ARGENTINA

I. INTRODUCTION

1. The Legal Framework

1.1. The Constitution

Argentina has a population of over 36 Million people, with about half a million indigenous persons, belonging to 16 principal indigenous groups spread over 12 provinces.[1]

According to the 1853 Constitution, as amended in 1994, Argentina is a federal constitutional democracy with an executive branch headed by an elected President, a bicameral legislature, and a separate judiciary.[2] The Constitution guarantees a range of civil and political as well as social and economic rights but contains no express right to life.[3] It also provides a right to a remedy for the violation of constitutional guarantees.[4]

There are two parallel judicial systems, the Federal Judicial Power and the judicial powers of the provinces. The Federal power has jurisdiction over defined matters, such as trafficking in narcotics and matters involving foreigners or companies. Provincial judicial powers have a residual jurisdiction and are competent in all other matters.

Both the federal and provincial judiciary are divided according to subject matter (e.g., civil, criminal, administrative). Civil matters are heard by courts of first instance (*fueros*) and appealed to the court of appeal (*Cámara*), whose decisions can in turn be appealed to the Supreme Court in respect of federal matters. Privincial matters can be appealed to the Provincial Supreme Court or Superior Tribunal, through an extraordinary recourse known as *casación* (cassation). First instance criminal proceedings are divided into two stages. The first stage is referred to as the instructional stage. Here, a single judge decides whether there is sufficient evidence to bring the matter to hearing before the Criminal Court (*Cámara Criminal*). If so, the trial will take place before three *Cámara* judges, usually through oral and public proccedings. The *Cámaras* have a Court Prosecutor (*Fiscal de Cámara*) in charge of maintaining the files coming from the investigation judge. Usually, the decisions of Criminal Courts can only be appealed to the Provincial Supreme Court or Superior Tribunal through the process of *casación*.

Military Courts have jurisdiction, "in time of peace," to "essential military offences and disciplinary acts"[5] over military servicemen[6] and over retired officers in certain particular circumstances.[7] Military courts have jurisdiction to try ordinary crimes commited by servicemen applying the

[1] "Core document forming part of the reports of the States Parties: Argentina", UN Doc. HRI/CORE/1/Add.74, 1 July 1996, paras. 1 et seq.

[2] The reformed Constitution entered into force on 24 August 1994.

[3] See Articles 14-18 and 41-42 of the Constitution.

[4] Article 43 of the Constitution.

[5] Article 108 CMJ (Code of Military Justice).

[6] Article 109 (1) CMJ.

[7] See Article 109 (5) CMJ.

ordinary Penal Code.[8] These courts will apply the punishments prescribed by the Code of Military Justice (CMJ) if it is greater than the one provided by the ordinary Penal Code.[9]

The independence of the judiciary is not expressly guaranteed by the Constitution.[10]

1.2. Incorporation and Status of International law in Domestic Law

Argentina has acceded to or ratified the following relevant regional and international human rights and humanitarian law treaties:

- Convention on the Prevention and Punishment of the Crime of Genocide (became a party by Law-Decree 6286, 9 April 1956)
- The four Geneva Conventions of 1949 (ratified 9 August 1956 by law 14.467)
- American Convention on Human Rights (ratified in March 1984 by Law 23.054)
- International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights (ratified by Law 23.313 of April 1986)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (ratified on 24 September 1986 by Law 23.338)
- Inter-American Convention to Prevent and Punish Torture (ratified in November 1988 by Law 23.652)
- Convention on the Rights of the Child (ratified in September 1990 by Law 23.849)
- Inter-American Convention on Forced Disappearance of Persons (ratified on 28 February 1996 by Law 24.629)
- ICC Rome Statute (ratified in February 2001, by Law 25.390)

On 7 July 1992, the Supreme Court held that "when the Nation ratifies a treaty which it has signed with another State, it is making an international commitment that its' administrative and jurisdictional bodies will apply ... , provided that it contains sufficiently specific descriptions of such cases to permit its immediate application."[11] Article 31 of the Constitution provides that: "This Constitution, the laws of the Nation enacted by Congress in pursuance thereof, and treaties with of foreign powers, are the supreme law of the Nation." Article 75(22) of the Constitution provides that specifically listed human rights treaties have constitutional status as have all other treaties approved by 2/3 of both Congress and Senate. The listed treaties "have constitutional rank, do not abrogate any article of the first part of this Constitution, and must be interpreted as complementary to the rights and guarantees recognized thereby. They may be

[8] Article 870 CMJ.

[9] Ibid. See for exceptions Article 871 CMJ.

[10] Supreme Court judges are appointed by the President and approved by the Senate. Its ministers elect a President of the Supreme Court periodically. Judges of lower courts are proposed to the Senate by a specific body called the Judicial Council ("*Consejo de la Magistratura*") in a nomination process where three candidates are put forward (art. 114, Constitution). This Council, created by the Constitution, is made up of members of Congress, the Supreme Court, and professional organizations. The judges of the Supreme Court and lower courts retain their posts as long as they maintain a good standard of conduct (art. 110 Constitution). They may be removed from office by the decision of an impeachment jury composed of legislators, magistrates and registered lawyers (art. 115 Constitution), on grounds of poor performance or professional misconduct or for ordinary offences (art. 53 Constitution). In that case, they are judged by special courts: the entire Senate, in case of impeachment of a member of the Supreme Court, or a special jury, in case of simple judges or members of a *Cámara*. This process ensures their right to defense. If the Senate or the Jury decides that the judge is guilty, he/she is removed from his/her position and can be judged as an ordinary citizen by the ordinary or federal courts. Otherwise, if he/she is found not guilty, s/he remains in his/her position.

[11] Act 1992/C:547. ***Ekmekdjian v. Sofovich***, quoted in Core Document, supra, para 42, according to which: "This decision had the merit of recognizing that, as of 7 July 1992, treaties have taken precedence over national legislation in Argentina, thereby eliminating any legal conflicts which jeopardized the international responsibility of the State whenever a subsequent law contradicted an earlier treaty."

denounced, if necessary, only by the Executive, following approval by two thirds of the members of each Chamber."[12]

Art. 75(22) also states that after being approved by Congress, other treaties and conventions on human rights shall require the vote of 2/3 of the members of each Chamber in order to acquire constitutional rank.[13]

Argentina has not adopted any specific implementing legislation relating to the Convention against Torture.

2. Practice of Torture: Context, Occurrence, Responses

2.1. The Practice of torture

Between 1974 and 1983, thousands of individuals were reportedly tortured, killed or made to disappear in Argentina. Sponsored by top state officials, extensive violence is said to have commenced when Juan Peron was succeded by his wife and vice president, Isabel, after his death in 1974. Under her presidency, gangs of security forces in civilian clothes reportedly killed and maimed hundreds of youths for the sole reason of being considered left-wing activists. In 1976, a military coup overthrew Isabel Peron and all individual rights guaranteed under the Constitution were suspended. Under the *de facto* control of four generals, military and para-military personnel are said to have made extensive use of torture and assassination in the name of saving the country from internal "subversion." An estimated 30,000 individuals were "disappeared" by the security forces, most taken to secret detention centres where they were tortured and kept in subhuman conditions before being murdered. The number of torture survivors is in the thousands.[14]

In 1999 Fernando de la Rúa of the Radical Party succeeded President Menem. In 2002 the economic, political, and social crisis in Argentina reached the worst levels in its recent history.[15] As a result, President de la Rúa resigned. Adolfo Rodriguez Saá from the Peronist party was elected interim President but resigned after a week. President Eduardo Duhalde also from the Peronist party succeeded him as interim President and has remained in office since then. At present, the use of torture in Argentina is reportedly frequent among police forces and prison guards. Methods of torture apparently include the techniques that were widespread when Argentina was under military rule.[16] In August 2001 three federal judges strongly criticized "the generalised practice of torture in all its forms in a systematic way, in the area of investigations and the treatment of detainees, especially in the province of Buenos Aires, where there is a

[12] Translation in Third periodic report of Argentina to the Committee against Torture, U.N. Doc. CAT/C/34/Add.5, 18 June 1997, para. 1. Article 75 (24) of the Constitution authorizes Congress "[t]o approve integration treaties which delegate competences and jurisdiction to interstate organizations, on the basis of reciprocal and equal conditions, and which respect the democratic order and human rights. Any standards dictated pursuant thereto are to supersede laws." In addition, Law 25.390 bestows constitutional status to the Rome Statute of the International Criminal Court.

[13] Up to this date, the only treaty given constitutional hierarchy under this proviso has been the Inter-American Convention on Forced Disappearance of Persons, through the passing of Law No. 24.820 (Official Gazette 29.5.1997), which had been previously approved by Law No. 24.556 on 13 September 1995.

[14] See e.g. Maria Luisa Bartolomei, ***Gross and Massive Violations of Human Rights in Argentina 1976-1983, An Analysis of the Procedure under ECOSOC Resolution 1503***, Skrifter utgivan av Juridiska Föreningen i Lund, Nr. 118, 1994.

[15] Human Rights Watch World Report 2002.

[16] These methods are said to include: beatings, hooding with plastic bags almost to the point of suffocation, and the use of electric shock batons on sensitive parts of the body. See Amnesty International, Report 2002, Argentina, p.34 and CELS (El Centro de Estudios Legales y Sociales), *Informe sobre la situación de los derechos humanos en Argentina 2002*, Chapter 5, p. 4, http://www.cels.org.ar/Site_cels/index.html.

history of authoritarian style state violence".[17] Reportedly, the perpetrators of torture and ill-treatment include provincial, border and federal police as well as naval guards.[18] The typical victims of torture and ill-treatment are young adults, teenagers, suspects of ordinary crimes, gays, lesbians, bisexuals and individuals of indigenous descent from the northern part of the country, as well as from Bolivia, Peru, and other Latin American countries. Many victims belong to economically vulnerable groups. Torture is reportedly also common in detention centres. Prison conditions are very poor and could by themselves be characterised as ill-treatment or torture because of the severe overcrowding and inadequate facilities and the corruption among prison guards which leads to abusive situations.[19]

2.2. Domestic Responses

In 1983, Argentina held its first democratic open elections after a period of almost seven years under military regime. Immediately after his election and upon taking office on 10 December 1983, President Raul Alfonsín sent a number of draft bills to Congress that were subsequently approved. The bills were designed to abrogate draconian criminal legislation enacted by the military regime and the Peronist government,[20] to penalise the crime of torture resulting in death with the same penalty as murder,[21] to ratify international treaties dealing with human rights[22] and to abrogate military jurisdiction for future crimes committed by members of the armed forces in connection with acts of service.[23] However, the impetus for reform waned under subsequent governments.

By Decree No. 3090/1984, the Office of the Under-Secretary for Human Rights (and Social Rights added subsequently) was established within the Ministry of the Interior. The function of this office is the promotion and protection of human rights in Argentina. The Human Rights Secretariat which forms part of the Ministry of Justice, Security and Human Rights assists the Ministry in the elaboration of programs and policies related to the promotion and defense of human rights, promotes human rights throughout the country, prevents violations and denounces human rights violations.[24] The Secretariat is currently undertaking a long-awaited nation-wide review on torture practices which will include court cases, human rights training of

[17] US Department of State, Country Reports on Human Rights Practices 2001: Argentina, 4 March 2002. "In July, Mario Coriolano, the chief state defense attorney attached to the criminal appeals court in the province of Buenos Aires, issued a report to the provincial Supreme Court giving details of more than six hundred complaints of ill-treatment and torture made from March 2000 until July 2001. By late October the court had information on more than 1,000 cases". HRW, World Report 2002, Argentina.

[18] See AI, Report 2002, Argentina, p.34.

[19] According to a Ministry of Justice prison census released in April 2001, there were 43,174 inmates in Federal and provincial facilities designed to hold 30,703 inmates. Of those, 38% were not in the appropriate facilities but were held in police stations. About 75% of the inmates in the census were held in detention cells awaiting trial. [19] US Department of State (DOS), Country Reports on Human Rights Practices 2001: Argentina,4 March 2002. See also HRW, World Report 2002, Argentina.

[20] Law 23.077, promulgated 22 August 1984.

[21]Article 1(1), Law 23.097, promulgated 24 October 1984. If the torture victim dies, the torturer faces the same sentence as for murder. *Ibid*, article 1(2).

[22] Law 23.054, promulgated 19 March 1984 (ratifying the American Convention on Human Rights).

[23] Law 23.049, promulgated 14 February 1984.

[24] Decree 1418/2000. Moreover: "Decree No. 1598/93 established the Office of the Government Procurator for the Prison System, thereby creating, under the authority of the Executive, a mechanism to monitor respect for the human rights of persons throughout the country in the custody of the federal prison service, both during pre-trial detention and after conviction. The specific functions of the Government Procurator for the Prison System are to investigate complaints and claims lodged by prisoners, their families (up to the fourth degree of blood relationship and third degree by marriage) or anyone able to prove cohabitation with a detainee, concerning acts which prima facie appear to be in violation of their rights. The Government Procurator may also initiate a criminal complaint and refer the case to the Ministry of Justice, which has jurisdiction over the prison system. In this respect, his activities and those of the enforcement judge are complementary". Third periodic reports of States parties due in 1996: Argentina, CAT/C/34/Add.5, 18/06/97, para. 66-67.

security forces and accountability mechanisms. It will also conduct a review of relevant provincial and federal legislation and media coverage of torture occurences.[25]

The Ombudsman is another institution in charge of protecting and defending human rights and other rights recognised by the Constitution. It is a federal institution that acts with full independence and autonomy.[26] The Ombudsman can carry out investigations in order to clarify the acts, actions or omissions committed by the administration and its agents, as well as any infringement to human rights or the illegitimate, defective, irregular, abusive, arbitrary, discriminatory, negligent, seriously inconvenient or untimely exercise of their functions, including those which may affect collective interests.[27]

There are no current moves to reform the law pertaining to the prohibition of torture or the right to reparation.

2.3. International Responses

In 1997, the Committee Against Torture, whilst noting some positive steps, outlined that there is still cause for concern with regard to the discrepancy between the "legislation adopted by the State for the prevention and punishment of the practice of torture ... and the actual situation ... this seems to indicate a failure to take effective action to eliminate these reprehensible practices."[28] This is underlined by the fact that the newly incorporated conventions are "weakened in their practical application by the courts, which, as the Committee has noted in its consideration of a large number of cases, often prefer to try the offenders on less serious charges attracting lighter penalties, thus reducing the deterrent effect." This situation has cause further aggravation where the "protracted nature of judicial inquiries into complaints of torture nullifies the exemplary and deterrent effect.[29]"

The more recent report presented before the Human Rights Committee in 2000 has highlighted its concern for the continuing "impunity for those responsible for gross human rights violations under military rule."[30] Allegations received by the Committee have underlined that "torture and excessive use of force by police officials ... is a widespread problem" which is inadequately addressed by "government mechanisms".[31] Furthermore, "the Committee is concerned that ...the high incidence of violence against women, including rape and domestic violence ...are not being adequately dealt with."[32]

The most recent visit of the Inter-American Commision on Human Rights took place from July 29 to August 6, 2002. In a press release which followed the visit the Commission stated, inter

[25] http://www.derhuman.jus.gov.ar/homepage.htm.

[26] Article 86 of the Constitution.

[27] Section 43 of the Argentinian Constitution provides: "Should there be no other available legal remedy, all individuals may bring an action for the protection of their constitutional rights (*acción de amparo*) against any act or omission on the part of any authority or individual which, actually or potentially might damage, restrict, alter or threaten the rights and guarantees protected by this Constitution, a treaty or an act. In such event, the judge may render the rule on which the act or omission is based unconstitutional. The interested party, the Ombudsman or any association registered according to law, may file this remedy against any form of discrimination, in relation with the rights which safeguard the environment, competitiveness, the rights of service users and consumers as well as any collective right."

[28] Concluding observations of the Committee against Torture: Argentina, UN Doc. A/53/44, 21 November 1997, paras.52-69; para. 62.

[29] See ibid., paras. 60 and 61.

[30] Concluding observations of the Human Rights Committee: Argentina, UN Doc. CCPR/CO/70/ARG, 3 November 2000, para. 9.

[31] Ibid., para. 12.

[32] Ibid., para. 15.

alia: "The Commission received a large number of complaints about acts committed by the security forces, including torture, unlawful pressure, and excessive use of force. According to the official records for the Province of Buenos Aires, from September 2000 to October 2001 there were more than 1,000 reports of unlawful pressure or mistreatment of children and young people under the protection of the state. The Public Defender for Appeals of the Province keeps a "Database of Cases of Torture and Cruel, Inhuman or Degrading Treatment or Punishment" which contains more than 1,000 instances (counted from March 2000 to July 2002) committed by individuals in the exercise of the public duties against persons involved in a judicial proceeding. According to information from the provincial authorities, the number of convictions is virtually insignificant compared to the number of complaints. The Commission considers that investigation, prosecution and punishment are crucial to the eradication of torture, and that impunity with respect to serious violations of this nature helps significantly to perpetuate it. Furthermore, the Commission received worrying information about overcrowded conditions at many prisons and police station cells, which creates a situation of extreme gravity and risk. As the Secretariat for Human Rights of the Province of Buenos Aires said in its review, this situation "has led, particularly in the conurbation of Buenos Aires, people deprived of liberty to be subjected to inhuman and degrading detention conditions in breach of constitutional, legal and international human rights standards ...". It is a particular cause for concern that, according to police reports, there are minors among the persons detained at police stations."[33]

In the recent case of *Juan Carlos Abella* before the Inter-American Commission on Human Rights, a group of people attacked a military barrack in La Tablada, Prov. of Buenos Aires on 23 January 1989. This resulted in the death of 29 of the attackers and several State agents. The Commission found that state agents tortured all survivors of the attack, and that the State breached, inter alia, the right to personal integrity (art. 5.2 of the Inter-Amer. Convention) and recommended reparation. [34]

In the case of *Garrido y Baigorria* Case, the Inter-American Court of Human Rights found Argentina to have violated the right to life, right to respect for physical, mental and moral integrity and the right to personal injury in being responsible for the disappearance of Raúl Bigorra and Adolfo Garrido. The Court decided: 1. To award $111,000 in reparations to the next of kin of Mr. Garrrido, and $ 64,000 to the next of kin of Mr. Baigorria; 2. To award $ 45,5000 in costs to the victim's families; of this amount $ 20,000 was set aside for the attorney's fees; 3. The State shall search for and identify the two natural children of Mr. Baigorria, by every means possible; 4. The State shall investigate the facts leading to the disappearance of Mr. Garrido and Mr. Baigorria and prosecute and punish their authors, accomplices, accessories after the fact and all those who may have had some part in these events; 5. The payments shall be done within six months of the notification of the judgment; 6. Reparations shall be exempted from taxation.[35]

II. PROHIBITION OF TORTURE UNDER DOMESTIC LAW

Section 18 of the Constitution provides, *inter alia*, that: "Nobody may be compelled to testify against himself... any kind of tortures and whipping, are forever abolished. The prisons of the Nation shall be healthy and clean, for the security and not for the punishment of the prisoners confined therein..."

[33] Commission, PRESS RELEASE No. 33/02, http://www.cidh.org/comunicados /english/2002/press33.02.htm.

[34] See Commission's Report No. 55/97, Case 11.137, JUAN CARLOS ABELLA, 18 November 1997, paras. 390 and 438.

[35] Garrido y Baigorria Case vs Argentina Series C No. 39 Reparations, Judgment of 27 August 1998.

The Penal Code contains a specific offence of torture, which came into force in October 1984.[36] However, the definition of torture that "concerns not only physical suffering, but also the infliction of mental suffering when it is sufficiently serious,"[37] is confined to harm inflicted on individuals whilst deprived of their freedom, and is for this reason not in line with the definition in Article 1 of the Convention against Torture.[38]

There is no provision providing expressly for the non-derogabiity of torture.[39] However, the Supreme Court, in the "Granada" case,[40] held that the authority to suspend constitutional guarantees can only be be used with regards to those rights which are incompatible with the state of siege; the courts exercise judicial control over the reasonabilty of a measure taken pursuant to the state of siege, but this control must be exceptional.

III. CRIMINAL ACCOUNTABILITY OF PERPETRATORS OF TORTURE

1. The substantive law: Criminal offences and punishment

Article 144 of the Penal Code provides for a specific offence of torture as follows:

A public official who commits torture or orders torture to be carried out against a person under his/her custody carries a punishment of imprisonment from 8 to 25 years.[41] If the torture results in serious injuries or death of the victim it is subject to a punishment of 10 to 25 years.[42] Public officials who, having the power to do so, fail to prevent the commission of such torture or ill-treatment are themselves subject to a punishment from 1 to 10 years imprisonment and disciplinary sanctions, which also applies to doctors who are officials.[43] Article 144 (5) of the Penal Code establishes a form of command responsibility for torture.[44]

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[36] Article 144 of the Penal Code, see infra, III.

[37] Article 144 (3) 3. Penal Code.

[38] See Article 144 (3), 1 Penal Code, infra.

[39] Article 23 of the Constitution states: "In the event of internal disturbance or external aggression which endangers the exercise of this Constitution and the tenure of the authorities established by it, the province or territory where the disruption of public order exists shall be declared under a state of siege, the constitutional guarantees being suspended therein. During such suspension, however, the President of the Republic may not pronounce judgment or impose penalties in his own right. In such cases, in respect of persons his power shall be limited to their arrest or transfer from one part of the Nation to another, if they do not prefer to leave Argentine territory." In accordance with the Constitution, the Congress of the Nation is empowered to "declare under a state of siege one or more parts of the Nation in the event of internal disturbance, and to approve or suspend the state of siege declared, while it is in recess, by the Executive" (art. 75 (29)). The Constitution empowers the Executive to declare a state of siege "in one or more parts of the Nation in the event of external aggression and for a limited period, with the agreement of the Senate. In the event of internal disturbance it only has this power when Congress is in recess, because this power lies with Congress. The President exercises it with the limitations laid down in article 23" (art. 99 (16)). Third periodic reports of States parties due in 1997: Argentina, UN Doc. CCPR/C/ARG/98/3, 07/05/99, para. 19-20.

[40] CSJN, *La Ley*, 1986 B, p. 221y ss.

[41] Article 144 (3), 1. Penal Code: "Any public official who subjects individuals, lawfully or unlawfully deprived of their freedom, to any kind of torture shall be punished by rigorous imprisonment from 8 to 25 years and by general disqualification for life, it being sufficient that the official has de facto power over the victim even if the latter is not legally in charge. The same penalty shall be applied to private individuals who carry out those acts." Source: UN Doc. CAT/C/5/Add.12, para.15.

[42] Article 144 (3), 2 Penal Code: "In the event that death of the victim should ensue in consequence of the torture, a custodial penalty, rigorous or ordinary imprisonment, shall be enforced. If any of the injuries provided for under article 91 (serious injuries) are caused, the custodial penalty shall be rigorous or ordinary imprisonment from 10 to 25 years."

[43] Article 144 (4) Penal Code: "1. Any public official who, although in a position to do so, does not prevent any of the acts identified in the previous article from being committed, shall be punished by 3 to 10 years' imprisonment.; 2. The penalty shall be from one to five years' imprisonment for any official who, on account of his position, was aware that any of the acts mentioned under the previous article had been committed and who, lacking the authority referred to in the previous paragraph, failed to report the act within 24 hours to the competent official, public prosecutor or judge. If the official is a doctor, he shall be liable to specific disqualification from exercising his profession for twice as long as the prison sentence imposed. 3. The penalty provided for under paragraph 1 of this article shall be imposed on a judge who, having knowledge of any such facts by reason of his office, does not

A public official who, during the course of employment, ill-treats a person or applies "*apremios ilegales*" (unlawful punishment), is subject to a punishment of 1 to 5 years imprisonment.[45] "Ill-treatment" refers to treatment that is degrading or humiliating.[46] Sexual abuse and rape are criminal offences, the latter carrying a punishment of 6 to 15 years and 8 to 20 years in those cases where, *inter alia*, the sexual abuse or rape results in grave damage to the physical or mental health of the victim or was committed by members of the police or security forces in the course of their employment.[47] The punishment is 15 to 20 years when the offence results in death.

The Code of Military Justice includes the offence of *abuso de autoridad* (abuse of atuthority) defined as the "arbitrary exercise of authority against an inferior."[48] It has been used in cases involving the ill-treatment of soldiers by their superiors.[49]

Primary accomplices receive the same penalty as the author or instigator of the offence and those aiding and abetting the offence are subject to a sentence of 1/3 to 1/2 of the applicable sentence.[50]

Argentinian law recognises the defence of due obedience that should not apply in torture cases as it can be invoked only for compliance with lawful obligations.[51]

Perpetrators of torture are subject to disciplinary sanctions which may be imposed in addition to any criminal punishment. Public officials found guilty of torture will be suspended from public service for life.[52] Further sanctions that may be applied are described in article 19 of the Penal Code:

1. Suspension from work even though the accused was elected by popular mandate
2. Denial of the right to run for office
3. Ban to occupy public office
4. Suspension of pension.

A detained police officer is automatically suspended and, if sentenced to imprisonment, he or she shall lose his/her status as a police officer.[53] Public officials that do nothing to prevent the

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draw up the corresponding indictment or report the matter to the competent judge within 24 hours; 4. In the other cases covered by this article, a specific life disqualification from public office shall be enforced. The disqualification shall include disqualification from possessing or bearing any type of weapon."

[44] Article 144 (5) Penal Code: "If the act referred to in article 144 (3) is committed, a prison sentence from six months to two years and specific disqualification for three to six years shall be imposed on the official responsible for the division, establishment, department, section or any other organization, if the circumstances indicate that the act would not have been committed if proper vigilance had been exercised or if the official had taken the appropriate measures."

[45] Article 144 bis (2) Penal Code.

[46] This could be interpreted as specific acts, demands causing harm or even words (Ricardo C Núñez and Víctor Félix Reinaldi, ***Manual de Derecho Penal: Parte Especial***, 2nd ed., Marcos Lerner Editora Córdoba: Córdoba, 1999). Carlos Creus suggests (***Derecho penal, Parte Especial***, 4th ed., Astrea De A. y R. Depalma: Buenos Aires, 1993) that this could refer as well to attacking one's sense of dignity or self-respect.

[47] See Article 119 Penal Code.

[48] Article 702 CMJ.

[49] See Igounet(h), Oscar and Igounet, Oscar, ***Codigo de Justicia Militar*** (Librería del Jurista: Buenos Aires, 1985) pp. 258-60.

[50] Articles 45 and 46 Penal Code.

[51] Article 34 (4) and (5) Penal Code.

[52] See Articles 144 (3) and (4) of the Penal Code supra.

[53] Article 721 Decree 1866 (1983) of the Organic Law of the Federal Police and Article 731 of the Penal Code.

commission of torture will also be suspended for life from public service. If the public official is a doctor, he/she shall be suspended from the medical profession for twice the amount of years of imprisonment.

2. The procedural law

2.1 Immunities

At President Raúl Alfonsin's initiative, Argentina adopted the *punto final* (full stop) law 23.492.[54] The law required that all prosecutions for crimes under international law committed during the military government, involving personnel belonging to the army, security forces, police, and in charge of detention centres under the authority of the army between 24 March 1976 and 26 Septmeber 1983, be stopped within 60 days of promulgation.[55] The *Ley de Obediencia Debida* (due obedience law, 23.521)[56] exempted from punishment all military officers and soldiers who had committed crimes whilst following orders and terminated their trials.[57] On 6 October 1989 and 29 December 1990, President Carlos Saúl Menem issued pardons for those who had already been convicted for human rights violations, including torture.[58]

On 6 March 2001, Argentine Judge Gabriel Cavallo held that the *Ley de Obediencia Debida* and the *Punto Final* were void as unconstitutional and in violation of Argentina's obligations under international law.[59] The Federal Chamber for Buenos Aires confirmed the decision on 9 November 2001.[60] Also, in October 2001, a second federal judge, Claudio Bonadio, upheld the decision on the unconstitutionality and invalidity of the two immunity laws in a case that related to a conspiracy within the Navy to kidnap the children and take the property of persons who disappeared.[61] These rulings did not affect the cases of torture and genocide for which military leaders were tried and later pardoned. The Supreme Court is expected to decide on the constitutionality of the two laws in the course of 2003.[62]

The Convention against Torture came into effect only 18 days after the *Obediencia Debida* laws.[63] The majority in the Argentinian Supreme Court rejected the applicability of the

[54] The law was enacted on 23 December 1986, proclaimed on 24 December 1986 and published in the Official Gazette on 29 December 1986.

[55] See Article 10 (1) of Law 23.049 of 9 February 1984.

[56] Enacted on 4 June 1987, proclaimed on 8 June 1987 and published in the Official Gazette on 9 June 1987.

[57] Law 23,492 set a 60-day deadline for terminating all criminal proceedings involving crimes committed as part of the so-called "dirty war". Law 23,521 established the irrefutable presumption that military personnel who committed crimes during the "dirty war" were acting in the line of duty, thereby acquitting them of any criminal liability.

[58] HRW, Annual Report 1990: Argentina.

[59] ***Simón, Julio y otros s/ sustracción de un menor - Causa Nº 8686/00, Juzgado Nacional en lo Crminal y Correccional Federal Nº 4, Secretaría Nº 7***. The case was lodged by Claudia Poblete, whose parents had disappeared. Cavallo's decision was based on the incompatibility of the amnesty laws with the American Convention on Human Rights and Article 29 of the Constitution, which denies Congress the ability to give extraordinary powers to any branch of the Government.

[60] ***Causa nº 17.889 "Incidente de apelación de Simón, Julio", Jdo. Fed. Nº 4, Sec. Nº 7., Reg. Nº 19.192. See also Causa nº 17.768 "Simón, Julio s/ procesamiento"; Causa nº 17.844 "Del Cerro, Juan Antonio s/nulidad" and Causa nº 17.890 "Del Cerro, J. A. s/ queja"*** in Nunca Más, http://www.nuncamas.org/juicios/juicios.htm.

[61] Nunca Más, http://www.nuncamas.org/juicios/juicios.htm.

[62] See HRW, Argentina: Supreme Court should resist army pressure, 12 March 2003.

[63] See, for an overview of the responses of international bodies and an analysis of the amnesty law, Argentina, ***Amicus Curiae brief on the incompatibility with international law of the full stop and due obedience laws***, presented by The International Commission of Jurists, Amnesty International and Human Rights Watch before the National Chamber for Federal Criminal and Correctional Matters of the Republic of Argentina (June 2001), published by the International Commission of Jurists

Convention to cases of torture covered by the *Obediencia Debida* laws on two occasions, on the basis that the Convention could not be applied retroactively.[64]

2.2. Statutes of limitations

All offences and punishments are subject to statutes of limitations. Offences that carry a life sentence are subject to a statute of limitations of 15 years and offences carrying other terms of imprisonment are subject to statute of limitations from 2 to 12 years, depending on the maximum terms of punishment prescribed for the offence.[65]

2.3. Investigations into Torture

A victim of a crime may lodge a complaint with a judge,[66] the public prosecutor or the police. [67] Complaints can also be lodged with the Office of the Under-Secretary for Human and Social Rights (Ministry of the Interior) and at the Federal level, with the Government Procurator for the Prison System, whose specific functions include serving as a focal point for complaints concerning acts falling within his sphere of competence.[68] A complainant must provide all relevant details concerning witnesses, place and time of the alleged act and any other information that may provide evidence of the act.[69] Furthermore, public officials have an obligation to file complaints concerning offences prosecutable *ex officio*.[70]

A victim of a crime may become co-prosecutor.[71] In order for the victim to actively participate in the case, s/her must be recognized as a "*querellante particular*", i.e. a private complainant.[72] However, torture is not among the offences that allow for private prosecution.[73]

The state has the unique right to prosecute criminal cases, including torture.[74] If the office of the public prosecutor receives a complaint or proceeds *ex officio*, he/she must notify the judge.

[64] Decision of the Supreme Court in the case "ESMA, *Hechos que se denunciaron como ocurridos*", 29 March 1988, and Decision of the Supreme Court, Case 311/600.

[65] See Articles 62 and 63 Penal Code.

[66] A detainee may do so in the course of *habeas corpus* proceedings, see Act No. 23.098, enacted 28 September 1984, Official Gazette, 25 October 1984.

[67] Article 174 of the Code of Criminal Procedure which has been in force since September 1992, states that "Any person who considers himself to have been harmed by an offence prosecutable ex officio or who, while not claiming to have been harmed, learns of such an offence, may file a complaint with a judge, government attorney or the police."

[68] "Decree No. 1598/93 established the Office of the Government Procurator for the Prison System, thereby creating, under the authority of the Executive, a mechanism to monitor respect for the human rights of persons throughout the country in the custody of the federal prison service, both during pre-trial detention and after conviction. The specific functions of the Government Procurator for the Prison System are to investigate complaints and claims lodged by prisoners, their families (up to the fourth degree of blood relationship and third degree by marriage) or anyone able to prove cohabitation with a detainee, concerning acts which prima facie appear to be in violation of their rights. The Government Procurator may also initiate a criminal complaint and refer the case to the Ministry of Justice, which has jurisdiction over the prison system. In this respect, his activities and those of the enforcement judge are complementary". Third periodic reports of States parties due in 1996: Argentina, CAT/C/34/Add.5, 18/06/97, para. 66-67.

[69] Article 176 Code of Criminal Procedure.

[70] Article 177 of the Code of Criminal Procedure provides that "The following have an obligation to file complaints concerning offences prosecutable ex officio: (i) public officials or employees who learn of such offences in the course of their work; (ii) doctors, midwives, pharmacists and other persons engaged in any of the health professions, with regard to offences they learn of while providing their professional services, unless the acts of which they have knowledge are protected by professional secrecy."

[71] Pursuant to Article 174 of the Code of Criminal Procedure, subject to the formalities set forth in book I, title IV, chapter IV which also provide that "when the criminal action is a private action, only the person entitled to bring charges may file the complaint, in conformity with the relevant provisions of the Criminal Code."

[72] Article 179 CCP. Artilce 82, Chapter 4 CCP details the role of the complainant (or their spouse, parents, children or legal counsel, in case of death) and their ability to present arguments.

[73] Articles 71 et seq. of the Penal Code.

If the perpetrator has not been identified, the public prosecutor will be responsible for the investigation and will notify the judge of the proceedings.[75] The security forces must notify the responsible authorities established under the Attorney General and the judge about the occurrence of a crime.[76] The judge is competent to investigate a complaint pursuant to a demand by the public prosecutorin accordance with Articles 188 and 195 CCP.[77] The investigating judge is responsible for the investigation of criminal offences, unless the judge orders the public prosecutor to do so under Article 196 CCP.[78] The opening of an investigation is obligatory so long as the facts contained in the complaint constitute a criminal offence.[79] The decision to refuse to open an investigation may be appealed by the complainant.[80]

In the course of the investigation,[81] a judge may order medical examinations for investigation purposes.[82] In so doing, the judge can appoint a medical expert who must have a degree and be registered in the corresponding list of the competent judicial body.[83] Parties to the case may also, within 3 days of the notification of the appointment of a doctor, propose their own doctor (at their costs).[84] If the accused is found guilty, he may be ordered to pay the costs of the doctor proposed by the victim.

The physical condition of detainees is checked by means of medical examinations on admission to and release from the place of detention. In case of an alleged breach of this rule, prisoners may appeal to the judge hearing the case,[85] or may, if applicable, address a complaint to the Procurator for Prisons, who is responsible for the protection of prisoners' rights.[86]

A judge may order pre-trail detention when there are sufficient grounds to hold a preliminary hearing and it is presumed that the accused will not be present voluntarily.[87]

There is no specific required level of substantiation. The usual basis for a decision not to proceed with an investigation is lack of evidence or lack of reliability. At the federal level, and at the instruction stage, the judge or the complainant can reject the prosecutor's request for discontinuance. The case must then be decided by the Appeal Chamber. If the Chamber agrees, it will appoint a new prosecutor pursuant to Article 348 CCP. Whenever the evidence warrants the charge of an accused, the public prosecutor will submit the case to the competent judge who must within 3 days, decide whether to delegate the investigation to the Attoney General's

[74] Article 71 Criminal Code. The Public Prosecutor is responsible, according to Articles 5 and 65 of the National Criminal Code and Articles 5 and 56, Law 12.061 of the Provincial (Buenos Aires) Criminal Code.

[75] Article 196 (bis) Code of Criminal Procedure.

[76] Article 196 (ter) Code of Criminal Procedure.

[77] Article 194 CCP.

[78] Article 26 Code of Criminal Procedure provides for the delegation of these functions to the Prosecutor.

[79] Article 71 Criminal Code; Article 5 Code of Criminal Procedure.

[80] Article 180 CCP.

[81] Art. 260 CCP authorizes the judge to assist to "determined procedural acts".

[82] Article 253 CCP (authorizing the judge to order medical examinations) and art. 258 (authorizing the judge to appoint an official medical expert) CCP.

[83] See Articles 258, 254 and 255 CCP.

[84] Article 259 CCP.

[85] Article 493 (1) of the Code of Criminal Procedure stipulates that the judge shall be competent to monitor observance of all constitutional guarantees and international treaties ratified by the Argentine Republic in the treatment accorded to convicted prisoners, detainees and persons subject to security measures.

[86] Similar provisions can be found in the CPP of the Province of Buenos Aires, see Articles 244, 246, 247 and 254.

[87] Article 283 CCP.

representative.[88] At the Federal level, a judge has the power to reject a demand of the public prosecutor and to permanently suspend the proceedings at any stage, pursuant to Articles 334 and 335 CCP.[89] The Court of Appeal (Criminal Chamber), can review such a decision following an appeal of the public prosecutor or the complainant.[90] Such a decision may be further appealed by way of cassation to the Supreme Court.[91]

If sufficient evidence is gathered to secure a conviction, there will be an indictment.[92] Formal charges can only be brought by the investigating judge, who is also responsible for the imposition of pre-trail detention.[93] No indictment is necessary when the investigation was conducted by the public prosecutor pursuant to Article 215 CCP. In this case, the prosecutor may make a direct request for a trial.[94]

Article 79 of the Criminal Code of Procedure establishes the rights of the victim and his/her family, as well as that of any witnesses, to the protection of their physical and moral integrity. The Public Prosecutor's office in Buenos Aires has implemented a witness protection programme pursuant to Articles 39 and 40 of Law 12.601 of the Province of Buenos Aires.[95]

2.4. Trials

Ordinary criminal courts are competent to try individuals (police officers, military personnel etc.) charged with torture.[96] The procedure is the same as for any other criminal offence. Proceedings are inquisitorial. The burden of proof is on the prosecution.[97] There are no strict evidentiary rules and any means can be used to prove a case. The weight accorded to particular evidence will depend on the discretion of the judge.

The CCP allows for the participation of the victim or (in the case of the death of the victim) his or her relatives (spouse, parents, children or legal representative) in a criminal trial if he or she becomes a co-prosecutor under Article 82. This gives victims the power to provide and present evidence, cross-examine the accused and other witnesses, and experts, submit closing arguments and present applications and motions.[98]

Judges have discretionary sentencing power and may suspend sentences when the term of imprisonment does not exceed three years, taking into account the circumstances of the offence.[99] The President has the power to grant pardons or commute punishment for crimes subject to federal jurisdiction.[100]

[88] Article 196 (quater) Code of Criminal Procedure.

[89] Article 195 CCP.

[90] Article 24 (a) CCP and Article 18 of Law 24.050, 1992.

[91] Article 445 and 446 CCP.

[92] Article 294 CCP.

[93] See Articles 306 and 312 CCP. The judge may order the accused to remain in custody unless the maximun punishment for the offence does not exceed 3 years.

[94] Such a request is to be made pursuant to Article 347 (2) CCP.

[95] Article 35 of Law 12.601 sets out the responsibility of the Public Prosecutor to counsel and advise victims.

[96] Ordinary criminal courts in the Federal Capital (Article 25 of CPP and Article 12 of Law 24.050); Prov. of Buenos Aires: Criminal (Ordinary) Tribunal (Article 22 CCP Buenos Aires).

[97] Article 3 CCP and Article 1 CCP Buenos Aires.

[98] Articles 398, 391 and 393 CCP. See also Articles 77-79 CCP Buenos Aires.

[99] Article 26 Criminal Code.

[100] Article 99 (5) of the Constitution.

3. The Practice

In 1985 the high echelons of the military regime, including the commanders in chief of the three military forces, Jorge Videla, Emilio Massera, and Leopoldo Galtieri, were tried and condemned (terms of imprisonment included life sentences) by the *Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal de la Capital Federal* for crimes committed during the military dictatorship, in those cases mentioned in President Alfonsin's decrees 158/83 and 280/84. Due to military pressures, the democratically elected government subsequently passed immunity laws, which prevented further trials for crimes committed during the military dictatorship. Carlos Saúl Menem, from the Peronist party, who had won the 1989 elections, pardoned the military leaders who had been tried in October 1989, but for the five former commanders of the armed forces and the former Police Chiefs of Buenos Aires Province and another official.[101]

Presently, only offences not covered by the amnesty laws can be prosecuted, namely baby theft and identity substitution; property theft; crimes commited by persons who did not belong to the army or security forces; and torture and illegitimate deprivation of liberty and crimes commited before 1976 (disappearances). Moreover, those offences covered by the amnesty laws, which the Supreme Court struck out as pending, may be subject to investigation and prosecution, namely disappearances, and offences in relation to those cases in which the constitutionality of Menem's pardon was challenged.

In relation to present torture cases, while there have been several complaints about torture, most cases do not result in successful prosecutions.[102] In 2000, about 700 investigations were opened under federal jurisdiction into complaints of "ill-treatment and unlawful punishment" resulting in 2 convictions. In the first half of 2001, 350 investigations were opened, resulting in two convictions for "ill-treatment" (committed by prisoners against their guards).[103]

Allegations of torture are generally not investigated promptly, adequately or impartially. Investigations are slow and suffer from many irregularities.[104] Torture victims who have complained have faced serious repercussions, ranging from threats, beatings to murder.[105] Threats, battery and intimidation of witnesses and lawyers are also common. Prison guards have reportedly offered prisoners release in return for attacks on human rights defenders.[106]

The judiciary is generally independent but is inefficient, underfunded, and subject at times to intimidation and political influence. Evidence extracted under ill-treatment or torture is

[101] HRW Annual Report 1990.

[102] See on official data regarding cases of ill-treatment from 1992-1996, Argentina's 1997 report to CAT, supra, Annex I and II. See on the number of complaints also the press release by the Inter-American Commission on Human Rights following its recent visit to Argentina, quoted supra, I, 2.3.

[103] Data provided by Attorney-General to NGOs CELS and INECIP.

[104] CELS, "*Informe al Relator contra la Tortura*", 2001 and 2002, http://www.cels.org.ar/Site_cels/index.html

[105] "In a case reported on 31 July 2001, prisoners in the new General Alvear prison in Buenos Aires province filed a complaint alleging physical and psychological torment. The courts determined that there had been abuses and ordered transfers and an investigation. An investigator told the press that two prisoners had reported that prison personnel in General Alvear Unit 30 had offered drugs and temporary releases to them in exchange for killing Daniel Chocobar, who was the first prisoner to file a complaint in 2000". US DOS, Country Reports on Human Rights Practices 2001: Argentina, 4 March 2002. A court is investigating the killing of two teenagers. A prosecutor revealed that, before they were killed, the youths had told a judge that police attached to a police station in Buenos Aires province, had tortured them. At the end of October 2001, five policemen, who were suspected of reprisal killings of minors who had denounced torture, were removed from their posts. See HRW, World Report 2002: Argentina.

[106] US DOS, Country Reports on Human Rights Practices 2001: Argentina, March 4, 2002.

inadmissible,[107] though both the Supreme Court and lower courts have continued to accept declarations made as a consequence of police interrogations. Law 23.465 amended the Code of Criminal Procedure (CCP). Article 316 of the CCP provided that a confession had to be made before a competent judge, but still did not modify the judicial use of declarations made to the police. In 1991, a new reform of the CCP prohibited the police from taking declarations from the accused.[108]

Allegation of torture in the course of a trial must be remitted to an investigating judge. Courts have not followed a consistent practice of investigating torture cases where allegations of torture have been raised before them.[109]

Many of the cases that reach trial do not result in appropiate sentences as per the seriousness of the offence. Judicial authorities often characterize offences as "*apremios ilegales*" instead of torture, which carries a lighter sentence of 1 to 5 years. According to the information provided by the Office of the Attorney General, only 1 % of cases reach trial and only 0,25 % result in a sentence, usually short-term imprisonment.[110]

IV. CLAIMING REPARATION FOR TORTURE

1. Available Remedies

1.1. Constitutional Law

The Constitution does not stipulate an express right to a remedy or reparation.

1.2. Civil Law

Compensation is due for any delict (tort) causing harm, either intentionally or negligently.[111] Damages awarded can be pecuniary or non-pecuniary (moral).[112] Individuals, in particular public official(s), are responsible under tort law. The State or other public entities are jointly liable for the conduct of its officials.

Torture survivors can claim reparation through a civil action before an ordinary tribunal. A civil claim for torture must be initiated within two years.[113] Public officials and the State are not immune from legal action relating to acts of torture. A successful civil claim is premised on sufficient evidence, particularly evidence of wounds or bruises and confirming evidence related to the time, place and author of the injuries. The initial complaint must include all evidence to be introduced in the proceeding. The rules of evidence are the same as for any other civil action, that means that the burden of proof is on the plaintiff unless there is some other evidence, which may reverse the burden to the defendant.

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[107] Supreme Court, Montenegro, Luciano Bernardino s/ robo, 1981, http://comunidad.derecho.org/neoforum/FallosCompletos/Montenegro.htm.

[108] Article 184 Law 23.984.

[109] CELS, *Informe al Relator Especial contra la Tortura*, Sir Nigel S. Rodley, 24 October 2001, p.21.

[110] Ibid., p.23. See cases described in CELS, *Informe Sobre La Situación De Los Derechos Humanos En Argentina 2002* and 2001, http://www.cels.org.ar/Site_cels/publicaciones/publi_info02.html.

[111] Article 1067 Civil Code.

[112] Article 1078 Civil Code. Article 30 Law No. 25.188, Title IV.

[113] Article 4037 Civil Code.

An award of civil reparation is linked to the outcome of the criminal proceedings.[114] There are three exceptions to this principle: a) in case of probation;[115] b) if the defendant to the civil action died before the launching of civil proceedings, the action may continue against his/her heirs and c) in case where the accused cannot be found and the criminal action cannot be initiated or continued.[116]

Costs (of both parties) are paid by the losing party, though a judge has discretion to reject totally or partially a claim for costs.[117]

If the debtor tacitly or expressly refuses to honour the judgment, it can be executed through execution proceedings. Any assets of the debtor are liable to enforcement provided that they are the debtor's property and are not seizure exempt as is the case with property registered as a "family property" (*bien de familia*).[118]

1.3. Criminal Law

Reparation, in particular damages, may be claimed as part of criminal proceedings. A complainant may take the procedural position of "*querellante*" or private (co)prosecutor. Not only will they have the right to seek reparation as a civil claimant but additionally, the chance to approach the designated investigating body to submit or request gathering specific evidence, and the right to appeal the decision of the judge. Federal criminal procedures allow the victim to join the criminal proceedings as an *actor civil* (civil party). The responsibility of those convicted of a crime is expressly stipulated by law.[119]

Claims for reparation against a public official or against the State are brought before the Ordinary Federal criminal courts. The court may award damages for pecuniary and non-pecuniary harm.[120] Compensation of the victim has priority over any other financial obligations of the perpetrator of the crime, such as paying costs and fines.[121] Neither amnesty nor pardon apply to compensation.[122]

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[114] Articles 1101 and 1102 Civil Code.

[115] Article 76 quarter Penal Code.

[116] See Article 1101 Civil Code.

[117] Article 69 of the Federal Code of Civil and Commercial Proceedings and Art. 68 CCP of the Prov. of Buenos Aires.

[118] See Code of Civil Procedure, art . 499 et seq.

[119] Articles 31 and 32 Law 25.188.

[120] Title IV-Prejudicial Reparations, Article 29, Law No.25.188: " the condemning sentence may order:

1) the return to a state previous to the commission of the crime, as far as may be possible, using for this purpose the restitution and any other measures required; 2) compensation for material and moral damages caused to the victim, heir family or a third party, the cost of which shall be determined by the judge in the absence of proof; 3) costs paid."

[121] Art. 30 Law No. 25.188.: "the obligation to compensate is preferable to all those the responsible party is accountable for after committing the crime, or taking advantage of the crime and the payment of the fine. If the condemned person's goods are not sufficient to cover the responsibilities of payment, they shall be satisfied in the following order:1) Compensation for damages and prejudices; 2) Payment of trial costs; 3) Confiscation of products obtained during or through the crime; 4) Payment of fine." Article 33 Law No.25.188: "In the case of total or partial insolvency, the following rules shall be followed for those sentenced to prison, reparations shall be made according to art. 11 in the case of those serving other sentences, the tribunal shall decide the amount of their incomes which they shall deposit periodically until completing payment." (Article 11 Law No.25.188 provides: "*El producto del trabajo del condenado a reclusión o prisión se aplicará simultáneamente: 1. A indemnizar los daños y perjuicios causados por el delito que no satisficiera con otros recursos; 2. A la prestación de alimentos según el Código Civil; 3. A costear los gastos que causare en el establecimiento; 4. A formar un fondo propio, que se le entregará a su salida.*")

[122] Article 61 Law No. 25.188: "Amnesty shall cancel penal action and stop the sentence and all its effects, except for compensation owed to individuals;" Article 68 Law No.25.188: "the prisoner's pardon shall cancel the sentence and its effects except for compensation owed to individuals."

2. The Practice

There have only been a few cases of reparation suits relating to torture, mainly because the democratic governments established administrative compensation schemes for victims of the dictatorship. In 1999, for the first time, a member of the military was ordered to pay damages for human rights violations. The Supreme Court ordered Emilio Massera, former leader of the military junta, to pay US$120,000 damages to Daniel Tarnopolsky whose family "disappeared" in July 1976. The decision of the Supreme Court was unanimous. In the same ruling the Argentine state was ordered to pay US$1,250,000 damages.[123] However, compensation claims were hampered by defences based on "due obedience" and the "full-stop" law because they made it difficult for torture survivors or relatives of torture victims to establish the responsibility of the perpetrators.

There have only been a few successful compensation cases relating to the conduct of police officers after 1983. The principle obstacles have been the deficient investigation practice and the small number of convictions.[124] On 24 April 1996, the Criminal Court of Appeal in San Rafael, Province of Mendoza, sentenced three police officers to two and three years of imprisonment respectively, barred them from public office for four years and ordered each of the convicted officers to pay US$ 5,000 in compensation to the victims for ill-treatment. The provincial government was also held responsible for the actions of its employees and ordered to pay US$ 15,000.[125]

V. GOVERNMENT REPARATION MEASURES

Act No. 23.852 of 27 September 1990, exempted from military service, upon request, anyone whose parent or sibling disappeared prior to 10 December 1983 in circumstances justifying a presumption of enforced disappearance.[126]

Act No. 24.043 of 1991 provides compensation to victims of the most recent military dictatorship (1976-1983) and their relatives. In addition, on 7 December 1994 Congress adopted Act No. 24.411, which grants benefits to the heirs of individuals who disappeared when that Act was promulgated and to the heirs of those who died as a result of action by the armed forces, the security forces or any paramilitary group prior to 10 December 1983.

In addition:

a) Act No. 23.466 of 30 October 1986, grants non-contributory pensions to the relatives of individuals who disappeared prior to 10 December 1983. Payment of these pensions began on 1 November 1987; 4,160 were granted and 1,864 were still being paid by July 1998;[127]
b) Decree No. 70/91, authorizes payment of benefit to individuals who were detained by the Executive prior to 10 December 1983 and whose criminal compensation action was

[123] Amnesty, Annual Report Argentina 2000

[124] See supra III, 3.

[125] See Argentina's 1997 report to CAT, supra, para 72.

[126] Military service is no longer obligatory in Argentina.

[127] See Third periodic reports of States parties due in 1997: Argentina, UN Doc. CCPR/C/ARG/98/3, 7 May 1999, para. 77.

denied owing to the expiration of the statute of limitations; 227 benefits were paid out, totalling 9,980,000 pesos;[128]

c) Act No. 24.043 of 27 November 1991, authorizes payment of benefit to persons detained by the Executive prior to 10 December 1983 and to civilians who were arrested on the orders of the military courts, whether or not they were convicted by those courts: "Of the 9,840 applications received, decisions were taken on 8,416, 7,596 favourably. Of the 820 refused, about 54 % related to periods of detention that fell outside the scope of the legislation, 13 % related to members of the armed forces or security forces or conscripts detained by military courts, 22 % had been placed at the disposal of a judge, 10 % related to cases of exile and 1 % had already received the benefit under Decree No. 70/91. As of 24 February 1998, 551,005,427.78 pesos [at that time 1 peso equalled 1 US$] had been paid out".[129]
d) Act No. 24.321 of 11 May 1994, authorizes a declaration of absence due to enforced disappearance in the case of anyone who disappeared involuntarily from his home or place of residence prior to 10 December 1983 and has not been heard of since.

Act No. 24.823 of 7 May 1997 regulates certain aspects of the benefits provided under Act No. 24.411, such as their nature, application procedure and beneficiaries.

Despite the amnesty laws that benefit those suspected of human rights abuses during what has come to be known as the dirty war (1976-1983), since 1995, human rights activists have pursued truth trials, based on the right to the truth. Although they have not resulted directly in criminal convictions, these unofficial truth trials serve to correct official records, such as the Civil Registry, and are bringing out additional information about human rights violations commited during the "dirty war".[130]

In November 1999, within the framework of a friendly settlement sponsored by the Inter-American Commission on Human Rights of the Organization of American States, the Argentine government, in the case of Carmen Lapacó, acknowledged and guaranteed the right to the truth as a right unaffected by statutes of limitations. The government made a commitment to introduce legislation allowing national courts to uphold such a right. The relevant legislation had not been put forward at the time of writing, however the Supreme Court changed its own jurisprudence (which had been established by the rejection of the petititon of Mrs. Lapacó) in the case of Benito Urteaga in its decision of15 October 1998. In this case, the Court recognized the right o the truth and accepted the *habeas data* petition as the correct procedure to bring a claim to obtain information.[131]

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[128] Ibid.

[129] Ibid.

[130] The best-known examples are the ones conducted in the cities of Bahia Blanca (Court of Appeal), La Plata, and Mar del Plata in the Province of Buenos Aires. In La Plata the investigations included oral proceedings with testimony by victims and their families. In Mar del Plata, a committee of organizations constituting a broad cross section of civil society was formed to assist the judiciary in the investigations.

[131] On 19 June 2000, the petitioners asked the Inter-American Commission to adopt precautionary measures because the Argentinian Government was breaching the friendly settlement by permiting military tribunals to take jurisdiction over cases involving the right to the truth. The Commission demanded further information from the government. The Supreme Court, however, issued a decision in which it established that all cases involving the appropiation of minors should be kept in the ordinary criminal courts. See CELS, Caso Alejandra Lapacó, http://www.cels.org.ar/Site_cels/index.html "In 1995 the horrifying confessions of former officers who had participated in the so-called death flights - in which the military drugged defenseless prisoners and dropped them alive from planes into the Atlantic - reopened the public debate about the past. Relatives of victims and human rights attorneys grasped the opportunity to present cases once more to the Federal Appeals Court in Buenos Aires (which had tried junta leaders ten years before). They demanded not sentences and punishment, but merely judicial investigations to search for the truth about the fate of the "missing." Thus began the so-called truth trials, a legal innovation apparently without precedent in the continent. Currently, at least twenty-eight courts across Argentina are conducting such investigations, with powers to subpoena military witnesses to appear and testify under oath, but with no powers to charge or convict them. Most military witnesses, however, refuse to testify, and the truth that has emerged has owed little to them. Yet, the trials have established the principle that judicial

VI. LEGAL REMEDIES IN CASES OF TORTURE COMMITTED IN THIRD COUNTRIES

1. Prosecution over acts of torture committed in a third country

1.1. The Law

1.1.1. Criminal Law

Article 118 of the Constitution of Argentina provides Argentine courts with jurisdiction over violations of international norms outside of its territory[132] which has been recognised by Argentinian courts as a legal basis for the exercise of universal jurisdiction.[133] The last sentence of article 118 of the National Constitution, provides for jurisdiction in case of criminal offenses "against the law of nations" (*contra el derecho de gentes*), in which case "Congress shall enact a special statute to fix the location where the trial is to be held". The provision was obviously taken from s. 2 of art. 3 of the US Constitution but with the addition of the "law of the nations" and it has been part of every Argentine Constitution since 1853. However, Congress never adopted the "special statute" and, Argentine courts never decided to assume or exercise this power granted by the Constitution.[134] Moreover, the Argentinian Government declared that it applies the principle of *aut dedere aut punier*.[135] Commentators have understood this provision to relate to trial by juries and the original meaning of "special law" was legislation regulating the organization of federal tribunals. Such legislation did not exist at the time the Constitution was adopted. Nevertheless, a recent judgment of the National Appeals Chamber (on Criminal matters) accepted the universality principle in cases of violations of international law.[136] Arguably, universal jurisdiction can therefore be exercised over grave breaches of the Geneva Conventions and Protocol I, the Convention against Torture and crimes falling within the Rome statute.[137] Moreover, Argentinian criminal law applies to offences committed in foreign countries by agents or employers of the Argentinian authorities in the course of their employment.[138]

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investigation of crimes against humanity such as "disappearances" must continue, regardless of laws passed to prevent the prosecution of those responsible. This principle was upheld by the Inter-American Commission on Human Rights in a friendly settlement with the State of Argentina signed in November 1999, by which Argentina agreed to "accept and guarantee the right to truth, which consists in the exhaustion of all means to obtain clarification of what happened to disappeared persons." " See HRW, ***Reluctant Partner: The Argentine Government's Failure to Back Trials of Human Rights Violators.*** http://www.hrw.org/americas/argentina.php.

[132] "All ordinary criminal trials not resulting from the power of impeachment granted to the Chamber of Deputies shall be concluded by juries, once this institution is established in the Republic. The proceedings in these trials shall take place in the same Province where the crime was committed; but when the crime is committed outside the borders of the Nation, in violation of international norms, Congress shall determine by a special law the place where the trial is to be held."

[133] The first decision which interpreted the phrase "against the law of nations" in Article 118 of the Constitution was the decision of Chamber judge Leopoldo Schiffrin in the case of the extradition of nazi criminal Josef Schwammberger ("Schwammberger, Josef F. L. s/extradición", ED, 135-346). Judge Schiffrin used Article 102 of the then Constitution (current Article 118) to override the prohibition of the *ex post facto* application of foreign laws in matters of statutes of limitations as the German legislation "derives from the 'laws of the nations' in which the principle of *nullum crimen poena sine previa lege* does not apply" (point 3, parag 2). See also overview of jurisprudence in Amnesty International, Universal Jurisdiction: The duty of states to enact and enforce legislation, Chapter Four, Part A, Argentina.

[134] Alberto Luis Zuppi, ***Jurisdicción universal para crímenes contra el derecho internacional***, Ad-Hoc: Buenos Aires, 2002, pp.23-24.

[135] Ibid.

[136] Caso Massera, "Emilio E. s/sustracción, retención y ocultación de menores s/excepciones", No. 30.514 from September 9, 1999 (unpublished).

[137] See for discussion of this point Amnesty, Universal Jurisdiction, supra.

[138] Article 1 Penal Code.

Art. 18 of the new Code of Penal Procedure establishes that Argentinian courts will have jurisdiction over crimes commited in national territory, if the effects of the offence occurred in the national territory, on the basis of the nationality of the public official (as in the Penal Code) but contains no reference to universal jurisdiction or passive personality. Argentina has accepted that it is under a duty pursuant to the Convention against Torture to prosecute a non-national for torture committed outside Argentina,[139] though such action is highly doubtful, given the reluctance of local authorities to prosecute even their own nationals.

1.1.2. Extradition Law

No extradition treaty between Argentina and a second state is needed for extardition proceedings. Article 1 of the Law on International Cooperation in Criminal Matters (Law No. 24.767, published in the Official Gazette, 16 January 1997), establishes the duty of Argentina to assist the requesting state in bringing an individual to trial. A specific treaty overrides the provisions of Law 24.767. Both bilateral and domestic legislation are limited by the principle of *aut dedere aut judicare* in cases arising from the human rights treaties to which it is a party. Law 24.767 recognizes torture as an extraditable offence, provided that guarantees of due process for the accused and the requirements for extradition are met. Moreover, "the act must constitute an offence with a minimum term of imprisonment and that the addition of both minimum and maximum terms will be at least one year. If the extradition is requested to serve a sentence, the sentence must be of at least one year long."[140]

Furthermore, Article 8 of Law 24.767 provides that extradition will not proceed when: the crime is political;[141] the act constitutes an offence only under the military law; criminal proceedings originate by one of the special commissions prohibited under art. 18 of the Constitution; extradition procedures are generated for the purpose of persecution arising from political opinions, nationality, race, religion or that there was a reasonable belief that such purposes might harm the defence during the trial; reasonable belief that the accused will be subject to torture, cruel punishment, ill-treatment; the offence is subject to death penalty in the requesting country and this latter does not guarantee that this sentence will not be applied. Extradition may also be refused if "it conflicts due to special reasons arising from national sovereignty, security, public order or other essential interests of Argentina."[142]

Article 12 of Law 24.767 confirms the right of nationals to choose whether to be extradited or prosecuted, unless an international treaty makes extradition mandatory. The proviso appears to suggest that this option can only be exercised with the consent of the requesting state.

Decree No. Nº 1581/01 of 5 December 2001 supplements Law 24.767. It provides that the territoriality doctrine will apply to all extradition requests. Therefore, the Foreign Affairs Ministry can reject requests that relate to acts that took place in Argentina or in places subject to Argentina's jurisdiction (Art.2). This decision is not subject to judicial review, however the Decree mandates that the requests for preventive arrest be sent to the judiciary. Judges may

[139] Country Rapporteur, Gonzalez Poblete, summary records of the 303rd meeting, U.N. Doc. CAT/C/SR.303 (1997), para. 24.

[140] Article 6 Law 24.767.

[141] Article 9 Law 24.767 stipulates that Argentina cannot reject an extradition on the basis of the "political" nature of the offence in relation to crimes against humanity.

[142] Article 10 Law 24.676. See also the grounds enumerated in Article 11 of the said law:" a) Crime or criminal proceedings are barred by a staute of limitations or other procedural reasons in the requesting state; b) Accused was tried in Argentina or other country for the same offence; c) Accused could not have been brought to trial under Argentinian law because of his age; d) Sentence was given *en rebeldía* and the requesting state does not warrant that the case will be reopened, the accused heard and a new sentence given; e) Requesting state does not warrant that the detention time during the extradition process will be computed as part of the sentence which will result from the a guilty finding."

order the arrest of the accused though they will not have jurisdiction to decide on the extradition matter. The Decree in fact allows the Executive to reject extradition requests of alleged perpetrators of human rights violations during the last military dictatorship in Argentina.

1.2. The Practice

Argentinian courts and/ or the government have repeatedly refused extradition of Argentine nationals involved in the last military dictatorship on the basis of universal or passive jurisdiction on the grounds that those charged already had been tried, convicted, and pardoned under domestic law.[143]

During 2001, the judiciary abandoned this doctrine but the executive still refused extradition requests:

1. On 12 July 2001, a German court ordered the arrest of retired General Carlos Guillermo Suarez Mason and in November 2001 Germany requested his extradition for the 1977 murder of a German citizen in Buenos Aires.[144] The Argentine Government rejected the extradition request, reaffirming its principle of "territoriality" which prevents foreign courts from judging human rights violations that occurred in Argentina.[145]

2. In August 2001, a court denied the Government of Italy's request to extradite former naval officer Alfredo Astiz on territoriality (jurisdictional) grounds, implying that he could face charges in Argentina, if not for murder and genocide, then for kidnapping and facilitating illegal adoption of children of persons who disappeared.

3. Also in August 2001, the Foreign Ministry denied a separate request from the Government of France for extradition of Astiz for the disappearance of two French nationals again on territoriality (jurisdictional) grounds.[146]

4. In 1999 Spanish Judge Baltasar Garzon charged 186 persons for crimes committed during the dirty war by the 1976-83 military regime with torture, terrorism, and genocide.[147] In September 2001 federal Judge Gabriel Cavallo granted the Spanish request for the arrest and extradition of 18 alleged military regime repressors. However, the Executive did not carry out the extraditions. In 2001, the Government of Argentina expressed its opposition to Mexico's decision to extradite Ricardo Miguel Cavallo, a former Argentinian military official to Spain for charges of terrorism, torture and

[143] Argentina, has, however, extradited Nazi war criminals such as Franz Leo Schwammberger to the Republic of Germany (see August 1989 judgement of the Third Division of the La Plata Federal Court of Appeal and 20 March 1990 judgment of the Supreme Court of Justice affirming the granting of the extradition).

[144] In December 2000, Rome's Second Criminal Court had sentenced Suárez Mason and Gen. Santiago Omar Riveros to life imprisonment in absentia, on charges of kidnapping, torture, and premeditated murder. Five naval officers received lesser sentences. CELS, Informe Annual, 2001 http://www.cels.org.ar/Site_cels/index.html.

[145] "In September 2000, Jorge Olivera, a former member of the Argentine armed forces was released and allowed to return to Argentina after the Rome Appeal Court applied the statute of limitations to the crimes of which he was accused. He had been detained in Italy in August 2000, after an international arrest warrant was filed by France, for the abduction and torture of French citizen Marie Anne Erize Tisseau who "disappeared" in 1976 in the Argentine province of San Juan. In December (2000), an Italian court sentenced seven former Argentine military officers to prison terms ranging from 24 years to life. The trial *in absentia*, initiated in Rome, related to the abduction and murder of seven Italian citizens and the kidnapping of the child of one of them in Argentina under the military government." Amnesty International, 2001 Annual Report: Argentina.

[146] Since there were no charges pending against him in Argentina, Astiz was immediately released.

[147] Garzon indicted the leaders of the military junta, including former military leaders General Leopoldo Galtieri, General Jorge Videla, Admiral Emilio Massera, and 95 other officers, including an active federal judge. CELS, Informe Annual, 2001 http://www.cels.org.ar/Site_cels/index.html.

genocide.[148] The decision of the Mexican courts relating to the extradition is still pending.

2. Claiming reparation for acts of torture committed in third countries

Argentina´s rules on jurisdiction are found in the federal and provincial codes of civil and commercial procedure. The jurisdictional rules found in the provincial codes roughly follow those in the Code of Civil and Commercial Procedure of the Nation ("CPC").

According to Article 5(4) of the CPC, and following the predicates of jurisdiction in matters of tort found in most civil law countries, the competent court over tort matters is the court of the place where the wrongful act took place or, at the option of the plaintiff, the court of the place where the defendant is domiciled (i.e., in the case of a corporation or legal entity, the court of the place where it has its main place of business or central administration).

As in most civil law countries, Argentine law does not accept the doctrine of *forum non conveniens*. A court with jurisdiction over the case, once seized of the matter, does not have the power or the discretion to decline jurisdiction on the ground that there is an alternative, adequate forum that is more convenient or efficient.

Immunity from Argentine jurisdiction is granted to foreign sovereign nations. For most of its history, the Supreme Court of Argentina adhered to the doctrine of absolute immunity, that is, a foreign nation or instrumentality could not be subject to Argentine jurisdiction unless such foreign state gave its consent. As of three or four years ago, Argentina adopted a narrower theory of foreign sovereign immunity. It distinguishes between acts "*jure imperii*," for which the foreign state or instrumentality is immune, and acts "*jure gestions*", for which it cannot claim immunity.[149]

[148] See, for details on the case, HRW, World Report 2002, Argentina. The then Defense Minister Ricardo López Murphy asserted that no country "should be recognized as having the capacity to be a court of appeals for decisions freely adopted by Argentines." HRW, World Report 2002: Argentina. See on this case also the Audit Project Country Report on Mexico, VI, 1.3.

[149] The Law, which did away with absolute immunity, is No. 24.488, sanctioned May 31 1995, partially promulgated on 22 June 1995 with an observación to art. 3 of the Law (observation, the consequence being the exclusion of Article 3 from the Law) by Decree 849/95 and published on the Official Gazette on 28 June 1995.