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ARGENTINA AND CHILE

THE INTERNATIONAL COMMUNITY'S RESPONSIBILITY REGARDING CRIMES AGAINST HUMANITY

TRIALS IN SPAIN FOR CRIMES AGAINST HUMANITY UNDER MILITARY REGIMES IN ARGENTINA AND CHILE

ARGENTINA

During the seven years of intense repression which followed the coup of 24 March 1976, thousands of people fell victim to human rights violations. The military junta had announced its intention to stamp out subversion at any cost, illustrating its determination by resorting to torture, extrajudicial execution and "disappearance". Task forces were set up, drawing men from all the services, whose job was to capture and interrogate all known members of "subversive organizations", their sympathizers, associates, relatives or anyone perceived as a possible government opponent. Congress was dissolved, the state of siege imposed

by the previous government was renewed, legal guarantees were disregarded and formal arrests were replaced by abductions. The number of "disappearance" cases increased dramatically.

According to General Jorge Rafael Videla, President and Commander of the Armed Forces of the first military junta (March 1976 to March 1981), "A terrorist is not just someone with a gun or bomb but also someone who spreads ideas that are contrary to Western and Christian Civilization"¹. The definition of "the enemy" became broader and broader. Operations had to be carried out in secret if the mission was to be achieved without incurring international condemnation. A long-term policy of planned "disappearances" was put in place.

However, despite widespread fear and press censorship, action against the "disappearances" in Argentina began to emerge as groups of relatives came together, united in their desperation and frustration at the lack of official information. As of 1978, individual and collective petitions to the courts and to the Supreme Court continued to be rejected. That same year, 2,500 "disappearances" were reported publicly. With time, new evidence came to light: released prisoners gave statements about secret detention camps and there were reports of unmarked graves being discovered in cemeteries around Argentina. Several governments began to make persistent enquiries about the fate of their "disappeared" citizens in Argentina. In the face of national and international outrage, the government admitted that excesses had occurred, but claimed that the actions of members of the armed forces fighting the "war against subversion" were acts carried out in the line of duty.

¹ *The Times*, London, 4 January 1978.

The state of siege was lifted at the end of October 1983 and free elections were held. On 10 December 1983, the civilian government of President Raúl Alfonsín took office and created the National Commission on Disappeared People (CONADEP), requesting it to "clarify the tragic events in which thousands of people disappeared" ².

The CONADEP report, *Nunca Más* (Never Again), published in November 1984, documented 8,960 cases of "disappearances" and indicated that the true figure could be even higher. It listed 340 clandestine detention centres in Argentina and concluded that the armed forces had used the State's security apparatus to commit human rights violations in an organized manner. It rejected the claim that torture and forced disappearances were exceptional excesses. CONADEP concluded that human rights violations including forced disappearances and torture were carried out by the military regime as part of a widespread methodology of repression introduced by the Argentinian Armed Forces enjoying absolute control over the State's resources³. The vast majority of "disappearance" cases in Argentina remain unresolved, the fate of the victims has not been clarified and those responsible remain at large. The principles of truth and justice have yet to be honoured.

² CONADEP was created by Decree 187 of 15 December 1983.

³ *Comision Nacional sobre la Desaparicion de Personas, Nunca Mas - Informe de la Comision Nacional sobre la desaparicion de Personas*, Editorial Universitaria de buenos Aires, Argentina, 1984, p.479. English translation, *Nunca Más (Never Again), a Report by Argentina's National Commission on Disappeared People*, published in 1986 by Faber and Faber in association with Index on Censorship, page 447.

"We waged this war with our doctrine in our hands, with the written orders of each high command," declared General Santiago Omar Riveros, head of the Argentine delegation, in a speech given to the Inter-American Defence Junta on 24 January 1980⁴. The "war" waged by the Argentinian Armed Forces against the population unleashed unprecedented violence and an atmosphere of terror. The State's machinery was placed at the service of crimes against the population: military headquarters and security force installations became centres for forced disappearance, torture and extrajudicial execution. "Among the victims," said CONADEP, "are thousands who never had any links with such [subversive] activity but were nevertheless subjected to horrific torture because they opposed the military dictatorship, took part in union or student activities, were well-known intellectuals who questioned state terrorism, or simply because they were relatives, friends, or names included in the address book of someone considered subversive"⁵. Dr. Julio Strassera, the Prosecutor in the trial of the military junta commanders, concluded at the end of the trial that the acts committed by the Argentinian Armed Forces should be categorized as crimes against humanity. He described the years of military rule as a period of "state terrorism"⁶.

CHILE

11 September 1973 is a date fixed indelibly in the memory of the Chilean people. Almost 25 years later, the wounds inflicted during the period of military rule, which began on that date, have yet to heal. Chilean society is still divided as a result and the fate of thousands of victims of human rights violations remains unknown, though not forgotten.

⁴ Ibid. p. 2.

⁵ Ibid. p. 448.

⁶ Amnesty International, Argentina: The Military Juntas and Human Rights : Report of the Trial of the Former Junta Members - AI Index: AMR 13/04/87, 1987.

Following the bloody coup in September 1973, the military junta which seized power immediately embarked on a program of repression which alarmed the world. Constitutional guarantees were suspended through more than 3,500 decree laws and four "constitutional laws" passed over several years. Congress was dissolved and a country-wide state of siege declared, under which hundreds of people were detained and countless more extrajudicially executed, torture was used systematically and a state policy of "disappearance" put in place.

The fate of most of those who "disappeared" in Chile between 1973 and 1977 remains unknown. However, overwhelming evidence which has come to light over the years demonstrates that the "disappeared" were victims of a military government program of elimination of perceived opponents. In the course of a long search by their relatives, human remains have been discovered in clandestine graves and hundreds of former detainees have made statements confirming that the "disappeared" were held in detention centres. These detention centres and the police and military units to which they belonged have been identified. Furthermore, some former security force members have confessed to having participated in secret commando operations to eliminate political opponents.

Following the return to civilian rule in 1990, two bodies were created in different periods to gather information leading to the clarification of the truth about "disappearances", extrajudicial executions and deaths resulting from torture by state agents. In its final report, published when its mandate came to an end in 1996, the Reparation and Reconciliation Corporation, established in 1992 as a successor to the Truth and Reconciliation Commission (Rettig

Commission) set up by the administration of President Patricio Aylwin, officially documented 3,197 cases of victims of human rights violations.

The vast majority of those who abused their position in the State apparatus to order and carry out human rights violations under the government of General Augusto Pinochet (1973-1990) remain unpunished.

IMPUNITY AS STATE POLICY

Most of the human rights violations documented under military rule in Argentina (1976 -1983) and Chile (1973 - 1990), including thousands of cases of torture, extrajudicial execution and “disappearance”, have gone uninvestigated and unpunished. In 1978, the military government of General Augusto Pinochet decreed an amnesty (Decree 2191) aimed at shielding the perpetrators of human rights violations committed between 11 September 1973 and 10 March 1978 from prosecution. This measure was declared constitutional by the Supreme Court of Justice. Although several cases are still pending before military and civilian courts, the amnesty law is still being applied.

Following the example of the Chilean military, the military regime in Argentina issued an amnesty law⁷ in 1983 so as to ensure impunity for its crimes. However, with the return to civilian rule later that year, the law was repealed and the military junta commanders who had ruled Argentina were ordered to stand trial, as were other members of the military responsible for human rights violations. Nine military

⁷ Law 22,924 - 22 September 1983.

commanders were prosecuted. It was a remarkable trial, in which the Prosecutor's office laid bare the pattern of human rights violations committed under military rule. Following an intricate appeals process, five commanders were given prison sentences in 1985. Charges were also brought against other members of the military. Argentinian society's quest for justice suffered a major setback when the government of President Raúl Alfonsín passed the "Full Stop" and "Due Obedience" laws in 1986 and 1987 respectively. The government of President Carlos Menem subsequently granted a pardon to members of the military implicated in human rights violations.

But Argentinian and Chilean society has by no means given up the struggle for truth and justice. In Argentina as in Chile, efforts to keep judicial cases open, to clarify the fate and whereabouts of the "disappeared" and to bring to justice those responsible for human rights violations, as well as the recent repeal of the "Full Stop" and "Due Obedience" laws, all bear witness to society's determination to keep alive the struggle for truth and justice.

THE OBLIGATION TO IMPART JUSTICE

International law imposes various human rights obligations on States: one of them is the duty to guarantee the effective protection of human rights. As guarantor of the rights of individuals, the State has an obligation to investigate violations, prosecute and punish perpetrators, provide reparation to the victims and clarify the truth about what happened. As the UN Special Rapporteur on extrajudicial, summary or arbitrary executions has made clear, "Governments are obliged under international law to carry out exhaustive and impartial investigations

into allegations of violations of the right to life, to identify, bring to justice and punish their perpetrators, to grant compensation to the victims or their families, and to take effective measures to avoid future recurrence of such violations. The first two components of this fourfold obligation constitute in themselves the most effective deterrent for the prevention of human rights violations... [T]he recognition of the right of victims or their families to receive adequate compensation is both a recognition of the State's responsibility for the acts of its organs and an expression of respect for the human being. Granting compensation presupposes compliance with the obligation to carry out an investigation into allegations of human rights abuses with a view to identifying and prosecuting their perpetrators. Financial or other compensation provided to the victims or their families before such investigations are initiated or concluded, however, does not exempt Governments from this obligation"⁸.

There can be no doubt that there exists an obligation to punish perpetrators of human rights violations. The Human Rights Committee of the United Nations has affirmed that a "State party is under a duty [...] to prosecute criminally, try and punish those held responsible for [forced disappearances and extrajudicial executions]. This duty applies a fortiori in cases in which the perpetrators of such violations have been identified"⁹. The UN Committee against Torture has considered that, as regards torture, this obligation exists regardless of whether a State has ratified the UN Convention against Torture, as there exists "a general rule of international law which should oblige all States to take

⁸ UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Report to the Commission on Human Rights, doc. E/CN.4/1994/7, paras. 688 and 711.

⁹ Human Rights Committee, decision on the case of *Nydia E. Bautista*, 27 October 1995, Communication 563/1993, doc. CCPR/C/55/D/563/1993, para 8.6 and decision on the case of *Jose Vicente Villafañe and others*, 29 July 1997, Communication 612/1995, doc. CCPR/C/60/D/612/1995, para 8.8.

effective measures to prevent torture and to punish acts of torture", recalling the principles of the Nuremberg judgement and the Universal Declaration of Human Rights¹⁰.

¹⁰ UN Committee against Torture, decision of 23 November 1989, Communication Nos. 1/1988, 2/1988 and 3/1988, Argentina, decisions of November 1989, para 7.2.

This obligation includes the duty of the State to exercise its jurisdiction: those alleged responsible for human rights violations should be investigated, tried and punished if found guilty. A State incurs international responsibility if it does not comply with this obligation. This principle was established early in the development of international law, one of the first jurisprudential precedents dating back to 1925¹¹. As was described by the United Nations Observer Mission in El Salvador, "State responsibility can arise not only from a lack of vigilance with regard to the prevention of harmful acts but also from a lack of diligence in prosecuting perpetrators and in applying the necessary civil penalties."¹²

The State's duty to impart justice is anchored not just in treaty law but in the justiciable nature of human rights. A right whose transgression cannot be judged before the courts is an imperfect right. Human rights, by contrast, are basic rights. Thus any legal order based on human rights must provide for their justiciability. To deny legal protection of these rights would undermine the very notion of the rule of law. The UN Special Rapporteur on the right to restitution, compensation and rehabilitation has stated that any judicial system which seeks to protect the rights of victims cannot remain passive and indifferent to the flagrant crimes committed by perpetrators of human rights abuses.¹³

*The obligation to punish those responsible for violations of fundamental rights is expressed in international criminal law in the *aut dedere aut judicare* rule, according to which a State must either try those responsible or extradite them so that they can be tried elsewhere. Furthermore, this international obligation must be incorporated in good*

¹¹ Nations Unies, *Recueil de sentences arbitrales*, vol. II, pp. 615 to 742.

¹² United Nations Observer Mission in El Salvador, ONUSAL, Report of 19 February 1992, doc. A/46/876 S/23580, para 29.

¹³ UN Special Rapporteur on the right to restitution, compensation and rehabilitation, doc. E/CN.4/Sub.2/1992/8, para 5.5.

faith into domestic law¹⁴. The Commission on Human Rights of the United Nations has repeatedly drawn attention to this obligation in several resolutions concerning forced disappearances¹⁵.

For these reasons, the amnesty laws and pardons issued in Argentina and Chile contravene international law. This has been explicitly affirmed by the Human Rights Committee of the United Nations and the Inter-American Commission on Human Rights of the Organization of American States. The Human Rights Committee stated that the “Full Stop” and “Due Obedience” laws deny victims of human rights violations their right to an effective remedy and as such they violate several rights recognized in the International Covenant on Civil and Political Rights and contribute to “a climate of impunity”¹⁶. The UN Committee against Torture concluded that, although “it was a democratically elected post-military authority that enacted the Punto Final and the Due Obedience Acts... the Committee deems [these laws] to be incompatible with the spirit and purpose of the Convention [against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment]”¹⁷.

¹⁴ Bassiouni, Cherif, “Les états d’urgence et d’exception: les violations des droits de l’homme et l’impunité sous couvert du droit”, in Droits intangibles et états d’exception, Ed. Bruylant, Bruxelles, 1996.

¹⁵ Commission on Human Rights of the United Nations, Resolutions 1994/39, para 15 and 1995/38, para 13.

¹⁶ Human Rights Committee, “Final observations - Argentina”, UN document CCPR/C/79/Add. 46, 5 April 1995, para 10.

¹⁷ Committee against Torture, Communication N°. 1/1988, 2/1988 and 3/1988, Argentina, decision of 23 November 1989, para 9.

For its part, the Inter-American Commission on Human Rights has stated that the Full Stop and Due Obedience laws in Argentina, as well as the pardon issued under Presidential Decree No. 1002 of 7 October 1989, were incompatible with the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights¹⁸. The Inter-American Commission on Human Rights also considered that the 1978 amnesty, granted under Decree-Law 2191 by the government of General Augusto Pinochet, was incompatible with the American Convention on Human Rights¹⁹.

This position is supported by the Vienna Declaration and Programme of Action, adopted by the 1993 World Conference on Human Rights, which calls on governments to “abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law”²⁰. The Conference also reaffirmed that “it is the duty of all States, under any circumstances, to make investigations whenever there is reason to believe that an enforced disappearance has taken place on a territory under their jurisdiction and, if the allegations are confirmed, to prosecute its perpetrators”²¹. Article 18 of the UN Declaration on the Protection of All Persons from Enforced Disappearance²² states that perpetrators or suspected perpetrators of enforced disappearance shall not benefit from any special amnesty law or similar measure that might have the effect of exempting them from any criminal proceedings or sanction.

¹⁸ Report No. 28/92, Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311, Argentina, 2 October 1992.

¹⁹ Report No. 36/96, Case 10.843, Chile, 15 October 1996

²⁰ UN Document, A/CONF.157/23.

²¹ Ibid

²² This Declaration was adopted by the General Assembly in Resolution 47/133 of 18 December 1992.

NUREMBERG LAW

The crimes committed in Argentina and Chile under the military regimes of the 1970s and 1980s were not only human rights violations. Because of their scale and gravity, the human rights violations documented in Argentina and Chile constitute crimes against humanity under international law.

The need to protect individuals against acts which go against the most basic standards of civilized human coexistence has led to the search for concepts and mechanisms for confronting the cruellest and most inhumane attacks on the human being²³. From this search to protect individuals against acts which shocked humanity's moral conscience there emerged the concept of crimes against humanity. As the concept emerged, so did the notion that these acts should be brought to justice by the international community acting in concert.

²³ Amnesty International, International Criminal Court – Making the right choices, AI Index: IOR 40/01/97, January 1997, Part I, p. 26 and following.

The horrors of the European wars of the nineteenth century and those of the First World War served to increase awareness that certain acts went against the very essence of being human – acts which today would be considered crimes against humanity – and should therefore be internationally proscribed and those responsible tried before international tribunals²⁴. There were significant developments in the search for more effective protection of human beings in situations of war. An important landmark was the Martens clause, adopted by the First Hague Peace Conference of 1899 as part of the Preamble to the Hague Convention Respecting the Laws and Customs of War on Land²⁵. Today, the Martens clause has been incorporated practically without modification into a wide variety of international humanitarian law standards.

But it was after the Second World War, with the creation of the International Military Tribunal at Nuremberg, that the concept of

²⁴ In January 1872 the Swiss Gustav Moynier proposed the creation of an International Criminal Court to deter violations of the Geneva Convention of 1864 and to try those responsible for the atrocities committed by both sides in the Franco-Prussian War of 1870. A Declaration by France, Great Britain and Russia on 24 May 1915 stated that the massacres of Armenians in Turkey by the Ottoman Empire were “crimes against humanity and civilization for which all members of the Turkish Government will be held responsible together with its agents implicated in the massacres.” The 1919 Peace Conference Commission made clear that these crimes included murders and massacres, systematic terrorism, killing of hostages, torture of civilians, rape and abduction of women and girls for the purpose of enforced prostitution, among others. Following the First World War, the Treaty of Versailles provided for the setting up of a special international tribunal to try the Kaiser for the “supreme offence against international morality and the sanctity of treaties”, as well as providing for the creation of Allied military tribunals to try others for war crimes.

²⁵ This clause reads, “Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that, in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.”

crimes against humanity began to be defined. François de Menthon, France's Prosecutor General at the Nuremberg trial, defined them as crimes against the human condition and as a capital offence against humanity's conscience and awareness of its own condition²⁶.

The Statute of the Nuremberg Tribunal classed the following as crimes against humanity: murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the Second World War, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal. Moreover, the Statute established one of the essential elements of crimes against humanity: that it was a crime whether or not it constituted a violation of the domestic law of the country where perpetrated.

²⁶ Dobkine, Michel, Crimes et humanité - extraits des actes du procès de Nuremberg - 18 octobre 1945/ 1er. Octobre 1946, Ed. Romillat, Paris 1992, pp. 49-50.

The concept of crimes against humanity reflects the international community's acknowledgement that "there are elementary dictates of humanity to be recognized under all circumstances"²⁷ and is today recognised as a principle of international law. This was confirmed by the UN General Assembly in Resolution 95 (I) of 11 December 1946. The concept of crimes against humanity seeks to protect in international criminal law a nucleus of fundamental rights which States have a binding international obligation to safeguard. As affirmed by the International Court of Justice in the *Barcelona Traction* judgement, "In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*"²⁸. This means that these obligations are binding on all States and can be invoked by any State.

It should be noted that crimes against humanity are crimes under international law. As pointed out by the International Law Commission of the United Nations, a grave and large-scale violation of an international obligation of crucial importance for the protection of the human being, such as those prohibiting enslavement, genocide and apartheid, is an international crime²⁹. This means that its content, nature and conditions of responsibility are established by international law regardless of any related provisions in domestic law. There are therefore no legal grounds for allowing violations of fundamental human rights, such as those involved in crimes against humanity, to go untried and unpunished. The international obligation of States to try and punish those responsible for crimes against humanity is a binding norm of

²⁷ Final Report of the Commission of Experts for the investigation of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed on the territory of former Yugoslavia, UN document S/1994/674, 27 May 1994, para. 73.

²⁸ International Court of Justice, ruling of 5 February 1970 in the case of *Barcelona Traction Light and Power Company*, para. 32, in *Recueil des Arrêts de la Cour Internationale de Justice - 1970*, French original, author's translation.

²⁹ International Law Commission, Annual Report of the International Law Commission 1976, Vol. II, Part 2, p. 89.

international law belonging to *jus cogens*³⁰ – norms recognized as peremptory by the international community of nations.

CRIMES AGAINST HUMANITY

Although subsequent legal instruments have developed the definition of crimes against humanity, there is widespread agreement about the type of inhumane acts which constitute crimes against humanity, which are essentially the same as those recognized almost eighty years ago. In light of current developments in international customary and treaty law, acts such as genocide, apartheid and enslavement constitute crimes against humanity. The definition is also considered to include the systematic or large-scale practice of murder, torture, enforced disappearance, arbitrary detention, enslavement and forced labour, persecutions on political, racial, religious or ethnic grounds, rape and other forms of sexual abuse, arbitrary deportation or forcible population transfers³¹.

³⁰ Although opinions differ over this doctrine, *jus cogens* can be said to consist of the body of norms and principles which are essential to civilised life between nations, peoples and individuals. *Jus Cogens* norms are binding and cannot be set aside or derogated from by international treaty.

³¹ See International Law Commission, Report of the International Law Commission, UN Document, Supplement N° 10 (A/51/10), p. 100 and ff. and Amnesty International, International Criminal Court – Making the Right Choices, Part I, January 1997, AI Index: IOR 40/01/97.

Many of these crimes against humanity have been the subject of international treaties, such as the International Convention on the Suppression and Punishment of the Crime of Apartheid and the Convention on the Prevention and Punishment of the Crime of Genocide. In contrast to the definition of genocide and the crime of apartheid, the definition of crimes against humanity appears in several instruments and has undergone clarificatory modifications. The systematic practice of forced disappearance of persons is considered a crime against humanity in the UN Declaration on the Protection of All Persons from Enforced Disappearance and the Inter-American Convention on the Forced Disappearance of Persons. The same opinion was expressed by the General Assembly of the Organization of American States³² and the Parliamentary Assembly of the Council of Europe³³. Similarly, torture is considered an “offence against human dignity” by the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The European Court of Human Rights has also considered that the systematic practice of torture constitutes a crime against humanity³⁴.

Crimes against humanity have several essential characteristics, by virtue of their nature as crimes against the inherent dignity of the human being. They are crimes to which statutory limitations do not apply³⁵. They are imputable to the individual who commits them, whether or not an official or agent of the State. In accordance with the principles set down in the Charter of the Nuremberg Tribunal, any person who commits an act of this nature is subject to international

³² Resolutions 66 (XIII-/83) and 742 (XIV-0/84).

³³ Resolution 828 of 26 September 1984.

³⁴ Decision N° 163 of 18 January 1978.

³⁵ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted by the UN General Assembly in Resolution 2391 (XXII) of 1968.

criminal responsibility and sanction. Similarly, the fact that an individual acted as head of State or a State authority does not exempt him or her from responsibility. Neither can he or she be exempt from criminal responsibility for having acted in compliance with superior orders: this means that the due obedience defence cannot be invoked to evade punishment for these crimes. Those known or suspected to have committed a crime against humanity cannot be granted territorial asylum nor refuge³⁶.

As an international crime, the nature and conditions of responsibility of crimes against humanity are set down in international law independently of any related provisions in domestic law. The fact that a State's domestic law imposes no penalty for an act which constitutes a crime against humanity does not absolve the perpetrator from international criminal responsibility. Article 15 of the International Covenant on Civil and Political Rights states that, although no one can be convicted of "any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed", a person may be tried and convicted for "any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations". The European Convention on Human Rights contains a similar clause. Therefore the absence of provisions in domestic criminal law prohibiting crimes against humanity, which are covered by these international legal principles, cannot be invoked as an obstacle to the trial and punishment of perpetrators.

³⁶ Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity (Principle 5), adopted by Resolution 3074 (XXVII) on 3 December 1973 by the UN General Assembly; Convention relating to the Status of Refugees (Article 1.F) and Declaration on Territorial Asylum (Article 1.2).

THE INTERNATIONAL SUPPRESSION OF CRIMES AGAINST HUMANITY

Perhaps one of the major consequences of the fact that these crimes constitute an offence against the human condition and the conscience of humanity is that crimes against humanity are subject to the principle of universal jurisdiction. This means that all States are obliged to prosecute the perpetrators of these crimes, regardless of where they were committed or the nationality of the perpetrator or victims. There exists an international obligation to investigate, try and punish those guilty of crimes against humanity, reflecting the international community's interest in suppressing this category of crimes. As stated by the French Court of Cassation during the trial of Klaus Barbie for crimes against humanity, this category of crimes must be punished internationally and so knows no borders. This has been the reason for the establishment of the Ad Hoc International Tribunals for former Yugoslavia and Rwanda and the creation of the International Criminal Court.

One of the means of putting the principle of universal jurisdiction into effect, and thus making progress in the international suppression of crimes against humanity, is through international criminal courts. Their creation has been foreseen since 1948, when the Convention on the Prevention and Punishment of the Crime of Genocide was adopted. Similarly, the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973 foresaw the setting up of an international court. An international convention to establish this

Court, whose jurisdiction would include crimes against humanity, is currently in the process of being adopted.

The principle of universal jurisdiction can be put into effect through the rule of *aut dedere aut judicare*, according to which the State where the perpetrator of a crime against humanity is to be found should extradite him or her to the country where the crime was committed or else try him or her for the crime. As well as being a recognised principle of international law, several international treaties explicitly provide for this³⁷.

³⁷ See for example the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 5), the Inter-American Convention for the Prevention and Punishment of Torture (Article 12) and the Inter-American Convention on the Forced Disappearance of Persons (Article IV). The Geneva Conventions of 1949 and their Additional Protocol I, contain similar provisions.

But the international suppression of crimes against humanity can also be effected through the action of national courts of a third State, even if the crime was not committed in that country and neither the perpetrator nor the victims were nationals of the country. The Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity³⁸ provide that “[C]rimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment”³⁹. Although these same principles established that those responsible for crimes against humanity should be tried “as a general rule in the countries in which they committed those crimes”, this does not eliminate the possibility of trying the perpetrators in the courts of other countries. Moreover, Principle 2 establishes that States have the right to try their own nationals for crimes against humanity, making it possible for a State to try a person for a crime against humanity committed in another State. Article 5 of the International Convention on the Suppression and Punishment of the Crime of Apartheid states that the courts of any State can try a perpetrator of the crime of apartheid if it has jurisdiction over this person. Jurisdiction may arise from a provision of domestic law allowing the punishment of crimes of international significance, even where these were committed abroad and did not involve nationals of the State. Several countries, including Spain, have legislation including provisions of this kind⁴⁰.

This last means of putting into effect the international suppression of crimes against humanity is referred to in the draft Body

³⁸ These principles were adopted by UN General Assembly Resolution 3074 (XXVII) of 3 December 1973.

³⁹ Principle 1.

⁴⁰ Examples include the Penal Codes of Venezuela (Article 4), El Salvador (Article 9) and Colombia (Article 15).

of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity⁴¹. Specifically, Principle 20 states that foreign courts should have jurisdiction over crimes against humanity, whether by virtue of a treaty in force or a provision of domestic law establishing extraterritorial jurisdiction over serious crimes under international law. Similarly, the Body of Principles states that, “States may for efficiency’s sake take measures in their internal legislation to establish extraterritorial jurisdiction over serious crimes under international law committed outside their territory which by their nature are within the purview not only of internal criminal law but also of an international punitive system to which the concept of frontiers is alien.” This approach is not new. Grotius, consider one of the founding fathers of international law, pointed out that if kings and similar figures had the right to punish offences other than those committed against them or their subjects, they were all the more justified in punishing offences which, though not affecting them directly, were in clear breach of natural law or the law of the international community of nations⁴².

The amnesty laws and pardons which have granted impunity to Argentinian and Chilean military perpetrators of these crimes cannot be invoked as an obstacle to their prosecution and punishment. Firstly, because such impunity measures have denied the victims the right to a judicial remedy and to know the truth and have been judged to be incompatible with the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights.

⁴¹ This Body of Principles is currently before the UN Commission on Human Rights and has been published in UN document E/CN.4/Sub.2/1997/20/Rev.1.

⁴² H. Grotius, *Le droit de la guerre et de la paix*, Pradier-Fodère, Paris 1867.

Secondly, in view of the precedence of international law over domestic law⁴³, domestic legal measures such as amnesties or pardons have no legal effect on the international obligations of States to try and punish the perpetrators of crimes against humanity. In addition, the standards relating to crimes against humanity have the status of *jus cogens* and thus cannot be contradicted in domestic law: unilateral measures by States aimed at nullifying the provisions of these standards within the State's own jurisdiction therefore have no legal validity. Nor can they be used to prevent action by other States or by the international community as a whole.

Thirdly, the prohibition of double jeopardy (being tried twice for the same crime- also known as the principle of *non bis in idem*), which is set down in Article 14.7 of the International Covenant on Civil and Political Rights, only proscribes re-trials by courts of the same State. The scope of this principle was clearly set out in the drafting record of the Covenant⁴⁴ and has been explicitly endorsed by the Human Rights Committee of the United Nations⁴⁵. The International Law Commission has observed that "international law [does] not make it an obligation for States to recognize a criminal judgement handed down in a foreign State"⁴⁶. However, the Commission was concerned that a person who has been tried fairly, convicted and punished proportionately to the crime should not be punished twice for the same crime, as this "would exceed the requirements of justice"⁴⁷. It has asserted the need to recognise the non-absolute applicability of the principle of *non bis in idem*, stating that this principle cannot be invoked under international criminal law when a perpetrator of a crime against humanity has not been duly tried or punished for the crime, where the justice system has not functioned independently or impartially or where the proceedings were designed to shield the accused from international criminal responsibility. The International Law Commission concluded that in such cases, "the international community should not be required to recognize a decision that is the result of such a serious transgression of the criminal justice process"⁴⁸.

The suppression of crimes against humanity is inspired by the very notion of justice. Therefore the steps taken to achieve this goal should under no circumstances undermine procedural guarantees and the right to a fair trial.

THE TRIALS IN SPAIN

⁴³ This principle is also enshrined in Article 27 of the Vienna Convention on the Law of Treaties, ratified by both Argentina and Chile in 1972 and 1981 respectively.

⁴⁴ Marc J. Bossuyt, *Guide to the "Travaux preparatoires" of the International Covenant on Civil and Political Rights*, Dordrecht, Martinus Nijhoff Publishers, 1987, pp. 316-318.

⁴⁵ Human Rights Committee, Communication No. 204/1986, decision of 2 November 1987.

⁴⁶ International Law Commission, *Report of the International Law Commission's 48th session - 6 May to 26 July 1996*, supplementary document No. 10 (A/51/10), p. 67.

⁴⁷ *Ibid.* p68

⁴⁸ *Ibid.* p. 70.

There can be no doubt that the human rights violations documented in Argentina and Chile during the period of military rule constitute crimes against humanity. It is also undeniable that the armed forces of both countries implemented systematic and large-scale repression, exerting absolute control over the resources of the State and using these to commit human rights violations, passing repressive laws, denying victims judicial remedies, using the judicial system to persecute opponents, placing society in a situation of total defencelessness and generating an atmosphere of terror among the population. One analysis of events in Argentina between 1976 and 1983 concluded that “the criminal exercise of the supreme power of the State, free of any kind of control and by means of an organized system backed by the highest levels of State, is what has come to be known as State Terrorism”⁴⁹.

The trials which have opened in Spain for crimes against humanity committed in Argentina and Chile under the military governments of 1976 to 1983 and 1973 to 1990 respectively, represent an important step forward in ensuring that these crimes against the conscience of humanity do not go unpunished. As affirmed by the Prosecutor in the trial of Klaus Barbie⁵⁰, crimes against humanity are the negation of humanity and seek to set certain individuals apart from the rest of the human community, denying that the victims are human beings. Another statement made during that trial goes to the heart of the issue: “the whole of humanity is the plaintiff here today”⁵¹. The entire human community is the aggrieved party in this type of crime.

The Spanish courts are empowered to pursue these crimes and to exercise jurisdiction over them. The Organic Law of the Judiciary and the Spanish Penal Code contain provisions authorizing the Spanish courts to try crimes against humanity committed in Argentina and Chile. The results of these Spanish judicial initiatives will have enormous value in the suppression of crimes against humanity and could set an important precedent in the struggle against impunity which the international community must continue to wage. Rather than hindering the process, the Argentinian and Chilean authorities should comply with their obligation to cooperate with these initiatives and ensure that those responsible for crimes against humanity are brought to justice.

⁴⁹ Caiati, M.C. and Frontalini, D., *El mito de la guerra sucia*, ediciones CELS, Buenos Aires, 1984, p. 83.

⁵⁰ Pierre Truche, “La notion de crime contre l’humanité”, in *Esprit* magazine, Paris, May 1992, pp. 67 and ff.

⁵¹ Statement by lawyer R. Amselem, in *Le Monde*, Paris, 3 July 1987, p. 12.

