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QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT, IN PARTICULAR

QUESTION OF ENFORCED OR INVOLUNTARY DISAPPEARANCES

Statement submitted by the Federación de Asociaciones de Defensa y Promoción de los Derechos Humanos, a non-governmental organization in special consultative status on the Roster

The Secretary-General has received the following statement, which is circulated in accordance with Economic and Social Council resolution 1296 (XLIV).

[9 March 1998]

1. The Federación de Asociaciones de Defensa y Promoción de los Derechos Humanos (Spain) wishes to express publicly its support for the series of cases before the National High Court relating to Spaniards who disappeared during the period of the Argentine and Chilean military dictatorships.

2. In March 1996, the Progressive Union of Prosecutors lodged a complaint with the National High Court against the members of the Argentine military junta which usurped democratic rule in Argentina between 1976 and 1983 for alleged crimes against humanity, including genocide and terrorism. Subsequently, in July 1996, the same Association lodged a complaint against the members of the Chilean military junta relating to similar offences committed during their period in power between 1973 and 1990.

3. A favourable settlement of these cases would represent an important contribution to efforts to combat impunity by confirming the incontestable existence of a universal criminal jurisdiction. In view of the obstacles which are being encountered as a result of failure to comply with agreements for legal cooperation as well as a degree of reluctance within the Spanish legal machinery for the administration of justice - specifically, the office of the chief prosecutor for the National High Court - the Federation wishes to state the following.

4. The domestic criminal courts - in this case the National High Court - are competent to hear cases involving alleged crimes against humanity committed under the Argentine and Chilean dictatorships on the basis of the principles of universal criminal jurisdiction and passive personality, which exist under domestic and international law:

- Articles 10.2 and 96.1 of the Spanish Constitution acknowledge that International Law on Human Rights is incorporated in Spanish domestic law in different ways. The Universal Declaration of Human Rights is a mandatory yardstick in interpreting the corresponding constitutional rules; the rules contained in international agreements such as those on International Humanitarian Law (the Geneva Conventions of 1949 and their additional protocols of 1977), the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the International Covenant on Civil and Political Rights (1966), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), inter alia, [1] having been published in the Boletín Oficial, form part of Spanish domestic law. These instruments have also been ratified by Chile and Argentina.

- Article 23.4 of the Organization of Justice Act establishes the competence of the Spanish courts to hear cases involving acts committed by Spaniards or foreigners outside the national territory, provided that such acts can be described, inter alia, as constituting the crime of genocide [2] or terrorism.

5. There are reasonable indications that officers of the Argentine and Chilean armed forces committed acts of genocide, extermination, murder, forced disappearance, torture, persecution of individuals because of their political ideas and prolonged detention, and that individually and jointly they violated

the norms of jus cogens. Together these acts constitute crimes against humanity under customary international law, which is applied in Spanish domestic law. As for the crime of terrorism, customary international law also recognizes it as such. It should be remembered that in the case of Chile, the Chilean Supreme Court has described the Directorate of National Intelligence (DINA) as a "criminal organization". The United Nations General Assembly itself has expressly condemned this crime (resolutions 49/185 and 50/186, December 1994 and 1995 respectively).

6. Nor can it be considered that these crimes have been tried in the countries in which they were committed, which would have led to the inapplicability of the clause contained in article 23.2 (c) of the Organization of Justice Act, preventing the exercise of Spanish jurisdiction to bring proceedings on the grounds that the offender had been acquitted, pardoned or punished abroad. Even though, in Argentina and in Chile, some of the military officers referred to in the complaints have been brought to trial, such trials have not been genuine, either because they reached no conclusion, or because the offenders were pardoned or amnestied subsequently under the punto final, obediencia debida or amnesty laws enacted under pressure from the very military officers who were implicated. Consequently, these rules cannot be cited to justify an exception to the universal jurisdiction provided for in the case of these crimes; indeed, they have been declared by the OAS (Organization of American States) Inter-American Commission on Human Rights to be contrary to the provisions of article 1.1 of the American Convention on Human Rights. Nor can it be held that, as the Organization of Justice Act was enacted in 1985, only crimes committed after that date should be taken into account. In response to this argument, Spanish Laws and Jurisprudence lay down that, once a rule relating to PROCEDURE has been enacted (as in the case of the 1985 Organization of Justice Act), it will also apply to proceedings initiated since then even though they may cover offences committed before the law on PROCEDURE was enacted - unless there is an express stipulation to the contrary, which is not the case here. In fact, the Organization of Justice Act 6/1985 has been applied by the Supreme Court in respect of offences committed BEFORE July 1985.

7. Similarly, the criminal law can be applied to crimes against humanity committed before it entered into force because such crimes were already covered by general International Law. Thus: (1) The 1966 International Covenant on Civil and Political Rights, which has been ratified by Spain, Chile and Argentina, article 15 of which refers to the principle of nullum crimen sine lege, "national or international", adding: "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations"; (2) see also article 7 of the European Convention on Human Rights.

8. Crimes against humanity are subject to neither prescription nor amnesty (article 1 of the Council of Europe Convention of 25 January 1974, A/Res.47/133, inter alia), nor may the defence of obedience to orders from a superior be offered; in the case of Spain, article 131 of the Penal Code also provides that the crime of genocide shall not be subject to prescription in any circumstances.

9. To conclude, the twentieth of the principles contained in the Final Report of the Rapporteur on impunity in violations of civil and political rights, Mr. Joinet [E/CN.4/Sub.2/1997/20/Rev.1] reads as follows: “The jurisdiction of foreign courts may be exercised by virtue either of a universal jurisdiction clause contained in a treaty in force or of a provision of domestic law establishing a rule of extraterritorial jurisdiction for serious crimes under international law”.

10. Both possibilities are being drawn on in the procedures followed in the Spanish National High Court, while the crimes being tried are subsumed under the generic definition of serious crimes under International Law, which would cover war crimes and crimes against humanity (including genocide and serious breaches of International Humanitarian Law). It should not be forgotten that the Convention on the Prevention and Punishment of the Crime of Genocide merely spelled out one of the offences tried in Nuremberg.

11. Efforts to combat impunity essentially coincide with the idea of democracy, and hence are aimed at securing the rights encompassed by this idea: the right to the truth, the right to justice and the right to redress. The cases pending in the Spanish National High Court correspond to the need of our societies that these rights should be realized.

Notes

1.In resolution 95 (I) of 11 December 1946, the United Nations General Assembly “affirms the principles of International Law recognized by the ... Nürnberg Tribunal and the Judgment of the Tribunal”. These resolutions have the effect of enshrining with universal scope the right created in the Charter and the Judgment of the Nuremberg Tribunal. Its application in Spain was recognized when the Geneva Convention of 12 August 1949 was ratified; article 85 refers expressly to the “Nuremberg Principles” approved by the United Nations General Assembly on 11 December 1946.

In its report on the establishment of an International Tribunal entrusted with the task of trying “persons responsible for serious violations of International Humanitarian Law committed in the territory of the former Yugoslavia” since 1991, the United Nations Secretary-General enumerated various conventions which in his view form part of customary International Law, namely:

- The Hague Regulations of 1907,
- The Charter of the International Military Tribunal of Nuremberg of 1945,
- The Convention on the Prevention and Punishment of the Crime of Genocide of 1948,
- The Geneva Conventions of 1949.

The fact that the Secretary-General noted the nature of these instruments as part of customary law is of considerable probative force as to their binding nature for all States in accordance with Article 25 of the Charter of the

United Nations, insofar as the Security Council approved the Secretary-General's Report without any reservations (S/Res. 827, 25 May 1993, para. 2).

2.A highly authoritative recent interpretation on the part of the United Nations concerning the Convention against genocide and "domestic" genocide was provided by M. B. Whitaker, Special Rapporteur, in the "Report on the question of the prevention and punishment of the crime of genocide", who states: "Genocide need not involve the destruction of a whole group." The expression "in part" in article 2 would seem to indicate a rather high number relative to the total size of the group, or else a significant part of that group, such as its leadership (E/CN.4/Sub.2/1985/6, 2 July 1985, p. 19).
