organized by agents of the Chilean government.

23. For information in this regard see *Keesing's*, 1992, p. 39187; 1993, pp. 39594 and 39733. In doctrine, see R. E. Norris, "Leyes de impunidad...", *loc. cit.*, pp. 48—56. The 1979 report by the expert of the Commission for Human Rights for Chile, Ermacora, merits mention. In this report, a very precise legal construction of Chile's international responsibility is carried out and constant reference is made to the 1978 law of amnesty: A/34/583/Add.1, pp. 88—96.

the Supreme Court of Chile stated, the 1978 amnesty law could not be applied to Letelier's assassins, and therefore a ruling made May 4, 1995, convicted General Contreras and Brigadier Espinosa as the intellectual authors of that assassination[24].

From the perspective of the other State affected by the Letelier case, the United States, we should mention that in November, 1980, a court in Washington declared the Chilean government responsible for the assassinations committed in 1976 and demanded almost five million dollars in compensation. In 1979, the Chilean Supreme Court refused to extradite the allegedly guilty DINA officials. In January 1981, a military court in Santiago de Chile absolved the heads of DINA, Juan Manuel Contreras Sepúlveda, Pedro Espinoza Bravo and Armando Fernández Larios, from all responsiblity for this crime. However, in 1987, Fernández Larios voluntarily turned himself in to the authorities of the United States and cooperated in the clarification of the case in exchange for protection and a reduction in his sentence. He confirmed the participation of the Chilean government in the death of Letelier and Moffitt. In October 1988, the United States government demanded twelve million dollars in compensation for the families of Letelier and Moffitt[25]. This matter was finally resolved, at least from the perspective of the United States government's claim against Chile, when compensation for the relatives of the victims was granted. The determination of this compensation occurred in the following way: in June 1990, both governments agreed to appeal to the Commission stipulated in the 1914 Treaty for the Settlement of Disputes and asked it to decide the amount of compensation[26]. This agreement stipulated that the compensation was granted by Chile *ex gratia*, although the Commission was to determine the amount by applying the principles of international law as if international responsibility had been established[27]. In January 1992, the Commission decided that Chile should pay the United States a total of $2,611,892 and that the United

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24. See the commentary made on the ruling by P. A. Barcroft, in "International Decisions", *A.J.I.L.*, vol. 90 (1996), pp. 290—296. However, compliance with these sentences was delayed thanks to an astute use of all of the procedural tactics available and the reluctance of the army to collaborate, although both men were eventually sent to prison. See *Keesing's*, 1995, pp. 40640 and 40596.

25. For information on this see *Keesing's*, 1979, pp. 29601 and 30284; 1981, p. 30728; 1987, p. 34989; 1988, pp. 36096 and 36346.

26. See "Practice of the U.S.", *A.J.I.L.*, vol. 86 (1992), pp. 347—352.

27. See the text of the agreement in *I.L.M.*, vol. XXX (1991), pp. 421—424, p. 424.

States should deliver the entire amount to the Letelier and Moffitt families[28].

On the other hand, we must point out that the Chilean government has adopted measures to provide compensation in the form of monthly pensions and other types of benefits such as scholarships, etc., for the victims of human rights violations and/or their relatives. This compensation is administered by the National Corporation for Reparation and Reconciliation[29], although this is only for dead victims' families or the "disappeared' and not for torture victims[30].

But in conclusion, as the Human Rights Commission Special Rapporteur on torture states, impunity continues to be the norm for the perpetrators of human rights violations during the Chilean military dictatorship[31]. Therefore, the conclusions that Ermacora drew as early as 1979 have not been totally put into practice:

> "The Expert therefore concludes that the Chilean Government is responsible according to international law for the fate of 600 disappeared persons whose basic rights as human beings were infringed and violated as is shown in this report. The Government is also responsible for those disappeared persons who lost their lives in

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28. See the text of the decision in *I.L.M.*, vol. XXXI (1992), pp. 1—15, and the Orrego Vicuña separate concurrent opinion in pp. 16—31, who pointed out that the humanitarian nature of the case justified the non-application of the traditional rules on diplomatic protection such as the nationality of the claim or the prior exhaustion of all local remedies. Also, as regards the possible discrimination that could exist in relation to other Chilean nationals who might receive lower compensation for human rights violations, Orrego Vicuña states that this unequal treatment was justified because Chile had limited economic resources that could be used for compensation in the context of massive violations of human rights.

29. See the Chilean government's position as transmitted to the Secretary General in the report on *El derecho de restitución, indemnización y rehabilitación de las víctimas de violaciones graves de los derechos humanos y las libertades fundamentales*, C/CN.4/1996/29, pp. 11—19. Also see the *Informe del Grupo de Trabajo sobre Desapariciones Forzadas o Involuntarias*, E/CN.4/1994/36, pp. 28—30. In doctrine see C. Medina, "Chile ...", loc.cit., pp. 123—125. As regards the most recent work of the Corporation for Reparation and Reconciliation on the identification of victims of the repression (estimated mid-1996 as 3,197 dead between 1973—1990) in order to grant economic reparation to relatives of victims: see Coorporación Nacional de Reparación y Reconciliación, *Informe sobre la calificación de víctimas de violaciones de derechos humanos y de la violencia política*, Chile, 1996.

30. N. S. Rodley, *Informe sobre la Visita del Relator Especial a Chile*, C/CN.4/1996/35/Add.2, p. 4.

31. *Ibid*, pp. 3—5.

suspicious circumstances imputable to government organisms. The Government of Chile has the obligation before the international community to explain and clarify the fate of these disappeared persons, to punish those responsible for the disappearances, to compensate the families of the victims and to take measures to prevent these acts from happening again in the future"[32].

4. The Response of Other States

A) Argentina

There is no doubt that the reaction of many countries to Argentina's invasion of the Falkland Islands in 1982 was clear and forceful[33]. However, human rights violations committed by the same government that decided to invade the Falklands, in the form of several thousand "disappeared" between 1976 to 1983, did not receive the same reaction from the international community. Only the United States, under President Carter, adopted measures that prohibited the sale of military material to Argentina in September 1978 and a partial reduction of the financial aid that the United States gave to this Latin American country, although these measures could be abolished if the President "certified" that the human rights situation in Argentina improved. Additionally, according to a study by Hufbauer, Schott and Elliott, these economic

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32. A/34/583/Add.1, p. 96.

33. Great Britain made use of its right to legitimate defense and applied economic reprisal measures against Argentina consistent with an embargo on Argentinian imports and exports and a blockade of Argentinian funds held within its territory. The United States supported Great Britain logistically and decided to suspend not only the exportation of military material to Argentina but also export credits and guarantees in spite of the fact that North American companies with affiliates in Argentina publicly supported this country and in some cases, even supplied materials for logistic support. France and the Federal Republic of Germany, the principal exporters of arms to Argentina at the time, also suspended weapons exports. Furthermore, in a Council of Ministers meeting on April 16, 1982, the European Economic Community decided to establish a one-month embargo on Argentinian imports and a two-week embargo on export credits. These measures were later extended. Canada, Australia and New Zealand also adopted economic sanctions against Argentina. For more details on the events of this international crisis, including antecedents, see "Chronique", *R.G.D.I.P.*, vol. 86 (1982), pp. 724—773. As regards the reaction of the European Community and its member States, see L. Perez-Prat Durban, *Cooperación política y Comunidades europeas en la aplicación de sanciones económicas internacionales*, Madrid, 1991, pp. 241— 265.

repercussions were insignificant and did more to enhance the foreign policy image of the United States than to improve the human rights situation in Argentina[34].

Along the same lines, it is important to point out that the principal exporters of arms to Argentina between 1978 and 1982, France and the Federal Republic of Germany, did not consider the human rights violations that were taking place during these years in Argentina as sufficient reason to establish an arms embargo against this country. Nevertheless, when the Falkland Islands were invaded in March, 1982, an embargo was instituted[35].

As far as we know, no other State took any measures, apart from verbal condemnation, in response to the human rights violations taking place in Argentina. Nor are we aware of any reaction by the members of international society against the decisions made by the democratic regimes in Argentina in the 80s to prevent those responsible for violations from being prosecuted or to grant presidential pardons in the few cases that were tried in the courts, not even when the effectiveness of the recourses available in Argentina to try those responsible for human rights violations committed against the nationals of these States was in play. The only actions we know of were the unofficial attempts made by embassies and consular offices to offer humanitarian help to the victims and their families[36].

B) Chile

We should point out that with the exception of the Israeli–occupied territories in the Middle East and apartheid in South Africa, the first case of serious and massive violations of human rights on which there was significant consensus in the United Nations was the case of Chile in the 70s. Resolutions were passed condemning these human rights violations by the Economic and Social Council and by the General Assembly from 1974 onwards[37]. However, if we move from the area of

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34. See G. C. Hufbauer, J. Schott and K. A. Elliott, *Economic Sanctions Reconsidered. History and Current Policy*, 2ª ed., vol. II, Washington, 1990, pp. 445—448.

35. See "Chronique", *R.G.D.I.P.*, vol. 86 (1982), pp. 746—747.

36. See C. Jiménez Piernas, *La conducta arriesgada ..., op. cit.*, pp. 143—144.

37. For example, the General Assembly adopted Resolution 33/175 on December 20, 1978 by 96 votes in favor and 7 against (Argentina, Brazil, Chile, Guatemala, Lebanon, Paraguay and Uruguay) in which a demand was made of the Chilean government to put an end to the human

verbal condemnation to specific relations with third countries, we can see that this institutional consensus manifested in resolutions, was not backed up in practice by member States.

The country that seems to have been most concerned about the human rights situation in Chile was the United States. But this concern was largely motivated, in our opinion, by the Letelier case which we mentioned earlier. These events, in addition to the attacks on the right to life, *constituted a clear violation of the territorial sovereignty of the United States by Chile.* Due to space limitations, we will only refer to what we consider to be the most relevant responses[38]. In this regard, in December 1974, the Congress of the United States prohibited any military cooperation with Chile for the year 1975 and limited economic assistance to 25 million dollars. However, President Gerald R. Ford publicly stated that the prohibition of military cooperation was not an effective means by which to promote respect for human rights in Chile. After Letelier and Moffitt were assassinated and Pinochet's regime refused to extradite two army officials allegedly involved in the assassinations, the United States (now under President Carter) decided to terminate all military cooperation, to prohibit export credits for goods destined for Chile, to vote against the granting of loans to Chile by international financial institutions, and to reduce its diplomatic presence in that country. However, in 1981, citing the favorable economic prospects of the Chilean market, President Reagan reversed the prohibition on export credits that had been instituted in 1979 in response to Chile's refusal to extradite those presumed to be responsible for the assassination of Letelier and Moffitt. He also decided to approve loans being granted to Chile by international financial institutions[39].

We can mention the attitude of other countries, although only in terms of the export of military material. In 1980, the United Kingdom broke the 1974 arms embargo against Chile basing its decision on the fact that respect for human rights in Chile had improved, in spite of the fact that only a few days earlier, a British national had been tortured. However, the Austrian government had cancelled the sale to Chile of

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rights violations, to restore democracy and to prosecute those responsible for the human rights violations, especially those responsible for torture

38. For a more detailed analysis of the relations between both States, in which the importance of the Letelier case is shown, see G. C. Hufbauer, J. Schott, and K. A. Elliott, *Economic Sanctions ..., op. cit.*, vol. II, pp. 359—365.

39. *Ibid.*, pp. 360—361.

100 tanks and 300 cannons worth 167 million dollars because, in its opinion, these arms could be used "for purposes other than self–defence". In 1979 and 1981, France sold military material to Chilé in spite of the fact that the French government did not publicly recognize this fact, and used third countries as bridges for the shipments. The French socialist government stopped those sales in 1982[40].

In conclusion, it does not appear that the economic measures instituted against Chile by some countries (especially the United States), in response to its human rights policy, had much effect in terms of terminating the illegal behavior and bringing about a regular application of international rules on human rights, such measures remaining almost symbolic, especially as regards the policy of the Reagan administration. We can cite an example: in spite of the public declarations made by the United States that it would vote against international financial institutions granting Chile loans, between the years 1976 and 1987 all 53 loans proposed were granted, even though the United States votcd against or abstained in 22 cases. There is no need to mention the United States role in international institutions such as the World Bank or the International Monetary Fund[41].

5. Spain's Position

A) Disappearances in Argentina

After human rights violations ceased in Argentina and this Latin American country started down the road to democracy, the Spanish government did not seem to think that the lack of punishment of the intellectual or material authors of those violations, or the lack of compensation for the victims or their families — with the important exception mentioned above —, should affect relations betwcen Argentina and Spain in any way, regardless of whether the victims were Spanish nationals, Argentinian nationals of Spanish origin, or other individuals, whatsoever their nationality.

In this regard, with the exception of a very forceful, negative reaction in 1983 to a document issued by the Argentinian military junta

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40. See *Keesing's*, 1980, p. 30620; "Chronique", *R.G.D.I.P.*, vol. 85 (1981), p. 859; *Keesing's*, 1982, pp. 31474—31745; "Chronique", *R.G.D.I.P.*, vol. 94 (1990), pp. 771—772.

41. See G. C. Hufbauer, J. Schott, and K. A. Elliot, *Economic Sanctions ..., op. cit.*, pp. 359—367.

declaring itself free of blame for the human rights violations committed under its regime, Spain has only carried out simple unofficial procedures of a humanitarian type through its embassy and consular offices which have focused on Spanish nationals who were victims or those with Spanish ancestors[42]. Today Argentina is one of the countries with which Spain has a very dense network of bilateral cooperation treaties given that it is, together with Brazil, one of the largest markets in Latin America[43].

B) Arms Sales: The Case of Chile

The European Council met in Luxembourg on June 28—29, 1991, and approved a declaration on the non–proliferation of the export of arms. One of the common conditioning criteria of arms exports, as found in many national arms exportation policies, is the concept of "respect for human rights in the country of delivery"[44]. However, in a resolution issued in January, 1995, the European Parliament severely criticized the member States' policy on arms exportation which was considered lacking in coherence. The Parliament called for a common position to be reached at the 1996 Intergovernmental Conference which would link the export of arms to the human rights situation in the country of delivery — among other criteria — and even suggested that article 223 of the Treaty of the European Community be abolished[45].

In this regard, at the end of 1995, the Ministry of Commerce published a report on Spain's export of defense and dual use materials which showed that it was not clear if Spain's 50 billion peseta annual

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42. See "Documentación sobre Política Exterior", *Revista de Estudios Internacionales*, vol. 4 (1983), pp. 696—697; *Documentos de Política Exterior*, 1983, p. 81 and p. 121; and 1985 p. 484—485; see the list of "disappeared" in ibid., 1983, pp. 689—692.

43. A. Fernández Tomas, *La celebración de tratados bilaterales de cooperación por España*, Valencia, 1994, p. 21 and note 11.

44. See the text of the declaration in *R.I.E.*, vol. 18 (1991) pp. 1088—1089, cited on p. 1088. The Spanish government has recently regulated the export and import of "Defense Material and Dual Use Material" in Royal Decree 824/1993, 28 May: *B.O.E.*, no. 226, 21.9.1993.

45. See O.J. E.C. n. C43, 20.2.1995, pp. 89—90. Specifically, the European Parliament criticized the sale of arms by Great Britain to Indonesia, of France to Algeria and of Germany to Turkey. Furthermore, it warns that in disputes in which European Union troops are deployed, such as in Rwanda, Bosnia or Somalia, they have found that there are huge numbers of conventional arms manufactured by European Union member States.

export of these materials complies with the directives issued by the European Union, especially the one related to limiting the export of arms to countries that respect human rights. This is evident if we look at the list of Spain's main clients: Morocco, Thailand, Turkey, Indonesia, Angola and South Korea[46]. Furthermore, a situation has arisen that is, in our judgment, somewhat absurd, and that is that the credits granted by the Development Assistance Fund through which Spain channels the majority of its bilateral development cooperation projects, has financed the exportation of defense or dual use materials by Spanish companies to countries such as Morocco, Indonesia and Somalia[47].

In the case of Chile, in spite of the fact that the Spanish government stated on several occasions during the 80s that "... the continued and growing disregard for the human rights of the Chilean people affects normal relations with Spain ..."[48], our legislators presented several questions to the Government to ascertain if arms sales to the Pinochet regime had been authorized. All of these inquiries received negative responses[49], until a time in 1987 when our Government gave an "implicit" affirmative response, thereby prohibiting exports to this country from August 1986[50] until the restoration of democracy in 1990.

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46. See the article by V. Fisas, "Hay secretos que matan", *El País*, 30.9.95, p. 28. From a more general perspective, it is sadly paradoxical that the largest exporters of arms in the world today are the five permanent members of the Security Council — and Germany — which are also those mainly responsible for maintaining international peace and security according to the United Nations Charter. See E. Barbé Izuel, *Relaciones internacionales*, Madrid, 1995, pp. 138—142; A. Remiro Brotons, *Civilizados, bárbaros y salvajes en el nuevo orden internacional*, Madrid, 1996, pp. 43—48.

47. See C. Gómez Gil, "Los créditos FAD en la AOD española", in A. Martínez González-Tablas, *Visión global de la cooperación para el desarrollo*, Barcelona, 1995, 471—538, pp. 505—512.

48. *Documentos de Política Exterior*, 1984, p. 533.

49. See *inter alia*, B.O.C.G., Congreso de los Diputados, 1st Legislative Session, Series E, 21 August 1979, no. 50-1 (cited in *R.E.D.I.*, Vol. XXXII [1980], p. 354); *Documentos de Política Exterior*, 1986, p. 264; *ibid.*, 1987, pp. 321—322, informing the Government (p. 322) of the criteria to be applied when authorizing arms exports: a) By applying United Nations Security Council resolutions; b)Countries involved in warlike disputes; c) By applying the decisions adopted by the Council of Ministers of the European Economic Community; d) For reasons of foreign policy.This last "criterion" seems to confirm the Government's discretionary power in this area in cases that do not meet the first three criteria. This could be, for example, a country which systematically and grossly violates international rules on the protection of human beings.

50. *Documentos de Política Exterior*, 1987, p. 322: "B) Since August 1986, no exportation of arms of war to Chile have been authorized".

C) The Criminal Jurisdiction of Spanish Courts

On March 28, 1996, the *Unión Progresista de Fiscales* filed a complaint[51] before the *Audiencia Nacional* in Spain claiming that the acts committed in Argentina between 1976 and 1983 in which some 600 Spanish nationals died, were crimes of genocide and terrorism according to the Spanish criminal code, and that for this reason, Spanish courts were competent to hear these cases by virtue of the principle of universal jurisdiction found in article 23.4 of the *Ley Orgánica del Poder Judicial* (L.O.P.J.)[52]. On May 10, the Asociación Libre de Abogados filed a class–action complaint[53]. On May 6 and May 9, *Izquierda Unida* and the *Asociación Argentina Pro–Derechos Humanos–Madrid* joined the suit. The complaint was accepted by the *Audiencia Nacional* in an order dated June 28, 1996, and on September 12, 1996, proceedings began. This provoked a negative reaction from Argentinian military authorities as more than one hundred active military personnel were implicated in the case. In mid–October, President Menem stated that the investigation initiated by the *Audiencia Nacional* would not be allowed in Argentina[54].

Along the same lines, the *Unión Progresista de Fiscales* filed a suit charging genocide and terrorism against Pinochet and other members of the high command during the years of repression in Chile. During this period three thousand people lost their lives, among them several Spaniards. The Fundación Presidente Allende filed a suit based on the same acts calling them acts of genocide and international terrorism. The complaint was accepted in an order issued by the Audiencia Nacional on July 29, 1996, which understood these acts to be possible crimes of genocide under article 23.4 of the 1985 L.O.P.J.[55].

From the perspective of the Spanish legal system, the *Audiencia Nacional's* acceptance of the suits involving Argentina and Chile based

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51. We would like to thank Carlos Castresana Fernández, the *Unión Progresista de Fiscales'* representative, who kindly provided a copy of this complaint.

52. On this rule see J. J. Díez Sánchez, *El Derecho penal internacional (ámbito espacial de la ley penal)*, Madrid, 1990, pp. 184—200.

53. A type of complaint in which even those who are not the victims of an action can bring charges against the accused in the same proceedings as the public prosecutor.

54. See *El País*, 15.9.96, p. 15; *El País Digital*, 17.10.96.

55. We should point out that this court order does not include any argumentation of foundation for the international criminal jurisdiction of Spanish courts in relation to the occurrences that took place in Chile.

on the concept of universal jurisdiction found in article 23.4 of the *L.O.P.J.* in relation to genocide and terrorism[56], gives rise to some legal questions that are difficult to resolve. We should point out that the *Fiscal* (Government Attorney) from the *Audiencia Nacional* did not feel that the concepts of genocide or terrorism were applicable to the acts carried out in Argentina and Chile and defended the position that Spanish courts are not competent to hear cases related to these acts[57]. In our opinion, the *Fiscal's* position is legally correct for the following reasons:

a) The concept of genocide is very limited under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and given the terms of its insertion into our domestic legal code, as it does not include social, political or cultural groups and also requires there be an element of intent: to completely or totally destroy a group, be it national, ethnic, racial or religious[58]. It is impossible to consider the several hundred Spanish victims of the repression in Argentina as a totally or partially destroyed national group as is stated in the *Audiencia Nacional's* order of June 28, 1996. In order to apply the concept of genocide to the cases of Argentina and Chile, the

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56. Article 23.4 of the *L.O.P.J.* states that: "Spanish courts will also be competent to hear cases related to acts committed by Spaniards or aliens outwith national territory which can be classified under Spanish criminal law as one of the following: a) genocide, b) terrorism, c) hijacking or the illegal takeover of aircraft, d) counterfeiting of foreign currency, e) crimes related to prostitution, f) illegal trafficking of psychotropic, toxic or narcotic drugs, g) any other crime which should be prosecuted in Spain according to international treaties and conventions". According to section 5 of article 23, this section is always applicable provided that "the delinquent has not been absolved, pardoned or sentenced abroad or, in this last case, has not served his sentence. If he has served part of the sentence, this fact will be taken into account so that time served can be deducted."

57. The Fiscal basically believes that: a) the *L.O.P.J.* cannot be applied retroactively and therefore the concept of terrorism is not applicable since the regulation on terrorism under the principle of universal justice is one of the new points included in the 1985 *L.O.P.J.*; b) the concept of genocide is also inapplicable as the element of intent as contemplated in our Criminal Code is not evident. Intent is defined as the intention to totally or partially destroy a national group, based precisely on the issue of nationality, and c) in any case, even if a) and/or b) were rejected, it would be necessary to determine what legal actions were taken in other countries related to these acts and what the rulings were, to what degree these rulings have been enforced and, when appropriate, the reasons why they have not been completely enforced.

58. From the Public International Law perspective, see M. Pérez González, "La responsabilidad internacional de entes distintos de los Estados", in M. Díez de Velasco, *Instituciones de Derecho Internacional Público*, 10th edition, Madrid, 1994, 764—770, pp. 770—771.

definition would have to include political or social groups.

b) On the other hand, article IV of the 1948 Convention to which Argentina, Chile and Spain are party States[59], stipulates that until international criminal jurisdiction is established — which has not taken place as yet — those alleged to have commited crimes of genocide would be judged by the competent court of the State in which the acts of genocide took place. Therefore, if we accept that genocide did occur in Argentina and Chile, the courts competent to hear cases related to this genocide would be Argentinian and Chilean courts[60]. Furthermore, as Tomás Ortíz de la Torre pointed out, article 23.4 of the L.O.P.J. is only applicable to acts of genocide committed in the territory of States that are not party to the 1948 Convention, at least as long as this international treaty is not denounced by Spain[61]. For example, this means that pursuant to this Convention, Spanish courts will never be competent to judge those accused of the genocide of the Kurdish people that has been taking place in northern Iraq for the last 20 years, given that Iraq has been a party State to the 1948 Convention since January 20, 1959[62], unless the government of Iraq renounces the

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59. Argentina ratified this international treaty on 5 June 1956 and made two reservations aimed at safeguarding its territorial rights over the Falkland Islands. Chile ratified the treaty on 3 June 1953 with no reservations. Spain followed suit on 13 September 1968, with one reservation which prohibits Artice IX of the Convention to be applied to Spain. This article gives the International Court of Justice competence in disputes that result from the interpretation, application or enforcement of the provisions of the treaty among its party States. See United Nations, *Human Rights, Status of International Instruments,* New York, 1987, pp. 175, 177, 179 and 185.

60. As doctrine has warned, the precept of the 1948 convention that we are commenting upon here really implies that "when acts of genocide are ordered by a government, as there is no ad hoc international jurisdiction, the Convention can only be applied — and as of today there have been no applications to any case — after a revolutionary change of government or the defeat of the adversary by the conquering power": see M. Pérez González, "La responsabilidad internacional de entes distintos de los Estados", *loc. cit.*, p. 771.

61. J. A. Tomás Ortíz de la Torre, *Competencia judicial penal internacional de los tribunales españoles para conocer de ciertos delitos cometidos por extranjeros contra españoles en Iberoamérica,* communication presented at the XIX Congreso del Instituto Hispano–Luso–Americano de Derecho hiternacional, Lisbon, 1996, pp. 6—7.

62. See United Nations, *Human Rights, Status ..., op. cit.*, p. 176; see United Nations, *Human Rights. International Instruments, Chart of Ratifications as at 30 June 1996, op. cit.*, pp. 4—5. The United Nations International Law Commission (ILC) itself demonstrates that it is aware of this unjustifiable limit found in the 1948 Convention when it insists on universal jurisdiction in cases of genocide in its comment on article 8 of the Draft Code of Crimes Against the Peace and Security of Mankind entitled "the establishment of jurisdiction": see

application of this precept, which seems quite doubtful at this point in time. However, Spanish courts are currently competent to hear cases on acts of genocide that have been committed against the peoples of East Timor during the last 20 years[63], as Indonesia has not yet accepted the 1948 Convention[64].

c) In the third place, it is true that the concept of terrorism has not been defined conclusively. However, there is no international convention or domestic law which makes reference to so–called State terrorism[65], that is, to those acts of violence carried out by governmental bodies, or at least with their consent, as is the case in Argentina and Chile. Therefore, the concept of State terrorism is not legally relevant[66]. On the other hand, the concept of terrorism was included in the preliminary examination order in the case of Argentina, but was not included in the examination order which accepted *prima facie* competence in the case of Chile, which was justified strictly on the basis of genocide.

d) Furthermore, serious doubts can be raised about whether or not article 23.4 of the 1985 L.O.P.J. can be applied retroactively. This precept introduces the principle of universal justice for crimes of

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Informe de la Comisión de Derecho Internacional sobre la labor realizada en su 48° período de sesiones, A/51/10, pp. 45—54; on universal jurisdiction in cases of genocide: ibid, pp. 49— 50.

63. See J. Bonet i Pérez, "La situación de los derechos humanos en Timor Oriental", in A. Badia Martí, (Dir.) *La cuestion de Timor Oriental*, Barcelona, 1995, 107—146, pp. 113— 119 and 127—129.

64. See United Nations, *Human Rights, International Instruments, Chart of Ratifications as at 30 June 1996, op. cit.*, pp. 4—5.

65. The current Spanish Penal Code (in force since 25.5.1996) deals with crimes of terrorism in articles 571 and following; art 571 typifies the crimes of terrorism as follows: "those who belong to, act on behaly or collaborate with armed bands, organisations or groups whose aim is to overthrow the constitutional order or seriously disturb the peace,..." This article substitutes art. 174 *bis* of the former Penal Code: "Whosoever formes part of an armed or rebellious band, or in collaboration with their objectives and purposes, undertakes any criminal act which contributes to such activities,...". From the perspective of Public International Law see M. Pérez González, "La responsabilidad internacional de entes distintos de los Estados", *loc.cit.*, pp. 771—772.

66. In 1991, the ILC approved the provisional version of a Draft Code of Crimes Against the Peace and Security of Mankind, for the purpose of defining and classifying these crimes, among which is found the crime of terrorism. But in 1996 the ILC has not included the crime of terrorism among the crimes of the definitive Draft Code of Crimes Against the Peace and Security of Mankind: see *Informe de la Comisión de Derecho Internacional sobre la labor realizada en su 48° período de sesiones*, A/51/10, pp. 16—19.

terrorism into our legal system for the first time. In our opinion, this precept cannot be classified as simply procedural as it contemplates criminal penalties for certain actions carried out abroad by individuals who are not Spanish nationals. The legal classification of these actions is a *sine qua non* requirement in any modern criminal law for them to be judged[67].

e) Finally, from a legal perspective, we do not understand why the examination order for Argentina limits itself to beginning proceedings against those allegedly responsible for the assassination and torture of Spanish citizens. If the main support for the competence of our courts is the principle of universal justice as regards genocide and terrorism, the proceedings should also be concerned with all victims, regardless of their nationality, something which is not required by article 23.4 of the L.O.P.J.

However, none of these legal arguments was taken into account by the *Comité de Asuntos Exteriores* (Foreign Affairs Committee) of the Congress of Deputies when in September of 1996, they unanimously approved an initiative asking the Government to collaborate with the judicial proceedings related to the clarification of the disappearance of Spanish nationals in Latin America which were undertaken by the *Audiencia Nacional* and were at the preliminary investigation stage[68].

Now then, the analysis of the *lex lata* on this subject that we have provided does not prevent us from making some value judgments. In the first place, it is not unreasonable to propose lege ferenda the modification of the *L.O.P.J.* precept that we cited so that Spanish courts would be competent to hear cases in relation to acts that constitute a threat to life or physical integrity when the victims are Spanish nationals, even if those acts are committed outwith Spain by individuals who are not Spanish nationals. This is contemplated, although with some limitations, in other countries such as Germany, Portugal and Switzerland as regards their nationals[69]. We do not feel that it is appropriate that this article contemplates the competence of Spanish courts for crimes of counterfeiting or prostitution committed abroad by

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67. In other words, the retroactive application of this precept could contravene the principle of *nullum crimen nulla poena sine previa lege*. See an opposing opinion by C. Castresana Fernández, *Informe sobre la competencia penal internacional de los tribunales españoles en el caso de Argentina y Chile*, (unpublished), Madrid, 1996, pp. 18— 23.

68. See BOCG-congreso. D, VI leg.n.55, p.3.

69. See J. J. Díez Sánchez, *El Derecho penal ..., op.cit.*, pp. 113—114; A. Quintano Ripollés, *Tratado ..., op. cit.*, vol. II, Madrid, 1957, pp. 92—94.

individuals who are not Spanish nationals[70], but does not cover cases in which a Spanish citizen is assassinated in another country, particularly when that act goes completely unpunished, if it does not constitute genocide or an act of terrorism. On the other hand, one might criticize our criteria on nationality, which are not in accordance with the nature of international law on human rights, but it is not altogether realistic to suggest that Spanish courts should be competent to hear cases on any attempt made on the life or on the physical integrity of a person anywhere in the world which goes unpunished.

In the second place, and now in keeping with the principle of universal jurisdiction[71], we could also expand the concepts covered by article 23.4 — and obviously modify our Criminal Code — to include at least some of the acts classified in the Draft Code of Crimes Against the Peace and Security of Mankind and the International Criminal Court developed by the ILC, and bearing in mind the acts that are contemplated in the Statutes on the Criminal Courts for the ex–Yugoslavia and Rwanda. From these we can surely see that in contemporary international law, serious and massive violations of human rights or crimes against humanity which refer to the protection of life and physical integrity, constitute acts that can — and in our opinion should — be heard in the courts of any State, regardless of the nationality of the perpetrators of the crime or the place in which it was committed[72]. No matter how indefinite the concept of "serious and massive violations" of human rights might seem — and we insist that they are limited to the rights that protect life and physical integrity — this concept could be applied to cases such as Argentina and Chile. This would prevent having to use the concepts of genocide or terrorism.

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70. However, we should state that the regulation of these two situations is based on several international conventions on these issues which, in some cases, date back to the beginning of this century: see A. Quintano Ripollés, *Tratado de Derecho penal internacional e internacional penal*, vol. 1, Madrid, 1955, pp. 351—359 and 368—375.

71. On this paragraph see A. Quintano Ripollés, *Tratado ..., op. cit.*, vol. II, Madrid, 1957, pp. 19—113.

72. Although we are not very optimistic about the possibility that the work done by the ILC on this issue will become conventional international rules accepted by a good number of States in either the short or medium term, we can say that the Draft Articles for the Code of Crimes Against the Peace and Security of Mankind finally approved by the ILC in 1996 includes the crimes of genocide, aggression, war crimes, crimes against U.N. personnel and associated staff, and crimes against humanity: see *Informe de la Comisión de Derecho Internacional sobre la labor realizada en su 48° período de sesiones*, A/51/10, pp. 101—111.

In spite of the above, and in the third place, we are aware that in international practice our proposals might give rise to some problems that would be quite difficult to solve as they come into conflict with the rules on jurisdictional immunity and immunity from enforcement applicable to foreign States and their organs, in cases of human rights violations that are carried out, ordered or authorized by the civilian or military personnel of a specific State, some of whom — such as in the cases of Argentina and Chile — hold an important rank or position in the State hierarchy[73]. We support, at least as *lex ferenda*, the opinion given by the U.S. court in the Letelier v. Chile case: "Whatever policy options may exist for a foreign country, it has no 'discretion' to perpetrate conduct designed to result in the assassination of an individual or individuals, an action clearly contrary to the precepts of humanity as recognized both in national and international law"[74]. The ILC has recently taken the same position when it stated in article 7 of the Draft Code of Crimes Against the Peace and Security of Mankind that even heads of state and government are not exempt from responsibility for crimes that are contemplated in the Draft[75]. However, there is no doubt that what the ILC is doing here is progressive development, which goes far beyond the mere codification of current

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73. See C. Tomuschat, "Crimes against the Peace and Security of Mankind and the Recalcitrant Third State", in Y. Dinstein and M. Tabory (Eds.), *War Crimes in International Law*, Dordrecht, 1996, 183—196, pp. 59—60.

74. Cited by H. Fox, "State Responsibility and Tort Proceedings Against a Foreign State in Municipal Courts", *N.Y.I.L.*, vol. XX (1989), 3—34, p. 34. However, we should once again insist that in this case, a clear violation of the territorial sovereignty of the United States occurred. This seems to be the main reason why U.S. courts have been so inclined to apply jurisdictional immunity in other cases as we will see in a note below. In this same area, there has been a certain discomfort in the German executive branch given the excellent trade relations that exist with Iran, because the German Supreme Court has requested the arrest of the Iranian minister of secret services, who is allegedly responsible for the assassination within German territory of members of the Iranian opposition : *see. Keesing's*, 1996, p. 41024; *El País*, 16.3.96, p. 6.

75. See *Informe de la Comisión de Derecho Internacional sobre la labor realizada en su 48° período de sesiones*, A/51/10, pp. 42—45.

76. We might mention that the I.D.I. resolution on "Contemporary problems concerning the immunity of States in relation to questions of jurisdiction and enforcement", makes no reference to the application of jurisdictional immunity as regards the subject we are dealing with here, but it does remit to the rules on the immunities of heads of State and Government and diplomatic envoys, and other State organs according to customary and conventional

international law according to the practice of the subjects of international law themselves[76].

In countries such as the United States, the contradiction that could arise as regards human rights and rules on jurisdictional immunity and immunity from enforcement of judgments for foreign States and their organs, has already been approached from the perspective of the competence of their courts with results that we believe favour the principles of sovereign equality and non–intervention given that in practice, the perpetrators of human rights violations are prosecuted and civil compensation is exacted, but only once these individuals no longer hold any official government office, otherwise the doctrine of jurisdictional immunity is applied[77]. Basically this is done so as not to affect the cooperation that exists with third States and to avoid reciprocal treatment by the domestic courts of other countries, especially in non–democratic States in which there is no independent judicial power[78]. In this regard, it is interesting to note that the Foreign Sovereign Immunities Act of 1976 has recently been modified and a

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international law: *see.* the text of this resolution in *A.I.D.I.*, vol. 64–II (1992), pp. 388—401.

77. A well–known precedent in this area is the *Filartiga v. Peña case*. Vid. Appeal Court Judgment in *I.L.M.*, vol. XIX (1980), 966—980; and the U.S. government's position in ibid., pp. 585—606. However, in the *Nelson v. Saudi Arabia* case, finally resolved by the Supreme Court in 1993, which had to do with an American engineer who was allegedly tortured, mistreated and imprisoned by Saudi Arabian authorities in 1983, U.S. courts applied the doctrine of jurisdictional immunity and alleged that the events in question were not covered by any of the exceptions found in the 1976 *Foreign Immunities Act*: vid. a discussion of this case by the American Society of International Law in *A.S.I.L. Proceedings*, 1992, pp. 324— 348. The doctrine of jurisdictional immunity based on the fact the defendant was a head of State was also applied, with the full support of the United States government, in the *Lafontant v. Aristide* case, resolved in1994. In this case, Lafontant's widow sued Aristide on the basis of his alleged responsibility for the assassination of her husband in Haiti in 1991 when the coup that *de facto* overthrew Aristide as president of Haiti took place: vid. J. W. Dellapenna, "International Decisions", *A.J.I.L.*, vol. 88 (1994), pp. 528—532.

On the other hand, a U.S. court, in a decision handed down on October 13, 1995, stated that it is competent to hear the trial of Radovan Karadzic, leader of the Bosnian Serbs: Vid. the text of this ruling in *I.L.M.*, vol. XXIV (1995), 1592—1614. The court rejected the petition for jurisdictional immunity in this case because the United States had not recognized Karadzic as a head of State, and also rejected the *political question doctrine* and the act of state doctrine. But the court itself seemed to admit that if Karadzic were considered a high authority of a State, jurisdictional immunity should be applied and U.S. courts would not be competent.

78. *Cf.* two studies in the doctrine that arrive at totally opposite conclusions: first M. Reisman, "A Human Rights Exception to Sovereign Immunity: Some Thoughts on Princz v. Federal Republic of Germany", *Michigan Journal of International Law*, vol. 16 (1995), 403—

new exception related to acts of terrorism has been added. This new exception provides that immunity shall not be available in "any case... in which financial indemnity is sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources... for such an act". The apparent breadth of the exception is narrowed by clauses providing that a court should decline to hear a claim if the foreign state has not been designated by the Secretary of State as a state sponsor of terrorism under other federal legislation or if the claimant of victim was not a national of the United States when the terrorist act occurred[79]. Obviously, this new exception must be considered in the context of the confrontations that exist between the United States and countries such as Libya, Iran or the Sudan. Due to these confrontations, the United States has ended all political, military and economic or commercial cooperation.

Finally, we must also be aware of the fact that the excessive expansion of the international criminal jurisdiction of Spanish courts could become a moot point, given the obviously decentralized structure of contemporary international law which allows each State to exercise sovereignty over its own territory with total exclusivity. In this sense, if the cases cited above were to proceed, and given the impossibility of holding in absentia trials, the result would most certainly be an international arrest warrant for those allegedly responsible, who would have to remain in the "prison" constituted by the frontiers of their State or in the territory of another State that will not grant their extradition to Spain. However, it is currently totally hypothetical to think that Argentinian or Chilean authorities would hand over those allegedly

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431, pp. 419—431. This author insists that jurisdictional immunity should not be applied in cases of serious human rights violations, at least in relation to U.S. citizens, because, in his opinion, *it is absurd that commercial exceptions are contemplated under jurisdictional immunity, but the protection of basic human rights are left aside*. For the opposing view see A. Zimmermann, "Sovereign Immunity and Violations of International jus cogens — Some Critical Remarks", ibid., 433—440, pp. 437—449. This author defends the point of view that when faced with tension or contradictions between the principles of respect for human rights and sovereign equality as regards the application of jurisdictional immunity, international law has developed some mechanisms for diplomatic protection which reaffirm the principle of the peaceful settlement of disputes, and for this reason, the use of domestic courts should be rejected.

79. See "Current Developments", *A.J.I.L.*, vol. 91 (1997), pp. 186—187; I.L.M., vol. XXXVI (1997), pp. 759—760.

responsible for these acts to Spanish authorities so that they could be tried in Spanish courts[80]. The Chilean Government has recently made a very strong statement in this regard through an official declaration of the Ministry of Justice: "Chile does not recognize the competence of courts of other countries to hear cases related to events that took place within our territory which are subject to the laws and jurisdiction of Chilean courts ... . The suit brought before the *Audiencia Nacional* in Spain can be interpreted as a political trial on Chile's transition to democracy"[81].

D) Spain's Demand for International Responsibility

The Spanish government may present a formal State–to–State claim against Argentina and Chile related to the international responsibility derived from the violation of human rights found in the minimum standard of treatment both as regards Spanish nationals[82] and other individuals, regardless of their nationality. However, we must mention as regards this point, that the only humanitarian–type actions taken by Spain so far have been those related to its own nationals, as has been the rule in traditional international law.

The contents of this claim, as we have seen in the Letelier case, could be redirected towards the public recognition of responsibility for

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80. Furthermore, article 9 of the current extradition treaty between Spain and Chile, which was ratified on November 20, 1994 (*B.O.E.*, 10.1.95), states that one cause for obligatory denial of extradition is the following situation: "when according to the law of one of the parties, the punishment or criminal action corresponding to the crime on which the extradition is based no longer exists."

81. See *El País Digital*, 30.5.97.

82. To give a example, the Spanish government filed a claim against the United States based on international responsibility and demanded one–million dollars in compensation for the death in Panama of the Spanish photographer Juan Antonio Rodríguez Moreno as a consequence of the invasion of the Central American state by U.S. armed forces. However, the United States denied any responsibility for these events and alleged that there was no proof of who had fired the shots that killed this photographer: vid. both governments' positions in "Spanish Diplomatic and Parliamentary Practice in Public International Law, 1992", *Spanish Yearbook of International Law*, vol. II (1992), pp. 157 in fine—161. From a more general perspective, democratic Spain's practice as regards the protection of its nationals abroad until mid–1992 (although there are not many precedents for the formal exercise of diplomatic protection) has been studied by C. M. Díaz Barrado, "La protección de españoles en el extranjero. Práctica Constitucional", *Cursos de Derecho Internacional de Vitoria–Gasteiz*, 1992, 239—353, *passim*.

international illegal acts by the government of the State involved, the compensation of victims, and the prosecution and criminal punishment of the individuals who were the material or intellectual authors of these violations through Argentinian or Chilean courts.

This option was suggested as regards a concrete case which in 1996 had important repercussions in the press: the Soria case. Carmelo Soria, a Spanish national, was tortured and assassinated in 1976 in Chile by members of the Chilean police force and army when he was carrying out his duties as an international employee of the Economic Commission for Latin America and the Caribbean[83]. In spite of the protection afforded him given his position as an international civil servant[84], and even though the alleged authors of the acts have been identified — two are still active colonels in the Army —, Chilean courts have used a series of legal manoeuvres to sanction the impunity of the authors by applying the 1978 Amnesty Law, with the result being that today, at the beginning of 1997, those who tortured and assassinated a Spanish citizen still have not been brought to justice. By applying the Amnesty Law, the Chilean Supreme Court closed the case and effectively ruled out any type of legal appeal.

The Spanish government has been negotiating with the Chilean government since mid–1996[85] to try to obtain some type of "moral reparations" for the relatives of Carmelo Soria. *The relatives of Carmelo Soria demand that at the very least, those responsible be banned from state employment of any type.* At the end of 1996, the relatives of Carmelo Soria rejected the compensation pact offered by the Chilean government which consisted of donating one million

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83. A subsidiary organ created by the United Nations Economic and Social Council in order to promote international economic cooperation between Latin American countries: see V. Abellán Honrubia, "La cooperación internacional en la solución de problemas de carácter económico y social (I)", in M. Díez de Velasco, *Las Organizaciones internacionales*, 9ª Ed., Madrid, 1995, 249—265, pp. 253—254.

84. Specifically, we should mention the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, published in the *B.O.E.*, 14.12.86, to which Chile has been a party State since 21.1.1977. In Spanish doctrine see C. Gutiérrez Espada, "A propósito de la adhesión española (1985) a la Convención sobre la prevención y el castigo de delitos contra personas internacionalmente protegidas (contexto de un tratado internacional, reservas y objeciones, arreglo de controversias), *R.E.D.I.*, vol. XXXVIII (1986), 9—32, *passim*.

85. According to government sources quoted in a Spanish newspaper, the Spanish government has also been studying the possibility of bringing the case before the International Court of Justice, in accordance with article 13 of the Convention just cited.

dollars to create a foundation dedicated to the promotion of human rights that would carry his name and the erection of a monument to his memory. The Spanish government respected the family's wishes and did not accept Chile's offer, even though the official government position was that the offer "was a serious attempt by the two governments to come up with a concrete extra–judicial solution through negotiations that would encompass both the moral and material aspects of the desired reparation". Finally, the relatives of Carmelo Soria have decided to bring the case before the Inter–American Commission on Human Rights. The lack of agreement on the solution of this controversy does not seem to have affected cooperation between the governments of Chile and Spain. It is enough to cite, in this regard, that in January 1997, Spain, in competition with Sweden, the United Kingdom and Germany, won a contract for the sale to Chile of two submarines valued at more than 40 billion pesetas[86].

If we take a more general view, it is important to point out that when a claim for international responsibility is not satisfied, several options for further action exist. First, as we mentioned above in the Soria case, there is the option of bringing a suit before the International Court of Justice or some other international jurisdictional body whose competence has been accepted by the States who are involved in the dispute. Finally, Spain can make use of the traditional mechanisms for the application of rules of international law to make international responsibility effective. That is, it could resort to retorsion and/or reprisals.

We should point out that, like many of its Community partners who have developed economic relations with Latin American over the last few years[87], Spain has only undertaken informal, unofficial steps on humanitarian grounds in relation to Spanish nationals, since democracy

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86. As regards all of this paragraph and the previous one, see *Documentos de Politica Exterior*, 1996, p. 696; *El Pais*, 23.6.96, p. 10; 24.8.96, p. 3; *El Pais Digital*, 27.9.96; 19.12.96; 24.1.97.

87. For data on cooperation between the European Community and its member States with Latin America in the last few years, see C. del Arenal, *La política exterior de España hacia Iberoamérica*, Madrid, 1994, pp. 200—220. We should also say that the new Cooperation Agreements, known as "third generation" agreements, drawn up between the Community and Argentina and Chile in 1991, include a clause that conditions the enforcement of the treaty on the existence of a democratic regime and respect for human rights: ibid., pp. 210—211; *vid.* also C. R. Fernández Liesa, *Las bases de la política exterior europea*, Madrid, 1994, pp. 107 *in fine*—108.

was reestablished in Argentina and Chile. It is perhaps unrealistic to think that Spain, on its own, and given that it is not a major international power, could formally demand international responsibility and unilaterally apply retorsion measures or reprisals against Argentina and Chile. There is no doubt that attempts of this nature would meet with little success given that a good number of States would be more than willing to take over the economic relations that Spain currently enjoys with these two countries[88]. Therefore, the only way that a demand for international responsibility against Chile and Argentina could be successful is if consensus were reached among the members of the international society.

The fact of the matter is that the members of international society have not — except in a very few cases such as the Letelier situation — formally demanded international responsibility from Argentina and Chile or applied retortion measures and reprisals. The main exception — the Letelier case — was undoubtedly due to the violation of the territorial sovereignty[89] of the United States, a superpower in[90] all areas, with the ability to exert a strong influence on Latin America. We shall try to explain the legal arguments of this practice in the next section.

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88. We could even ask ourselves if Spanish public opinion would be in favor of supporting these measures and the economic costs involved.

89. In some ways, the Letelier case parallels the *Rainbow Warrior* case. This case was presented by France and New Zealand to the United Nations Secretary General for resolution of a conflict by means of an obligatory solution for both parties. The Secretary General decided that the two French agents who were arrested in New Zealand and sentenced by New Zealand courts to ten years of prison, for placing a bomb which sank the Greenpeace ship called the Rainbow Warrior killing a Dutch national, should be returned to France and confined on the Island of Hao for at least three years. In addition to this, France had to agree to seven-million dollars in compensation and offer a formal apology: vid. the facts related to this case in "Chronique", *R.G.D.I.P.*, t. 90 (1986), pp. 993—996 y 216—225. The resolution of the conflict was published in *R.S.A.*, vol. XIX, pp. 199—221.

However, France did not comply with the Secretary General's decision as regards the first obligation, according to a Arbitral ruling dated 30 April 1990 on this case. But the arbitral board ruled that this obligation was no longer in force, and therefore France was not required to return the two agents to the Island of Hao long enough to complete the three year period. All of this was independent of reparation for the illicit acts committed by France through the judgment itself as a means of satisfaction in the Court's opinion: vid. the facts in "Chronique", *R.G.D.I.P.*, t. 94 (1990), 1069—1070. The arbitral ruling was published in *R.S.A.*, vol. XX, pp. 217—284.

90. It is indeed sad that in the last 20 years, the United States has not always actively used its influence to defend human rights in America. Suffice it to say that according to a Spanish newspaper, an internal Pentagon document shows that the so-called "School of the Americas",

6. Legal Evaluation of the Practice being Examined

A) The Cessation of Internationally Wrongful Act and Reparation

We have already pointed out in the Introduction that the events that have taken place in Argentina and Chile during the last few years seem to contravene a good number of both conventional and customary international rules. This has been confirmed by the organs of monitoring compliance with international human rights norms. We should ask ourselves just what the consequences should be for violating these rules, that is, just what comprises the content of international responsibility for a State.

First of all, it seems obvious that any State that is internationally responsible for illicit activity should cease that activity immediately, thereby returning to a situation of international legality. As regards human rights, the State should terminate any illicit behaviour that is contrary to its obligation to prevent and repress human rights violations in order to ensure that the people under its territorial jurisdiction enjoy the free exercise of their human rights. In order to achieve this, the State should use any means it deems necessary from its domestic legal system to prevent new human rights violations. Furthermore, it should investigate all alleged human rights violations, punish those responsible, grant compensation to the victims or their relatives, and offer guarantees that no further violations will occur. If these measures are taken, illicit acts will cease to occur and the international rules that are binding on the State will be respected[91].

Second, we should mention that when an international rule on human rights is violated, the only type of reparation that other States bound by the same international rules can demand of the perpetrating State is reparation for the moral or legal harm that may be derived from

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. U.S. military training program based in Panama until 1984 when it was transferred to Georgia, trained thousands of Latin American military personnel in the use of torture, assassination and "disappearance" techniques (Chile, Argentina, El Salvador and Guatemala are cited): see El País, 22.9.96, p. 4.

91. Cf. F. Lattanzi, *Garanzie dei diritti dell'uomo nel Diritto Internazionale Generale*, Milano, 1983, pp. 159—239; A. Sanjosé Gil, A., *La protección de los derechos humanos en el ámbito del Derecho Internacional*, Valencia, 1992, pp. 108—114; G. Cohen-Jonathan, "Responsabilité pour atteinte aux droits de l'homme", in S.F.D.I., (Ed.), *La responsabilité dans le système international*, Paris, 1990, 101—135, pp. 112—115. As regards the protection of the rights of aliens, *vid.* M. lovane, *La riparazione nella teoria e nella prassi dell'illecito internazionale*, Milano, 1990, pp. 231—286.

the commission of a wrongful act[92]. Therefore, we can only really contemplate some means of satisfaction, because as Arangio Ruiz has recently said in response to the comments made by one of the ILC members:

> "It is true that when there is a violation of a multilateral rule that protects human rights, no State is injured in the sense established in paragraph 1 of article 8. Therefore, no State can obtain monetary compensation. It would be very strange for State A to be able to claim compensation from State B for the human rights violations of the nationals of State B perpetrated by this same State. However, in the Special Rapporteur's opinion, this question is covered in the draft of article 10 (dedicated to means of satisfaction). The provisions of this article, especially paragraph 1, offer a solution to any State that is directly affected by a legal situation that derives, for example, from the violation of a multilateral rule on human rights. The injury suffered in this type of case by the State is exactly the type of moral or legal injury stipulated in paragraph 1 of article 10. In this article, the Special Rapporteur has established several means and different degrees of satisfaction to be considered, especially in this type of situation"[93].

Public acknowledgment of an illicit act could be one of the means of satisfaction mentioned above. In practice, this recognition is taking place through the so–called "Truth Commissions" in the cases of Chile and Argentina. The creation of these commissions, charged with investigating human rights violations and publishing reports thereon, does, to some extent, constitute a generic means of satisfaction for other members of the international legal community. However, it is really no more than a very poor mechanism for reparation if such illegal act does not cease and the primary rules are not applied, at least from the perspective of the goal of international rules in this area which is the protection of individual human rights. Hayner has studied States practice and has concluded that: "the fifteen cases here show that

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92. Provided that we use a rigourous definition of reparation understood as: "... obbligo di provvedere alla reintegrazione degli *effetti* pregiudizievoli dell'illecito e non, genericamente, nel senso di eliminazione o cessazione dello stesso comportamento antigiuridico, oppure di prestazione gravante sullo Stato responsabile al fine di repristinare in qualche modo l'ordine giuridico turbato dall'illecito": M. Iovane, *La riparazione...*, op. cit., p. 51.

93. *Anuario C.D.I.*, 1990–1, pp. 200—201.

prosecutions are very rare after a truth commission report; in most cases, there are no trials of any kind, even when the identity of violators and the extent of the atrocities are widely known"[94].

Another means of satisfaction for other States bound by international rules on human rights might be the statements made by the international organs responsible for monitoring these rules such as, for example, the decisions made by the Inter–American Commission on Human Rights declaring that a State has violated the provisions of the American Convention[95].

Finally, it seems obvious that in situations where international human rights rules are not respected, no type of compensation can be sought by another State. We have already cited Arangio Ruiz on this issue. This explains why in the Letelier case, the United States had to give the compensation obtained from Chile directly to the victims' families. Furthermore, the restitutio in integrum cannot be applied in these cases as essential and irreplaceable assets of human beings, such as their life or physical integrity, are affected.

We should be aware that in State practice, as we have seen in the cases of Argentina and Chile, there are enormous difficulties involved in the cessation and reparation of an internationally wrongful act. First, just as with traditional international law in relation to the rules on the protection of aliens, in this case, the State's obligation to investigate and punish human rights violators is only vaguely defined as regards States' practice[96]. The cases of Argentina and Chile examined here do not allow us to establish clearly what these obligations are, although it is obvious that we are dealing with an indefinite legal concept which needs to be

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94. P. B. Hayner, *loc. cit.*, p. 604.

95. Cf. T. Meron, *op. cit.*, pp. 201—208.

96. Cf. F. V. García Amador, *The Changing Law of International Claims*, vol. II, pp. 504—593, in which he shows that the tendency in practice seems to be the granting of compensation and occasionally some type of satisfaction related to apologies, but not punishment of those responsible for the acts, regardless of whether they were private citizens, officials or government employees.

From a more general perspective, we should not be surprised by the lack of specificity in the contents of the primary rule in the framework of a decentralized legal system such as the international one which encompasses many types of rules that suffer from the same problems, including such basic rules as those used to regulate the use of force and their exceptions, which are still the object of divergent interpretations: cf. A. Rodríguez Carrión, *Lecciones de Derecho internacional público*, 3ª Ed., Madrid, 1994, pp. 527—537; I. Brownlie, "International Law at the Fiftieth Anniversary of the United Nations. General Course on Public International Law", *R. des C.*, t. 255 (1995), 9—228, pp. 195—210.

defined for application in each specific case. However, the most important thing to remember is that in the cases we have studied, impunity has become the rule and punishment of the perpretrator the exception.

We should make a distinction between Argentina and Chile on this point. In Argentina, the nine members of the Military junta were tried and punished, although they were later pardoned. However, they were declared ineligible to hold any public post. In Chile, we saw that the individual who was the most responsible for the repression continues to hold a position of power as head of the armed forces, and that the only people who were tried and imprisoned were those responsible for the Letelier case. In neither case have other members of the army or police force been tried or declared ineligible to hold public office and this means that many of the intellectual and material authors of assassinations and torture still hold military or civilian positions. This has been justified with terms like "peaceful transition" and "national reconciliation", with the excuse of safeguarding the restoration of democracy and the country's economic development. However, as we also saw above, the control organs for international rules on human rights have insisted that the fact that human rights violators have not been tried contravenes the international rules that the State has accepted. The States that are affected have ignored this, and third States have also appeared to be rather unconcerned with this tendency towards impunity, even in cases in which the human rights of their own citizens have been violated.

Finally, the granting of compensation to the victims or their families is also quite sporadic, although in the cases of Chile and Argentina, some measures have been adopted in this regard, as was explained above. Nevertheless, in neither of these cases do these measures apply to victims of torture.

B) Final Considerations: lex data and lex ferenda

Apart from the *lege ferenda* considerations given below, it is true that if we believe that international law is the result of States' practice applying inductive methods[97], as jurists we should try to find some

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97. *See* C. Jiménez Piernas, *El método del Derecho Internacional Público: una aproximación sistémica y transdisciplinar,* Madrid, 1996, pp. 41—45. The use of *an inductive method that is more concerned with the facts than with verbal declarations* justifies the

explanation for this practice which is not consistent with the protection of human beings.

First, we could point out that due to the decentralized nature of international society[98] every State evaluates specific situations individually and has the power to react to illicit acts. In other words, as international law stands today, decentralized reactions to a illegal act are seen as a right of each State or groups of States. There is no obligation to demand responsibility from another State for that illegal act nor is there any requirement to apply retortion measures or reprisals to make demands for international responsibility effective[99]. This is why it is very difficult to try to find a legal explanation for the behaviour of third States, including Spain, in the cases of Argentina and Chile, even though we can always simply say that this behaviour was adopted within the limits of the *discretion* that international law allows all States. This attitude can clearly be classified as "abstentionist" and can lead to the practice of "excusing" States from accepting the responsibility for human rights violations[100].

However, one possible legal explanation for this type of State practice is that the *notion of a state of necessity*, as found in article 33

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frequent recourse to the information provided in prestigious chronicles on practice such as the *R.G.D.I.P.* prepared by Rousseau until 1992, and which is currently under the direction of Torrelli, or by internationally renowned journalistic publications such as *Keesing's*. In this regard we should remember that in the case of *Military and Paramilitary Activities In and Against Nicaragua*, the International Court of Justice insisted it be free to assess the worth of several different types of evidence used in international practice, and affirmed that facts can be considered proven if they have been widely covered in the press, as this shows that there is a clear consensus on their veracity: see I.C.J. Reports 1986, pp. 40—41. More recent doctrine says that the freedom to assess means of proof is now well established in the case law of the I.C.J.: see C. Fernández de Casadevante Romaní, *La Interpretación de las Normas Internacionales*, Pamplona, 1996, pp. 295—296.

98. Evidently, this is reflected in the system for the application of rules in the international system, based on self-regulation, although an important means of correction was introduced when international organizations began to appear, especially the United Nations, to which member States have transferred the competence to apply sanctions: *see*. J. D. González Campos, L. I. Sánchez Rodríguez, and M. P. Andrés Sáenz de Santa María, *Curso de Derecho Internacional Público*, 5ª Ed., Madrid, 1992, pp. 356—358.

99. See J. A. Carrillo Salcedo, "Droit international et souveraineté des États. Cours général de droit international public", *R. des C.*, t. 257 (1996), 35—222, pp. 80—82, 104—114 y 196—204.

100. See F. M. Mariño Menéndez, "Responsabilidad e irresponsabilidad de los Estados y Derecho Internacional", in *Estudios en Homenaje al Profesor Don Manuel..., op. cit.*, 473—487, pp. 474—475.

of the first part of the ILC draft on international responsibility[101], is considered applicable in these situations. This concept is related to the State's need to safeguard a climate of peace so that democracy can be established and consolidated and economic recovery can take place. It says that the fact that the authors of human rights violations are not tried or punished does not infringe any *ius cogens* rule or seriously affect the essential interests of any other State, which seems to be true if we look at the practice of these States. From a legal point of view centered on the law on State responsibility, this approach to the problem explains the lack of demand for international responsibility in the cases of Argentina and Chile, even in cases in which the human rights of nationals of third countries were violated, once attempts to return to democratic practices were initiated. It is also possible to apply the concept of a state of necessity as an explanation for the fact that there has been no type of compensation whatsoever for the victims of torture in either of these countries, especially given the large number of individuals who would be eligible to claim compensation if this were possible[102].

Guissé and Joinet seem to accept this line of reasoning and accept a "relative impunity", whereby the intellectual or material authors of human rights violations are not fully punished (even though the highest ranking individuals who ordered or authorized systematic human rights violations should always be criminally punished), but by which these violations are publicly recognized through judicial proceedings, the perpetrators banned from holding any public office, and some form of compensation offered to the victims or their families[103]. This ban from holding public office is undoubtedly offered as a guarantee that human rights violations will not occur again in the future, and to a reasonable extent, it allows the use of the term "absolute impunity" to be avoided;

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101. *Cf.* "Informe de la Comisión a la Asamblea General sobre la labor realizada en su trigésimo segundo período de sesiones", *Anuario C.D.I.*, 1980—II (2ª parte), pp. 33—50. In Spanish doctrine cf. C. Gutiérrez Espada, *El estado de necesidad y el uso de la fuerza en derecho internacional*, Madrid, 1987, pp. 33—68.

102. The precedents from Chile and Argentina have been followed in other democratic reconstruction processes in a good number of other Latin American countries such as Guatemala, Uruguay, Nicaragua, Honduras; see N. Roth-Arriaza, *op.cit, passim.*

103. Cf. H. Guissé, and L. Joinet, *Informe sobre la cuestión de la impunidad de los autores de violaciones de los derechos humanos,* E/CN.4/Sub. 2/1993/8, pp. 32—42; L. Joinet, *Informe final acerca de la cuestión de la impunidad de los autores de violaciones de los derechos humanos (derechos civiles y políticos),* E/CN.4/Sub.2/1996/18, pp. 16—20.

and may be considered as a form of sanction, albeit a very caution one, to be applied against the perpetrators of serious human rights violations[104].

We should point out that more recent practice also tends to bypass criminal punishment for those ultimately responsible for human rights violations. There is a case that provides a paradigmatic example and cannot be compared to the cases of Chile and Argentina, the concept of genocide can most definitely be applied and an international criminal court has been established as a result. We are referring to the atrocities committed by the Serbs in the last few years in Bosnia–Herzegovina during the very bloody civil war, under the leadership of the psychiatrist Radovan Karadzic. Even today, at the beginning of 1997, none of those mainly responsible for these atrocities has been criminally punished. However, a good number of member States of the United Nations pushed for a ban on those responsible from holding public office, and this ban was indeed applied in 1996[105].

Of course, our assessment of the practice that we have just described[106] is very negative. As Pastor Ridruejo has said, the role of the iusinternationalist should not be limited to describing current law, but should also entail evaluating the law in order to contribute to the development of international law and encourage respect for human rights based on a humanistic approach to international law[107].

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104. In this regard we should point out that in the context of the peace process in El Salvador at the beginning of the 90s, even though the authors of human rights violations have generally not been punished criminally, more than one hundred civilian and military officials alleged to be responsible for authorizing or carrying out these violations, have been stripped of their positions in the State administration: see M. Popkin,"El Salvador: A Negotiated End to Impunity?", in N. Roht-Arriaza, *op. cit.*, 198—217, pp. 203—204.

105. See *Keesing's*, 1996, pp. 40961—40962. At the end of 1996, the number of individuals accused by the International Criminal Court for the former Yugoslavia was 74, but only 7 of them had been taken into custody; in the doctrine, see H. Ascensio, A. Pellet, "L'activité du Tribunal pénal international pour l'ex-Yougoslavie (1993—1995)", *A.F.D.I.*, vol. XLI (1995), 101—136, *passim*.

106. We can also make quick reference to the fact that in the case of South Africa, those responsible for serious human rights violations committed during the apartheid era have not been punished criminally. In mid-1996, the Constitutional Court of South Africa determined that the Promotion of National Unity and Reconciliation Act, which guaranteed broad amnesty, is in keeping with the South African Constitution and international law: see the comments made by D. F. Wilhelm, "International Decisions", *A.J.I.L.*, vol. 91 (1997), pp. 360—364

107. J. A. Pastor Ridruejo, *Curso..., op. cit.*, pp. 42 *in fine*—43. *Cf.* P. Stefani, *Il Diritto internazionale dei diritti umani. Il diritto internazionale nella comunità mondiale*, Padova,

Therefore, it should be declared unacceptable that individuals who have committed, ordered or condoned human rights violations can continue to fill positions of responsiblity in the civilian or military arenas in Argentina or Chile. This does not seem to provide justice for the victims of those violations or offer any type of moral or material satisfaction to their families. Furthermore, as Chile and Argentina are bound by international rules, this question should not be left exclusively to the internal jurisdiction of these two countries.

Finally, from a general perspective that places international rules on human rights within the framework of the legal system that currently regulates international society, the cases of Argentina and Chile show that even at the beginning of 1997, the conclusions reached by Jiménez Piernas in 1988 on the interrelation between international law relating to aliens and international rules on human rights and humanitarian law still apply. He pointed out that in spite of the substantive development of the creation of international rules on human rights meant to protect the individual, the international legal system always considers the rights and interests of States to be more important[108]. Two years later this author said:

> "Just as Resolution 2625 shows, the formal structure of contemporary international law, which is closely linked to the relational and conservative principles of sovereign equality and non–intervention, and at the same time to the institutional and renovating principle of peaceful cooperation between States, tends to restrict and even sacrifice the rights and freedoms of individuals (nationals or aliens) for the sake of both the *ad intra* security of a State and the *ad extra* stability of the cooperative relations that exist between States, especially when situations of internal conflict arise within any of these States"[109].

1994, pp. 63—132. *Cf.* On the iusinternationalist's role, see O. Casanovas y la Rosa, "La vuelta a la teoría", in *Estudios en Homenaje al Profesor Don Manuel Díez de Velasco*, Madrid, 1993, 179—196, pp. 189—190; Piñol i Rull, J., "La categorización de la ciencia del Derecho como conocimiento preteórico: consecuencias para el profesor de Derecho internacional público", in *Estudios en Homenaje al Profesor Don Manuel..., op. cit.*, 587— 603, pp. 596—603.

108. C. Jiménez Piernas, *La conducta arriesgada..., op. cit.*, pp. 311 *in fine*—312.

109. C. Jiménez Piernas, "La codificación del Derecho de la responsabilidad internacional: un balance provisional", in C. Jiménez Piernas, (Ed.), *La responsabilidad internacional. Aspectos de Derecho Internacional Público y Derecho Internacional Privado. XIII Jornadas de*

7. Summary

This study shows that in the last few years, domestic legislation in Chile and Argentina has allowed individuals responsible for serious human rights violations protected by the minimum standard of treatment to go unpunished, and this has become the rule rather than the exception. This practice can, in principle, be considered contrary to international law, as many organs for monitoring the application of international human rights norms have stated. However, ever since steps to consolidate democracy and reconstruct the economy began to be taken, third States, including Spain, have not demanded international responsibility in these cases, even when the human rights of one of their own nationals were involved. As regards Spain, this problem has resurfaced in relation to the international criminal jurisdiction of Spanish courts and the so–called Soria case. One possible legal explanation for this situation is the concept of a state of necessity, which has been regulated by the ILC in article 33 of the first part of the Draft Articles on International Responsibility. However, a least from *lege ferenda*, we cannot accept the fact that the perpetrators of serious human rights violations — against Argentinian or Chilean nationals or those of third States, including Spain — continue to hold civilian or military positions of responsibility in Argentina and Chile. In this sense, the ban on holding public office, in spite of being a very cautious sanction, would at least prevent the use of the term absolute impunity. At all events, it is true that inductive reasoning applied to the practice studied here shows that States are only minimally concerned with human rights, especially when their political and economic relations with other countries are in play.

Alicante, April 1997.

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la Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales, Alicante, 1990, 17—109, p. 38.