TRIBUNAL SUPREMO: SALA SEGUNDA

Procedencia:
Audiencia Nacional, Sala de lo Penal: Sección 3ª
Rollo de Sala: 139/1997
Juzgado Central de Instrucción 5
Sumario 1971997

BRIEF OF
THE ALLARD K. LOWENSTEIN
INTERNATIONAL HUMAN RIGHTS CLINIC
AT YALE LAW SCHOOL
AS AMICUS CURIAE

James J. Silk, Esq.
Allard K. Lowenstein International Human Rights Clinic
Yale Law School
P.O. Box 208215
New Haven, CT 06520-8215
Phone: 203-432-7480
Fax: 203-432-8260

December 2006

On the brief: Liam Brennan
Efrén C. Olivares

TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE

The Allard K. Lowenstein International Human Rights Clinic ("The Clinic") is a Yale Law School course that gives students first-hand experience in human rights advocacy under the supervision of international human rights lawyers. The Clinic undertakes litigation and research projects on behalf of human rights organizations and individual victims of human rights abuses.

The Clinic has prepared briefs and other submissions in the area of international human rights for national courts, including courts in the United States and in other countries, as well as for the Inter-American Commission on Human Rights, the African Commission on Human and Peoples' Rights, and various bodies of the United Nations. The Clinic has a longstanding commitment to the protection of human rights for people of all nationalities and political affiliations and to seeking justice for serious violations of human rights regardless of when they occurred. The Clinic is also committed to the establishment and enforcement of the international law of human rights and has, in particular, done work on the international law prohibiting and defining crimes against humanity and genocide.

HISTORICAL BACKGROUND

According to the factual findings of the Audiencia Nacional of Spain, the armed forces of Argentina, working in conjunction with security and police forces throughout 1975 and before, developed a plan both to overthrow the constitutional president and to purge the country of elements the military deemed to be subversive.[1] The Audiencia Nacional found that these "subversives" were individuals who, because of their ways of thinking, political beliefs, or relationships appeared to be incompatible with the political and social project of the military leaders.[2] The high command of the armed forces prepared the Secret Order of February 1976, which detailed a systematic plan through which the Argentine military would assume power, including plans for the clandestine detention of political dissidents.[3]

On 24 March 1976, the Argentine military forcibly took control of the national government.[4] Until 10 December 1983, Argentina's military government carried out projects called the "Process of National Reorganization" and the "Struggle Against Subversion."[5] The goals of these activities were the "systematic destruction of persons opposed to the conception of the nation maintained by the pro-coup military and those who would be identified as opposed to 'western and Christian civilization.'"[6] The acts by which these goals were pursued were perpetrated through an extremely hierarchical

---

[1] *Sentencia Núm.* 16/2005, *Sección Tercera, Sala de lo Penal, Audiencia Nacional, 19 de abril de 2005,* at 26 [hereinafter Sentencia]. Where this brief of *amicus curiae* Lowenstein Clinic makes statements about the facts of the case, it has relied on the findings of the Audiencia Nacional. Translations into English are unofficial and by the Allard K. Lowenstein International Human Rights Clinic.
[2] *Id*. at.25-26.
[3] *Id*. at,29-30.
[4] *Id*. at,25.
[5] *Id.*at 29.
[6] *Id.* "[D]estrucción sistemática de personas que se opusiesen a la concepción de nación sostenida por los militares golpistas, y a las que se identificaría como opuestas a la '*Civilización Occidental y Cristiana.*"

command structure involving all levels of the armed forces, the security forces, and intelligence personnel and were coordinated horizontally between the groups' command centers.[7] The military government organized five working groups, each integrating military, civil, and intelligence personnel.[8] Following existing national military structures, the nation was organized into six zones, each of which contained secret detention centers.[9] There were approximately 340 such centers throughout the country. [10]

In pursuing its aims, the Argentine state maintained widespread secret detention sites, at which officials systematically used torture, exterminations, common graves, the cremation of victims' bodies, and various sexual abuses.[11] An estimated 20,000 to 30,000 victims "disappeared" during the seven-year period.[12] The victims came from diverse religious, ethnic and economic backgrounds.[13] Initially, individuals deemed to be ideologically dangerous were gunned down in the open.[14] However, the military government began to purge Argentina ideologically through the use of the detention centers, where kidnapped victims were tortured for information and either killed or indefinitely detained.[15] This had the double aim of purifying the country of "subversive and atheist contamination" and giving the impression that street violence had disappeared as a result of the stabilizing force of the new government.[16]

---

[7] *Id.* at 37.
[8] *Id.*
[9] *Id.*at 38-39.
[10] *Id.* at 39.
[11] *Id.* at 43.
[12] *Id.*
[13] *Id*. at 46.
[14] *Id.* at 39.
[15] *Id.*at 39-40.
[16] *Id.*

On 10 March 1976, there was a gathering of approximately 900 naval officials in Puerto Belgrano, an Argentinean seaport in the capital region.[17] The organizers of the meeting explained the upcoming changes that were going to transform Argentina into a pacified and orderly country.[18] Adolfo Franciso Scilingo Manzorro ("Scilingo"), the appellant, then a lieutenant in the navy,[19] attended the meeting.[20]

Days after the military coup, Scilingo returned to Puerto Belgrano, where he attended another gathering in which Admiral Luis Maria Mendía outlined a plan to combat everything "contrary to western and Christian ideology."[21] To that end, Working Group 3.3.2 (Group de Tareas 3.3.2) would consist of members of the navy and would engage in plain-clothes operations, intense interrogations, the use of torture, and the physical elimination of subversives through what would become known as "flights of death" ("vuelos de la muerte"), in which individuals would be drugged and thrown from planes to their death in the sea.[22] Mendía explained that pregnant women who were detained would be kept alive until they gave birth.[23] This would be done in order to turn over the children to families with the proper "western and Christian" ideology.[24]

In his role as a member of the Working Group, Scilingo was stationed at the Naval Mechanical School (ESMA),[25] a facility where an estimated 5,000 people were

[17] *Id.*at 28.
[18] *Id.*
[19] *Id.* at 48.
[20] *Id.*
[21] *Id.*
[22] *Id.* at 48-49.
[23] *Id. a*t 49.
[24] *Id.* at 43.
[25] *Id.* at 55.

detained throughout the dictatorship.[26] As Chief of Electricity and later Chief of Auto-Mechanics at the ESMA, Scilingo was involved in a number of acts in which he knowingly and actively advanced the ends of the government's plan. The record shows that he witnessed the kidnapping, detention, and maltreatment of various individuals deemed "subversive" by the government. He provided necessary materials for "Barbeques" ("Asados"), in which the bodies of the deceased detainees were cremated.[27] He was present at incidents of torture and participated in one kidnapping and two "flights of death."[28]

APPELLANT SCILINGO'S CONDUCT CONSTITUTED CRIMES AGAINST HUMANITY UNDER INTERNATIONAL LAW

a. International law proscribes and defines crimes against humanity

In the wake of the Second World War, the United States of America, the United Kingdom, the provisional government of the French Republic, and the Union of Soviet Socialist Republics initiated a series of military tribunals to prosecute members of the European Axis Powers for atrocities committed during the war.[29] These states agreed to the principles of the tribunals on 8 August 1945 with the signing of the London Agreement. The Charter of the International Military Tribunal (the Nuremberg Charter), which was annexed to the London Agreement and established the tribunals, provided that

[26] *Id.* at 61.Of the 5,000 detained therein, the Audiencia Nacional found that 248 remain disappeared and only 129 were subsequently freed. Sixteen women gave birth in the ESMA. Each of them was separated from her child, and the location of some of these children remains unknown.
[27] *Id.* at 57.
[28] *Id.* at 58-61.
[29] Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, 8 August 1945, 82 U.N.T.S. 279 [hereinafter London Agreement].

crimes against peace, war crimes, and crimes against humanity were all offenses within the Tribunal's jurisdiction.[30] The Nuremberg Charter defined crimes against humanity as

> murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[31]

Furthermore, the Charter provided, "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."[32] The Charter also provided that having committed criminal acts pursuant to orders of a superior or government would not alleviate an accused of responsibility.[33]

The United Nations General Assembly recognized the precedent-setting framework of the Nuremberg Charter and the Nuremberg Trials carried out under its authority and affirmed the principles they established. Citing the United Nations Charter and the goal of encouraging the development of international law, the U.N. General Assembly passed Resolution 95 on 11 December 1946. The Resolution "[a]ffirms the principles of international law recognized by the Charter of the Nürnberg (sic) Tribunal and the judgment of the Tribunal."[34] In doing so, the General Assembly made clear the binding nature of the legal standards the Tribunal had applied. Following the directive of Resolution 95 to formulate the principles of the Tribunal, the International Law

---

[30] Article 6, Charter of the International Military Tribunal, Annexed to London Agreement, *supra* note 29.
[31] *Id.* at art. 6(c).
[32] *Id.* at art 6.
[33] *Id.* at art. 8.
[34] Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal,, G.A. Res. 95(I), U.N. GAOR, 1st Sess., pt 2 at 1133, U.N.Doc. A/64/Add.1 (1946), also available at http://www.un.org/documents/ga/res/1/ares1.htm.

Commission of the United Nations promulgated the Principles of the Nuremberg Tribunals. Principle VI defined crimes against humanity as

> [m]urder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.[35]

The Principles provided that "the fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him."[36] Although the Principles did not reiterate the Nuremberg Charter definition of crimes against humanity verbatim, they included the same acts carried out in circumstances that were forward looking and more general than the Charter definition, which was specific to the conduct before and during the Second World War. As such, they affirmed the legal prohibitions found in the Nuremberg Charter.

The Statute of the International Criminal Tribunal for the Former Yugoslavia ("ICTY Statute"), which the United Nations Security Council adopted in 1993, [37] affirmed the universality of the prohibition against crimes against humanity under international law. The Statute states that the ICTY was established to prosecute "persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia."[38] Article 5 of the ICTY Statute names crimes against humanity as one of the proscribed violations of international law.

---

[35] Principle VI, Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgment of the Tribunal, U.N. Doc. A/CN.4/SER.A/1950/Add.1 (1950).
[36] Principle IV, Principles of the Nuremberg Tribunals, *supra* note 35.
[37] Statute of the International Tribunal for the Former Yugoslavia, adopted by S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 6, U.N. Doc. S/RES/827 (1993), 32 I.L.M. 1203 (1993) [hereinafter ICTY Statute].
[38] *Id.*

> The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
> (a) murder;
> (b) extermination;
> (c) enslavement;
> (d) deportation;
> (e) imprisonment;
> (f) torture;
> (g) rape;
> (h) persecutions on political, racial and religious grounds;
> (i) other inhumane acts.[39]

Like the Nuremberg Charter, the ICTY Statute provided that "[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime."[40] Moreover, the ICTY Statute, like the Nuremberg Charter, makes clear that defendants acting in accordance with orders from their superiors or their governments are responsible individually.[41]

In 1994, the United Nations Security Council passed resolution 955, which established the International Criminal Tribunal for Rwanda (ICTR)[42] and charged it with the "prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between 1 January 1994 and 31 December 1994."[43] The Statute of the ICTR ("ICTR Statute") detailed the scope and competence of the tribunal. Like the ICTY Statute, the ICTR Statute lists crimes against humanity as one of the breaches of international humanitarian law within

[39] *Id.* at art. 5.
[40] *Id.* at art. 7
[41] *Id*.
[42] Statute of the International Tribunal for Rwanda, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994).
[43] *Id*.

its scope and defined it to include the same types of acts that had been included in earlier definitions. Article Three of the ICTR Statute defines crimes against humanity as

> the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:
> (a) Murder;
> (b) Extermination;
> (c) Enslavement;
> (d) Deportation;
> (e) Imprisonment;
> (f) Torture;
> (g) Rape;
> (h) Persecutions on political, racial and religious grounds;
> (i) Other inhumane acts.[44]

Consistent with well-established principles of international law, the ICTR Statute holds responsible all persons who committed or aided in committing crimes against humanity,[45] regardless of whether he or she had been ordered to do so by the government or a superior.[46]

In light of the atrocities of the Second World War, the United Nations General Assembly passed resolution 260 in 1948, recognizing the need to establish a permanent international criminal court.[47] The idea languished for approximately 50 years, until the United Nations convened a conference on establishing an international criminal court.[48] Established by the Rome Statute, the International Criminal Court ("ICC") has jurisdiction over a number of international crimes, including crimes against humanity.

---

[44] *Id.* at art. 3.
[45] *Id.* at art. 6(1) : Individual Responsibility, "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime."
[46] *Id*. at art. 6(4): Individual Responsibility, "The fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires."
[47] United Nations, Rome Statute of the International Criminal Court, Overview, U,N. Doc. 2187, U.N.T.S. 90, entered into force July 1, 2002
[48] *Id.*

Article 7 defines crimes against humanity in much the same way as the Nuremberg Charter, the ICTY, and the ICTR. According to Article VII of the Rome Statute, crimes against humanity are

> any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
> (a) Murder;
> (b) Extermination;
> (c) Enslavement;
> (d) Deportation or forcible transfer of population;
> (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
> (f) Torture;
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
> (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
> (i) Enforced disappearance of persons;
> (j) The crime of apartheid;
> (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.[49]

Article 33 of the Rome Statute provides that defendants acting pursuant to orders are to be held criminally responsible under the Statute.[50]

International law has clearly established crimes against humanity as any of a number of acts, including murder, imprisonment, torture, disappearance, and sexual violence, committed as part of a widespread or systematic attack against any civilian population. Although the ICTY Statute limited the acts to the context of armed conflict,

---

[49] *Id.* at art. 7.

[50] *Id.* at art. 33.

> (1) The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) The person was under a legal obligation to obey orders of the Government or the superior in question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful.
> (2) For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

the law defining crimes against humanity has otherwise consistently included such acts whenever they are part of a widespread or systematic attack on civilians.

b. Crimes against humanity were clearly proscribed and defined under international law before appellant Scilingo's acts

In determining whether appellant Scilingo is responsible for crimes against humanity, the Audiencia Nacional stated that the "first and most important objection" to the charges is the question of whether the law on which they are based is applicable to him.[51] The principle of legality – that there is no crime without a previously existing law (*nullum crimen, nulla poena, sine lege praevia*) – is well established. However, the Audiencia Nacional correctly held that preexisting international norms proscribing crimes against humanity applied to Scilingo's actions. Indeed, international law had proscribed crimes against humanity long before Scilingo's acts.

In the case of *Kolk and Kislyiy v. Estonia*, the European Court of Human Rights ("European Court") heard the appeal of two applicants that an Estonian court had found guilty of crimes against humanity.[52] According to the Estonian court record, the appellants, through their positions in the Ministry of National Security and the Ministry of the Interior of the Estonian Soviet Socialist Republic,[53] had participated in the forced deportation of a civilian population in Estonia to "remote areas of the Soviet Union."[54] Kolk and Kislyiy argued that because their actions were lawful under Soviet law of the time, they could not be held responsible for the commission of the crime, since they "had

[51] Sentencia, *supra* note 1, at 85.
[52] See *Kolk and Kislyiy v. Estonia*, App. No. 23052/04 & 24018/04, Eur. Ct. H.R., 17 January 2006, available at http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en.
[53] *Id.* at 2. August Kolk was an investigator for the Ministry of National Security on 25 March 1949. Kislyiy was an inspector for the Ministry of the Interior on the same date.
[54] *Id.*

no possibility of foreseeing that 60 years later their acts would be regarded as crimes against humanity."[55] They argued that "criminal responsibility for crimes against humanity had been established in Estonia only on 9 November 1994."[56] The European Court disagreed. It held that the proscription of crimes against humanity was recognized in 1945 in the Charter of the Nuremberg Tribunal, which also established the principle that such crimes cannot be barred by time restrictions.[57] Furthermore, the Court stated

> . . . that even if the acts committed by the applicants could have been regarded as lawful under the Soviet law at the material time, they were nevertheless found by the Estonian courts to constitute crimes against humanity under international law at the time of their commission. The Court sees no reason to come to a different conclusion.[58]

The European Court noted that the Soviet Union was a party to the London Agreement and that the United Nations had affirmed the principles of international law recognized by the Nuremberg Charter.[59] Thus, the Soviet Union would have been aware of these principles. The European Court thus found the applicants' assertions that their acts did not constitute crimes against humanity at the time of their commission "groundless."[60]

In a recent decision, the Inter-American Court of Human Rights found norms regarding crimes against humanity applicable to participants in the regime of Chilean dictator Augusto Pinochet. In *Almonacid Arellano, et al. v. Chile,* the Court found that there was "ample evidence to conclude that in 1973, the year of Almonacid Arellano's death, the commission of crimes against humanity, including murder carried out in the context of a generalized or systematic attack against sections of the civilian population,

---

[55] *Id*. at 8.
[56] *Id*.
[57] *Id*. at 7.
[58] *Id*. at 9.
[59] *Id*.
[60] *Id*.

were in violation of an imperative norm of international law."[61] The Court traced the origin of crimes against humanity to the Hague Convention of 1907, noting that France, the United Kingdom, and Russia used the term "crimes against humanity" to denounce the 1915 massacre of Armenians in Turkey.[62]

The international prohibition against crimes against humanity was well established in international law at the time of the conduct that the Audiencia Nacional found appellant Scilingo to have committed. Just as individuals were held criminally responsible for acts that constituted crimes against humanity in Germany in the 1940s, in Estonia in 1949, and in Chile in 1973, regardless of their legality under state law at the time, Scilingo can be held responsible, as he has been by the Audiencia Nacional, for acts that have constituted crimes against humanity since long before 1976. The Audiencia Nacional correctly stated, "As we have indicated, since the Nuremberg verdicts it has been recognized that obligations exist that are incumbent upon the individual by reason of international law and that individuals can be punished for the violation of international law . . . ."[63] The prohibition against crimes against humanity existed prior to Scilingo's acts and continues to exist today. This prohibition was widely recognized in international law at the time of Scilingo's acts and is, thus, applicable to Scilingo in the present case.

---

[61] Caso *Almonacid Arellano y otros vs. Chile*. Sentencia sobre Excepciones, Prelinares, Fondo, Rearaciones y Costas. 2006 Inter-Am. C.H.R., (ser. C) No. 154 ¶ 99 (26 September 2006). Basándose en los párrafos anteriores, la Corte encuentra que hay amplia evidencia para concluir que en 1973, año de la muerte del señor Almonacid Arellano, la comisión de crímenes de lesa humanidad, incluido el asesinato ejecutado en un contexto de ataque generalizado o sistemático contra sectores de la población civil, era violatoria de una norma imperativa del derecho internacional. Dicha prohibición de cometer crímenes de lesa humanidad es una norma de *ius cogens,* y la penalización de estos crímenes es obligatoria conforme al derecho internacional general.

[62] *Id*. at ¶ 94.

[63] Sentencia, *supra* note 1, at 93. Como ya hemos indicado desde los juicios de Nuremberg se ha reconocido en la esfera internacional que existían deberes que incumbían a los individuos en virtud del Derecho internacional y que puede castigarse a los individuos por violar el derecho internacional . . . .

c. International law does not allow statutory limitations to apply to the prosecution of crimes against humanity

International law clearly forbids any time restrictions on the prosecution of crimes against humanity. Regardless of the time that has elapsed since the crimes were committed, international law calls for the prosecution of crimes against humanity. Since the Nuremberg Charter, the principle that crimes against humanity can not be time barred has been affirmed in treaties, by international courts, and by the statute establishing the ICC.

On 26 November 1968, the General Assembly of the United Nations adopted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.[64] The Preamble of the Convention notes that the punishment of "crimes against humanity is an important element in the prevention of such crimes."[65] Thus, reflecting the concern that the periods of limitation generally applicable to ordinary crimes may interfere with the prosecution of crimes against humanity, Article I of the Convention states:

> No statutory limitation shall apply to the following crimes, irrespective of the date of their commission:
>
> . . . .
>
> (b) Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nurnberg (sic), of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, . . . even if such acts do not constitute a violation of the domestic law of the country in which they were committed.[66]

---

[64] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968), *entered into force* Nov. 11, 1970.
[65] *Id.*
[66] *Id.*

The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity entered into force on 11 November 1970.[67]

In *Papon v France,* the European Court of Human Rights recognized that statutes of limitations are prohibited for crimes against humanity, holding that international law "recognised by civilised nations" provided that "the prosecution of crimes against humanity cannot be time-barred."[68] It has not been alone in doing so. In *Furundzija*, the ICTY addressed the issue of torture as an international crime. It held that the international prohibitions on acts like torture have a host of corollary consequences.[69] Among these consequences is a prohibition on any statute of limitations.[70]

The Rome Statute drew on existing international law when it established the International Criminal Court. In doing so, it reiterated the proscription on statutes of limitations for crimes against humanity. Article 29 of the Rome Statute provides that "crimes within the jurisdiction of the Court shall not be subject to any statute of limitations."[71] The Rome Statute's prohibition against a statutory limitation on crimes against humanity reflects the establishment of this prohibition in international law.

d. The acts found by the Audiencia Nacional to have been committed by appellant Scilingo constitute crimes against humanity

The acts that the Audiencia Nacional found the appellant Scilingo to have committed fit within the definition of crimes against humanity that was established in international law well before the events at issue in this case. The Audiencia Nacional

---

[67] *Id.*
[68] *Papon v. France*, App. No. 54210/00, Eur. Ct. H.R., (15 Nov. 2001), at 21.
[69] Furundzija, Case No. IT-95-17/1, Judgment of 10 December 1998, § 155 (10 December 1998).
[70] *Id.* at § 157.
[71] Rome Statute, *supra* note 47.

stated that the "definition of crimes against humanity in [the Spanish] Code is established through a concrete act," such as homicide, torture, or illegal detention, that is systematically executed against the civilian population as a whole or in part.[72] Such crimes become crimes against humanity when the victim belongs to a group or collective being persecuted for political, racial, national, ethnic, cultural, or religious reasons, for reasons of gender, or for other motives universally held to be unacceptable by international law."[73]

The Audiencia Nacional found that the various branches of the Argentine armed forces, with the support of police and security forces, decided not only to overthrow the constitutional president but to "design, develop and execute a systematic criminal plan of kidnapping, disappearance and, finally the elimination of every part of the citizenry with the suspect reputation of being 'subversive.'"[74] Scilingo, by attending the meeting at Puerto Belgrano and observing the numerous detentions at the ESMA, was aware of the systematic repression being carried out by the military government. Through his actions at the ESMA, he became not only an accessory to those crimes but an active participant in them.

Through his work as Chief of Electricity and of Auto-Mechanics, Scilingo collaborated in the various atrocities occurring within the ESMA and was, thereby, a participant in the wider crimes against humanity occurring in Argentina at the time.

---

[72] Sentencia, *supra* note 1, at 77.
La definición del delito de lesa humanidad en nuestro Código penal viene establecida sobre la base de la comisión de un hecho concreto: homicidio; lesiones; detenciones ilegales, etc. . . . Dentro del contexto de un ataque generalizado o sistemático contra la población civil o contra una parte de ella . . . .
[73] *Id.*
[74] *Id.* at 25.
[tomaron la decisión de . . .] diseñar, desarrollar y ejecutar un plan criminal sistemático de secuestro, tortura, desaparición y, finalmente, eliminación física de toda aquella parte de la ciudadanía que reputaban sospechosa de ser "subversiva" . . . .

According to the record, as Chief of Electricity, he went to the "capucha" floor of the ESMA approximately ten times during his tenure.[75] There he saw kidnapped detainees, including pregnant women, held in deplorable conditions.[76] Furthermore, the record shows that as Chief of Auto-Mechanics, Scilingo was responsible for providing such things as flammable oil and a truck to transport wood for the destruction of corpses in the "barbeques" ("asados") carried out at the ESMA.[77] As a result of his actions and his position, Scilingo was, as the Audiencia Nacional held, criminally responsible for the atrocities being carried out at the ESMA.

The judgment of the Nuremberg Tribunal in the case of Albert Speer affirmed the principle that an accused who knowingly participates in a plan that includes acts constituting crimes against humanity, even where the accused does not directly carry out these acts, is guilty of such crimes. In 1942, Speer became Minister for Armaments and Munitions (later Armaments and War Production) for the Third Reich.[78] The Tribunal found Speer guilty of war crimes and crimes against humanity, stating that all evidence of his guilt "relates entirely to his participation in the slave labour programme."[79] The Tribunal found that Speer was aware of a common plan to commit crimes against humanity and that he willfully participated in that plan by ordering munitions that he knew were being produced by slaves in concentration camps.[80] Although Speer did not exercise direct control over the use of slave labor, he was aware that it would be used to

[75] *Id.* at 57.
[76] *Id.*
[77] *Id.*
[78] Judgment of the International Military Tribunal, Trial of Major War Criminals, Albert Speer, 6 F.R.D. 69 (1946).
[79] *Id.*
[80] *Id.*

fill the orders he placed for munitions.[81] The Tribunal found evidence that Speer's knowledge of the use of forced labor in filing his orders was enough to find him guilty of crimes against humanity.[82] As the Nuremberg Tribunal held that Speer was guilty of crimes against humanity for procuring munitions from the Ministry of the Interior knowing that they would be produced by forced labor in inhumane conditions, Scilingo provided services for the ESMA knowing that they were furthering the continued illegal detention, torture, and extermination of large numbers of civilians.

However, the record indicates that, in contrast to Speer, Scilingo also participated more directly in the atrocities that occurred. In the middle of 1977, Scilingo was the driver of a "Falcon" car used in the kidnapping of an unknown person.[83] Scilingo also participated in two "flights of death" in which 30 people were tossed from planes to their deaths in the ocean.[84] Regardless of whether or not these actions were proscribed under Argentine or Spanish law at the time, they clearly violated long-established international norms defining such acts as crimes against humanity.

The holding of the Audiencia Nacional that Scilingo is responsible for crimes against humanity for his actions in 1976-77 is consistent with international law. The Audiencia Nacional found that from 1976 to 1983, the military government of Argentina participated in the systematic and widespread persecution of part of Argentina's civilian population. Individuals were summarily identified as subversive – a term the Audiencia Nacional found to mean those who held a different conception of the world than that held by the military government – and the regime worked to cleanse Argentina of their

[81] *Id.*
[82] *Id*.
[83] Sentencia, *supra* note 1, at 58.
[84] *Id.* at 60. According to the record, 13 in the first flight and 17 in the second.

influence by kidnapping, disappearing, detaining, and murdering them, as well as taking their newborn children. Appellant Scilingo was aware of the military's objectives from the outset and became aware of the methods used to achieve these objectives. By acting to support the systematic practices of the Argentinean military that furthered these objectives and by participating directly in acts of murder and imprisonment, Scilingo was responsible for acts that constitute crimes against humanity. They were criminal acts that were carried out "as part of a widespread or systematic attack directed against [a] civilian population."[85] The Audiencia Nacional was correct to hold him responsible for crimes against humanity in the first instance. The Court should uphold that judgment to ensure consistency with international law and to preserve the interests of justice.

SCILINGO'S ACTS DID NOT CONSTITUTE GENOCIDE UNDER INTERNATIONAL LAW

Spain acceded to the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)[86] on 13 September 1968. Since then, Spain has voluntarily accepted the obligation to prevent and punish the crime of genocide, defined in the Genocide Convention as

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;

[85] Rome Statute, *supra* note 47, at art. 7. Definition of Crimes Against Humanity.
[86] U.N. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

(e) Forcibly transferring children of the group to another group.[87]

In 1973, Spain adopted this provision in article 137bis of its Penal Code.[88] Both the Genocide Convention and the domestic Spanish provisions were in effect when appellant Scilingo engaged in the conduct at issue in this case.

Since genocide as defined in article 137bis was the only crime that covered the range of such acts[89] under Spanish domestic law at the time of Scilingo's acts, the Audiencia Nacional determined that Scilingo would have been guilty of "genocide" under the 1973 Penal Code.[90] However, under international law that was as well established and clear in 1973 as it is today, Scilingo's acts did not constitute genocide. The definition of genocide under international law is not consistent with the acts for which Scilingo was prosecuted. Unlike Spanish law, international law – in 1973 as today – recognized crimes against humanity, which, as discussed above in section II(d), correspond to Scilingo's acts.[91]

In order to reach its conclusion that Scilingo would have been guilty of genocide under the 1973 Penal Code, the Audiencia Nacional applied a broad reading of the definition of "genocide" under that law so that it would encompass Scilingo's acts.[92] In particular, it interpreted the definition of "group" more broadly than international law can sustain, in order to apply it to the victims of the Argentine dictatorship's oppression. Furthermore, the Audiencia Nacional ignored, or at least diminished, the requirement of

---

[87] *Id.* at art. 2.
[88] Sentencia, *supra* note 1, at 110.
[89] *Id*. at 48. Scilingo was convicted of crimes against humanity, including "premeditated murder[,] . . . illegal detention[,] . . . [and] torture" (muertes alevosas . . . detención ilegal . . . [y] tortura grave).
[90] *Id.* at 208.
[91] Crimes against humanity were added to the Spanish Penal Code in October 2004.
[92] Sentencia, *supra* note 1, at 95.

"genocidal intent."[93] Since the offense of crimes against humanity was already established and clearly defined in international law, independent of the crime of genocide, the Audiencia Nacional's overly broad reading of the definition of genocide was not warranted. Scilingo's acts and the pattern of repression of which they were part do not satisfy the requirements for each of the elements of the definition of genocide and, thus, do not constitute genocide under international law.

a. The victims of Scilingo's acts were not a "group" that could be the object of a genocide under international law

Scilingo's atrocities, however abhorrent, did not constitute genocide, because the victims were not a "group" for the purposes of genocide under international law. The Genocide Convention defines the object of genocide as "a national, ethnical, racial or religious group."[94] The victims of the Argentine military dictatorship did not all share the same national origins, ethnicity, race, or religion. The campaign that included the attacks on these victims was aimed at all opposition to the regime's moral and political values, with no regard for the national origin, ethnicity, race, or religion of those suspected of holding views deemed unacceptable.[95] Therefore, the victims of the dictatorship did not fit any of the groups that the Genocide Convention protects.

The appeal (*recurso de casación*) submitted by several accusing parties (*acusaciones populares* and *particulares*) alleges that the victims were part of a national group. This allegation is based partly on the Audiencia Nacional's statement that the military leaders planned the "physical elimination of the national group opposed to their

[93] The interpretation of "group" and the requirement of "genocidal intent" under international law are discussed in Sections III(a) and III(b), *infra*.
[94] Genocide Convention, *supra* note 86, at art. 2.
[95] Sentencia, *supra* note 1, at 25-27.

ideology or to their project."[96] Appellants base their definition of national group on the Audiencia Nacional's description of the victims, who because of

> their way of thinking, activities, relationships or political affiliation were apparently incompatible with [the military's] political and social project. The selection of who would be considered subversive would be a function of their affiliation to certain activities and sectors, fundamentally for political and ideological reasons, although ethnic and religious reasons would also have influence.[97]

The military targeted "people from the different sectors of the population, classifying them based on their profession, ideological, religious, syndical, intellectual, and even ethnical affiliation and that would encompass students, workers, housewives, children, handicapped persons, politicians, union leaders, lawyers, Jews."[98] Appellants claim that the atrocities that took place in Argentina constituted genocide because they were part of an attempt to eliminate part of the "national group," understood as consisting of people sharing the list of characteristics identified by the Audiencia Nacional.[99]

Appellants' assertion that the victims constituted part of a national group within the definition of genocide is based on a misreading of the Audiencia Nacional's statement. The Audiencia Nacional refers to the military's target group as "a national group opposed to their ideology."[100] The language that the Audiencia Nacional used to describe the victims makes clear that it could not have meant a "national group" in the sense of a group of people who share a common national origin, which is the relevant

---

[96] *Id.* at 27. "[L]a eliminación física del grupo nacional opositor a su ideología o a su proyecto."
[97] *Id.* at 25-26. "[S]u forma de pensar, actividades, relaciones o adscripción política resultaban en apariencia incompatibles con su proyecto político y social. La selección de quienes tendrían la consideración de subversivos se haría en función de su adscripción a determinadas actividades y sectores, fundamentalmente por motivos políticos e ideológicos, aunque también influirían los étnicos y religiosos."
[98] *Id.* at 27. "[P]ersonas de los diferentes bloques de población, clasificándolas bien por su profesión, adscripción ideológica, religiosa, sindical, gremial o intelectual, e incluso étnica y que afectaría a estudiantes, trabajadores, amas de casa, niños, minusválidos o discapacitados, políticos, sindicalistas, abogados, judíos."
[99] *Id*.
[100] *Id*. at 27.

sense for finding genocide under international law.[101] Rather, when the Audiencia Nacional referred to the "national group opposed to their ideology,"[102] it meant a group that opposed the military's ideology and whose operations were of national scope; that is, it operated nationally. In other words, the Audiencia Nacional was referring to a "national group" as distinct from a local or regional group. Appellants misconstrue the Audiencia Nacional's mention of "national group" as one covered by the Genocide Convention in order to support their argument, but their construction of "national group" has no support in international law.

The UN *Special Rapporteur on the Question of the Prevention and Punishment of the Crime of Genocide* attempted to define "national group" in the context of genocide. Although the Special Rapporteur made it clear that the concept of national group was not limited to citizenship or nationality in the political-legal sense, he stated that "a national group comprises persons of a common national origin."[103] National origin, as used in international instruments and literature, refers to persons "having a certain culture, language and traditional way of life peculiar to a nation."[104] Thus, the victims of the Argentine military were not a national group; they came from a variety of cultures and did not all have a way of life peculiar to a particular nation. "What characterizes a nation is not only a community of political destiny, but, above all, a community marked by

[101] This is discussed *infra*, but see generally *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, E/CN.4/Sub.2/416, 4 July 1978. *See also*, Appeal, sec. IV, 3.3.
[102] Sentencia, *supra* note 1, at 27.
[103] *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, *supra* note 101 at ¶ 59.
[104] *Id*. at ¶ 61.

distinct historical and cultural links or features."[105] The victims of Scilingo's acts lacked these historical and cultural links. Therefore, they were not a national group.

Although they were heterogeneous in all ways relevant to the definition of genocide, the victims of Scilingo's acts and the Argentine military's repression shared, or were presumed by the perpetrators to share, common political views or, at least, a common opposition to the military regime. Arguably, they constituted a political group; certainly, they were persecuted for their presumed political views. However, "[p]olitical groups were intentionally excluded from the definition [of genocide under the Genocide Convention] and subsequent international practice has not broadened it."[106] From its inception in 1948, the Genocide Convention has excluded political groups from the list of protected groups. The Statutes of the International Criminal Tribunal for the former Yugoslavia,[107] the International Criminal Tribunal for Rwanda,[108] and the International Criminal Court[109] also exclude political groups from the definition of genocide. If, as the factual findings of the Audiencia Nacional clearly indicate, the victims of the Argentine military were, if a group at all, a political group, their persecution and murder could not constitute genocide, because political groups cannot satisfy the "group" element of the crime of genocide under international law.

---

[105] Stefan Glaser, *Droit international pénal conventionnel*, Brussels: Bruylant, 1970, pp. 111-12 (translated into English in *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, *supra* note 101 at ¶ 57.

[106] Maria del Carmen Carrasco and Joaquin Alcaide Fernandez, International Decision: *In Re Pinochet: Spanish National Court, Criminal Division (Plenary Session)*, Case 19/97, 4 November 1998; Case 1/98, 5 November 1998. 93 A.J.I.L. 690, Bernard H. Oxman, ed.

[107] ICTY Statute, *supra* note 37, at art. 4.2. "Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group . . ."

[108] *Id.* at art. 2.2. "Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group . . ."

[109] *Id.* at art. 6. "For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group . . ."

Several forums have considered the meaning of "group" within the definition of genocide. In *George Anderson Nderubumwe Rutaganda v. The Prosecutor*,[110] the ICTR acknowledged the lack of a precise definition of "national group" in the international law of genocide. Therefore, the Tribunal stated that for the purpose of finding genocide, whether a group that is the object of relevant acts is a national group should be "assessed in the light of a particular political, social and cultural context."[111] Nevertheless, the Tribunal went on to explain that

> from a reading of the *travaux préparatoires* of the Genocide Convention . . . certain groups, such as political and economic groups, have been excluded from the protected groups, because they are considered to be "mobile groups" which one joins through individual, political commitment. . . . [T]he Convention was presumably intended to cover relatively stable and permanent groups.[112]

Applying this interpretation of the "group" definition to the situation in Argentina in the 1970s leads to the conclusion that what happened there was not genocide, because the persecuted group was political, and not national, in nature. Moreover, the Argentine military itself foreshadowed as early as 1975 that the group to be persecuted was not stable or permanent. Jorge Rafael Videla, Brigade General and *de facto* President of Argentina during the dictatorship, announced in Montevideo that "[i]n Argentina as many people as necessary will have to die in order to achieve the security of the country."[113] This statement demonstrates that the military defined the targets of the campaign as unlimited and based on their supposed threat to security. This threat to security came from "every sector of the citizenry that was considered suspect of being 'subversive,' . . .

[110] ICTR-96-6-A, Judgment of December 6, 1999, affirmed on appeal on 26 May 2003.
[111] *Id*. at ¶ 56.
[112] *Id*. at ¶ 57.
[113] Sentencia, *surpa* note 1, at 28. "[E]n la Argentina van a tener que morir todas las personas que sean necesarias para lograr la seguridad del país."

[based on] their way of thinking, activities, relations or political affiliation."[114] The dictatorship targeted anyone who might hold or adopt, or be presumed to hold or adopt, individual political beliefs or commitments that could weaken the country's security, regardless of their national, ethnic, racial, or religious characteristics. The group that was the target of the Argentine military was precisely the kind of mobile political group that the ICTR found to fall outside the definition of genocide.[115]

The ICTY also faced the issue of defining a "group" in *The Prosecutor v. Goran Jelisic*.[116] In its discussion of groups protected under the Genocide Convention, the ICTY recognized that it is perilous to try to define a national group objectively. Therefore, "it is more appropriate to evaluate the status of a national, ethnical or racial group from the point of view of those persons who wish to single that group out from the rest of the community."[117] Although this approach might appear to suggest that the victimized group in Argentina could, therefore, be deemed to fit within the category of "national group," the ICTY affirmed that the drafters of the Genocide Convention intended to "limit the field of application of the Convention to protecting 'stable' groups . . . to which individuals belong regardless of their own desires."[118] Like the ICTR in *Rutaganda*, the ICTY in *Jelisic* found that political groups were intentionally excluded from the genocide definition. The victims of Scilingo, similarly, fall outside the definition of group under the international law of genocide. On the other hand, the offense of crimes against humanity, as discussed *supra*, contemplates precisely what

[114] *Id*. at 25. "[T]oda aquella parte de la ciudadanía que reputaban sospechosa de ser 'subversiva', [basandose en] su forma de pensar, actividades, relaciones o adscripción política."
[115] ICTR-96-6-A*, supra* note 110.
[116] *The Prosecutor v. Goran Jelisic*, Case No. IT-95-10-T, 14 December 1999.
[117] *Id*. at ¶ 70.
[118] *Id*. at ¶ 69. The Tribunal makes reference to the Brazilian and Venezuelan representatives at the drafting of the Genocide Convention, who insisted that only "permanent" groups be included. The inclusion of political groups was suggested, voted on, and ultimately rejected.

happened in Argentina: detaining, torturing, killing and persecuting a group for, *inter alia*, political reasons.

The history of Cambodia under the Khmer Rouge presents a useful analogue to the events in Argentina, albeit on a larger scale. In less than four years (1975-1979), Cambodian authorities instituted a system of oppression, including forced labor and the displacement and execution of civilians, that claimed the lives of approximately two million Cambodians.[119] Appellants maintain that because Scilingo's acts were similar to those that took place in Cambodia and that because there is an "undisputed general consensus about the existence of a genocide in Cambodia,"[120] Scilingo's acts must also have been genocide. However, there is no basis in international law for the appellants' assertion of an "undisputed general consensus." The leaders of the Khmer Rouge have yet to be tried.[121] In both Cambodia and Argentina, the perpetrators and the vast majority of the victims belonged to the same national, ethnic, racial, and religious group.

> Confusing mass killing of the members of the perpetrators' own group with genocide is inconsistent with the purpose of the [Genocide] Convention, which was to protect national minorities from crimes based on ethnic hatred. Obviously mass killing along the lines of the crimes committed by the Khmer Rouge . . . can be easily qualified as crimes against humanity.[122]

Where, as in Cambodia, it is impossible to differentiate the victims' group from the perpetrators on any of the grounds relevant to the definition of "group" under

---

[119] *See* Raoul-Marc Jennar, "Cambodia: Khmer Rouge in Court," in Le Monde Diplomatique, October 2006, available at http://mondediplo.com/2006/10/11cambodia; and Matthew J. Soloway, Cambodia's Response to the Khmer Rouge: War Crimes Tribunal vs. Truth Commission in Appeal: Review of Current Law and Current Reform. University of Victoria School of Law, 2002. 8 Appeal 32.

[120] *Recurso de casación*: Fundamentos Doctrinales y Legales. IV. 3.3. Gruppo nacional: como objeto de protección. Eliminación parcial de un grupo nacional en la República Argentina. "el indiscutido consenso general acerca de la existencia de un genocidio en Camboya."

[121] Two Khmer Rouge leaders, Pol Pot and Ieng Sary, were tried and convicted of genocide *in absentia* in 1979 in a trial backed by the Vietnamese government. This trial is generally regarded as a "show trial." See Soloway, *supra* note 119, at 38-39.

[122] Schabas, William A. GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES. Cambridge University Press, Cambridge, UK (2000), pp. 119-120 (citation omitted).

genocide law, the perpetrators cannot be held criminally responsible for genocide. In Argentina, as in Cambodia, the majority of victims cannot be distinguished from the perpetrators on such grounds. Victims of the military's crimes included non-Argentineans, but these victims do not constitute a group as defined in the law of genocide and were not tortured or killed on account of their nationality. Argentineans and non-Argentineans alike were persecuted, detained, tortured, and killed because they were presumed to oppose the military or the values that the military sought to uphold. To state that there is an undisputed general consensus about the existence of genocide in Cambodia is, at least, to use the term "genocide" loosely and in its non-technical sense. It is understandable that the term "genocide" could come to be widely applied to Cambodia, where nearly two million people died under the Khmer Rouge, because there is no term that comparably captures the murderous campaign of a government against its own people on this scale.[123] But there is no source of international law under which the Cambodian tragedy can be categorized as genocide.

The Cambodian legislation establishing the Khmer Rouge Tribunal (KRT) uses the definition of genocide found in the Genocide Convention.[124] This definition excludes political groups. The KRT will employ Cambodian law, except where inconsistent with international law or where international law is necessary to fill in gaps in Cambodian law.[125] Since the KRT will employ the definition of genocide accepted by international

[123] Some commentators have proposed "politicide" to describe the killing of large numbers of people for their political beliefs, as in Stalin's Russia. This term, however, carries no legal weight. *See generally* Alfred de Zayas, *The Right to One's Homeland, Ethnic Cleansing, and the International Criminal Tribunal for the Former Yugoslavia*, 6 CRIM L. 257 (1995).
[124] Draft Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, *in* U.N. GAOR 3d Comm., Human Rights Questions, 8 Annex, U.N. Doc. A/57/806 (2003).
[125] Patricia M. Wald, *Symposium: International Criminal Tribunals in the 21st Century: Iraq, Cambodia and International Justice.* 21 Am. U. Int'l L. Rev. 541, 551 (2006).

law,[126] "crimes against humanity [and not genocide] seems to be the more appropriate classification of the Khmer Rouge atrocities."[127]

b. What happened in Argentina was not genocide, because the required genocidal intent was missing

The Genocide Convention and international jurisprudence require not only that the object of the prohibited acts be a stable, permanent group but also that the perpetrators have a genocidal *mens rea*. To constitute genocide, the alleged killings or other prohibited acts have to be "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group."[128] To constitute crimes against humanity, prohibited acts, including the killing of thousands of people, can be committed for a variety of reasons. To constitute genocide, though, they must be committed with the intent to destroy a group, as defined by the law of genocide.[129] In *The Prosecutor v. Zoran Kupreškic*, the ICTY established that genocide is a crime

> perpetrated against persons that belong to a particular group and who are targeted because of such belonging. . . . [W]hat matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics. . . . [T]hat intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong.[130]

Similarly, in *The Prosecutor v. Krstic*, the ICTY reiterated that

> the victims of genocide must be targeted *by reason of* their membership in a group. This is the only interpretation coinciding with the intent which characterizes the crime of genocide. The intent to destroy a group as such, in

---

[126] *Id*. at 553.
[127] Scott Luftglass, Note, *Crossroads in Cambodia: The United Nation's Responsibility to Withdraw Involvement from the Establishment of a Cambodian Tribunal to Prosecute the Khmer Rouge*, 90 Va. L. Rev. 893, 925 (May 2004).
[128] Genocide Convention, *supra* note 86, at art. 2.
[129] *See* Doudou Thiam, Special Rapporteur, *Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind*, UN Doc. A/CN.4/398.
[130] *The Prosecutor v. Zoran Kupreskic, et al.* ICTY, IT-95-16-T. Trials Chamber, ¶ 636, 14 January 2000.

> whole or in part, presupposes that the victims were chosen by reason of their membership in the group whose destruction was sought.[131]

The victims of the Argentine military were targeted because of their presumed political beliefs and because the military considered them "incompatible with its political and social project"[132] and a danger to the security of the country.[133] They were *not* targeted "by reason of their membership in a group," as the standard for genocidal intent requires, but rather based on their presumed individual political views or social values. Those responsible for the detention, torture, and killing of the Argentine military's victims did not have the required *mens rea*. Therefore, these acts did not constitute genocide under international law.

Because the Argentine victims, to the extent that they constituted a group at all, were not a group for which the Argentine military could have the required intent to destroy, the crimes against them, including imprisonment, torture, and killings, did not constitute genocide under international law. In *Krajišnik*, the ICTY considered that "on intent, genocide requires proof of intent to commit the underlying act, or *actus reus*, in addition to proof of the specific intent of genocide."[134] Since the ICTY could "make no conclusive finding that any acts were committed with the intent to destroy [the] ethnic group,"[135] it acquitted Krajišnik of genocide and convicted him of crimes against humanity.[136] Scilingo, in his participation in the Argentine military's criminal campaign,

---

[131] *The Prosecutor v. Radislav Krstic*, ICTY, IT-98-33-PT. Trials Chamber, ¶ 561 02 August 2001 (emphasis in the original).
[132] Sentencia, *supra* note 1, at 25-26. ("incompatibles con su proyecto político y social." Hechos Probados 1.1, pp. 25-26).
[133] Sentencia, *supra* note 1, at 28.
[134] *The Prosecutor v. Momčilo Karjišnik*, ICTY, IT-00-39-T. Trials Chamber, 27 September 2006, ¶ 858.
[135] *Id*. at ¶ 869.
[136] *Id.*at ¶ 1173.

could not have had this necessary *mens rea*, so his criminal acts could not have constituted genocide.

CONCLUSION

Spain has an obligation under international law to bring to justice the perpetrators of crimes against humanity, genocide, and war crimes. Scilingo was responsible for crimes that are accurately and appropriately categorized as crimes against humanity. These crimes cannot be characterized to fit the definition of genocide. Responsibility for the acts at issue has been established by the judgment of the Audiencia Nacional. Thus, the relevant question on appeal is whether those acts are proscribed by law and, if so, what crimes they constitute. Under international law, appellant Scilingo's conduct clearly constitutes crimes against humanity. The crimes of the military regime's campaign do not satisfy the elements of the crime of genocide, and Scilingo's conduct (*actus reus*) and his intent (*mens rea*) do not fulfill the requirements of genocide.

If justice is to be served, Adolfo Scilingo must be held criminally responsible for the atrocities that he committed as part of the military dictatorship that ruled Argentina from 1976 to 1983. This Court must not allow those acts, as found by the Audiencia Nacional, to be mischaracterized as genocide. This mischaracterization would prevent the Court from fulfilling its duty to bring appellant Scilingo to justice for his responsibility for the criminal acts that the Audiencia Nacional found he has committed.

For the foregoing reasons, the Allard K. Lowenstein International Human Rights Clinic at Yale Law School as *amicus curiae* respectfully submits that the prosecution and conviction of appellant Scilingo for crimes against humanity are consistent with and

justified under international law and that the acts he committed are not consistent with a finding of genocide as defined in international law.