

# COMMENT

## ACTION SPECIFIC HUMAN RIGHTS LEGISLATION FOR EL SALVADOR

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The United States has long been a party to international instruments calling for the protection of human rights.<sup>1</sup> In the 1970's, Congress became increasingly concerned about human rights abuses in countries that received United States military and economic aid.<sup>2</sup> This concern was first expressed in the Foreign Assistance Act of 1973,<sup>3</sup> but key policymakers in the Executive Branch appeared not to share Congress's enthusiasm for using military aid to encourage respect for human rights.<sup>4</sup> Congress subsequently tightened the requirements of the For-

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<sup>1</sup> See, e.g., Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/1810, at 71 (1948); U.N. CHARTER art. 55; International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966); International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).

<sup>2</sup> Congress held hearings on the subject in 1973. *International Protection of Human Rights: The Work of International Organizations and the Role of U.S. Foreign Policy: Hearings Before the Subcomm. on Int'l Organizations and Movements of the House Comm. on Foreign Affairs*, 93d Cong., 1st Sess. (1974). The subcommittee released a significant report shortly afterwards, concluding that the United States should use restrictions on military aid as a tool to promote human rights. SUBCOMM. ON INT'L ORGANIZATIONS AND MOVEMENTS OF THE HOUSE COMM. ON FOREIGN AFFAIRS, 93D CONG., 2D SESS. 11, HUMAN RIGHTS IN THE WORLD COMMUNITY: A CALL FOR U.S. LEADERSHIP (Comm. Print 1974).

<sup>3</sup> Pub. L. No. 93-189, 87 Stat. 714 (1973) (codified as amended in scattered sections of 22 U.S.C.). The Foreign Assistance Act provided in part that "[i]t is the sense of Congress that the president should deny any economic or military assistance to the government of any foreign country which practices the internment or imprisonment of that country's citizens for political purposes." *Id.* § 32, 87 Stat. 733. For a discussion of this Act and its subsequent amendment, see Comment, *Constitutional Impediments to Enforcing Human Rights Legislation: The Case of El Salvador*, 33 AM. U.L. REV. 163, 167-76 (1983); Cohen, *Conditioning U.S. Security Assistance on Human Rights Practices*, 76 AM. J. INT'L L. 246, 249-56 (1982).

<sup>4</sup> See CONGRESSIONAL RESEARCH SERVICE, 96TH CONG., 1ST SESS., HUMAN RIGHTS AND U.S. FOREIGN ASSISTANCE: PREPARED FOR THE SENATE COMM. ON FOREIGN RELATIONS 84-85 (Comm. Print 1979); Weissbrodt, *Human Rights Legislation and U.S. Foreign Policy*, 7 GA. J. INT'L & COMP. L. 231, 241 (1977).

eign Assistance Act,<sup>5</sup> and in some cases went so far as to make United States aid to specific countries contingent upon their respect for human rights.<sup>6</sup>

One example of such country specific legislation is the El Salvador certification requirement. In 1981, Congress enacted legislation requiring that the President certify human rights progress in El Salvador as a condition for United States military aid to that country.<sup>7</sup> Beginning in January 1982 and proceeding at six month intervals, the Executive Branch has regularly certified that respect for human rights in El Salvador has improved.<sup>8</sup> On the strength of those certifications, the United States has provided El Salvador with increasing quantities of armaments.<sup>9</sup>

Members of Congress, along with independent human rights organizations, have criticized the accuracy of the certifications, arguing that human rights abuses in El Salvador have persisted and in some respects have become worse.<sup>10</sup> The vague language

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<sup>5</sup> Foreign Assistance Act of 1974, Pub. L. No. 93-559, § 46, 88 Stat. 1795, 1815 (1974) (current version at 22 U.S.C. § 2304 (1982)); International Development and Food Assistance Act of 1975, Pub. L. No. 94-161, § 116, 89 Stat. 849, 860 (1975) (current version at U.S.C. § 2151n (1982)). For a discussion of these changes, see Comment, *supra* note 3, at 167-73.

<sup>6</sup> Congress reduced military aid to South Korea and denied it to Chile in the Foreign Assistance Act of 1974, Pub. L. No. 93-559, 88 Stat. 1795, 1802 (1974) (codified as amended in scattered sections of 22 U.S.C.).

<sup>7</sup> International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, § 728, 95 Stat. 1519, 1555 (1981).

<sup>8</sup> The first certification was made on January 28, 1982. Presidential Determination No. 82-4, 47 Fed. Reg. 6417 (1982), reprinted in *The Presidential Certification on El Salvador (Volume I): Hearings Before the Subcomm. on Inter-American Affairs of the House Comm. on Foreign Affairs, 97th Cong., 2d Sess. 2 (1982)* [hereinafter cited as *House Presidential Certification Hearings I*]. The second certification was made six months later. Report on the Situation in El Salvador With Respect to the Subjects Covered in Section 728(d) of the International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, reprinted in *The Presidential Certification on El Salvador (Volume II): Hearings and Markup Before the House Comm. on Foreign Affairs and its Subcomm. on Inter-American Affairs, 97th Cong., 2d Sess. 467 (1982)* [hereinafter cited as *House Presidential Certification Hearings II*].

President Reagan pocket vetoed an extension to the certification requirement in November 1983. 19 WEEKLY COMP. PRES. DOC. 1627 (Nov. 30, 1983). The legal validity of that pocket veto has been disputed. Telephone interview with Charles Shapiro, U.S. Dep't of State (Nov. 7, 1984). The administration submitted additional certifications, stipulating that they were voluntary, in January 1984 and July 1984. *Id.* The D.C. Circuit refused to declare provision of military aid to El Salvador illegal, see *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982), *aff'd per curiam*, No. 82-2461 (D.C. Cir. Nov. 18, 1983), but the plaintiffs in that case did not base their claim on the certification requirement. See generally Comment, *supra* note 3.

<sup>9</sup> U.S. military aid to El Salvador was \$5.9 million in 1980, \$35.5 million in 1981, \$82.0 million in 1982, \$81.3 million in 1983, and \$196.6 million in 1984. Telephone interview with Charles Shapiro, U.S. Dep't of State (Nov. 1, 1984); see also N.Y. Times, Mar. 30, 1984, at A4, col. 1.

<sup>10</sup> Congressional criticism was voiced during the certification proceedings. See, e.g., *House Presidential Certification Hearings II, supra* note 8, at 12-13 (statement of Rep.

of the certification requirement, however, has provided the President with considerable leeway in determining whether certification is justified.<sup>11</sup> At the same time, Congress is apparently unwilling to withhold all military aid to El Salvador, even in the face of disturbing abuses, for fear that the government could fall and that even greater violence could follow.<sup>12</sup> Congress has thus continued to accept the certifications, despite the concern among some of its members that the certifications are inconsistent with the goal of conditioning military aid on human rights progress.<sup>13</sup>

This Comment describes an approach to human rights legislation that seeks to overcome the limitations of congressional influence over human rights progress manifest in the presidential certification process. The approach relies on “action specific” conditions on military aid, in contrast with the “country spe-

Barnes (D-Md.); *id.* at 75 (statement of Rep. Studds (D-Mass.)); C. PELL & P. LEAHY, *EL SALVADOR: THE UNITED STATES IN THE MIDST OF A MAELSTROM. A REPORT TO THE SENATE COMM. ON FOREIGN RELATIONS, 97th Cong., 2d Sess. 4* (1982); *House Presidential Certification Hearings I, supra* note 8, at 13 (statement of Rep. Bonker (D-Wash.)); *id.* at 61 (statement of Rep. Solarz (D-N.Y.)); *Presidential Certification on Progress in El Salvador: Hearing Before the Senate Committee on Foreign Relations, 98th Cong., 1st Sess. 4* (1983) (statement of Sen. Cranston (D-Cal.)) [hereinafter cited as *Senate Hearing on Certification on Progress*]. For a representative reaction of human rights groups, see C. ARNSON, A. NEIER & S. BENDA, *AS BAD AS EVER: A REPORT ON HUMAN RIGHTS IN EL SALVADOR, JANUARY 31, 1984 FOURTH SUPPLEMENT* (1984); A. NEIER & J. MENDEZ, *JULY 19, 1983 THIRD SUPPLEMENT TO THE REPORT ON HUMAN RIGHTS IN EL SALVADOR* (1983); C. ARNSON & A. NEIER, *JANUARY 20, 1983 SECOND SUPPLEMENT TO THE REPORT ON HUMAN RIGHTS IN EL SALVADOR* (1983); C. BROWN, *JULY 20, 1982 SUPPLEMENT TO THE REPORT ON HUMAN RIGHTS IN EL SALVADOR* (1982); AMERICAS WATCH COMMITTEE AND THE CIVIL LIBERTIES UNION, *REPORT ON HUMAN RIGHTS IN EL SALVADOR* (1982) [hereinafter cited as *REPORT ON HUMAN RIGHTS*].

<sup>11</sup> One illustration of the difficulties raised by the statute involves the requirement that the Salvadoran government make a “concerted and significant effort to comply” with human rights principles. International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, § 728, 95 Stat. 1519, 1555 (1981). While the administration and some legislators interpret that language merely to require some showing of progress, other congresspersons have argued that it requires substantially more. *See, e.g., House Presidential Certification Hearings I, supra* note 8, at 17–18 (statement of Rep. Bonker).

<sup>12</sup> *See House Presidential Certification Hearings II, supra* note 8, at 219 (statement of Rep. Studds):

We clearly have a problem. At some point we have to be willing to cut off aid. There must be a point which is unacceptable even to this Congress and to this administration. The trouble is that people . . . are postulating that the aid cut off is unthinkable because of some of the consequences which would flow from that. If that is the case, then nothing we do by way of conditions will have any credibility down there because they know we do not think our interests are served by the cutting off of aid. It seems we are in a box of our own making . . . .

<sup>13</sup> *See supra* note 10; *see also* Horton & Sellier, *The Utility of Presidential Certification of Compliance with United States Human Rights Policy: The Case of El Salvador*, 1982 *Wis. L. REV.* 825.

cific" conditions imposed by the current certification process. Action specific human rights legislation defines the human rights objectives of Congress in narrow, specific terms, and it conditions particular items of military aid on that progress. In this way, the legislation avoids the vagueness of the certification process and provides Congress with a wider range of conditioning options than simply cutting off all military aid. Action specific human rights legislation can be used to supplement, rather than replace, other types of human rights legislation. It would be particularly appropriate where more general efforts have failed to produce the degree of human rights progress sought by Congress, as appears to be the case in El Salvador.<sup>14</sup>

### I. THE COUNTRY SPECIFIC CERTIFICATION REQUIREMENT FOR EL SALVADOR MILITARY AID

Congress expressed the general foreign policy of the United States regarding human rights in section 502B of the Foreign Assistance Act, stating that "a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries."<sup>15</sup> The provision directed that no government "which engages in a consistent pattern of gross violations of internationally recognized human rights" shall receive military aid.<sup>16</sup> Nonetheless, the Salvadoran government received increasing amounts of military aid<sup>17</sup> despite allegations of serious human rights abuses. Large numbers of civilian noncombatants were killed, driven into foreign exile, or internally displaced from their homes and lands.<sup>18</sup> Major independent human rights organizations report that the majority of human rights abuses were the fault of the Salvadoran government rather than the guerrillas

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<sup>14</sup> See *supra* note 10.

<sup>15</sup> Foreign Assistance Act of 1961, Pub. L. No. 93-559, § 46, 88 Stat. 1795, 1815 (1974) (codified at 22 U.S.C. § 2304 (1982)).

<sup>16</sup> *Id.* § 502B(c)(1) (22 U.S.C. 2304(a)). Exceptions are permitted where "extraordinary circumstances exist which necessitate a continuation [of military aid] in the national interest of the United States." *Id.* The elasticity of the "extraordinary circumstances" exception is described in REPORT ON HUMAN RIGHTS, *supra* note 10, at 305 n.24. For an account of the development and application of § 502B, see Cohen, *Conditioning U.S. Security Assistance on Human Rights Practices*, 76 AM. J. OF INT'L L. 246 (1982).

<sup>17</sup> See *supra* note 9.

<sup>18</sup> See, e.g., N.Y. Times, Oct. 16, 1984, at A1, col. 6 (estimating 50,000 civilian deaths); C. ARNSON, A. NEIER & S. BENDA, *supra* note 10, at 49 (estimating 500,000 refugees abroad and 500,000 internally displaced).

or the uncontrollable right wing, and that the "death squads" were composed mainly of members of the police and military.<sup>19</sup>

The certification legislation, enacted shortly after a series of highly publicized murders of United States citizens,<sup>20</sup> reinforced the "gross violations" restriction by requiring the President to certify every 180 days that the government of El Salvador was attaining the following goals:

- (1) making a concerted and significant effort to comply with internationally recognized human rights;
- (2) achieving control of the armed forces to end the indiscriminate torture and murder of Salvadoran citizens;
- (3) reforming the economic and political system, including land reforms;
- (4) preparing to organize early elections with international observers and to initiate discussions with all major political factions in the country.<sup>21</sup>

The legislation required the President to submit the certifications to the Speaker of the House and the Chairman of the Senate Committee on Foreign Relations.<sup>22</sup> As long as the President continued to submit certifications, his ability to send military aid to El Salvador would not be hampered; he could ad-

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<sup>19</sup> Americas Watch and the American Civil Liberties Union jointly concluded that "the government [of El Salvador] is in control of its security forces—that in fact, for all practical purposes, the security forces are the real government—and that torture and murder are instruments of policy." C. BROWN, *supra* note 10, at 132. The two organizations also found "considerable evidence that the unofficial paramilitary groups, or death squads, that are responsible for many anonymous killings include on- and off-duty members of the security forces." *Id.* at 143.

<sup>20</sup> Four American churchwomen were murdered in December 1980 under circumstances that strongly implicated the Salvadoran security forces. See LAWYERS COMMITTEE FOR INTERNATIONAL HUMAN RIGHTS, A REPORT ON THE INVESTIGATION INTO THE KILLING OF FOUR AMERICAN CHURCHWOMEN IN EL SALVADOR (1981). Two American land reform advisers were murdered in January 1981 in the lobby of the San Salvador Sheraton Hotel. See REPORT ON HUMAN RIGHTS, *supra* note 10, at 54. The Archbishop of San Salvador, Monsignor Romero, was shot and killed during Mass in March 1981 after delivering a homily urging army soldiers not to fire on unarmed civilians; those circumstances again suggested military complicity. *Id.*

<sup>21</sup> International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, § 728(d), 95 Stat. 1519, 1555 (1981). The first two certifications also required a special finding that the government was making progress in investigating the murders of the American churchwomen and land reform advisers. *Id.* Congress amended the Act to require a report on John Sullivan, an American journalist in El Salvador who has been missing since 1960. Act of July 15, 1983, Pub. L. No. 98-53, 97 Stat. 287 (1983).

<sup>22</sup> International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, § 728(d), 95 Stat. 1519, 1555 (1981).

minister the aid programs previously authorized by Congress without further impediment. If the President did not submit a certification when required, however, the legislation directed the President to suspend all military assistance to El Salvador immediately.<sup>23</sup> If the President failed both to submit a certification and to suspend military aid as required, Congress could, of course, sue to obtain a judgment declaring the President's actions illegal.<sup>24</sup> Congress defined the assistance covered by the certification requirement to include equipment, services, and credits extended under the Foreign Assistance Act of 1961<sup>25</sup> and the Arms Export Control Act.<sup>26</sup>

The improvement in human rights resulting from the certification process has been, at best, limited. In issuing the required certifications, President Reagan has pointed to the land reform program, the detention of National Guardsmen suspected in the murder of the four churchwomen, the elections of 1982, and claimed reductions in the number of death squad victims in the urban areas of San Salvador.<sup>27</sup> While such developments should be welcomed, they do not address the fundamental problems of human rights abuse in El Salvador, which stem from widespread military violence against peasants in the countryside.<sup>28</sup> This vio-

<sup>23</sup> *Id.* § 728(c).

<sup>24</sup> The equitable discretion doctrine applied in *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982), *aff'd per curiam*, No. 82-2461 (D.C. Cir. Nov. 18, 1983), would probably not prevent such a judgment. In *Crockett*, the court declined to examine the merits of plaintiffs' Foreign Assistance Act claim that El Salvador was engaging in "a consistent pattern of gross violations," 22 U.S.C. § 2304(a), holding that the dispute was one among legislators (those favoring aid and those opposing it) rather than between branches. 558 F. Supp. at 1002. Failure to submit a certification, however, would be more clearly an instance of a President failing to comply with congressional directives; no judicial inquiry into the condition of human rights in El Salvador would be necessary.

<sup>25</sup> Pub. L. No. 87-195, 75 Stat. 424 (1961) (codified as amended at 22 U.S.C. §§ 2151-2431 (1982)).

<sup>26</sup> Pub. L. No. 90-629, 82 Stat. 1320 (1968) (codified as amended at 22 U.S.C. §§ 2751-2796 (1982)).

<sup>27</sup> DEP'T OF STATE, JUSTIFICATION FOR PRESIDENTIAL DETERMINATION TO AUTHORIZE CONTINUED SECURITY ASSISTANCE FOR EL SALVADOR 4 (1982) (land reform); *id.* at 5 (murder suspects); *id.* at 4-5 (elections). Thomas Enders, Ass't. Sec'y of State for Inter-American Affairs, claimed in congressional testimony in 1982 that the level of noncombat violence had been reduced by one-half during 1981. *Presidential Certification Hearings I*, *supra* note 8, at 30. This claim was sharply disputed by Morton H. Halperin on behalf of the American Civil Liberties Union. *Certification Concerning Military Aid to El Salvador: Hearings Before the Senate Comm. on Foreign Relations*, 97th Cong., 2d Sess. 73 (1982).

<sup>28</sup> "As human rights workers in all of El Salvador's human rights organizations have stressed, the focus of killing in El Salvador, during this period of intensified armed conflict between government forces and armed insurgents of the left, has shifted to the countryside." C. ARNISON & A. NEIER, *supra* note 10, at 19; *see also* C. ARNISON, A. NEIER & S. BENDA, *supra* note 10, at 18-21.

lence has included aerial bombardments of peasant hamlets, massacres of civilian noncombatants in massive infantry sweeps through the countryside, and destruction of crops and agricultural infrastructure in an effort to undercut the guerrillas' logistical base.<sup>29</sup> Major human rights organizations, as well as members of Congress, have therefore argued that the certifications were improper.<sup>30</sup>

The certification requirement suffers from several difficulties. First, the statute is vague, giving little guidance to the Executive Branch on what Congress considers to be "progress" or "good faith efforts."<sup>31</sup> Second, it provides no mechanism for Congress to review the determinations of the Executive Branch, short of enacting additional legislation to curtail the aid.<sup>32</sup> Finally, the statute provides no alternative to a complete cutoff of United States military aid. Given the importance of the national security interests that many leaders in both branches perceive to be at stake in the Salvadoran conflict, the certification process is a clumsy tool for reducing human rights abuses.<sup>33</sup> Action specific legislation seeks to cure those defects.

## II. AN EXAMPLE OF ACTION SPECIFIC LEGISLATION FOR EL SALVADOR: THE SPECTER AMENDMENT

By 1983, despite administration certifications that the Salvadoran government was making good faith progress in bringing the murderers of the American churchwomen to justice, little

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<sup>29</sup> Infantry atrocities are described in the *Boston Globe*, Sept. 9, 1984, at 1, col. 5. The author's account of aerial bombardments, based on his personal observations and interviews with Salvadoran peasants in August 1984, appears in the *Boston Globe*, Oct. 1, 1984, at 19, col. 1.

<sup>30</sup> See C. BROWN, *supra* note 10, at 9-20; *Presidential Certification Hearings II*, *supra* note 8, at 521; AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT 1983, at 136 (1983); Horton & Sellier, *The Utility of Presidential Certifications of Compliance with United States Human Rights Policy: The Case of El Salvador*, 1982 WIS. L. REV. 825.

<sup>31</sup> See *supra* note 11.

<sup>32</sup> The use of a legislative veto to check executive action with regard to military aid would probably be invalid under *INS v. Chadha*, 103 S. Ct. 2764 (1983), which held that Congress cannot reserve one-house veto power when delegating authority to the Executive Branch. See generally Tribe, *The Legislative Veto Decision: A Law By Any Other Name?*, 21 HARV. J. ON LEGIS. 1 (1984); DeConcini & Faucher, *The Legislative Veto: A Constitutional Amendment*, 21 HARV. J. ON LEGIS. 29 (1984). Therefore, Congress could counter executive action only through the passage of formal legislation, which would be subject to a presidential veto.

<sup>33</sup> Rep. Barnes, for example, laments that the process has created "an all or nothing legislative game." *House Presidential Certification Hearings II*, *supra* note 8, at 221.

progress had in fact been made.<sup>34</sup> Some low level National Guardsmen had been detained, but no officers had been indicted; observers generally agreed that the paralysis of the Salvadoran judicial system and the traditional protection that the armed forces provided for their men prevented any substantial results.<sup>35</sup> Congress therefore adopted an amendment offered by Senator Arlen Specter (R-Pa.) and Representative Clarence D. Long (D-Md.) blocking one third, or \$21 million, of one of President Reagan's supplemental requests for El Salvador military aid until the Salvadoran government obtained convictions in the churchwomen case.<sup>36</sup>

The amendment succeeded for a variety of reasons. First, Congress wanted action on that particular case. The murders were especially disturbing, as the victims were female religious workers who had been raped and brutalized. The murders were also reported extensively in the United States press.<sup>37</sup> Even some members of Congress who generally favored President Reagan's policy in El Salvador were disturbed by this case.<sup>38</sup> Second, the amount of aid at risk gave the Salvadoran government a strong inducement to conduct a trial, without posing an immediate threat to the government's security. The Specter Amendment thus provided a realistic carrot and stick approach. By March 1984, a trial had been held, though with considerable United States involvement;<sup>39</sup> for the first time in Salvadoran history, members of the armed forces were convicted of political violence against civilians.<sup>40</sup>

Although these convictions were an important first step in curbing human rights abuses, the Specter Amendment was only a limited success. First, the circumstances of the case were unique. The case dealt with a privileged class of victim—United States citizens—and involved somewhat sensational facts. Second, responsibility for the violations was assigned no further up

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<sup>34</sup> See C. ARNSON, A. NEIER & S. BENDA, *supra* note 10, at 56.

<sup>35</sup> See DeWind & Kass, *Justice in El Salvador: A Report of a Mission of Inquiry of the Association of the Bar of the City of New York*, 38 REC. A.B. CITY N.Y. 112, 129 (1983).

<sup>36</sup> Act of Nov. 14, 1983, Pub. L. No. 98-151, 97 Stat. 970 (1983).

<sup>37</sup> See, e.g., N.Y. Times, Dec. 5, 1980, at A3, col. 3; L.A. Times, Dec. 5, 1980, at 1, col. 3; Chi. Tribune, Dec. 5, 1980, at 3, col. 1.

<sup>38</sup> See, e.g., *House Presidential Certification Hearings II*, *supra* note 8, at 336 (statement of Rep. Gilmer (R-N.Y.)).

<sup>39</sup> See N.Y. Times, May 25, 1984, at A11, col. 2.

<sup>40</sup> "Salvadoran judges said it was the first time a jury had convicted any member of the armed forces for a slaying with political overtones." *Id.* at A4, col. 12.



the military chain of command than enlisted men; no officers were punished.

The first qualification is important because further progress requires extension of protection to less privileged classes of victims. If one envisions a continuum of victims ranging from United States citizens at one end to socially important Salvadorans (for example, priests, urban union officials, important members of Duarte's Christian Democratic Party) to ordinary middle class Salvadorans down to peasants in the countryside, one would find that the last group is the most numerous, the most defenseless, and has suffered the most in the civil war.<sup>41</sup> In short, the group most urgently requiring protection is the one made up of those individuals who are lowest on the continuum.

The second qualification is important because further progress requires accountability at higher levels of the military when those levels are indeed responsible for the violations that occur. Some have argued that the Salvadoran military resists any punishment of its members.<sup>42</sup> A significant barrier to generally improving human rights protection in El Salvador is the difficulty of making individuals, including military officers, who are ultimately responsible for human rights violations, accountable for their actions. Human rights observers contend that in some cases, including the murder of Archbishop Romero, the direct responsibility lies with the high command, while in other cases lower officers are directly responsible with the high command giving tacit approval.<sup>43</sup>

### III. A PROPOSAL FOR ACTION SPECIFIC HUMAN RIGHTS LEGISLATION

Congress can assert more control over its efforts to demand respect for human rights without jeopardizing its concern for stability in the region by adopting action specific human rights legislation. Constructing such legislation requires that Congress choose a particular manifestation of progress and a particular aid package to be conditioned on that progress. In making the first choice, Congress can build on the Specter Amendment by

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<sup>41</sup> REPORT ON HUMAN RIGHTS, *supra* note 10, at 51.

<sup>42</sup> See, e.g., *Senate Hearing on Certification on Progress*, *supra* note 10, at 538 (statement of Michael Posner, Exec. Dir. Lawyers Comm. for Int'l Human Rights).

<sup>43</sup> See, e.g., N.Y. Times, May 24, 1984, at A11, col. 1; AMNESTY INTERNATIONAL, *supra* note 30, at 137 (1983).

identifying an objective that will both extend accountability further up the military chain of command and extend protection further down the social continuum described in Part II.

One objective that might meet these requirements would be to require the Salvadoran government to investigate a massacre that occurred in the Cabanas province in July 1984. According to accounts collected by the Archdiocese of San Salvador and by newspaper reporters, infantry troops swept through the area and left forty to sixty civilians dead, including men, women, and children.<sup>44</sup> An investigator for the Archdiocese brought back photographs that showed bodies burned, mutilated, and decapitated.<sup>45</sup> Survivor testimony named the army as the perpetrator, and later reports identified the United States trained Atlacatl Battalion as probably responsible.<sup>46</sup>

Some argue that the investigation of the Cabanas massacre has become a public test of President Duarte's will and ability to control the armed forces in El Salvador.<sup>47</sup> On August 27, 1984, Duarte ordered an investigation into the charges, although the investigator will be a military officer.<sup>48</sup> The investigator stated that he must move with "lead feet" for fear that the investigation will "tear apart the armed forces."<sup>49</sup> Such a beginning does not bode well for finding and punishing those responsible for the massacre.

To reinforce the power of Duarte's civilian government, and to further Congress's concern for human rights progress in the country, the United States should exert direct pressure on the Salvadoran military to complete an investigation, even though such an investigation could well implicate officers. The level of backing the United States provides Duarte in investigating this well-publicized, well-documented incident could have a great effect on Duarte's long-term credibility and on his control over the army. The United States thus has an independent reason to demand a complete investigation of the Cabanas province massacre, quite apart from the goal of reducing human rights abuses in the Salvadoran countryside. The prestige of a United States

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<sup>44</sup> See *Boston Globe*, Sept. 9, 1984, at 1, col. 5.

<sup>45</sup> The photographs are on file at Americas Watch, 36 West 44th St., New York, NY 10036. Telephone interview with Aryeh Neier, Vice Chairman, Americas Watch (Nov. 1, 1984).

<sup>46</sup> See *Boston Globe*, Sept. 9, 1984, at 1, col. 5.

<sup>47</sup> See *N.Y. Times*, Sept. 13, 1984, at A3, col. 1.

<sup>48</sup> See *Boston Globe*, Sept. 9, 1984, at 1, col. 5.

<sup>49</sup> See *id.*

supported civilian president is at stake, both inside and outside El Salvador. The identification and punishment of those responsible for the Cabanas massacre also provides an opportunity to discipline members of the military, perhaps including officers, for the murder of the most defenseless category of Salvadorans—the peasants in the countryside.

In choosing an appropriate military aid package to withhold pending punishment of the responsible individuals—the second prong of an action specific legislative approach—Congress must tread a fine line, withholding aid of sufficient importance to induce the armed forces to limit the internal loyalty code protecting brother officers, but not so important that its loss would jeopardize the government itself. One package that might meet these requirements is the administration's plan to build a second helicopter base in the eastern region of El Salvador, to continue delivery of UH-1H helicopters, and to deliver two C-47 airplanes.<sup>50</sup> Withholding this package pending the punishment of those responsible for the Cabanas massacre is especially appropriate because these weapons would leave civilian lives even more threatened than before.<sup>51</sup> If the Salvadoran government were to hold culpable officers responsible for a massacre like the one in Cabanas, it would provide some evidence that the Salvadoran army is ready to assume responsibility for the safety of civilians.<sup>52</sup>

#### IV. OBJECTIONS TO ACTION SPECIFIC HUMAN RIGHTS LEGISLATION

There are several possible objections to a proposal for action specific legislation. One general objection is that action specific conditions on military aid, whether tied to human rights or not, excessively limit the discretion of the President in conducting foreign policy. While a significant body of scholarship indicates

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<sup>50</sup> This plan was confirmed in a telephone interview with Charles Shapiro, U.S. Dep't of State (Nov. 1, 1984).

<sup>51</sup> See Uhlig, *Torpedoing Salvador's Talks*, N.Y. Times, Oct. 24, 1984, at A27, col. 2.

<sup>52</sup> The evidence would actually be quite tenuous. Since the Cabanas massacre was better documented than most, the lesson that Salvadoran officers will take from any convictions that follow might simply be to exercise more care in covering their tracks.

that legislation of this sort is constitutional,<sup>53</sup> this objection does implicate the wisdom of the policy. Some have argued that the Executive Branch makes better foreign policy decisions because it has more information and flexibility;<sup>54</sup> the Reagan Administration has argued that action specific legislation would unduly interfere with that decisionmaking.<sup>55</sup> If used appropriately, however, action specific legislation will have only a limited effect on presidential discretion. As noted earlier, Congress can limit its use of action specific conditions on military aid, attaching such conditions only where other measures have failed. Congress can continue to use general measures such as the "gross violations" rule or the certification process. By using action specific legislation only as a supplement to more general measures, Congress can leave the President's discretion in foreign policy matters largely intact.

A second potential objection is that this proposal would give the Salvadoran government an incentive to satisfy the aid conditions by punishing scapegoats rather than the actual offenders. If the Salvadoran army wants the helicopters, and it must have a conviction by a certain date to get them, then it might conduct a kangaroo court. The aid conditions should therefore require not only convictions, but also respect for due process standards. The convictions of the National Guardsmen for the murders of the American churchwomen is an apt example. There, the United States not only set standards, but also played an active role in the pretrial investigation and in the administration of the trial.<sup>56</sup> Although interfering with the integrity of another country's judicial system would not ordinarily be desirable, the Salvadoran judicial system at this time of internal disarray apparently has little integrity to lose. According to the U.S. State Department and independent human rights organizations, the

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<sup>53</sup> Congress has the power under the Constitution "to regulate commerce with foreign nations," U.S. CONST. art. I, § 8 cl. 3, and "to make rules for the government and regulation of the land and naval forces," *id.* cl. 14; see L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 114 (1972); Moeller, *Human Rights and United States Security Assistance: El Salvador and the Case for Country Specific Legislation*, 24 HARV. INT'L L.J. 95 (1983); Comment, *supra* note 3, at 176-78. *But see* Wallace, *The President's Exclusive Foreign Affairs Powers Over Foreign Aid* (pt. 1), 1970 DUKE L.J. 293 (arguing that it is unconstitutional for Congress to attach any conditions to foreign aid appropriations).

<sup>54</sup> See Comment, *supra* note 3, at 178-80, for a discussion of the relative merits of these contentions in the human rights field.

<sup>55</sup> See DEP'T STATE BULL., June 1984, at 79.

<sup>56</sup> See N.Y. Times, May 25, 1984, at A11, col. 2.

judicial system is virtually paralyzed.<sup>57</sup> Stephen Kass, speaking for the Association of the Bar of the City of New York, has testified that "the collapse of El Salvador's criminal justice system is general and pervasive,"<sup>58</sup> and Senator Christopher J. Dodd (D-Conn.) has declared that it "isn't a judicial system at all."<sup>59</sup> Far from interfering with its integrity, United States participation would probably improve the Salvadoran judiciary.

Finally, one could argue that the proposed legislation, by limiting the discretion of the Salvadoran army, could reduce the army's ability to pursue the counterinsurgency war against the guerillas. Limiting the discretion of the army, however, is precisely the purpose of the proposal: it is meant in the long term to eliminate certain unacceptable tactics used by an army supported by the United States government. The question of whether the utility of those tactics outweighs the losses inflicted on noncombatant civilians is debatable, perhaps, but in effect it has already been settled by the international law of warfare. The 1949 Geneva Conventions, to which the United States is a signatory, prohibit the murder, mutilation, or torture of civilian noncombatants, even in the absence of a declaration of war and even if the hostilities are confined to the territory of a single country.<sup>60</sup>

## V. CONCLUSION

Just as the presidential certification requirement permitted Congress to voice its concerns about human rights with more specificity than the general policy enunciated in section 502B of the Foreign Assistance Act, action specific conditions on military aid enable Congress to achieve greater specificity than the

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<sup>57</sup> While claiming that there had been some improvement, Ass't Sec'y of State Thomas Enders has testified that "[t]he basic issue in these cases is the nonfunctioning in most of its aspects of the Salvadoran judiciary system." *House Presidential Certification Hearings II*, *supra* note 8, at 68. For the views of representative human rights organizations, see Charney, *Failed Justice in El Salvador: Most Murder Cases End in Acquittals; Trial Procedures, Juror Alienation Blamed*, L.A. Daily J., Mar. 13, 1984, at 4, col. 3; *Visiting Lawyers Find Collapse of Justice in El Salvador*, N.Y.L.J., Feb. 17, 1983, at 1, col. 2; *House Presidential Certification Hearings II*, *supra* note 8, at 105 (statement of William Doherty, Exec. Dir., American Institute for Free Labor Development); *id.* at 381 (statement of Morton Halperin, Dir. Center for Nat'l Security Studies).

<sup>58</sup> *Senate Hearing on Certification on Progress*, *supra* note 10, at 480.

<sup>59</sup> *House Presidential Certification Hearings I*, *supra* note 8, at 59.

<sup>60</sup> Geneva Conventions, Aug. 12, 1949, art. 3, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

certification requirement. They also remove Congress from the quandary of either withholding all military aid, a choice inconsistent with its security objectives, or continuing to stand aside while human rights violations persist. Congress now has an opportunity to build on the tentative results of the Specter Amendment, not only increasing the accountability of Salvadoran military officers, but also extending greater protection to the least privileged members of Salvadoran society. In time, Congress could extend action specific legislation to other countries receiving United States aid, if and when Congress determines that more general human rights policies have failed to meet their objectives.