



The question of impunity in Spain and crimes under Franco.

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

Index:

Introduction.

I.- The illegality of the Franco regime: Uprising against a legitimate government and violation of the legal order in force.

II.- The United Nations declares the regime of Franco a fascist regime in origin, nature, structure and general conduct, aligned with the Axis Powers.

III.- The crimes of the Francoist repression form part of the European context and the types of offences committed are determined by the Nuremberg doctrine.

- A) Subsidiary obligation to apply the Charter of Nuremberg, the doctrine which has emerged from its judgments and the Principles of Nuremberg.
- B) Classification of the crimes of Francoist repression.
- C) Characteristics of crimes against humanity.
- D) Distinction between war crimes and crimes against humanity.

IV.- The failure to respect the rights of the victims and the families of the victims of the Francoist repression form part of the context of the impunity which still exists in Spain today.

V.- Conclusions.

VI.- Plan of action.

List of organizations presenting this document.

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

Introduction.

It is clear that in recent years Spanish society has become more conscious of the situation of the victims of Francoist repression and that this has resulted in the emergence of various associations related thereto.

Notwithstanding the amount of time that has passed, anyone approaching this subject finds a situation of neglect by the State with respect to issues concerning the victims, memory and human rights.

And it is precisely from the human rights perspective that it is possible to confront the situation and demand of the State the justice required to put an end to the lack of memory, the neglect and the impunity with which this subject has been treated, often intentionally.

The right to know the final fate of the victims of the Franco repression in Spain, is not simply the right of any individual victim or closely related person to know what happened - a right to the truth. The right to know is also a collective right, drawing upon history to prevent violations from recurring in the future.

Its corollary is a "duty to remember", which the State must assume, in order to guard against the perversions of history that go under the names of revisionism or negationism; the knowledge of the oppression it has lived through is part of a people's national heritage and as such must be preserved. These, then, are the main objectives of the right to know as a collective right, as was expressed in a United Nations' document - E/CN. 4/Sub. 2/1997/20/Rev.1, 2 October 1997- "Question of the impunity of perpetrators of human rights violations (civil and political)".

At a time when the legitimacy and the legality of other models of impunity established in other countries such as Argentina and Chile have broken down, we think it is a good moment for the State of Spain, partly responsible for those models, to consider its own problems, one we will describe as the "Spanish model of impunity" and to put an end to this issue in a democratic way and with the respect that all the victims deserve. But it should also be very clear that the objective is to strengthen civil liberties and human rights.

It is not possible for a lawful state to remain silent about, or for its representatives to minimize, the situation of those who have endured reprisals, imprisonment, murder, and disappearances, those who have passed through the system of Francoist or national socialist concentration camps or who died in French internment camps or who were forced into exile or estrangement.

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

Nor is it possible that the families of the victims, who have watched in silence and humiliation as years of democracy have gone by, should feel that their lives are passing without ever learning the final fate of those who suffered the planned acts of extermination. Nor can they, even with the historical information in their hands, obtain possession of the remains of the victims in a legal and legitimate way with all appropriate honours; to the point that judges refuse to follow applicable laws and in many instances a lawyer cannot even be found to help them.

In the same way, appropriate legal measures should be adopted to end the ridiculous situation which has made it possible to alter the causes of death in the archives of the civil registry. This practice was designed to conceal from the family members what really went on in the rural areas where the civil population was exterminated and looted by use of bogus legal processes instituted to gain control of assets and to humiliate the survivors by reducing them to starvation and poverty.

It is also necessary to address with justice and truth, the question of those who were taken out of Spain as children to protect them from the advance of the fascist regime; the question of those who were adopted with the resulting separation from their families and to whom the change in their names and last names was concealed, in the name of political/religious salvationism.

It is essential to take the measures necessary to recuperate the graves of the army regulars under conditions provided by international laws or such rules as may be imposed by Spanish society itself in order to normalize the memory of what really occurred.

It is necessary to understand that justice is the opposite of revenge. It must be understood in any discussion that the concept of justice should not be compared with that of revenge as this perverse construction allows lack of memory to form one of the bases for the rule of law. No society can survive ignorance of its own history, however terrible it may be.

This report does not seek to offer a solution to the question of impunity, simply an approach to the matter and the problems still to be resolved. It is also a means of introducing a basis for analysis and discussion to the victims and families who have been neglected by state institutions, political parties and civil society, all of whom have preferred to adopt an attitude of forgetting

The subject of human rights and freedoms has not yet recovered from the loss of freedoms which resulted from Franco's national uprising.

The process of forgetting can lead to an acceptance that the system of international law

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

of the United Nations should be doubted or to an acceptance of the concept of preventive war or of treating terrorism as a legal fiction which permits the establishment of a generalised state of exception.

And the most recent history of Spain shows us that this is entirely possible.

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

I. The illegality of the Franco regime: Uprising against a lawful government and violation of a legal order in force.

The origin and nature of the Franco regime were well defined by the General Assembly of the United Nations in its early resolutions at the time of presenting a legal basis to exclude the admission of the Francoist state into the United Nations, as will be described in more detail below.

The resolution unanimously adopted by the General Assembly of the United Nations on 9th February 1946 [Res. 32(I)], appropriates the declaration of Potsdam, according to which the Spanish government, "having been founded with the support of the Axis powers, in view of its origins, its nature, its record and its close association with the aggressor States, does not possess the necessary qualifications to justify its admission."

Likewise, the resolution of the General Assembly 39(I), of 12th December 1946, provided:

"Convinced that the Franco Fascist Government of Spain, which was imposed by force upon the Spanish people with the aid of the Axis Powers and which gave material assistance to the Axis Powers in the war, does not represent the Spanish people ... "

GA Res. 39(I), Fifty-ninth Plenary meeting, 12 December 1946

The issuance of a decree revoking the previous criminal code was one of the first legislative acts of the legitimate government of the Republic. **Decree of 15th April 1931**, which appeared in the Gazette [what is now the Boletín Oficial del Estado] of 16th April of the same year, provided: "the Criminal Code of 1928 is hereby revoked and its provisions shall be without any force or effect as are the provisions of the decree-laws of the Dictatorship which established or modified definitions of crimes or the setting of penalties".

The reason for this provision was set out in that Decree in the following words: "For having been one of the most serious dictatorial excesses, contrary to the basic principles of lawful society... the Government of the Republic recognising the almost universal protests formulated by public opinion to this attack to freedom and legal principles...(orders the repeal of the Criminal Code of 1928)..

By another Decree of 15th April 1931, the legitimate Government of the Republic went on to dissolve the militia known as "Somatenes" as being "irregular soldiers unduly and tendentiously armed".

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

The **Decree of 2nd May 1931**, published in the Gazette on 3rd May, amended various articles of the ordinary Criminal Code (CP) of 1870 as well as the criminal codes of the Army and Navy.

Article 6 of this Decree provided the following wording for articles 181, 243 and 280 of the 1870 CP:

“Art. 181. It shall be a crime for anyone to carry out any kind of act or conduct against the form of government established in Spain directly intended to achieve by force or by unlawful means one of the following objectives:

1. to replace the Republican Government with a monarchical Government.
2. to divest the legislative bodies or the Head of State of all or part of their corresponding prerogatives and powers.
3. to modify the system of election of the President of the Republic.
4. to deprive the provisional Government of its powers to govern the State of Spain until the Constitutive Assembly determines the political norms to elect a President of the Republic and such person has been appointed”.

“Art. 243. It shall be a crime of rebellion for anyone to rise up publicly in open hostility against the Government with any of the following objectives:

1. to remove the Head of State or depose the provisional Government of the Republic or to deprive them of personal freedom or to compel them to carry out any act against their will (...)
5. to subvert the Nation or any body of the army or navy or any other kind of armed force from obedience to the supreme Government.
6. to use to their own ends the powers of the Ministers of the Republic or to deprive them of their powers or impede or limit their free use of such powers” (...)

“Art. 8.º Article 237 of the Military Code of Justice in effect shall provide as follows:

“Art. 237. It shall constitute the crime of military rebellion for anyone to rise up against the Constitution of the Republican State, against the President of the Republic, the Constitutive Assembly, the Legislature or the provisional and legitimate Government, where the same is further confirmed by one of the following circumstances:

First. That they are commanded by military personnel or that the movement is

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

initiated, sustained or assisted by military forces.

Second. That they form an organized military group made up of ten or more individuals

Third. That they form a group of less than ten in number but that in other parts of the Nation there exist other groups or forces with the same objectives.

Fourth. That they oppose the forces of the Army either before or after a state of war has been declared.

Art. 9.º Article 128 of the Criminal Code of the Navy in effect shall provide as follows:

“Art. 128. Navy personnel who collectively rise up against the Constitution of the Republican State, the President of the Republic, the Constitutive Assembly, the Legislature or the provisional and legitimate Government will be punished.....”

On 9th December 1931 the Constitution of the Republic was passed and its Preamble set out the principles of liberty, justice and equality in a democratic framework.

In addition, its Article 6 provided: “Spain renounces war as an instrument of national policy”, and its Article 7 provided: “The State of Spain will comply with the universal norms of international law incorporating them into its positive law”.

By means of **Law of 27th October 1932** (Gazette of 5th November 1932, Ar 1408) the revised Criminal Code was enacted in accordance with **Law (Ley de Bases) of 8th September 1932**.

The first Chapter of the first Title (Crimes against the external security of the State), of Book Two (Crimes and Penalties), dealt with crimes of treason. In the Third Section of the First Chapter of Title II, are the provisions concerning “Crimes against the form of government “ (arts. 167 to 173).

Art. 167 provided:

“It shall be a crime against the form of government established by the Constitution for anyone to carry out any kind of act or acts which are directly intended to achieve by force or by unlawful means one of the following objectives:

1. To replace the Republican Government established by the Constitution with a

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

monarchical or other unconstitutional Government.

2. To deprive the Legislature or the Head of State in whole or in part of their corresponding prerogatives and powers.”

And art. 170:

“Anyone who rises up publicly and in open hostility in order to commit any of the crimes provided in article 167 will be punished with the following penalties...”.

The First Chapter of Title III regulated the crime of rebellion (arts. 238 to 244).

In accordance with art. 238,

“It shall constitute a crime of rebellion for anyone to rise up publicly in open hostility against the constitutional Government to commit any of the following acts:

1. to remove the Head of State or to compel him to carry out any act against his will.
2. to impede the holding of elections to parliament throughout the Spanish Republic or the legitimate assembly of such parliament.
3. to dissolve parliament or to hinder its functions or to obtain any parliamentary decisions by means of the use of force.
4. to subvert the Nation or any body of the army or navy or any other kind of armed force from obedience to the supreme Government.
5. to use to their own ends the powers of the Ministers of the Republic or to deprive them of their constitutional powers or impede or limit the free use of such powers” (...)

On the subject of public order, the Republican Government enacted the **Law of 28th July 1933, “New laws of public order”** (Gazette of 30th July 1933. Ar 1111).

Art. 58 thereof provided:

“The military authorities in a time of war may adopt the same measures as the civilian authorities in the preceding two chapters, whatever measures authorized by this Law and whatever others may be necessary for the restoring of order. The said military authorities will exercise special care that the chiefs or commanders of the forces which carry prisoners under their own or any civil or judicial authority, will deliver them to the relevant authority in complete safety, and in the event that they

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

do not safely arrive the authorities will take appropriate action to investigate and punish the mistakes and offences committed in the performance of these duties whatever rank the responsible commanding officer may hold”

Art. 63 on the subject of procedure provided:

“In a state of emergency or where there has been a suspension of constitutional rights, the provincial courthouses with a single chamber will perform as emergency tribunals and also one or more sections of the courts made up of various chambers”.

And further provided, “The emergency Tribunals thus constituted will be the only competent courts to try crimes concerning public order ...” (art. 64). “The Colleges of Lawyers will designate annually from among its members the lawyers who shall appear before such courts, and will establish a special list for the defence of accused persons who require such services”. (art. 66)

This shows, that even in a state of emergency, the right to due process and the conduct of cases through the ordinary courts were both upheld

On 24th April 1934 an Amnesty was enacted (Gazette of 24th and 25th April 1934) with reference to, among other crimes and offences, “crimes against the form of Government and committed by individuals in the exercise of individual rights guaranteed by the Constitution”, including the crime of armed uprising set out in art. 170 of the Criminal Code of the Republic.

- About the victims.

Therefore, the coup d'état led by General Francisco Franco constituted a violation of the constitutional order, the legal order in effect, the legitimacy of which was based on the principle of popular sovereignty recognised by the Constitution of the Republic.

The laws of the Republic were never repealed. Despite the fact that the communique announcing the end of the civil war put an end to the Republic, it did not also put an end to the legality of the Republic; what happened was that an illegal regime seized power.

Similarly, from the commencement of hostilities in the Second World War, the regime of Franco became considered as an Axis power and its illegality at a national level was recognised internationally.

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

II.- The United Nations declares the regime of Franco a fascist regime in origin, nature, structure and general conduct, aligned with the Axis powers.

Since its creation, the Organization of the United Nations has treated the "Spanish question" as an unresolved issue following the end of World War II, and the Franco regime was a reason for rejection and concern at the heart of the UN.

The condemnation of this regime at the Conferences of Potsdam and San Francisco was repeated by the UN General Assembly and by its Security Council.

Specifically, Resolution 32(1) of the United Nations General Assembly dated 9th February 1946, provided:

"32(I). RELATIONS OF MEMBERS OF THE UNITED NATIONS WITH SPAIN

1. The General Assembly recalls that the San Francisco Conference adopted a resolution according to which paragraph 2 of Article 4 of chapter II of the United Nations Charter "cannot apply to States whose regimes have been installed with the help of armed forces of countries which have fought against the United Nations so long as these regimes are in power."

2. The General Assembly recalls that at the Potsdam Conference the Governments of the United Kingdom, the United States of America and the Soviet Union stated that they would not support a request for admission to the United Nations of the present Spanish Government "which, having been founded with the support of the Axis powers, in view of its origins, its nature, its record and its close association with the aggressor States, does not possess the necessary qualifications to justify its admission."

3. The General Assembly, in endorsing these two statements, recommends that the Members of the United Nations should act in accordance with the letter and the spirit of these statements on the conduct of their future relations with Spain.

Twenty-sixth plenary meeting, 9 February 1946.

Resolutions 4 (1946) of the Security Council of 29th April 1946 and 7 (1946) of the Security Council of 26th June 1946 again addressed the Spanish question.

The first of these resolutions provided for the creation of a sub-committee to examine the

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

statements made before the Council concerning Spain and “to make further studies in order to determine whether the situation in Spain has led to international friction and does endanger international peace and security”.

By means of Resolution 7 (1946), the Council decided to continue watching the situation in Spain and to keep the matter on the list of pending issues; it also stated that the investigations of the sub-committee had confirmed those facts which had led to the condemnation of the Franco regime in the Potsdam and San Francisco Conferences.

The 35th and 36th plenary sessions of the General Assembly of 24th October 1946 again addressed the Spanish question in the following terms:

“The Spanish Question.

I cannot fail to draw the attention of the General Assembly to the Spanish question arising out of existence in Spain of the fascist regime which was imposed on the Spanish people with the armed intervention of the Axis Powers.

The Spanish question has again and again demanded the attention of organs of the United Nations. I do not need to remind you of the resolution on this question which was adopted at the first part of this session of the General Assembly. Since then, the Security Council has discussed it in detail, and it has been discussed in connection with several items which have come before the Economic and Social Council

It is probable that other organs of the United Nations as well as of the specialized agencies will also be impeded by the Spanish question.

In these circumstances, the General Assembly, at its current session, can do a valuable service by giving comprehensive guidance to the organs and to the Member States of the United Nations regarding their relationship with the Franco regime.

It is an unhappy fact that the fascist control of Spain has continued unchanged despite the defeat of Germany and Japan. It seems to be clear that as long as the Franco regime continues in Spain, it will remain a constant cause of mistrust and disagreement between the founders of the United Nations. It is therefore my hope that those who gave us victory and peace may also find ways and means by which liberty and democratic government may be restored in Spain.”

General Assembly - Thirty-fifth Plenary Meeting - Held on Thursday, 24 October 1946, at 11 a.m.

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

In the following plenary session, the Spanish question again formed part of the general debate::

(...) The inclusion of the Spanish question in the Council's agenda was requested by the representative of Poland on 8 and 9 April last. In the course of the proceedings, the Belgian Government was led, by means of communications made in May and in September, to contribute to the inquiry into the rôle of the Spanish Government.

The information which it supplied to the Council bears chiefly on the help which the Spanish Government gave to the traitor Degrelle, one of the principal German agents in Belgium, in allowing him to escape the fate he deserved for his political crimes and his crimes under common law. This information showed that the attitude of complicity of the Spanish Government with regard to agents of the Axis Powers during the war constitutes a disturbing element in Europe, and a threat to security.

The Belgian Government cannot remain indifferent to the fact that the various draft resolutions submitted to the Council with a view to positive measures be taken, have hitherto led to no result, since the requisite majority has not been obtained, and the matter remains unsolved.

The resolution unanimously adopted by the Assembly on 9 February adopts the Potsdam Declaration which states that the Spanish Government "having been founded with the support of the Axis Powers, in view of its origins, its nature, its record and its close association with the aggressor States does not possess the necessary qualifications to justify its admission."

The resolution recommends that Members of the United Nations should act in accordance with the letter and spirit of this statement in the conduct of their future relations with Spain.

It is useless to formulate declarations if they are to have no practical effect. Such methods cannot enhance the prestige of the Organization.

Limited in its efforts by the provisions of the Charter, as by the rules of procedure, the Belgian delegation can only submit a proposal that the Assembly should draw the attention of the Security Council to the advantage of taking definite measures capable of solving the Spanish problem. We will submit such a proposal to you in the course of the present session. (...)"

General Assembly - Thirty-sixth Plenary Meeting - Held on Thursday, 24 October 1946, at 4 p.m.

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

By means of Resolution 10 (1946) of the Security Council of 4th November 1946, the Council decided to remove the Spanish situation from the list of matters of which the council was seized and to put at the disposal of the General Assembly all records and documents of the case.

The Assembly approved Resolution 39(I) of 12th December 1946, which provided as follows:

“39 (I). RELATIONS OF MEMBERS OF THE UNITED NATIONS WITH SPAIN

The peoples of the United Nations, at San Francisco, Potsdam and London, condemned the Franco regime in Spain and decided that, as long as that regime remains, Spain may not be admitted to the United Nations.

The General Assembly, in its resolution of 9 February 1946, recommended that the Members of the United Nations should act in accordance with the letter and the spirit of the declarations of San Francisco and Potsdam.

The peoples of the United Nations assure the Spanish people of their enduring sympathy and of the cordial welcome awaiting them when circumstances enable them to be admitted to the United Nations.

The General Assembly recalls that, in May and June 1946, the Security Council conducted an investigation of the possible further action to be taken by the United Nations. The Sub-Committee of the Security Council charged with the investigation found unanimously: [\(1\)](#)

"(a) In origin, nature, structure and general conduct, the Franco regime is a fascist regime patterned on, and established largely as a result of aid received from, Hitler's Nazi Germany and Mussolini's Fascist Italy.

"(b) During the long struggle of the United Nations against Hitler and Mussolini, Franco, despite continued Allied protests, gave very substantial aid to the enemy Powers. First, for example, from 1941 to 1945, the Blue Infantry Division, the Spanish Legion of Volunteers and the Salvador Air Squadron fought against Soviet Russia on the Eastern front. Second, in the summer of 1940, Spain seized Tangier in breach of international statute, and as a result of Spain maintaining a large army in Spanish Morocco large numbers of Allied troops were immobilized in North Africa.

"(c) Incontrovertible documentary evidence establishes that Franco was a guilty

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

party with Hitler and Mussolini in the conspiracy to wage war against those countries which eventually in the course of the world war became banded together as the United Nations. It was part of the conspiracy that Franco's full belligerency should be postponed until a time to be mutually agreed upon."

The General Assembly,

Convinced that the Franco Fascist Government of Spain, which was imposed by force upon the Spanish people with the aid of the Axis Powers and which gave material assistance to the Axis Powers in the war, does not represent the Spanish people, and by its continued control of Spain is making impossible the participation of the Spanish people with the peoples of the United Nations in international affairs;

Recommends that the Franco Government of Spain be debarred from membership in international agencies established by or brought into relationship with the United Nations, and from participation in conferences or other activities which may be arranged by the United Nations or by these agencies, until a new and acceptable government is formed in Spain.

The General Assembly,

Further, desiring to secure the participation of all peace-loving peoples, including the people of Spain, in the community of nations,

Recommends that if, within a reasonable time, there is not established a government which derives its authority from the consent of the governed, committed to respect freedom of speech, religion and assembly and to the prompt holding of an election in which the Spanish people, free from force and intimidation and regardless of party, may express their will, the Security Council consider the adequate measures to be taken in order to remedy the situation;

Recommends that all Members of the United Nations immediately recall from Madrid their Ambassadors and Ministers plenipotentiary accredited there.

The General Assembly further recommends that the States Members of the Organization report to the Secretary-General and to the next session of the Assembly what action they have taken in accordance with this recommendation.

Fifty-ninth Plenary meeting, 12 December 1946.

(1) Documents S/75 and S/76

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

By Resolution 386(V), dated 4th November 1950, the General Assembly of the United Nations decided "To revoke the recommendation for the withdrawal of Ambassadors and Ministers from Madrid" and "To revoke the recommendation intended to debar Spain from membership in international agencies established by or brought into relationship with the United Nations..."

That is to say that the 1950 Resolution did not revoke in its entirety the Resolution of 1946. Those paragraphs dealing with the history and nature of the Franco regime and the condemnation by the United Nations remained in full force and effect. The revocation consisted only of the withdrawal of those measures which the General Assembly had recommended to the Member States of the UN in 1946.

Therefore, the comparison of the Franco regime to that of Hitler's Nazi Germany and Mussolini's fascist Italy, together with its alignment with the Axis powers, places the Franco regime under the same legal treatment that at the end of World War II was granted to those crimes committed by the European Axis powers.

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

III. The crimes of the Francoist repression form part of the European context and the types of offences are determined by the Nuremberg doctrine.

A) Subsidiary obligation to apply the Charter of Nuremberg, the doctrine which has emerged from its judgments and the Principles of Nuremberg.

The significance of the process of Nuremberg is not so much that of its role in ending an era, as that of commencing a new era, one with new international humanitarian laws, and with new effectiveness for the universal principles of human rights.

The man who served as Justice of the Supreme Court of the United States and also Chief Prosecutor for the United States at the International Military Tribunal of Nuremberg, (IMT, 1945), Mr. Robert H. Jackson, made the following statement in his opening argument:

"How a government treats its own inhabitants generally is thought to be no concern of other governments or of international society. Certainly few oppressions or cruelties would warrant the intervention of foreign powers. But the German mistreatment of Germans is now known to pass in magnitude and savagery any limits of what is tolerable by modern civilization. Other nations, by silence, would take a consenting part in such crimes..."

The principles recognised in the agreement signed in London on 8th August 1945 by the United States, France, the United Kingdom and the USSR - the said agreement was later also adopted by another nineteen countries, which therefore agreed to create an International Military Tribunal- are officially known as the "Principles of Nuremberg".

The IMT was governed by what is known as the Nuremberg Charter or Charter of the International Military Tribunal.

Art.1 of the Charter provides:

"In pursuance of the Agreement signed on the 8th day of August 1945 by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics, there shall be established an International Military Tribunal (hereinafter called "the Tribunal") for the just and prompt trial and punishment of the major war criminals of the European Axis."

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

That is to say, the Tribunal had jurisdiction over the principal war criminals of the European Axis countries.

On the 13th February 1946 the UN General Assembly adopted Resolution 3(1) in which it takes note "of the definition of war crimes and crimes against peace and against humanity contained in the Charter of the International Military Tribunal dated 8 August 1945", that is to say, war crimes and crimes against humanity as contained in Art. 6 of the Charter, which states as follows:

"Article 6.

The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) **CRIMES AGAINST PEACE:** namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) **WAR CRIMES:** namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) **CRIMES AGAINST HUMANITY:** namely, 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.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

are responsible for all acts performed by any persons in execution of such plan ”

For his part, the Secretary General of the United Nations, Trygve Lie, in his supplementary report of 21st October 1946 suggested that the Principles of Nuremberg be adopted as part of International Law. In its Resolution 95(I) of 11th December 1946, the General Assembly of the UN formally accepted the suggestion and "Affirms the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal".

The result of the said resolutions was to enshrine with universal effect the law created in the Charter and in the judgement of the Nuremberg Tribunal. Their applicability in Spain was recognised at the ratification of the Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949 (BOE 5 September 1952 and 31 July 1979), which in its art. 85 referred to the "Principles of Nuremberg" approved by the General Assembly of the United Nations by means of a resolution dated 11 December 1946.

The precise wording of the said Resolution 95 (I) of 11th December 1946 is as follows:

"95 (I). Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal

The General Assembly,

Recognizes the obligation laid upon it by Article 13, paragraph 1, sub-paragraph a, of the Charter, to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification.

Takes note of the Agreement for the establishment of an International Military Tribunal for the prosecution and punishment of the major war criminals of the European Axis signed in London on 8 August 1945, and of the Charter annexed thereto, and of the fact that similar principles have been adopted in the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, proclaimed at Tokyo on 19 January 1946;

Therefore

Affirms the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal;

Directs the Committee on the codification of international law established by the resolution of the General Assembly of 11 December 1946, to treat as a matter of

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

primary importance plans for the formulation, in the context of a general codification, of offenses against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal.

Fifty-fifth plenary meeting, 11 December 1946.

Similarly, by Resolution 177 (II), of 21 November 1947, concerning the formulation of the principles recognized by the Charter and the judgement of the Nuremberg Tribunal, the General Assembly determined to entrust such formulation to the International Law Commission, directing the Commission to:

"(a) Formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, and

(b) Prepare a draft code of offenses against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in subparagraph (a) above."

The Commission, in its first meeting in May and June 1949, formulated the so-called Principles and Crimes, adopting these in 1950 in the following terms:

Principle I

Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

Principle II

The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

Principle III

The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

Principle IV

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.

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

Principle V

Any person charged with a crime under international law has the right to a fair trial on the facts and law.

Principle VI

The crimes hereinafter set out are punishable as crimes under international law:

(a) Crimes against peace:

(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

(b) War crimes: Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war, of persons on the Seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

(c) Crimes against humanity: Murder, 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.

Principle VII

Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.”

This formulation of the Principles of Nuremberg by the International Law Commission includes complicity in crimes against peace, war crimes and crimes against humanity as an international crime, that is to say, complicity in an act constituting a crime under International Law is itself a crime under International Law.

The confirmation by the Secretary General that these instruments were customary law in nature was binding on all States according to article 25 of the Charter of the United Nations; the Security Council approved without reserve the Report of the Secretary

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

General recognizing that the Charter of the Nuremberg Tribunal has become part of International customary law: "... The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: ... the Charter of the International Military Tribunal of 8 August 1945". [Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), presented 3 may 1993 (S/25704). See also S/Res.. 827, 25th May 1993, para. 2].

The States of the international community therefore have the *erga omnes* obligation to apply the principles issued at Nuremberg, inter alia, because the mere fact of membership of the Organization of the United Nations by acceptance of its Charter, implied the acceptance of, and the obligation to ensure compliance with, the Nuremberg Principles; these having become part of International Law of obligatory effect and both customary and conventional law in nature.

In the case of Spain, the primacy of international law over internal law is envisaged in arts. 10 and 96 of the Spanish Constitution of 1978. Article 10.2 of the Constitution establishes that the "laws relating to fundamental rights and freedoms which are recognised by the Constitution shall be interpreted pursuant to the Universal Declaration of Human Rights and the International Treaties and Agreements on such matters which have been ratified by Spain".

Similarly art. 96.1 provides that "Validly concluded international treaties, once officially published in Spain, shall be part of the internal legal system. Their provisions may only be repealed, amended or suspended in the manner provided for in the treaties themselves or in accordance with the general rules of international law. "

B) Typology of the crimes of the Franco regime.

As mentioned, the Nuremberg Charter describes the crimes committed by the European Axis powers in the following way:

Article 6: " (...)

(a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) CRIMES AGAINST HUMANITY: namely, 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. (...)"

The historical development of the concept of crimes against humanity is associated with World War II and the Tribunals of Nuremberg but the story originates in an earlier era. The horrors of the wars in Europe of the 19th century as well as those of the World War I, constituted the basis for a developing awareness that certain acts were contrary to the very essence of mankind and therefore should be prohibited.

These crimes received legal recognition as long ago as 1868, in the Saint Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. This Declaration sought to limit the use of those weapons of war, which it considered to be "against the laws of humanity".

In January 1872, Gustav Moynier, of Switzerland, proposed that an International Criminal Court be constituted to stop violations of the Geneva Convention of 1864 and to bring to trial those responsible for the atrocities committed by both sides during the Franco-Prussian war of 1870.

The concept of laws of humanity then received express legal recognition at the First Conference of The Hague in 1899, which unanimously adopted the Martens Clause as part of its Preamble to the Hague Convention with Respect to the Laws and Customs of War on Land (Hague, II) (29 July 1899).

Today, the Martens Clause has been incorporated, almost unchanged into a large number of instruments of international humanitarian law, such as the four Geneva Conventions of 1949 (art. 63 of the first, art. 62 of the second, art. 142 of the third and art. 158 of the fourth Geneva Convention).

The massacres perpetrated by the Ottoman Empire against the Armenians in Turkey, were

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

among the first crimes specifically included under the rubric “crimes against humanity”. In a Declaration by France, Great Britain and Russia of 24th May 1915, the massacres were denounced as “crimes against humanity and civilization for which all the members of the Turkish government as well as any of its representatives implicated in the massacres will be held accountable”.

The Commission of the Peace Conference of 1919 determined that crimes against humanity included murder, massacres, systematic torture, killing of hostages, torture of civilians, forced starvation of civilians, rape, abduction of women and children for forced prostitution, deportation of civilians, internment of civilians in inhumane conditions, forced labour of civilians in connection with enemy military operations and the bombing of hospitals and defenceless sites.

But it was only after the Second World War, with the creation of the International Military Tribunal of Nuremberg, that the idea of crimes against humanity, would begin to be defined. During the Nuremberg Trials, French prosecutor François de Menthon described crimes against humanity as “crimes against the status of being human,” motivated by the ideology of a “crime against the spirit” aimed at “sending humanity back to a state of barbarity.” At Nuremberg the first trials for crimes against humanity would be heard.

The Charter of Nuremberg as stated above, defined crimes against humanity in its article 6(c).

Art. 6(c) of the Charter of the Nuremberg Tribunal has been applied directly not only by the allied tribunals following the Second World War but also:

-in 1961, by the District Court of Jerusalem and the Supreme Court of Israel (in the case of Eichmann . I.L.R., 36, pp. 39-42, 45-48,288, 295);

- in 1971, by the courts of Bangladesh in the request for extradition to India of Pakistani officers for “crimes of genocide and crimes against humanity” (C.I.J. Annuaire 1973-1974, p. 125);

- in 1981 by the Supreme Court of the Netherlands in the Menten case (N.Y.I.L., 1982, pp. 401 y ss.);

- in 1983, by the Supreme Court of France in the Barbie case, which based the application of art. 6 c) on the following criteria (all which are applicable in Spain):

a) this charge belongs to “an international repressive order to which the notion of

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

borders is fundamentally foreign”

b) the adhesion of France to this repressive order.

c) the enshrining through UN General Assembly resolution 13 February 1946 of the definition of crimes against Humanity as set forth in the Nuremberg Charter.

d) the recommendation of the United Nations to the States in this resolution that they should prosecute or extradite the authors of such crimes;

e) the agreement of these texts with art.15.2. of the International Covenant on Civil and Political Rights (and with art. 7.2 of the European Convention on the rights of man) which state that the principle of non-retroactivity of criminal laws did not prevent the trial and punishment of persons for acts described as “criminal according to the general principles of law recognised by the community of nations” (art.15.2 cit.). This exception to the non-retroactive effect of criminal laws has been applied in the criminal trial of a person accused of having diverted an aircraft when such an act was not punishable by *ius fori* at the time it was committed.

- in 1989, by the Superior Court of Justice of Ontario (Canada) in the Finta case (10.5.1989, I.L.R., 82, 438 ss.).

As a consequence, the following acts committed in times of war or peace, perpetrated in a systematic way or on a large scale, constitute crimes against humanity:

- murder,
- extermination,
- torture,
- enslavement,
- deportation,
- persecution based on political, racial or religious grounds,
- arbitrary detention

For D. Thiam, UN International Law Commission Special Rapporteur: “An inhuman act committed against a single person may constitute a crime against Humanity if considered in the context of a systematic pattern or if the execution forms part of a plan, or if repetitive in nature and leaves no doubt about the intentions of the author (...) An individual act may constitute a crime against Humanity if it ascribes to a context of a coherent and repeated set of acts committed under the same motive: political, religious, racial or cultural” (Rapport C.D.I., 1989, p.147, para.147).

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

In the Draft Code of Crimes against the Peace and Security of Mankind, the UN International Law Commission explains that "systematic manner" means "pursuant to a preconceived plan or policy"... The Commission attributes to the words "commission on a large scale" the sense "that the acts are directed against a multiplicity of victims." This provides two alternative pre-requisites with the result that an act could constitute a crime against humanity if it fulfils either of these two pre-requisites.

As a consequence, any of the following acts carried out by the Francoist repression which were perpetrated systematically and on a large scale against the civilian population constitute crimes against humanity:

a) **Extermination** is a crime against humanity and therefore punishable under International Law. Extermination was included as a crime against humanity in the Nuremberg Charter (article 6 (c)), Control Council Law No. 10 (article II, paragraph c), the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 5) and Rwanda (article 3) as well as the Nuremberg Principles (Principle VI c)) and the 1954 (article 2, paragraph 11) and 1996 draft Codes (Article 18(b)).

The International Law Commission, in its 1996 report, explained that both murder and extermination, "consist of distinct and yet closely related criminal conduct which involves taking the lives of innocent human beings. Extermination is a crime which by its very nature is directed against a group of individuals. In addition, the act used to carry out the offence of extermination involves an element of mass destruction which is not required for murder. In this regard, extermination is closely related to the crime of genocide in that both crimes are directed against a large number of victims. However, the crime of extermination would apply to situations that differ from those covered by the crime of genocide. Extermination covers situations in which a group of individuals who do not share any common characteristics are killed. It also applies to situations in which some members of a group are killed while others are spared."

Finally, the recently passed Rome Statute of the International Criminal Court, includes in its definition of extermination in article 7.2, "the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;"

b) The systematic or large scale practice of **murder** is a crime against humanity and is therefore punishable under International Law. Murder has been recognised as a crime against humanity since the First World War, in the Declaration of France, Great Britain and Russia of 1915, and by the Peace Conference Commission 1919. Since then, the crime of murder was included as a crime against humanity in the Nuremberg Charter (article 6

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

(c)), Control Council Law No. 10 (article II, paragraph c), the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 5) and Rwanda (article 3) as well as the Nuremberg Principles (Principle VI) and the 1954 (article 2, paragraph 11) and 1996 (article 18) draft Codes.]

In the draft Criminal Code, the International Law Commission explains that “Murder is a crime that is clearly understood and well defined in the national law of every State”. The conceptual differences in the definition of murder between different national systems of criminal law sometimes lead to confusion with respect to the matter of inclusion of murder as a crime against humanity. The definition of murder as a crime against humanity includes extrajudicial executions which are illegal and intentional, carried out by order of a government or with its complicity or consent. These types of murders are premeditated and constitute violations of national and international laws. Nevertheless, the crime of murder does not require that the act be premeditated and includes the creation of conditions endangering life which will probably result in death.

There are well established laws at the national, regional and international level which prohibit the arbitrary depriving of life. Article 15 of the Spanish Constitution clearly states “Everyone has a right to life....” Protection in the face of murder and protection of physical integrity are guaranteed by the Spanish Criminal Code in its article 138 and 142. Article 2, para. 1 of the European Convention on Human Rights imposes an obligation on the Parties with the provision that “Everyone's right to life shall be protected by law.”

At the international level article 3 of the Universal Declaration of Human Rights establishes “Everyone has the right to life, liberty and security of person” and similarly, article 6, para. 1 of the International Covenant on Civil and Political Rights states: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. “

As these examples indicate, the right to life is firmly protected by international norms, which makes murder a criminal offence both in international law and internal Spanish law. When systematic in nature it is elevated to the category of crime against humanity and, as such, it is never subject to the statute of limitations. This means that murder or extrajudicial execution committed by the Francoist forces are not subject to the statute of limitations as they fall within the category of acts which constitute crimes against humanity.

c) **Torture** has been recognised as a violation of customary international law since about a century ago.

The Commission on the Responsibility of the Authors of the War and on Enforcement of

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

Penalties recognised torture as a crime against humanity in its Report at the Peace Conference of 1919. At the end of the Second World War the concept of crimes against humanity was being developed, specifically in the trials of Nuremberg. Although there is no express mention of torture in the definition of crimes against humanity of the Nuremberg and Far East International Military Tribunals, nevertheless the accused were tried and convicted for having committed torture which is an “inhumane act” included within the definition of crimes against humanity.

Torture was recognised for the first time as a crime against humanity in Control Council Law No. 10, dated 20th December 1945 in its article II, 1 (c). Since the Second World War, the United Nations and other international and regional organs responsible for the protection and promotion of human rights have expressly and coherently recognised the right not to be subjected to torture as a fundamental and universal right in International Law.

Acts of torture are included in the category of crimes against humanity if they are committed in a systematic manner or on a widespread scale by any government, organization or group. This recognition has also been expressed in the statutes of the international criminal tribunals for the former Yugoslavia and Rwanda as well as in the Rome Statute of the International Criminal Court.

d) **Persecution on political, racial or religious grounds** is a crime against humanity and hence, punishable under international and domestic law.

Persecution on political, racial or religious grounds was included as a crime against humanity in the Nuremberg Charter (article 6 (c)), Control Council Law No. 10 (article II, paragraph c), the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 5) and Rwanda (article 3) as well as the Nuremberg Principles (Principle VI), the 1954 draft Code (article 2, paragraph 11), the 1996 draft Code (article 18 (e)) and the International Criminal Court Statute (article 7(h)).

The International Law Commission states that “The inhumane act of persecution may take many forms with its common characteristic being the denial of the human rights and fundamental freedoms to which every individual is entitled without distinction as recognized in the Charter of the United Nations (Articles 1 and 55) and the International Covenant on Civil and Political Rights (article 2). The present provision would apply to acts of persecution which lacked the specific intent required for the crime of genocide under article 17.”

Observing that the term “persecution” has acquired a universally accepted meaning, the

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

eminent professor and international human rights law expert, M. Cherif Bassiouni has proposed the following definition:

"State Action or Policy leading to the infliction upon an individual of harassment, torment, oppression, or discriminatory measures, designed to or likely to produce physical or mental suffering or economic harm, because of the victim's beliefs, views, or membership in a given identifiable group (religious, social, ethnic, linguistic etc.), or simply because the perpetrator sought to single out a given category of victims for reasons peculiar to the perpetrator."

e) **Arbitrary imprisonment** has also been recognized as a crime against humanity.

It was first recognized as such by Control Council Law No. 10, under which the trials against the war criminals of the European Axis other than those dealt with by the International Military Tribunal itself, continued being held-:

"1. Each of the following acts is recognized as a crime:

(c) Crimes against Humanity. Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated."

It has also been included as a crime against humanity in the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 5) and Rwanda (article 3), as well as in the Statute of the International Criminal Court (article 7(e)).

In addition, the right to not be detained without a previous fair and expeditious trial, according to international due process standards, is also a fundamental human right recognized by the Universal Declaration of Human Rights (articles 9 and 10) and the International Covenant on Civil and Political Rights. Articles 6, 9, 14 and 15 of the Covenant specifically provide for the right to not be subjected to arbitrary arrest or detention. It also contains the due process minimum standards in relation to the arrest, detention and trial of individuals.

According to the International Law Commission, "The term 'imprisonment' encompasses deprivation of liberty of the individual and the term 'arbitrary' establishes the requirement that the deprivation be without due process of law. This conduct is contrary to the human rights of individuals recognized in the Universal Declaration of Human Rights (article 9) and

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

in the International Covenant on Civil and Political Rights (article 9). The latter instrument specifically provides that "No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

Arbitrary imprisonment as a crime against humanity would cover systematic or large-scale instances of arbitrary imprisonment such as concentration camps or detention camps or other forms of long-term detention.

C) Characteristics of crimes against humanity.

Due to the nature of these crimes as offences against the inherent dignity of the human being, crimes against humanity have various specific characteristics:

- 1) They are not subject to any statute of limitations.
- 2) They are attributable to the individual who perpetrates such crimes, whether or not as an organ or an agent of the State.
- 3) No-one responsible for or suspected of having committed a crime against humanity can be given territorial asylum nor can they be offered refuge.
- 4) As it is an international crime, the nature of a crime against humanity and the conditions for showing responsibility therefor are established in international law independently of what may be established pursuant to the domestic law of the States. This means that the fact that the internal laws of a State may not impose any punishment for an act which constitutes a crime against humanity does not absolve the individual who committed such act from responsibility for the same in international law.
- 5) These crimes are not subject to amnesty
- 6) They are subject to the principle of universal criminal jurisdiction.

D) Distinction between war crimes and crimes against humanity.

Benjamin Ferencz, US Prosecutor at the Einsatzgruppen Trial (the ninth trial before the American military tribunal in Nuremberg, which focused on members of the Einsatzgruppen or mobile killing units), in the prosecution's opening statement, explained the distinction between war crimes and crimes against humanity.

".. The same acts, we have declared under count one as "Crimes against humanity" are alleged under count two as "war crimes." The same acts are, therefore, charged as separate and distinct offenses. In this, there is no novelty. An assault, punishable in itself, may be part of the graver offense of robbery, and it is proper pleading to charge both of the crimes. So here, the killing of defenseless civilians during a war may be a war crime, but the same killings are part of another crime. A graver one,

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

if you will--genocide, or a crime against humanity. This is the distinction we make in our pleading. It is real, and most significant. To avoid at the outset any possible misconception, let us point out the differences between the two offenses. War crimes are acts and omissions in violation of the laws and customs of war. By their very nature, they can affect only nationals of a belligerent, and cannot be committed in time of peace. The crime against humanity is not so delimited. It is fundamentally different from the mere war crime in that it embraces systematic violations of fundamental human rights committed at any time against the nationals of any nation.”

In the case of the 2nd Spanish Republic, none of the acts can be defined as crimes against humanity. The excesses which may have been committed by military personnel during legal operations even where they violated laws and customs of war by act or omission, can only be considered war crimes. The republican legal system defined crimes against civilians, and the Constitution (in its article 7), acknowledged the supremacy of international law over domestic laws. Such acts were deemed to be illegal pursuant to the legal system of the 2nd Republic.

The perpetration of assassinations or extrajudicial executions, however, not only constituted punishable offences pursuant to the Republican Criminal Code, but were also subject to prosecution in ordinary justice and, as in the case of Catalonia, led to the identification of the remains of those executed and their return to the family members as well as the trial and conviction of those held responsible. It is not suggested that all cases were prosecuted here, but what is clear is the evident falsehood of any attempt to put the two parties on the same level.

The legal documents of the Republican institutions make it very clear that their objective was the defence of civil liberties and of the democratic regime, and this fact was never doubted by the international community. In contrast, the Franco regime prepared a plan of extermination and political persecution which is documented in the instructions of the generals who rose up against the Republican Government and also participated directly in the national-socialist extermination plan against Spanish nationals (Mauthausen case), in acts of aggression and crimes against peace. It also allowed its own territory to be used for the planning of crimes against peace.

This plan of extermination was carried out over decades and was expressly condemned by the international institutions in particular by the United Nations where the resolution of the General Assembly of 12th December 1946 set out the fascist nature of the regime imposed by General Franco and compared it in law to German National-Socialism, Italian Fascism and Japanese Imperialism.

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

IV.- The failure to respect the rights of the victims and the families of the victims of the Francoist repression form part of the context of the impunity which still exists in Spain today.

1) Impunity.

"Impunity" means the impossibility, de jure or de facto, of bringing the perpetrators of human rights violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims."

[Question of the impunity of perpetrators of human rights violations (civil and political). Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119. E/CN.4/Sub.2/1997/20/Rev.1. 2 October 1997, Original: English; this report is also known as the "Joinet Report".]

In relation with the victims' legal rights, following the Joinet Report, it is the duty of the States to guarantee:

- (a) The victims' right to know;
- (b) The victims' right to justice; and
- (c) The victims' right to reparations.

2) The right to know.

The right to know "is not simply the right of any individual victim or closely related persons to know what happened, a right to the truth. The right to know is also a collective right, drawing upon history to prevent violations from recurring in the future. Its corollary is a "duty to remember", which the State must assume, in order to guard against the perversions of history that go under the names of revisionism or negationism; the knowledge of the oppression it has lived through is part of a people's national heritage and as such must be preserved. These, then, are the main objectives of the right to know as a collective right."

On this subject, the signatory organizations warn of the numerous attempts that have been made in Spain to construct revisionist theories of history.

The language setting out this right, within the United Nations framework, appears under Principle 2 of the Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, and provides as follows:

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

“PRINCIPLE 2. THE DUTY TO REMEMBER

A people's knowledge of the history of its oppression is part of its heritage and, as such, must be preserved by appropriate measures in fulfilment of the State's duty to remember. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.“

And also:

“PRINCIPLE 3. THE VICTIMS' RIGHT TO KNOW

Irrespective of any legal proceedings, victims, their families and relatives have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victim's fate.”

[E/CN.4/Sub.2/1997/20/Rev.1]

The right to know also implies that archives should be preserved. In relation with this matter, Principle 13 states:

“Technical measures and penalties shall be applied to prevent any removal, destruction, concealment or falsification of archives, especially for the purpose of ensuring the impunity of perpetrators of human rights violations. “

Following the adoption of these urgent measures, legislative or other reforms will be introduced to regulate on a permanent basis the storage of such archives, their conservation and their use according to these principles. At the same time, third countries in possession of such archives are invited to co-operate in their return.

Removal of the archives, in particular for commercial purposes should be severely punished.

And also:

“PRINCIPLE 14. MEASURES FOR FACILITATING ACCESS TO ARCHIVES

Access to archives shall be facilitated in order to enable victims and persons related to claim their rights.

Access should also be facilitated, as necessary, for persons implicated, who request it for their defence.

When access is requested in the interest of historical research, authorization formalities shall normally be intended only to monitor access and may not be used for purposes of

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

ensorship.”

Principle 15 states that: “Considerations of national security may not be invoked to prevent access.”

3) The right to justice.

With respect to the right to justice:

“... There can be no just and lasting reconciliation without an effective response to the need for justice; as a factor of reconciliation, forgiveness, insofar as it is a private act, implies that the victim must know the perpetrator of the violations and that the latter has been in a position to show repentance. For forgiveness to be granted, it must first have been sought.”

The crimes of the Francoist repression were systematic and widespread, which signifies that they were serious violations of human rights and imprescriptible, that is to say, the crime continues in effect and may be prosecuted or that there is impunity (which is effectively the same). With respect to imprescriptibility, the Set of Principles provides:

“PRINCIPLE 24: RESTRICTIONS ON PRESCRIPTION

Prescription - of prosecution or penalty - in criminal cases shall not run for such period as no effective remedy is available.

Prescription shall not apply to serious crimes under international law, which are by their nature imprescriptible. When it does apply, prescription shall not be effective against civil or administrative actions brought by victims seeking reparation for their injuries.”

With respect to amnesties:

“PRINCIPLE 25. RESTRICTIONS AND OTHER MEASURES RELATING TO AMNESTY
Even when intended to establish conditions conducive to a peace agreement or to foster national reconciliation, amnesty and other measures of clemency shall be kept within the following bounds:

(a) The perpetrators of serious crimes under international law may not benefit from such measures until such time as the State has met the obligations referred to in principle 18;

(b) They shall be without effect with respect to the victims' right to reparation, as referred to in principles 33 to 36; ... “

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

4) The right to reparation.

With respect to the right to reparation:

“PRINCIPLE 33. RIGHTS AND DUTIES ARISING OUT OF THE OBLIGATION TO MAKE REPARATION

Any human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator.”

“PRINCIPLE 34. REPARATION PROCEDURES

All victims shall have access to a readily available, prompt and effective remedy in the form of criminal, civil, administrative or disciplinary proceedings subject to the restrictions on prescription set out in principle 24. In exercising this right, they shall be afforded protection against intimidation and reprisals.

Exercise of the right to reparation includes access to the applicable international procedures.”

“PRINCIPLE 36. SCOPE OF THE RIGHT TO REPARATION

The right to reparation shall cover all injuries suffered by the victim; it shall include individual measures concerning the right to restitution, compensation and rehabilitation, and general measures of satisfaction as provided by the set of basic principles and rules concerning the right to reparation”, as well as guarantees of non-recurrence of violations.

Measures designed to give effect to the right to reparation should include the matter of appropriation of assets as well as that of material, physical and moral harm.

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

V.- Conclusions.

Given the foregoing,

The organizations who appear below support the terms of this document and:

Given the need for the recuperation of memory about the historical context in which the Francoist repression occurred and the events which resulted therefrom, i.e. the serious violations of human rights and freedoms, principally the reprisals and acts of extermination directed against the civilian population, as well as the violations of the laws and customs of war in the treatment afforded to prisoners of war;

Given the failure to respect the right of the victims and the families of the victims to truth, justice and proper reparation;

Given the attempts to construct revisionist and negationist theories of history;

Reaffirming that a people's knowledge of the history of its oppression forms part of its heritage and, as such, must be preserved by appropriate measures in fulfilment of the State's duty to remember;

Considering that impunity *per se* is a violation of human rights and its existence constitutes not only a violation of human rights such as the right to justice and truth, but also an attack against human dignity itself;

Considering that the initiative to investigate in the first instance belongs to the State and in circumstances where public powers do not undertake it, that initiative should be taken by the victims, the members of their families and human rights organizations;

Propose the following:

VI.- Plan of Action:

1. The ratification of the "Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity".

2. A declaration in law that all legal acts of the Francoist regime are null and void, with express reference to the resolutions of the United Nations unanimously adopted by the General Assembly of the Organization of the United Nations on 9th February 1946 [Res. 32(1)] and 12th December 1946 [Res.39(1)], and to the criminal nature of the regime

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

according to the norms of international law.

3. A declaration that all the criminal and military trials (of the regime) are null and void for having been arbitrary and illegal and the adoption of appropriate measures to achieve proportionate and updated compensation for the victims as well as the reconstruction of the relevant criminal and judicial archives.

4. The drafting of legislation to deal with the exhumation and identification of victims. Such legislation must consider the types of crimes, the necessary knowledge of the truth and set out procedures in accordance with international law of human rights.

Such legislation must also deal with the different types of graves - clandestine, official etc. and resolve the issues of the common graves which resulted from the extermination plan, the illegal burials and the common graves of the regular soldiers at the front lines.

5. The compiling of a Manual of Forensic Anthropology in accordance with international human rights standards, war crimes and the historical context of the 2nd. Republic and the Franco regime. Such a Manual must make it possible to classify the exhumations of the graves in accordance with the respective criminal investigation according to the type of crime and the victims, whether civilians or regular soldiers at the front line.

6. Legal measures to standardize DNA data-banks for the identification of victims resulting in judicial registration of the samples from the victims' remains, as well as from the family members who request the taking of such samples, and creating identification parameters out of the forensic anthropological and sociological practise.

7. The enacting of a law recognising the existence of concentration and forced labour camps; also, the reconstruction of the processes inside the camps and their victims is necessary.

8. Declassification and cataloguing of all diplomatic, military and intelligence archives up to the date of the establishment of the democratic regime.

9. Inventory, cataloguing and reorganization, using appropriate current technology, of criminal, judicial, prison, military, intelligence, municipal etc. archives at all levels of administration, in accordance with the laws of the right to truth and justice for the victims.

There must be recognition of free access to the archives and a legal obligation on the part of those responsible for such archives to co-operate with the victims, family members, victims' organizations, human rights organizations and national or foreign judicial systems.

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

10. Reconstruction of the lists of Spanish victims in other countries as a consequence of the Franco regime, particularly including the so-called “children of the war”, and requesting, where necessary, international co-operation, especially in the area of Europe, for which organizations of exiles or foreign organizations which have co-operated with Republican exiles should be relied upon.

The State of Spain must also proceed to the legal regularization of problems of Spanish nationality resulting from exile and problems arising from the registration of Spaniards with lawful authorities of the 2nd. Republic, allowing the right to maintain dual nationality in all such cases (both, for exiles and their descendants).

11. Reconstruction of the lists of victims and those who suffered reprisals from the time of the Francoist uprising, in a legally valid format providing legal and effective recognition and with particular concern for minors, orphans and women.

12. Adaptation of the laws concerning civil registries to ensure the correct identification of causes of death.

13. Establishment of an inventory of assets which were looted, embargoed or pillaged for political or religious reasons or in reprisals.

14. Establishment of laws which permit the recuperation of and indemnification for (at the cost of the State or of those responsible if they exist), assets looted from physical or legal persons for political or religious reasons or in reprisals of any kind.

15. Legislation which gives recognition to all military personnel who loyally served the 2nd. Republic restoring them to their historical position and acknowledging their proper status for all purposes.

16. Legislation which gives recognition to all military personnel and non-regular forces of Spanish origin who co-operated with allied countries in resistance against the Axis countries and the Franco regime, granting them the same legal, military and social treatment as was provided in countries such as France.

17. Reconstruction of the commanders of all Francoist organizations both inside and outside Spain, in order to facilitate the right to truth and the gaining of knowledge about the perpetrators of crimes against humanity.

18. Determination of a system of economic compensation actualized in actuarial terms and conforming with current economic and social reality in Spain, for all victims who are still

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

alive, their heirs and families, and the adoption of all necessary measures for social and cultural recognition, as well as the identification, cataloguing and declaration as historical patrimony of those places which represent the struggle in defence of the Republic and against the Francoist repression.

Equipo Nizkor - 14th. April 2004

The question of impunity in Spain and crimes under Franco

<http://www.derechos.org/nizkor/espana/doc/impuspa.html>

Organizations presenting this document:

- AFAR-IIREP (Association of Relatives and Friends of the 2nd. Republic Victims of Reprisals by the Franco Regime), Ana Viéitez Gómez, President
- Association for the creation of an Archive of the Civil War, the International Brigades, the Children of the War, the Resistance and the Spanish Exile. AGE (Archive of War and Exile) Dolores Cabra, President
- Association for the Descendants of the Spanish Exile, Ludivina García Arias, President
- Association of Salamanca for Memory and Justice, Fermin Sanchez Martin, Secretary
- Association of Valladolid for the Recovery of Historical Memory, Ricardo Bedera, President
- Corporation for the Promotion and Defence of the Rights of the People - CODEPU (Chile), Victor Espinoza, Executive Secretary
- Derechos Human Rights, California, USA, Margarita Lacabe, president.
- Equipo Nizkor, Gregorio D. Dionis, president.
- Forum for Memory, José Maria Pedreño, President
- Friends of the Fallen for Liberty (1939–1945), Historical Memory of the Murcia Region, Floren Dimas Balsalobre, Regional President.
- Gragero Group, Leon, Mario Osorio, Secretary.
- Manuel Azaña Association, Isabelo Herrero, President
- Peace and Justice Service -Serpaj- Europe, Brussels, Belgium, Parmenia Camargo, President
- Permanent Assembly for Human Rights (APDH Argentina), Horacio Ravena, Vice-President
- Republican Institute of Human Rights, Félix Rodriguez Sanz, President
- Young People for Historical Memory “Amnesia”, Javier Moreno and Ignacio Diaz Bidart

Any individual or organization wishing to sign on to the present document may do so by contacting Equipo Nizkor at the e-mail address which appears below.

For further information on this document you may contact:

Antonia Macías
Equipo Nizkor
Tel.: +34.915.267.502
Fax: +34.915.267.515
[Mailto:nizkor@derechos.org](mailto:nizkor@derechos.org)