CHILE

AN INESCAPABLE OBLIGATION:

BRINGING TO JUSTICE THOSE RESPONSIBLE FOR CRIMES AGAINST HUMANITY COMMITTED UNDER MILITARY RULE

Friday 16 October 1998 was an important milestone in the struggle against crimes against humanity. At around midnight, the Metropolitan Police in London (United Kingdom) arrested the former Chilean Head of State, General Augusto Pinochet Ugarte. He was arrested following a judicial request by Spanish judges who have initiated proceedings against the general for the crimes of genocide, terrorism, murder, torture, unlawful detention and abduction.

The abuses which took place in Chile under military rule from 1973 to 1990 were not just human rights violations. Because of their scale, number and gravity, as well as their systematic nature, the violations in Chile constitute crimes against humanity under international law. States have a duty, arising from their international obligations, to prosecute and punish these crimes. Statutory limitations do not apply to crimes against humanity and those responsible for them cannot invoke any kind of immunity as a means of avoiding legal proceedings. Amnesty International therefore considers that Spanish courts have jurisdiction to investigate, try and punish those responsible for crimes against humanity committed under the military regime of General Augusto Pinochet Ugarte.

11 September 1973 is a date fixed indelibly in the memory of the Chilean people and the international community. Twenty five 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. This pattern of massive human rights violations provoked a response from the international community. For example, the Organization of American States (OAS), sent high level missions to Chile and its protection mechanisms produced regular reports on human rights violations there. Similarly, in 1975 the United Nations set up an Ad Hoc Working Group to investigate the human rights situation in Chile. A Special Rapporteur on Chile was subsequently appointed, although the Rapporteur was never granted access to the country by the military regime. The reports of both the Ad Hoc Working Group and the Special Rapporteur detailed compelling evidence of large-scale, systematic torture and other human rights violations in Chile. As early as 15 September 1973, Amnesty International and the International Commission of Jurists had called on the United Nations to intervene in response to human rights violations in Chile. In November 1973,

Amnesty International sent its first research mission to Chile and between 1973 and 1990 the organization published numerous reports and other documents on the human rights situation.

Following the return to civilian rule in 1990, two bodies were created in succession to gather information that would help clarify the truth about "disappearances", extrajudicial executions and deaths resulting from torture by Chilean 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)[1] 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 the organs of State to carry out human rights violations under the government of General Augusto Pinochet remain unpunished.

THE TOTAL MOBILIZATION OF THE MACHINERY OF STATE

Following the bloody coup in September 1973, the Military Junta which seized power immediately embarked on a program of repression which alarmed the world. The Chilean Armed Forces, under the command of the Military Junta led by General Augusto Pinochet Ugarte, acquired total control of the machinery of State. The National Truth and Reconciliation Commission concluded that, while the judiciary appeared to retain its formal powers and autonomy, in reality its role was very different and much diminished. Swiftly-introduced legal reforms meant that the courts no longer had effective jurisdiction over matters relating to the detention of individuals.[2]

Constitutional guarantees were suspended as a result of 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 thousands of people were detained and countless more extrajudicially executed, torture was used systematically and a state policy of "disappearance" put in place. The Chilean population was left utterly defenceless against the repression unleashed by the leadership of the new military regime.

The civilian government which came to power in 1990 following the end of military rule acknowledged the gravity of the situation in its report to the UN Committee against Torture.

[1]The National Truth and Reconciliation Commission *(Comision Nacional de Verdad y Reconciliacion*) was created by Supreme Decree No. 355, signed on 25 April 1990 by President Patricio Aylwin Azocar, Enrique Vargas Krauss Rusque (Minister of the Interior) and Francisco Cumplido Cenceda (Minister of Justice).

[2] *Informe Rettig - Informe de la Comision Nacional de Verdad y Reconciliacion* (Rettig Report - Report of the National Truth and Reconciliation Commission), Ed. La Nacion, Vol 1, p42

It affirmed that military rule from 1973 to 1990 had been characterised by gross human rights violations, such as extrajudicial executions; executions following trials without due process; mass arrests of people held in concentration camps in extremely harsh conditions – many of whom "disappeared"; widespread torture and ill-treatment; and imprisonment for such crimes as challenging the coup or belonging to certain political groups. The report stated that the repressive methods used against political detainees by the previous government had included torture and ill-treatment.[3]

From the start, a strict vertical chain of command was exercised over the repressive apparatus. The figure of Supreme Head of State[4] was created and the title of President of the Republic[5] reinstated; both were assumed by General Augusto Pinochet Ugarte. As the National Truth and Reconciliation Commission concluded, a new state institution had in effect come into being – that of President/Commander-in-Chief – concentrating power in one entity in an unprecedented manner[6]. A harsh wave of repression against opponents of the military regime was swiftly organized by the Chilean intelligence services. The Air Force Intelligence Directorate (*Direccion de Inteligencia de la Fuerza Aerea* - DIFA), the Police Intelligence Directorate (*Direccion de Inteligencia de Carabineros* - DICAR), the Naval Intelligence Service (*Servicio de Inteligencia Naval* - SIN) and the Army Intelligence Directorate (*Direccion de Inteligencia del Ejercito* - DINE), together with members of the Chilean Investigative Police (*Policia de Investigaciones de Chile*), coordinated their repressive operations under the direction of the Joint Command (*Comando Conjunto*). Each of these intelligence bodies specialized in persecuting different social and political groups perceived as opponents of the military regime.

The Governing Junta led by General Augusto Pinochet Ugarte transformed human rights violations into State policy. A policy which found expression in legislative decrees and Chilean security force operations resulting in thousands of people being detained, executed, tortured, "disappeared" or exiled.

THE DINA: DESIGNED TO VIOLATE HUMAN RIGHTS

[3]Report of the State of Chile to the UN Committee against Torture, UN document CAT/C/7/Add. 9, 16 November 1990

[4]Decree Law No. 527.

[5]Decree Law No. 806.

[6]*Comision Nacional de Verdad y Reconciliacion*, Op.Cit, Vol 1, p.47.

From the very first days of the coup, an essentially army-based unit came into operation which was instrumental in implementing the policy of human rights violations and which demonstrated a remarkable degree of ideological and operational cohesion.[7] Originally known as the DINA Commission, this unit was formalized via Decree NE 521 of 14 June 1974, which created the National Intelligence Directorate (*Direccion Nacional de Inteligencia* - DINA). The National Truth and Reconciliation Commission concluded that, although the DINA was formally responsible to the Military Junta, in practice it answered only to the Chair of the Governing Junta, which subsequently became the Presidency of the Republic[8]. The Commission also concluded that the DINA was in practice an illegal organization whose role was to target anyone perceived to be a political opponent. The Commission considered the DINA to have practically limitless powers, allowing it to violate basic human rights while covering its tracks and ensuring its own impunity.[9]

Those arbitrarily detained by the DINA were held and tortured in a number of secret locations. Many were "disappeared" or executed in clandestine detention and torture centres. The names of centres such as Tejas Verdes, Cuatro Alamos, Londres NE 38, José Domingo Cañas, Villa Grimaldi, la Discoteque or la Venda Sexy, Cuartel Bilbao, Cuartel Venecia, Cuartel General or Calle Belgrano NE 11, Rinconada Maipu, Colonia Dignidad and Casa Parral continue to evoke chilling memories in Chile.

The DINA used torture and "disappearance" systematically in its attempt to destroy the "enemy", the political opposition, which had to be eliminated[10]. Its methods were described at length by the National Truth and Reconciliation Commission, and in the reports on Chile by the Inter-American Commission on Human Rights and the UN Ad Hoc Working Group on Chile. The civilian government which took office in 1990 recognized that the DINA had developed a well-planned system of detention followed by disappearance[11] and had used torture as a means of exterminating political opponents[12].

The DINA operated abroad as well as on Chilean soil. As confirmed by the National Truth and Reconciliation Commission, from mid-1974 the DINA expanded its extraterritorial capacity, involving operatives in a number of countries[13]. Victims of DINA operations abroad include the former Chilean Minister of Foreign Affairs, Orlando Letelier, and his assistant, US

[7] *Comision Nacional de Verdad y Reconciliacion*, Op.Cit, Vol 1, p.43.

[8] *Comision Nacional de Verdad y Reconciliacion*, Op.Cit, Vol ll, p.452 .

[9] *Comision Nacional de Verdad y Reconciliacion*, Op.Cit, Vol 1l, pp.449 and 450.

[10] *Comision Nacional de Verdad y Reconciliacion*, Op.Cit, Vol 1l, pp.478 and 485.

[11] Report of the State of Chile to the Committee against Torture of the United Nations, United Nations document CAT/C/7/Add.9, 16 November 1990, p. 3.

[12] Ibid, p4

[13] *Comision Nacional de Verdad y Reconciliacion*, Op.Cit, Vol ll, p.456.

citizen Ronnie Moffit, killed on 21 September 1976 in Washington (United States of America), when a bomb exploded in the car in which they were travelling.

A favourite country for DINA operations was Argentina, where it coordinated its operations with the paramilitary organization Argentinian Anti-Communist Alliance (*Alianza Anticomunista Argentina*) or Triple A and members of the Argentinian army. One of the victims of DINA's operations in Argentina was the retired general and former Commander in Chief of the Chilean army, Carlos Prats, who was murdered along with his wife, Sofia Cuthbert, in Buenos Aires on 30 September 1974. The couple was also killed by a remote-controlled car-bomb. Chilean ex-general and former head of the DINA Manuel Contreras Sepúlveda, who was sentenced to 7 years in prison for the killing of Orlando Letelier and Ronnie Moffit and charged with the Prats-Cuthbert murders by an Argentinian judge, stressed that he was responsible to General Augusto Pinochet Ugarte. Other victims included the British-Chilean citizen Guillermo Roberto Beausire Alonso, detained on 2 November 1974 at Ezeiza airport in Buenos Aires (Argentina). Transferred by the DINA from one Chilean clandestine detention centre to another, where other former detainees claim to have seen him, Guillermo Roberto Beausire Alonso remains "disappeared". Large numbers of people were abducted and "disappeared" in Argentina by DINA operatives with the support of the Argentinian armed forces. Several victims had obtained refugee status and were therefore under the international protection of the United Nations.

The DINA was disbanded in August 1977 and replaced by the National Information Centre (*Central Nacional de Informaciones* - CNI), a body which, by decree[14], inherited DINA personnel and officers and continued the repressive activities of its predecessor.

IMPUNITY

Most of the human rights violations documented under military rule in Chile from 1973 to 1990, including thousands of cases of torture, extrajudicial execution and "disappearance", have gone uninvestigated and unpunished. The fate of most of those who "disappeared" in Chile under military rule remains unknown. However, overwhelming evidence which has come to light over the years demonstrates that the "disappeared" were victims of a military government program to eliminate perceived opponents.

Their relatives have undertaken a long and tireless search which has led to the discovery of human remains in clandestine graves. Hundreds of former detainees have made statements confirming that the "disappeared" were held in detention centres. These detention centres and

[14] Decree NE 1.876 - 13 August 1977.

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.

In 1978, the military government of General Augusto Pinochet decreed an amnesty (Decree 2191) ostensibly aimed at promoting national harmony although designed in reality to shield from prosecution the perpetrators of human rights violations committed between 11 September 1973 and 10 March 1978. Fears that this amnesty would enshrine impunity in law were confirmed by decisions of the Supreme Court of Justice in subsequent years. Although several cases are still pending before military and civilian courts, the amnesty law is still being applied.

This self-conferred amnesty, which has legalised impunity and denied victims their right to legal remedies and to know the truth, has been declared 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 of the Organization of American States (OAS).

International law obliges States to investigate human rights violations, prosecute and punish perpetrators, provide reparation to the victims and clarify the truth about what happened to them. The UN Committee against Torture has considered that, as regards torture, this obligation exists whether or not 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 effective measures to prevent torture and to punish acts of torture", recalling principles set down by the Nuremberg International Tribunal and in the Universal Declaration of Human Rights.[15]

The amnesty law in Chile therefore contravenes international law. This has been explicitly affirmed by the Inter-American Commission on Human Rights of the OAS [16]. The Inter-American Commission concluded that the amnesty law 2191 and its legal effects formed part of a general policy of human rights violations adopted by the military regime which governed Chile from September 1973 to March 1990[17].

This position finds support in the Vienna Declaration and Programme of Action, adopted by the 1993 World Conference on Human Rights, which calls on governments to "abrogate

[15] UN Committee against Torture, decision of 23 November 1989, Comunication Nos. 1/1988, 2/1988 and 3/1988, Argentina, decisions of November 1989, para 7.2.

[16] Reports NE 36/96 (Case NE 10.843 - Chile), 15 October 1996 and NE 25/98 (Cases NE 11.505, 11.532 and others - Chile), 7 April 1998.

[17] Report NE 25/98 (Cases NE 11.505, 11.532 and others - Chile) 7 April 1998, para 76.

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"[18]. 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"[19]. Article 18 of the UN Declaration on the Protection of All Persons from Enforced Disappearance[20] 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.

CRIMES AGAINST HUMANITY AND THE INTERNATIONAL COMMUNITY

The abuses which took place under military rule in Chile in the 1970s and 1980s were not just human rights violations. Because of their scale, number and gravity, as well as their systematic nature, the violations in Chile constitute crimes against humanity under international law.

The need to protect individuals against acts which go against the most basic standards of human coexistence has led to the search for concepts and mechanisms with which to confront some of the cruellest and most inhumane attacks on the human being[21]. The concept of crimes against humanity emerged from the struggle to protect individuals against acts which shocked the universal moral conscience. As this concept emerged, so the notion took hold that these acts should be brought to justice by the international community acting in concert - hence the concept of universal jurisdiction.

It was in the aftermath of the horrors of 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 cardinal offence against humanity's conscience and awareness of its own condition[22].

[18] UN Document, A/CONF.157/23.

[19] Ibid

[20] This Declaration was adopted by the UN General Assembly in Resolution 47/133 of 18 December 1992.

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

[22] 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 Nuremberg International Military Tribunal was an important and highly significant milestone in history. Through the Tribunal, the international community manifested its clear and unequivocal commitment to comply with the requirement to punish crimes against humanity and create international mechanisms of justice, since these crimes offend humanity itself and "there are elementary dictates of humanity to be recognized under all circumstances"[23]. 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 judgment, "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*" [24]. This means that these obligations are binding on all States and can be invoked by any State.

The principles recognized by the Statute and judgment of the Nuremberg Tribunal were affirmed as principles of international law by the UN General Assembly in 1946[25]. The Ad-Hoc Tribunals for the former Yugoslavia and for Rwanda, as well as the Statute of the International Criminal Court, adopted on 17 July 1998 in Rome, consolidate an emerging international criminal system which seeks to prevent and punish crimes against humanity.

In the light of contemporary developments in international customary and treaty law, crimes against humanity 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[26]. 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.

By 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. For example, the systematic practice of forced disappearance of persons is

[23] 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.

[24] 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.

[25] Resolution No. 95 (I) of the UN General Assembly, adopted 11December 1946.

[26] See International Law Commission, Report of the International Law Commission, UN Document, Supplement NE 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.

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[27] and the Parliamentary Assembly of the Council of Europe[28]. Similarly, torture is considered an "offence against human dignity" in 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 humanity[29].

Crimes against humanity are international crimes. As pointed out by the International Law Commission of the United Nations, crimes against humanity represent 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.[30] This means that their content, nature and conditions of responsibility are established by international law, whether or not these crimes are codified in domestic law. There are therefore no legal grounds for allowing those who violate fundamental human rights by committing 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*[31].

Crimes against humanity have several specific characteristics, particular to their nature as crimes against the inherent dignity of the human being. They are crimes to which statutory limitations do not apply[32]. This means that those responsible can be investigated, tried and punished regardless of how much time has elapsed since the crime was committed. No amnesty can be applied to crimes which have been committed against the community of nations and against humanity itself, as has been affirmed by Professor Pierre Mertens[33]. Those known or

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

[28] Resolution 828 of 26 September 1984.

[29] Decision NE 163 of 18 January 1978.

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

[31] 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 modified or revoked by treaty or national law.

[32] 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; European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes, adopted by the Council of Europe in 1974.

[33] Pierre Mertens, L'imprescriptibilité des crimes de guerre et contre l'humanité, Ed, Université Libre de Bruxelles, Bruxelles, p.226.

suspected to have committed a crime against humanity cannot be granted territorial asylum nor refuge[34].

Those responsible for crimes against humanity cannot invoke immunity or special privileges as a means of avoiding legal proceedings. This principle was established in the Statute of the Nuremberg International Tribunal (Article 7) and confirmed in the Statute of the International Criminal Court (Article 27.2). As stated by the UN International Law Commission, it would be paradoxical if individuals responsible for crimes against humanity were allowed to invoke State sovereignty and shield themselves behind the immunity which their official status confers on them, particularly given that these hateful crimes offend humanity's conscience and violate some of the most fundamental norms of international law[35]. As recognized in the judgment of the Nuremberg Tribunal, the international law principle protecting State representatives in certain circumstances is not applicable to acts which constitute crimes under international law[36].

In accordance with the principles set down in the Statute of the Nuremberg Tribunal, any person who commits an act of this nature is subject to international criminal responsibility. Similarly, the fact that an individual acted in the capacity of Head of State or as a State authority does not exempt him or her from criminal 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.

"Crimes against international law are committed by men, not abstract entities," said the Nuremberg Tribunal in its judgment, "and only by punishing individuals who commit such crimes can the provisions of international law be enforced" [37]. Individual criminal responsibility applies without exception to any individual in the governmental hierarchy or military chain of

[34] 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 (XXVIII) on 3 December 1973 by the UN General Assembly; Convention on the Status of Refugees (Article 1.F) and Declaration on Territorial Asylum (Article 1.2).

[35] International Law Commission, Report of the UN International Law Commission on its 48th session, 6 May to 26 July 1996, document A/51/10, supplement 10, p 42.

[36] International Law Commission, Report of the UN International Law Commission on its 48th session, 6 May to 26 July 1996, document A/51/10, supplement 10, pp. 43 and 44.

[37] Nazi Conspiracy and Aggression: Opinion and Judgment, U.S.A. Government Printing Office, 1947, p 223, cited in the Report of the International Law Commission, Op. Cit., p 31.

command who contributes to the commission of a crime of this nature[38]. As stated by the French Deputy Prosecutor General, Edgar Faure, in his intervention before the Nuremberg Tribunal, the responsibility of a superior officer is directly established by the fact that a criminal act has been committed administratively by an official who is hierarchically responsible to him[39].

As international crimes, the nature of crimes against humanity and the conditions of responsibility attaching to them are set down in international law independently of the provisions of domestic law. The fact that crimes against humanity are not codified or penalized in a State's domestic law does not exempt the perpetrator from international criminal responsibility. Article 15.2 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" [40]. The European Convention on Human Rights contains a similar clause. Therefore the absence of provisions in domestic criminal law codifying and punishing crimes against humanity, which are covered by these international legal principles, cannot be invoked as an obstacle to the trial and punishment of perpetrators.

One of the most significant elements of crimes against humanity - arising from the fact that they are offences against the human condition and the conscience of humanity - is that they 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. The international obligation to investigate, try and punish those guilty of crimes against humanity reflects 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 type of crime belongs to an international criminal system which knows no borders. This has been the reason for the establishment of the Ad Hoc International Tribunals for former Yugoslavia and Rwanda, as well as the adoption of the Statute of the International Criminal Court on 17 July 1998.

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

[38]International Law Commission, Report of the UN International Law Commission on its 48th session, 6 May to 26 July 1996, document A/51/10, supplement 10, p. 34.

[39] Dobkine, Michel, Crimes et humanité - extraits des actes du procés de Nuremberg - 18 octobre 1945 / 1er. Octobre 1946. Ed. Romillat, Paris 1992, p. 81.

[40]ICCPR, Article 15.2.

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 those found guilty of war crimes and crimes against humanity[41] 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"[42].

Although these same principles establish that those responsible for crimes against humanity should be tried "as a general rule in the countries in which they committed those crimes", they allow for the possibility of trying 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 suppression of crimes of international significance, even where these were committed abroad and did not involve nationals of the State.

This approach is not new. Grotius, considered one of the founding fathers of international law, pointed out that if kings and similar figures had the right to punish offences 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 community of nations[43].

International norms regarding crimes against humanity oblige States to try or extradite those responsible and to offer each other the fullest cooperation in the suppression of these crimes. This principle has long been affirmed by the UN General Assembly [44] and enshrined in the Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity[45]. The International Law Commission of the United Nations reaffirmed this principle in 1987[46]. This obligation is enshrined in several human rights treaties, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Art. 8).

[41] These principles were adopted by UN General Assembly Resolution 3074 (XXVI) of 3 December 1973.

[42] Ibid., Principle 1.

[43] H. Grotius, Le droit de la guerre et de la paix, ed. Pradier-Fodére, Paris 1867.

[44] Resolutions NE 8 (I) 12 February 1946, NE 62 15 December 1946, NE 170 (II) 31 October 1947, NE. 2583 (XXIV) 15 December 1969, NE 2712 (XXV) 15 December 1970 and NE. 2840 (XXVI) 18 December 1971.

[45] UN General Assembly Resolution NE 3074 (XXVIII), 3 December 1973.

[46] Annual Report of the International Law Commission, 1987, Doc. Cit., Volume II, 1st Part, p 4.

CRIMES AGAINST HUMANITY IN CHILE

The human rights violations documented in Chile under the rule of the Military Junta constitute crimes against humanity under international law.

During this period, the systematic violation of basic human rights was part of a policy put in place by the senior military leadership under the iron command of President/Commander-in-Chief General Augusto Pinochet Ugarte. The systematic use of torture and forced disappearance has been amply documented in the reports of the Inter-American Commission on Human Rights, the UN Ad Hoc Working Group on Chile and others monitoring the human rights situation in Chile. This dramatic situation did not escape the attention of the UN General Assembly which stated that there existed in Chile an institutionalized practice of torture, cruel, inhuman or degrading treatment or punishment and arbitrary detention, imprisonment and exile[47].

These crimes against humanity were carried out as part of a campaign of terror by the intelligence and security apparatus of the Chilean State, both at home and abroad. Murder, torture, forced disappearance, abduction and arbitrary detention[48] were perpetrated by the Chilean security services, particularly the DINA. The UN Ad Hoc Working Group on Chile concluded that the military regime had implemented policies and methods of indoctrination and punishment aimed at eliminating those who opposed official doctrine, leading to fears of a new form of totalitarianism reminiscent of regimes which the world had wanted to forget or at least not witness again[49].

The systematic intimidation and physical elimination of political opponents, the permanent application of emergency legislation and the widespread use of torture and forced disapearance characterized the state terrorism methodology[50]. The UN High Commissioner for Human Rights has defined State terrorism as that which is committed by agents of the State

[47] UN General Assembly Resolution NE 3448 (XXX), 9 December 1975.

[48] The 1977 European Convention on the Suppression of Terrorism defines abduction and unlawful detention, as well as offences involving explosives and endangering life, as terrorist acts, for the purposes of extradition.

[49] UN Ad Hoc Working Group on Chile, Doc. Cit., para. 505.

[50] Yves Michaud, La Violence, Presses Universitaires de France, Collection *Que sais-je?*, Paris, 1986, p. 58-60.

for the purposes of repression[51] and has considered extrajudicial executions to be a form of State terrorism[52]. It is an undeniable fact that the Chilean armed forces and intelligence units implemented a systematic and large-scale repressive methodology, enjoying absolute control of the State's resources and placing these at their service for the commission of human rights violations, passing repressive legislation and denying victims access to legal protection and remedies, manipulating the judicial system in order to persecute opponents, rendering society utterly defenceless and creating an atmosphere of terror among the population.

SPANISH JURISDICTION OVER CRIMES AGAINST HUMANITY

In 1976, the UN Ad Hoc Working Group on Chile reminded the UN General Assembly that torture could be considered a crime against humanity and that those responsible for torture should be brought to justice by the international community[53]. The Ad Hoc Working Group pointed out even then that this was more than just a symbolic action, as it would serve to dissuade torturers everywhere[54]. Twenty two years later the Spanish courts have begun to heed this call to the international community to take action against perpetrators of crimes against humanity in Chile[55].

States have an international obligation to try and punish those reponsible for crimes against humanity, as the norms regulating these crimes are considered *jus cogens* or fundamental norms of international law[56] and are therefore binding. This means that unilateral acts by States aimed at rendering these norms void within their respective jurisdictions can have no legal validity. Unilateral measures of this kind cannot be invoked to evade an obligation which has been recognized as binding by the international community as a whole.

[51] UN High Commissioner for Human Rights, Centre for Human Rights, Human Rights and the application of law, Professional training series, NE 5, UN Doc NE S.96.XIV.5, para. 540, p. 104.

[52] Ibid, para. 465, p 89.

[53] UN Ad Hoc Working Group on Chile, Doc. Cit., p. 511.

[54] Ibid.

[55] See Amnesty International The International Community's responsibility regarding crimes against humanity: Trials in Spain for crimes against humanity under military regimes in Argentina and Chile, AMR 03/01/98/s, 29 May 1998.

[56] Cherif Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*", in Law and Contemporary problems, Durham, North Carolina, USA, Vol 59, Autumn 1996, NE 4. p68 and ff.

Spanish law includes certain provisions allowing for the prosecution of those responsible for crimes against humanity. The Spanish Penal Code codifies and punishes the crimes of murder, torture and abduction, crimes committed in Chile during the period of military rule and which constituted crimes against humanity, given their large-scale and systematic character. Similarly, Spanish criminal law punishes various crimes of terrorism. Although the Spanish Penal Code does not categorize crimes of terrorism as crimes against humanity, the latter are defined in international law. The Spanish State is therefore under an international obligation to try and punish the perpetrators of these crimes. The Organic Law of the Judiciary confers extraterritorial jurisdiction on Spanish courts in relation to crimes of terrorism. Spanish courts are therefore empowered to pursue these crimes and are fully entitled to exercise jurisdiction over them, in accordance with international norms regarding crimes against humanity.

Judicial proceedings initiated in the United Kingdom, Switzerland, France and possibly in other countries by relatives of victims of crimes against humanity committed under military rule in Chile are therefore consistent with the nature of these crimes and with the principle of universal jurisdiction. They also illustrate how global society has progressed in its awareness of the need to ensure that such crimes do not go unpunished. They are a welcome example of the international community honouring its international obligations.

Some have argued that the process of "national reconciliation" and "democratic transition" would be better served if those responsible for crimes against humanity in Chile were not brought to justice. But proponents of this argument forget that, in the long term, the rule of law will only be consolidated if it is based on one of humanity's most treasured fundamental values: the full protection of human rights, justice and equity. Human rights can only be respected if justice is imparted equally to all, under the rule of law. Allowing human rights violations to go unpunished legitimizes injustice in society and is tantamount to placing one sector of society above the law. To accept impunity for crimes against humanity as a price worth paying for political harmony is to accept that crime is a legitimate means of regulating social conflict.

Fifty two years after the setting up of the Nuremberg Tribunal, almost 50 years since the United Nations adopted the Universal Declaration of Human Rights, and just a few months since the international community decided to create an International Criminal Court, it would be incomprehensible to international public opinion if the crimes against humanity committed by the Chilean military regime were allowed to remain unpunished. It is shocking to humanity's moral conscience that the vast majority of these crimes have been

shrouded in impunity. But it is even more inconceivable that the perpetrators should be allowed to evade justice when proceedings against them have already been initiated.