ARGENTINA

Cases of "disappeared" facing judicial closure in Germany

INTRODUCTION

In Nuremberg, the *Coalition against Impunity - Truth and Justice for the German "disappeared" in Argentina, (Coalition),* has been working during the last two years to bring before the German justice the cases of victims of "disappearances" of German origin in Argentina. The Coalition was founded in Germany in March 1998 as an umbrella organization which includes lawyers, and national and international non-governmental organizations. They work for the clarification of the human rights violations committed in Argentina against German citizens and people of German descent during the military government (1976-1983), and to bring those found responsible to trial in Germany. Non-governmental human rights organizations in Argentina have also joined the efforts of the Coalition.

According to information provided by the Coalition there are 85 victims of "disappearances" who are German citizens or of German descent. Most of those cases are known to Amnesty International and have been included in external documentation published by the organization[1].

[1]See: The "Disappeared" of Argentina -List of cases reported to Amnesty International -November 1974 -December 1979", AI Index: AMR 13/06/80 of March 1980.

The initial action was undertaken on behalf of 10 cases submitted to the Nuremberg-Furth Chief Prosecutor[2]. A new case was included in March 2000 and currently 11 cases have been submitted. (See Appendix I for the full list). In October 1999, acting at the request of Argentine relatives of the victims, two German lawyers visited Argentina and filed criminal complaints against 41 former Argentine high rank officers, including former presidents of the military junta Jorge Rafael Videla and Leopoldo Fortunato Galtieri. Although German law excludes trials *in absentia* the court may decide to request the detention of the accused. However, on 3 February 2000 the Nuremberg-Furth Chief Prosecutor informed the relevant lawyer of his intention to close the four "disappeared" cases submitted for prosecution in the first half of 1999. The date initially set for the submission of arguments and additional information by the lawyer was extended until the end of March 2000 and subsequently left open.

FOUR "DISAPPEARED" CASES AND THE NUREMBERG PROSECUTOR:

The "disappeared" victims affected by the possible closure of the cases are: **Juan Miguel Thanhauser**, **Leonor Gertrudis Marx**, **Walter Claudio Rosenfeld** and **Alicia Nora Oppenheimer[3].** They are all children of Jewish German parents who had to leave Germany during the Nazi period.

The main argument of the Chief Prosecutor when considering the closure of the cases has been that the four victims are not German nationals and their cases do not satisfy the requirements of the German Penal Code and the Penal Procedure Code[4] and therefore their cases do not fall within German jurisdiction. While the German nationality of the parents was lost when they had to leave Germany, it was reinstated after 1945, although in the case of their descendants they had to expressly request it. This argument had already been forwarded by the Federal Prosecutor's office[5] to the Federal Supreme Court [6] in August 1999. On 20 October 1999 the Federal Supreme Court, in spite of the

[2]German original: *Staatsanwaltschaft Nurnberg-Furth, Gandpair Oberstaatsanwalt*. Spanish translation: *Jefe Fiscal Fiscalia Nuremberg-Furth*

[3] The "disappeared" victims affected by the possible closure of the cases are : Juan Miguel Thanhauser "disappeared" on 18 July 1978,(23 years old); Leonor Gertrudis Marx "disappeared" on 21 August 1976,(28 years old); Walter Claudio Rosenfeld "disappeared" on 20 October 1977 (21 years old) and Alicia Nora Oppenheimer "disappeared" on 31 July 1976 (22 years old) .

[4]German original: *Strafgesetzbuch* and *Strafprozessordnung*. Spanish translation: *Código Penal Alemán* and
Código de Procedimiento Penal

[5]German original: *Der Generalbundesanwalt*. Spanish translation: *Fiscalia General*

[6]German original: *Bundesgerichtshof*. Spanish translation: *Corte Suprema Federal*

argument by the Federal Prosecutor's Office, stated that the lack of German jurisdiction, according to Article 13 of the Penal Procedure Code, was not established without doubt and forwarded the four cases to the Regional Prosecutor of Nuremberg-Furth for investigation and prosecution.

ARGENTINA - BACKGROUND

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"[7]. 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

[7] The Times, London, 4 January 1978.

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.

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" [8].

[8] CONADEP was created by Decree 187 of 15 December 1983.

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 resources[9]. 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.

"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 1980 [10]. 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,

[9] *Comisión Nacional sobre la Desaparición de Personas, Nunca Más - Informe de la Comisión Nacional sobre la desaparición 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.

[10] Ibid. p. 2.

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"[11]. *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"*[12].

NUREMBERG LAW

The crimes committed in Argentina under the military government (1976 to 1983) were not only human rights violations. Because of their scale and gravity, the human rights violations documented in Argentina constitute crimes against humanity under international law.

[11] Ibid. p. 448.

[12] 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.

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 being[13]. 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.

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 tribunals[14]. There were significant developments in the

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

[14] 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 "crímes 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.

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 Land[15]. Today, the Martens clause has been incorporated practically without modification into a wide variety of international humanitarian law standards.

[15] 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."

But it was after the Second World War, with the creation of the International Military Tribunal at Nuremberg, that the concept of 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 condition[16].

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.

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"[17] 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

[16] 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.

[17] 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.

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*" [18]. This means that these obligations are binding on all States and can be invoked by any State.

[18] 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.

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 crime[19]. 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 international law belonging to *jus cogens*[20] - 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

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

[20] 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.

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 transfers[21].

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 States[22] and the Parliamentary Assembly of the Council of Europe[23]. 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

[21] 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.

[22] Resolutions 66 (XIII-/83) and 742 (XIV-0/84).

[23] Resolution 828 of 26 September 1984.

also considered that the systematic practice of torture constitutes a crime against humanity[24].

[24] Decision N° 163 of 18 January 1978.

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 apply[25]. 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 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 refuge[26].

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

[25] 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.

[26] 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).

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.

CONCLUSION

Amnesty International continues to campaign against impunity for the human rights violations committed in Argentina during the years of military government, and for the right of relatives of the "disappeared" to know the truth about what happened to their loved ones. The organization welcomes the decision of the Federal Supreme Court to forward the cases to the Chief Prosecutor for investigation and prosecution.

This has been an important challenge to impunity in Argentina, and has open up an opportunity for relatives who have been denied knowledge of the fate of their loved ones for over 20 years. The organization is concerned that the Chief Prosecutor disregards the fact that the right of the four persons in question to claim the German nationality was made impossible because they were victims of a policy of systematic "disappearance" by the Argentine security forces, which is a crime against humanity. If the four cases are closed, the four victims and their relatives are being deprived for the second time of their right to justice.

According to international law, the scale and severity of the human rights violations recorded in Argentina from 1976 to 1983 constitute crimes against humanity which is subject to international jurisdiction. By keeping the cases open the German authorities will provide an opportunity of truth and justice to German descendant victims of human rights violations committed in Argentina under the military governments.

APPENDIX I

List of 11 German citizens or people of German descent, who were victims of "disappearance" in Argentina, whose cases have been submitted to the Nuremberg-Furth Chief Prosecutor

NAME	AGE	DATE OF "DISAPPEARANCE"
1. Alfredo Jose Berliner	29	September 1979
2. Gerardo Coltzau	22	26 April 1977
3. Betina Ehrenhaus.	21	1979
4. Elisabeth Käsemann	20	10 March 1977
5. Leonor Gertrudis Marx	28	21 August 1976
6. Alicia Nora Oppenheimer	22	31 July 1976
7. Walter Claudio Rosenfeld	21	20 October 1977
8. Jorge Federico Tatter	54	15 October 1976
9. Juan Miguel Thanhauser	23	18 July 1978
10. Marcelo Weisz	25	10 August 1977
11. Claudio Manfredo Zieschank	25	26 March 1976