



Germany

prosecution of massive crimes

Argentina

**MEMORIA
ABIERTA**

prosecution of massive crimes

the experiences of
Germany and Argentina

con el apoyo de



Embajada
de la República Federal de Alemania
Buenos Aires

Germany

prosecution of massive crimes

Argentina

05	Introduction. Atrocities committed across two continents
11	1 The Legal Frameworks that Enabled Prosecution
20	2 The Investigation of Crimes for Prosecution
28	3 Legal Proceedings
29	3.1 The First Phase: The Historical Trials
30	3.1.1 Germany
30	3.1.1.1 The Nuremberg International Trial
33	3.1.1.2 The Zonal Trials
39	3.1.2 Argentina
39	3.1.2.1 The Trial of the Juntas
45	3.1.2.2 The Trial of the Repression Circuit's Authors in the Province of Buenos Aires
46	3.1.2.3 The Trials of High-Ranking Officials and the Individuals Responsible for Operations
47	3.2 The Second Phase: The Years of Impunity
48	3.2.1 Germany, the Clemency Period
52	3.2.2 Argentina, the Impunity Period
58	3.3 The Third Phase: Reopening of Trials
59	3.3.1 Germany
59	3.3.1.1 Auschwitz Trials in Frankfurt
63	3.3.1.2 Current Trials in Germany
66	3.3.2 Argentina
66	3.3.2.1 Reopening of Trials in Argentina
73	Final Conclusions



Photos of disappeared people in Argentina from the Santiago Mellibovsky Collection, CELS Archive. Argentina.

introduction

atrocities committed across two continents

5

On November 20, 1945, six months after Germany's surrender in World War II, the prosecution of crimes committed by Nazism officially began. These crimes had started before the war in 1933 and intensified during the conflict. Since Adolf Hitler and the National Socialist Party took over power in 1933, they had unleashed a persecution of political opponents, both communists and social democrats, as well as other dissidents. Thousands of people were arrested and sent to the first concentration camps, including Dachau, which opened in 1933. In 1935, the Nuremberg Race Laws institutionalized racism and anti-Semitic discrimination, stripping German Jews of their citizenship and prohibiting them from marrying people of "German or other related blood." These laws marked the beginning of a systematic segregation and persecution of Jews.

The invasion of Poland by Germany in September 1939 is widely regarded as the official commencement of World War II. In the immediate aftermath, the Nazi regime initiated the implementation of policies aimed at the extermination and repression of certain groups. These policies included the establishment of ghettos

to confine the Jewish population and the systematic massacre of civilians and prisoners of war. As the Nazi forces occupied more territories across Europe, they implemented the so-called “Final Solution,” a plan for the systematic extermination of the European Jewish population. Millions of Jews were deported to extermination camps like Auschwitz, where they were systematically killed in gas chambers. The German forces committed atrocities against civilians in all occupied territories, including mass executions, forced labor, medical experiments, and forced displacement. In addition to targeting Jews, they also persecuted and exterminated the Romani people, people with disabilities, homosexuals, Jehovah’s Witnesses, and other groups.

The unconditional surrender of Germany in 1945 was the end of the Nazi regime and paved the way for political reconstruction under the oversight of the Allied powers: France, England, the Union of Soviet Socialist Republics (USSR), and the United States. The action taken in response to the perpetrated crimes was decided taking into consideration the declared objectives of demilitarizing, denazifying, and democratizing the nation.

The International Military Tribunal (IMT) of Nuremberg was a landmark in the realm of international justice. This was so because it was the first time that acts exceeding the violation of the laws of war, including crimes against peace and crimes against humanity, were judged. The Nuremberg trials consolidated an international consensus that sought to ensure the perpetrators of large-scale crimes were not able to evade accountability.

The initial trials, which had been fostered and carried out by the Allied powers, centered on the Nazi hierarchy and select governmental entities they had resorted to in order to perpetrate such crimes. Subsequently, a series of trials were conducted throughout Europe. These trials were held in both the victorious countries and in those that had been occupied by Germany during the Nazi era or that had been its allies during the war.

The process of justice in German territory was complex and was influenced by the dynamics of internal and international politics. Its analysis can be systematized into three distinct stages. The first stage was marked by the International Military Tribunal of Nuremberg and the subsequent trials carried out by the Allied powers in their occupation zones. The second, featured by measures of clemency and amnesties, began with the division of the Federal Republic of Germany and the Democratic Republic of Germany in 1949, which extended until the late 1950s. The third stage started in the late 1950s and consisted of the reactivation of judicial prosecution before German courts.

The prosecution process has continued to the present day, reaching military personnel and civilians involved in different ways and to different extents.¹

A total of 6,494 people have been convicted in West Germany. Of these convictions, 4,667 were imposed between 1945 and the end of 1949. The American occupation zone recorded the highest number of convictions, followed by the British zone and lastly the French zone.

The courts in the Soviet occupation zone handed down sentences to 8,059 people. If the sentences imposed in East Germany from 1949 onwards are included, the total number of people sentenced jumps to 12,815. This is twice the number of sentences imposed by the rest of the Allies. Out of these, 129 were death sentences.

The sentences imposed for Nazi crimes by German courts² during and after the occupation were meager or very modest. From 1945 to 2005, only 9 percent of the convictions resulted in a sentence for a term of more than five years, including 166 life sentences. Sixteen death sentences were imposed, all during the occupation period under the provisions of the Allied Control Council Law No. 10 (CCL10)³, of which only four were actually carried out.

The range of crimes prosecuted was gradually narrowed as the statute of limitations expired. At first, the trials covered all Nazi crimes against persons and property. Later, they were limited to homicide and, from 1960 to 2011, exclusively to premeditated homicide with the direct participation of the individual accused. In 2011, the construction of participation was broadened, and the scope of the trials extended to include those who participated without having committed any homicide on their own. Since then, there have been six convictions for homicide and nine trials still pending.

Although the process has dragged on and is still ongoing, most of the trials of the Nazis were held during the Allied occupation.

1 Devin O. Pendas; *Democracy, Nazi Trials, and Transitional Justice in Germany, 1945–1950*; Cambridge University Press (2020), who takes as a reference the work by: Andreas Eichmüller, "Die Strafverfolgung von NS-Verbrechen durch westdeutsche Justizbehörden seit 1945," *Vierteljahreshefte für Zeitgeschichte* 56/4 (2008), pages 621–640, and *Die Haltung Der Beiden Deutschen Staaten Zu Den Nazi- Und Kriegsverbrechen: Eine Dokumentation* / Herausgeber: Der Generalstaatsanwalt Der DDR, Ministerium Der Justiz Der DDR.

2 As discussed later, the Allies could delegate jurisdiction over certain crimes to the lower German courts in their occupation zone. This is what France, the United Kingdom, and the Soviet Union did.

3 Enacted on 20/12/1945



Defendants' section during the Nuremberg Trial. November, 1945. Germany.

On March 24, 1976, the Armed Forces staged a *coup d'état* in Argentina and established a system of illegal and clandestine political repression throughout the country. Its immediate predecessor was Operation Independence, ordered in 1975 by the constitutional government to “combat subversion” in Tucumán.

The Military Junta, which consisted of the Army, the Navy, and the Air Force, divided the country into five zones controlled by the Army. The Secretariat of State Intelligence and both military and police intelligence agencies played a key role in the persecution. The backbone of the system was made up of secret or clandestine detention centers. There were 814 detention centers, including military facilities, schools, hospitals, and businesses. Thousands of people were kidnapped, and most of them were subsequently murdered, and only a few survived.

The disappearance of the corpses was a central feature of the repressive system established by the military. The methods of final disposition included dropping bodies from airplanes into Río de la Plata (the so-called “death flights”), burying them in clandestine graves, or dumping them in open fields. Many bodies were collected by the police forces and buried in cemeteries as unknown individuals or *N.N.* (no name). In addition, the material possessions of the abducted individuals were appropriated by the repressive structure. The abducted persons were subjected to prolonged torture and isolation in the clandestine centers. Women were victims of sexual abuse. Moreover, certain centers served as clandestine maternity wards where many children born in captivity were given to other families and registered with false identities. The search for these individuals still continues. It is estimated that 30,000 political activists, trade union members, students, workers, journalists, and members of armed organizations have been victims of such clandestine repression.

The transition to democracy in 1983 was the result of the internal collapse of the dictatorship, exacerbated by the defeat in the Falklands War in 1982, which paved the way for the unconditional reinstatement of democracy. As there was no transition pact, the democratic government took over the prosecution of the military juntas. Unlike in Germany, where justice was initially administered by *ad hoc* international tribunals, the trials in Argentina were pursued by the local judiciary and natural judges.

The Trial of the Juntas in 1985 imposed the rule of law against state crimes and enshrined Argentina's commitment to human rights. This trial, along with the work of the National Commission on the Disappearance of Persons (Comisión Nacional sobre la Desaparición de Personas, CONADEP), became a model of transitional justice for other countries in Latin America. The scale of the atrocities revealed during the trial led the court to allow for the criminal prosecution of the middle and lower chains of command of the Armed Forces and security forces, who were held responsible for the crimes.

As in Germany, persecution in Argentina came to a halt with the enactment of impunity and amnesty laws, which extended for almost two decades. The resumption of the judicial process in the new century revealed an unprecedented depth and breadth of such transitional justice experience. To date, 353 trials have reached a verdict and 1232 people have been sentenced.

In this paper, we navigate through the political, legal, and judicial decisions that were made to conduct the trials in both countries. We will focus on how the legal systems were modified to facilitate these processes, how the investigations of the facts were conducted, and finally, what the characteristics of the different trial stages were and their scope.

the legal frameworks
that enabled prosecution

1

the legal frameworks that enabled prosecution

12

The trials in both Germany and Argentina were to be specially designed to adapt to the seriousness of the crimes, the political circumstances, and the actors involved. The rules were amended to meet the objectives vis-à-vis the circumstances prevailing at the time.

Until 1949, decisions about prosecution in Germany were in the hands of the foreign Allied powers, and some of them had been made before the end of the war. The Moscow Declaration, signed by the United States, the USSR, and the United Kingdom in November 1943, stated that all material and intellectual perpetrators would be returned to the countries where they had committed their acts to be tried and punished according to the laws of those countries. Any perpetrator whose crimes did not have a clearly identifiable geographic location would be tried by the Allies. The establishment of special regulations was necessary to prosecute these acts.

Some authors emphasize the influence of Jewish organizations after 1942, when the scale and systematic nature of the massacres became known, so that the traditional interpretation of war crimes could be expanded and the crimes committed against the Jews could be judged.¹ The enactment of the so-called *ex post facto* laws after the events that were to be judged was resisted by Great Britain but prevailed with the support of the majority of the other Allied countries.

The London Agreement signed by the Allied Powers on August 8, 1945, provided for the establishment of the International Military Tribunal (IMT) to try criminals whose crimes had no specific geographical location, whether they were accused individually or as members of organizations. The Statute of the International Military Tribunal of Nuremberg, which was adopted as an annex to the London Agreement, set out the rules of procedure of the Tribunal and listed the charges on which it would decide:

- » Crimes against peace: Planning, preparing, initiating, or waging an aggressive war or a war in violation of treaties, agreements, or international guarantees; and engaging in a common plan or conspiracy to commit any of the foregoing.
- » War crimes: Violations of the laws or customs of war. These included, among others, murder, ill treatment, or deportation of civilians to work as slaves or for other purposes; murder or ill treatment of war prisoners; killing of hostages; pillage of public or private property; indiscriminate destruction of cities, towns, or villages, or any destruction not justified by military necessity.
- » Crimes against humanity: Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, either before or during the war; or persecutions on political, racial, or religious grounds arising out of or in connection with any crime within the jurisdiction of the IMT, whether or not such acts were violations of any domestic law of the country in which they were committed.

13

¹ Donald Bloxham; *Genocide on Trial. War Crimes Trials and the Formation of Holocaust History and Memory*, Oxford University Press, 2001, p. 18.

The organizations thus accused were simply prosecuted as criminals or not, and included the following:

- » The Reich Cabinet, which was declared non-criminal.
- » The leadership of the National Socialist German Workers' Party, which was found criminal.
- » The Schutzstaffel (SS), the paramilitary, police, political, penitentiary, and security organization at the service of Adolf Hitler and the National Socialist German Workers' Party, which was found criminal.
- » The Gestapo, the official secret police of Nazi Germany and the occupied territories, and the Sicherheitsdienst (SD), the intelligence service of the SS, which were found criminal.
- » The Sturmabteilung (SA), a volunteer militia associated with the National Socialist German Workers' Party, which were found non-criminal.
- » The General Staff and the High Command of the Armed Forces, which were found non-criminals.

14

The Nuremberg Statute expanded the scope of international law and became a turning point in its development. It enshrined the following principles, which have been recognized by the UN as general principles of international law, namely: ²

- I. Any person who commits an act considered a crime under international law is liable and therefore subject to sanctions.
- II. The fact that the domestic law of a country fails to punish the act considered a crime under international law does not relieve the perpetrator from his responsibility under international law.
- III. The fact that the perpetrator of an act constituting a crime under international law has committed it as a head of state or government official does not relieve him from responsibility under international law.
- IV. The fact that the actor has committed such an act under the orders of his government or a hierarchical superior does not relieve him from responsibility under international law, provided that it was morally possible for him to refrain from committing the act.

² Approved by the International Law Commission of the United Nations and presented to the General Assembly on December 31, 1950.

- v. Any individual accused of having committed a crime, as defined by the international law, has the right to a fair trial based on the facts and in accordance with the law.
- vi. Complicity in the commission of a crime against peace, a war crime, or a crime against humanity is a crime under international law.
- vii. The following acts are punishable as crimes under international law: crimes against peace, war crimes, and crimes against humanity.

This was the legal framework under which the International Military Tribunal of Nuremberg operated. As we shall see, this was not the only prosecution that took place. Rather, it was the one that attracted the attention of the international community. At the same time, it was the only one in which all four Allied Powers participated together.

Subsequent trials were conducted under the framework of other legal statutes. The Allied Control Council Law No. 10 laid the foundations that gave each of the powers the possibility of conducting trials within their respective zones of occupation in Germany. Like the International Military Tribunal Statute, the CCL10 allowed for the prosecution of war crimes and crimes against humanity, although it also allowed the Allies to delegate the prosecution of crimes against humanity to German courts if they were committed against German citizens or stateless persons.³ Each power took a different approach: the British and French issued a general order granting such jurisdiction to German courts, while the Americans refused to surrender jurisdiction over crimes against humanity. At first, the Soviets decided to address each case individually, but later, by Soviet Military Government Order No. 201 of August 16, 1947, they decided to merge criminal trials and denazification, granting jurisdiction over both to German courts.

³ Devin Pendas, *Retroactive Law and Proactive Justice: Debating Crimes against Humanity in Germany, 1945–1950*, *Central European History* Vol. 43, No. 3 (September 2010), Published by Cambridge University Press, p. 431.



Members of the U.S. Army reviewing documents
for the Nuremberg Trial. 1945-1946, Germany.

The trials conducted by the American and Soviet courts applied the CCL10. The British, who did not agree with the inclusion of crimes that were not in force in local legislation at the time such acts were committed, proceeded with prosecutions under the Royal Warrant for the Trial of War Criminals. This was a more restrictive piece of legislation that considered only war crimes and allowed for the prosecution of individuals directly involved in the commission of crimes, thus excluding those who had administered the Nazi policies of segregation, persecution, and extermination.

As we shall see, after the occupying powers withdrew from Germany, the subsequent trials applied the pre-existing German criminal code.

For its part, after democracy was reinstated in 1983, Argentina had to decide under which legislation the crimes committed by the dictatorship were to be prosecuted, and the decision was made to firmly maintain the guarantee of the previous criminal law.

There were significant regulatory changes. These included, on the one hand, the repeal of a self-amnesty decree issued by the military, which made prosecution impossible⁴; and, on the other hand, the enactment of a law setting forth a special procedure for prosecution.

A group of jurist specializing in human rights advised President Raúl Alfonsín on the design of such a procedure. The main idea was to focus the trials on the military high command, to establish a preliminary trial phase under military jurisdiction, and to reserve the role of final review to the civil justice. Thus, the prosecution of the former members of the first three military juntas was ordered by virtue of a presidential decree.⁵

In the case of enforced disappearances, the crime that characterized the Argentine dictatorship, a special mechanism was necessary to investigate and document them. This was the so-called National Commission on the Disappearance of Persons (Comisión Nacional sobre la Desaparición de Personas, CONADEP).⁶

4 National Pacification Act (Act No. 22,294). This act also declared any disappeared individual as dead: "It should be made definitely clear that any individual included in the list of disappeared individuals who are not exiled or living clandestinely are considered dead for legal and administrative purposes, even though the reason or date of their eventual death or the location of their graves could be accurately determined."

5 Decree-Act 158/83.

6 Decree-Act 187/83.

The National Congress played a crucial role in the design of this judicial procedure, and in certain aspects it even frustrated the president's claims to accept the demands of human rights organizations. Upon the request of the President, the Code of Military Justice was amended so that cases could be brought before the Armed Forces Supreme Council (Consejo Supremo de las Fuerzas Armadas, CONSUFA), in accordance with the summary procedure in force in times of peace. The amendment of the Code of Military Justice proposed by the government included obedience as a mitigating factor for criminal responsibility for those who had obeyed but had no decision-making power while following orders or directives. However, the Congress limited its application to those cases that were not considered "atrocious and aberrant acts." The assessment of the application of this exception and the interpretation of what was considered an aberrant or atrocious act were left to the courts.

At the same time, following the demands of human rights organizations, it was established that the decisions would be subject to mandatory review by the civil justice. Such review was entrusted to the federal criminal courts of appeal.

A period of 180 days was also defined for military tribunals that had not completed trials to report the reasons for such delay. If the courts of appeal found such delay to be unjustified, they could assume jurisdiction and continue the trials until a verdict was reached. Additionally, both the victims and their relatives were allowed to participate in the trials, provide evidence, and appeal the decisions. This system of review by the civil justice system prevented the military trials from resulting in a justification for the actions of the Armed Forces and absolving the perpetrators of their responsibility for following orders. The defendants were prosecuted in accordance with the Criminal Code in force at the time of the events.

These reforms were embodied in Act 23,049, enacted in February 1984.

On the other hand, during the early years of the transition, Argentina subscribed and ratified the international human rights treaties in force, some of which would have an impact on the investigation and punishment of the serious violations committed during the dictatorship. These treaties include the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, and the American Convention on Human Rights. The government agreed to submit to the jurisdiction of the Inter-American Court of Human Rights. The Convention on the Prevention and Punishment of the Crime of Genocide had been ratified in 1956. Moreover, Argentina ratified the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968 in 1995.



Demonstration at Plaza del Congreso against the enactment of the Self-Amnesty Law. August 19, 1983. Argentina.

the investigation of
crimes for prosecution

2

the investigation of crimes for prosecution

21

The investigation and the documentation of the crimes posed special challenges and led to definitions in both Germany and Argentina. Victims and human rights organizations played a key role in the collection, preservation, and systematization of evidence to support the accusations. In turn, institutional structures were created to receive complaints, reconstruct the facts in their complexity, document them, and collect evidence. They were crucial to investigate crimes featured by their magnitude and state support.

Researcher and professor Valeria Vegh Weis, who has studied the process of pursuing justice in Germany, asserts that the victims played a fundamental role. During the war and especially throughout the postwar period, victims from the refugee camps established in the different Allied occupation zones in Germany took early action to secure evidence, collect testimonies, systematize documentation, compile lists of murdered persons, and even request official

information from German authorities. After the Allied occupation, they cooperated in identifying criminals and witnesses, filed complaints, appeared in court to testify even under the most hostile conditions, provided evidence, and also devised innovative legal strategies to promote the conviction of the accused.

At the institutional level, a number of bodies were established based on the different stages of the process. During the war, the United Nations War Crimes Commission was established. It operated from 1943 to 1949. Its purpose was to identify, classify, and assist national governments in the process of prosecuting war criminals in Europe and Asia.

Throughout the various trials and at different stages, offices were created to support the prosecutors and their work. The Office of the Chief of Counsel for the Prosecution of Axis Criminality (OCCPAC), led by Prosecutor Robert H. Jackson, was responsible for gathering documentary evidence to support formal charges. This office underwent significant expansion as the number of captured documents, prisoner interrogations, and witness contributions increased. It included an Interrogation Division, a Documentation Division, a Special Projects Unit, four committees specializing in gathering evidence related to specific parts of the indictment, and an Administrative Division. The OCCPAC ceased to exist in 1946 with the termination of the International Military Tribunal.¹

The agency records are located at the National Archives of the United States (NARA) and include original copies and reproductions of documents collected for use as evidence, transcripts of proceedings and background reports prepared in connection with the trial, as well as audio recordings, films, and photographs related to the TMI.

¹ <https://historyhub.history.gov/military-records/b/military-records-blog/posts/records-of-the-international-military-tribunal-imt-at-nuremberg-in-the-national-archives-collection-of-world-war-ii-war-crimes-records-record-group-238>.



Photographs, objects, and a map presented as evidence during the Nuremberg Trial. 1945- 1946, Germany.

In Argentina, the role of victims and human rights organizations was crucial for the collection, preservation, judicialization, and analysis of all the evidence of state-sponsored terrorism. During the dictatorship, these organizations supported the victims and their families, collected testimonies, and systematized the information available in Argentina and overseas to account for what was happening. The contribution of international organizations such as Amnesty International was crucial to this task.

The information gathered was presented to the Inter-American Commission on Human Rights (IACHR), which made a visit to Argentina in September 1979. The IACHR issued a report that revealed what was happening at the national and the international levels, and confirmed the allegations made by the families of the victims.²

In August 1983, just before the presidential elections, local human rights organizations created the Technical Data Collection Commission. Its purpose was to collect and systematize information on the victims of state repression. This Commission was responsible for classifying data on detained-disappeared persons, identifying those responsible for it, and locating clandestine detention centers.³

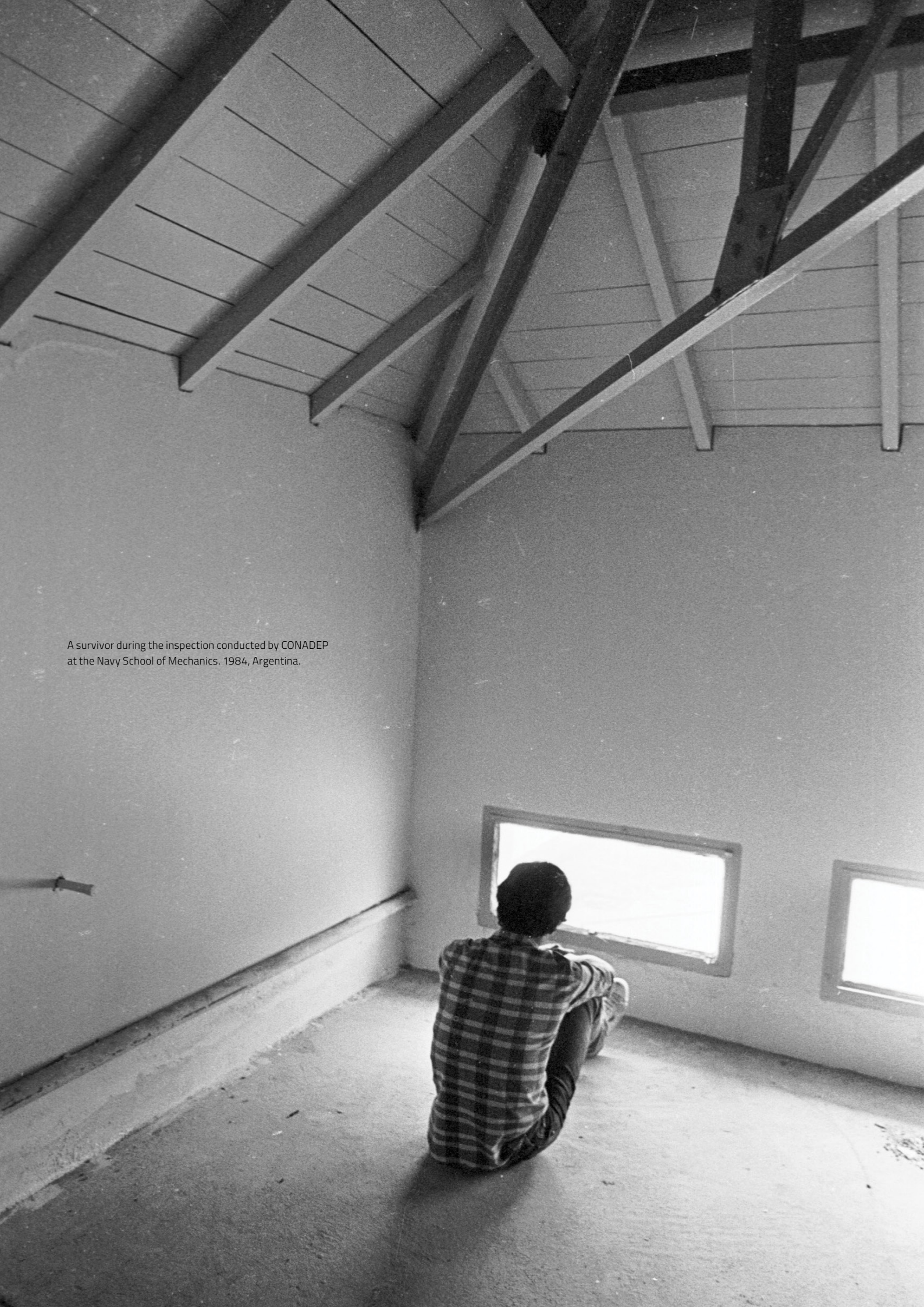
As soon as the democratic government took office, it created the National Commission on the Disappearance of Persons (Comisión Nacional sobre la Desaparición de Personas, CONADEP), an innovative institution dedicated to investigating and documenting what had happened, guided by the mandate of preparing a report that would provide a public interpretation of what had happened during the dictatorship. Its legitimacy was based on its pluralistic composition of prominent leaders from the cultural, religious, scientific, journalistic, and human rights defense spheres, as well as policy-makers from the National Congress. As Emilio Crenzel aptly explains, there is no certainty about how the idea of creating this commission came to light. Its precedent can be found in the special mechanisms in place in the United States Congress or in other experiences from Bolivia and Uganda that had investigated violations, even though they had not published a report.⁴

2 Published in 1980, available at <https://cidh.oas.org/countryrep/argentina80sp/introduccion.htm>.

3 Carolina Varsky and Lorena Ballardini; "La 'actualización' de la verdad a 30 años de CONADEP. El impacto de los juicios por crímenes de lesa humanidad", at Repositorio Digital CONICET, 2013, available at: https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://ri.conicet.gov.ar/bitstream/handle/11336/28580/CONICET_Digital_Nro.a6e42da3-416c-4189-9ee7-fdf6526b660e_B.pdf%3Fsequence%3D5&ved=2ahUKEwipwZaW4laKAXWRJUCHYgWC-8QFnoECBsQAQ&usq=AOvVawOY6MFWv4nO_gkO1jtgLNPq.

4 Emilio Crenzel, *La historia política del Nunca más: la memoria de las desapariciones en la Argentina*, Buenos Aires: Siglo XXI, 2014.

A survivor during the inspection conducted by CONADEP at the Navy School of Mechanics. 1984, Argentina.



CONADEP was nourished by the contribution of documentation and information gathered by human rights organizations. It collected reports of kidnappings and disappearances from victims and their families, tried to determine the whereabouts of those considered disappeared, collected testimonies from members of the Armed Forces and Law Enforcement agencies, and located hundreds of places that served as clandestine detention and torture centers, some of which were also used for extermination. The secrecy with which the dictatorship had carried out its criminal plan made the investigation of the facts more difficult.

On September 20, 1984, in a public event of social importance, CONADEP presented the report known as *Nunca Más* to the President of the Nation.

The information was also presented to the Judiciary to help it proceed with the trial of the documented crimes. This was set forth in the decree that created CONADEP, whose functions included receiving complaints and evidence and submitting such information to the Judiciary. To this end, it had an area specifically dedicated to processing the information and presenting it to the Judiciary. It was at this stage that the decision was made to sort the reported cases based on the detention centers where the disappeared persons had been seen. Such a scheme would be useful for organizing their subsequent prosecution.

CONADEP's document archive, which is at the National Memory Archive of the National Secretariat of Human Rights (Archivo Nacional de la Memoria de la Secretaría de Derechos Humanos de la Nación), has been crucial to pursue all the judicial investigations and to develop the policy of economic and symbolic reparations for the victims.



Report files received during the military dictatorship from the APDH Collection. Argentina.



We can explore into the judicial processes conducted in Germany and Argentina by dividing them into three phases. We shall present the information organized in this way for both countries. In the case of Germany, however, we shall present separately the trials that took place in the German Democratic Republic from 1949 until reunification in 1989.

The first phase identified is characterized by the historical trials - the Nuremberg Trials and the Trials of the Juntas - and by other trials of high-ranking officials. The second one refers to the decisions that ensured the impunity of the suspects or those who were actually convicted. The third phase is defined by the reopening of trials, a process that continues to this day in both Germany and Argentina.

legal proceedings

3

the first phase

the historical trials

Germany

the Nuremberg international trial

nov 1945 - oct 1946

The International Military Tribunal at Nuremberg was composed of judges appointed by the Allied Powers. There were nine members, of whom three were American, two were British, two were French, and two were Soviet. Geoffrey Lawrence, a judge from Great Britain, was the president of the court. The prosecution was conducted by representatives of each of the Allied powers, with Robert H. Jackson, the representative of the United States and a member of that country's Supreme Court, as chief prosecutor.

The prosecution structured the formal charges around three main concepts: Nazism, militarism, and economic imperialism. Based on these elements, the indictment against the criminal organizations included the political representatives of Nazism, inter alia the Reich Cabinet, the highest authorities of the Nazi Party, and the Reich Security Office, which included the Gestapo. To judge militarism, it accused the General Staff and the High Command of the Armed Forces as criminal organizations. The accusation also extended to industrial, financial, and private business leaders who contributed to the Nazi warfare power, as well as some of those considered responsible for the economic policy.

The determination of criminal responsibility by organizations facilitated the approach to individual responsibility for acts committed in the name of the State and allowed for the acceleration of mass prosecutions. The Court had to prove that any individual who belonged to a criminal organization had done so voluntarily and with full knowledge of its unlawful activities.

The trial focused on determining war criminality in terms of aggression and conspiracy, rather than crimes committed against Jews and other groups. This approach allowed the focus to be on the wartime period and the crimes committed by the Germans, while ensuring that the crimes committed by the Allied Powers were excluded.

The success of the criminal prosecution depended on the ability to obtain evidence to support the accusation. To this end, the powers divided such task: The Americans were entrusted with proving crimes against peace; the British were to focus on war crimes; while the Soviets and the French were to deal with crimes against humanity, depending on whether they had been committed in Eastern or Western Europe.

The prosecution decided to prioritize original Nazi documents as evidence over the testimony of witnesses or victims, which could be dismissed as biased or partial. Although the press and the public at large might consider documents boring and thus detract from the impact of the trial, the testimonial evidence was more vulnerable, especially when it involved people who had been persecuted. In its judgment, the Court emphasized that the prosecution case was largely based on documents produced by the defendants themselves. Nevertheless, a number of testimonies were heard during the trial, mostly from nationals of the Allied countries, not from ethnic victims.

On October 1, 1946, the Court delivered its verdict. Twelve of the defendants were sentenced to death. Ten were executed by hanging and their bodies were cremated in Dachau before their ashes were scattered on the Isar River. Hermann Göring committed suicide before his execution. Bormann was tried in absentia because he had managed to escape. Three of the defendants were sentenced to life imprisonment, and four were sentenced to prison terms from ten to twenty years. Three were acquitted.

The businessman from the industrial sector, Gustav Krupp, was declared unfit to stand trial. This paved the way for the possibility of a second international trial of the industrialists. France and the Soviet Union, which had been heavily affected by Germany during the war, had a particular interest in including the economic issue in the trial. However, with the advent of the Cold War, this trial was abandoned. The United States and Great Britain needed Germany's recovery and integration into the Central European power bloc as a measure to contain communism and its advance. By mid-1946, this goal had outweighed the fear of a rebirth of German nationalism.



Presentation of evidence during the
Nuremberg Trial. 1946, Germany.

the zonal trials

1946 - 1948

Following the conclusion of the Nuremberg International Trial, there was a consensus against the establishment of a second International Military Tribunal. This was due to British skepticism about the project as a whole and, more generally, to the rising tensions imposed by the Cold War between the Western Allies and the Soviet Union.¹ Therefore, it was decided that any subsequent trial of major war criminals would be conducted individually by the occupying powers.

The CCL10 gave the Zonal Tribunals jurisdiction over the crime of membership in government bodies that had been declared criminal by the International Military Tribunal.²

The United States –whose military authorities remained in Germany until 1949– was responsible for prosecuting the criminals lower in the chain of command of the organizations that had been declared criminal by the IMT. These trials are known as the “Subsequent Nuremberg Trials” and were conducted by military tribunals operating at the Nuremberg Palace of Justice, the same place where the international trial had taken place. Although they were military tribunals, all but one of the judges were civilians.

In all, there were twelve trials including 185 well-known defendants who held a variety of positions within the Nazi hierarchical structure. The intent was to expose the criminal nature of the Nazi state and its chains of authority. They prosecuted individuals and groups involved in the formulation and implementation of criminal policies which, due to the broad scope of application, had no specific geographic location.

The charges against the accused were the same as those brought before the International Tribunal. The main elements of these charges were their involvement and personal responsibility for the crimes committed, or even their failure to report them despite knowing that they were criminal acts.

¹ Donald Bloxham, “The Trial That Never Was’: Why There Was No Second International Trial of Major War Criminals at Nuremberg,” *History* 87 (2002), pp. 41–60.

² Article II.

The cases were:

- » **Case No. 1. United States v. Karl Brandt et al. ("medical trial"):** The case was related to high-ranking doctors and scientists involved in experiments with concentration camp prisoners and the euthanasia program.
- » **Case No. 2. United States v. Erhard Milch ("Milch Trial"):** It was related to his involvement in the slave labor program and medical experiments on prisoners at Dachau.
- » **Case No. 3. United States v. Josef Altstötter et al. ("Justice Trial"):** It involved judges and lawyers accused of abusing judicial and criminal proceedings, resulting in mass murder, torture, looting of private property, and the like.
- » **Case No. 4. United States v. Oswald Pohl et al. ("Concentration Camp/ WVHA Trial"):** It targeted the personnel of the SS Central Economic and Administrative Office, who were responsible for the administration of concentration camps and other related economic enterprises.
- » **Case No. 5. United States v. Friedrich Flick et al. ("Flick Trial"):** It prosecuted the representatives of an industrial company involved in slave labor, looting, and the "Aryanization" of Jewish capitals.
- » **Case No. 6. United States v. Karl Krauch et al. ("Farben Trial"):** The case prosecuted representatives of a chemical business conglomerate accused of aiding and promoting Nazi plans of an aggressive war and the use of slave labor.
- » **Case No. 7. United States v. Wilhelm List et al. ("Balkans Generals' Trial" or "Hostages Trial"):** It involved high-ranking military personnel accused of numerous war crimes, including reprisal killings and the illegal execution of hostages.
- » **Case No. 8. United States v. Ulrich Greifelt et al. ("RuSHA Trial"):** It prosecuted representatives of different SS offices responsible for the forced evacuation and the "Germanization" of occupied countries, as well as other Nazi plans of "racial reorganization."
- » **Case No. 9. United States v. Otto Ohlendorf et al. ("Einsatzgruppen Trial"):** It prosecuted leading members of the SS and the police units responsible for racially and politically motivated mass murders.
- » **Case No. 10. United States v. Alfred Krupp et al. ("Krupp Trial"):** It prosecuted a leading executive of the industrial sector and his associates. They had been accused of aiding and promoting Nazi plans for an aggressive war and the use of slave labor.

- » **Case No. 11. United States v. Ernst von Weizsäcker et al. ("Ministries Trial"):** It involved a variety of defendants, including governmental officials, SS leaders, economists, and propagandists, on charges ranging from crimes against peace to crimes against humanity.
- » **Case No. 12. United States against Wilhelm von Leeb et al. ("High Command Trial"):** It prosecuted high-ranking military personnel for planning an aggressive war, as well as war crimes and crimes against humanity.

The sentences imposed included twelve death penalties, eight life sentences, and 77 prison terms. Some defendants were acquitted.

The OCCPAC initially led the investigation of these cases. Its Post-Trial Division gathered evidence for new judicial proceedings and prepared the cases for the international trial. Once that process was completed, the OCCPAC was dissolved and replaced by the Office of the Chief of Counsel for War Crimes (OCCWC). It was headed by Colonel Telford Taylor. The latter was responsible for organizing these trials and selecting the accused.

This institution was organized into seven teams. Four teams secured the evidence, analyzed and prepared it for its subsequent use in cases against the main criminals (military division, ministry division, SS division, and economics division). Two teams were involved in trials; and the last one located suspects and witnesses and managed the evidence for the other teams. The latter was also responsible for sending the information gathered in the IMT and the subsequent investigations to the German agencies in charge of the Denazification Program.

In addition to these cases against high-rank personnel, a significant number of trials were held between 1946 and 1948. They focused on lower-rank personnel who had committed crimes within the occupation zone of one of the Allied Powers. The trials included personnel from concentration camps and prisons.

These criminal trials coexisted with the denazification program, which, according to Directive 38 of the Allied Control Council,³ was left in German hands. Directive 38 established that denazification was a separate matter from criminal prosecution, and that punishment for denazification would not prevent criminal prosecutions for the same offense. LCC10 was a criminal statute intended to punish individual illicit actions, while Directive No. 38 was an administrative purging procedure for political reasons.

3 Delivered on October 12, 1946.



A survivor testifying at the trial for crimes committed at the Mauthausen concentration camp. 1946, Germany.

The United States implemented a criminal investigation and prosecution program that ran until July 1948. The program covered cases against staff members and guards in the concentration camps of Dachau, Buchenwald, Flossenbürg, Mauthausen, Nordhausen, and Mühldorf. The “Dachau series” is the one that stands out. It includes the prosecution of events that occurred in the former concentration camp, where 1,672 individuals were tried. Other trials involved guards and staff members from the sub-camps and auxiliary camps for the main camps, and prosecuted around 800 defendants.

A significant number of criminal proceedings centered on the judgment of war crimes committed against American soldiers and other citizens. The most prominent cases were against the lawyers of Dresden and the medical personnel, also in Dresden, who were accused of euthanasia crimes.

The British occupation structure lacked an entity capable of conducting complex criminal investigations. Military courts focused exclusively on war crimes and the individuals directly involved, in accordance with the Royal Order for the Trial of War Crimes. Furthermore, extraditions of suspects were granted for further prosecution in the American zone. Over time, the British trials focused mainly on the atrocities committed against British soldiers. Even under such restrictions, they conducted a significant number of trials.⁴

France’s participation was also limited to war crimes. It delegated the processing of other crimes to ordinary German courts. In turn, the geographical area occupied by the French military authority was smaller than that of the other powers, so there were fewer cases.⁵

Prosecution in the Soviet occupation zone had two distinct stages. In the beginning, the decision was made not to generally delegate jurisdiction to German courts, as permitted by Control Council Law No. 10 (CCL10). Accordingly, each case was addressed individually to determine the appropriate authority to judge it.

As of 1947, pursuant to Soviet Military Order No. 201, the decision was made to merge criminal trials and denazification, and to grant German court’s jurisdiction over both.

⁴ Bloxham, citation, pp. 32 and subsequent ones.

⁵ Devin Pendas, cited in note 6, p. 432.

Order No. 201 implemented Directive 38, as mentioned before. With the issuance of this Order, the Soviets made a clear distinction between criminal proceedings and administrative proceedings. According to Devin Pendas, this decision resulted in the politicization of trials in the occupation zone.⁶ The purpose was to expedite the exclusion of the Nazis who had been active and involved in criminal activities, leaving this task in the hands of the Germans themselves. They also sought to facilitate the social reinsertion of those who had not been actively involved.

For the implementation of this Order, primary responsibility for preliminary investigations of state prosecutors was delegated onto the Ministry of the Interior - i.e., the police. They were given more power and self-sufficiency. Upon enforcement of this regulation, the prosecutors' role was limited to confirming the charges presented in court. However, the accused still had certain due process rights, such as the right to have a defense attorney and the right to appeal sentences before the State Supreme Court.

First of all, until 1950, the trials for Nazi atrocities in the Soviet zone, although under a rising political pressure, maintained a surprising degree of legal legitimacy. In fact, in some respects, they were superior to their counterparts in West Germany. Pendas argues that the trials in the Soviet zone were superior to those pursued in the Western zone in certain respects. He highlights that they achieved more convictions and imposed more appropriate sentences. Besides, they provided the accused with "reasonable protection to due process," and their jurisprudence offered a more precise analysis of the social depth and complexity of Nazi criminality.⁷

The scheme that combined denazification process with criminal prosecution continued after the establishment of the Democratic Republic of Germany, although due process guarantees weakened. There is no precise public data on the progress during such period.

6 Devin Pendas, cited in note 1, p. 95 and subsequent ones.

7 Devin Pendas, cited in note 17, p. 164.

Argentina

the trials of the Juntas

1985

The Argentine Armed Forces exercised a collegiate power that included representation from the Navy, the Air Force, and the Army in the various military juntas that ruled the country. However, the Army held primacy. The first Military Junta, led by General Jorge Rafael Videla, was in power from March 1976 until early 1981. Between 1981 and 1983, three more juntas succeeded each other, also led by Army generals. They were Roberto Eduardo Viola (from April to December 1981), Leopoldo Fortunato Galtieri (from December 1981 to June 1982), and Reynaldo Bignone (from June 1982 to December 1983).

The Trial of the Juntas in Argentina, designated as Case 13 of 1985, was strategically organized under the idea of President Raúl Alfonsín to make a distinction among different responsibility levels to avoid massive trials. These levels made a distinction between those who had given the orders (the commanders-in-chief of the Armed Forces), those who had carried them out and could be exempted from responsibility, and then those who had exceeded their duties. Because of this clear distinction, the first trial focused on the members of the military juntas, especially the first three.

The Supreme Council of the Armed Forces (Consejo Supremo de las Fuerzas Armadas, CONSUFA) initially heard the case, but it was later taken up by the Federal Court on Criminal and Correctional Matters of the City of Buenos Aires after the military courts showed a lack of willingness to prosecute their peers.

The judges were Carlos Arslanian, Jorge Torlasco, Andrés D'Alessio, Ricardo Gil Lavedra, Jorge Valerga Araújo, and Guillermo Ledesma. These judges were appointed during the democratic era.

The federal prosecutor's office, led by Julio Strassera as chief prosecutor and Luis Moreno Ocampo as deputy prosecutor, prepared the indictment and gathered the evidence.

The accused were Jorge Rafael Videla, Emilio E. Massera, Leopoldo Galtieri, Jorge Anaya, Basilio Lami Dozo, Omar Grafigna, Orlando Agosti, Armando Lambruschini, and Roberto Viola. They were all members of the first three military juntas.

Even though the Criminal Code in force at the time of those events was applied, the Federal Court decided to use the summary proceedings in times of peace embodied in the Code of Military Justice, as it allowed for an oral and public trial.

The prosecution focused on 709 cases that, according to the prosecutor's criteria, relied on sufficient evidence. Public hearings began on April 22, 1985, and 833 people testified.

The prosecutor's office filed charges, including the crimes of false imprisonment, torture, murder, and illegal entry. At that time, torture and forced disappearance were not classified as crimes in the Argentine Criminal Code. Torture was first regulated in a United Nations treaty in 1984,⁸ forced disappearance—defined as the kidnapping, unlawful detention, and concealment of the victims' whereabouts—was first recognized internationally in the Inter-American Convention on Forced Disappearance of Persons in 1994,⁹ and later in the United Nations International Convention for the Protection of All Persons from Enforced Disappearance, which came into force in 2010.¹⁰

The investigations carried out by human rights organizations during the dictatorship and the results of the investigation activities conducted by CONADEP were critical to prepare the formal indictment. The CONADEP facilitated judicial work by organizing the information based on legal criteria. It linked the victims to the clandestine detention centers where they had been seen. In addition, they provided all the information relative to each of them.

8 Ratified by Argentina in 1986.

9 Ratified by Argentina in 1996.

10 Ratified by Argentina in 2007.



Second day of closing arguments in the Trial of the Military Juntas. September 11, 1985. Argentina.

Unlike Nuremberg, the central evidence in this case was oral testimonies, mainly from survivors and victims' family members. This was because the dictatorship had acted clandestinely and under a pact of silence that hindered the possibility of relying on documents or other materials that would explain how the illegal repression had been organized or on statements from those responsible for it. Only those who had suffered human rights violations or the relatives of those who had been murdered or were missing could account for them. The ruling upheld the testimonies. Accordingly, it stated: "Witness testimony is a means of evidence that is privileged over particular modes of execution in which traces are deliberately erased, or in cases where crimes do not leave traces of their perpetration, or else are committed under the cover of privacy." In such cases, witnesses are known as necessary. In this case, the clandestine way the repression was conducted, the deliberate destruction of documents and evidence, and the anonymity sought by its authors support such an assertion. Therefore, it should not be surprising that most of those who served as evidence were either relatives or victims. They are necessary witnesses."¹¹

In turn, the judges highlighted that the witnesses' contributions were strengthened by the existing pre-established evidence corroborating it. The habeas corpus writs filed during the dictatorship stood out, and their content matched the testimonies provided by the witnesses. They also highlighted the similarities between the testimonies of the victims who were deprived of their liberty in the same clandestine detention center. In turn, this made it possible to reconstruct the details, the accommodation conditions, and the identity of the captives.

Another issue linked to the evidence was the requirement to have the victim's body to classify the crime as murder. The Higher Court determined that circumstantial evidence would not be accepted for this crime, while it also evaded declaring the death of missing persons. Thus, it classified cases in which the body was not found as false imprisonment aggravated by the use of violence and threats.

The final judgement established the existence of a systematic, clandestine plan to violate human rights: "As has been evidenced for the case, on a date close to March 24, 1976, the day when the Armed Forces overthrew the constitutional authorities and took over Governmental Power, some of the defendants, in their capacity as Chiefs of Staff of their respective Forces, instructed on a method of combating terrorist subversion, which basically consisted of: a) capturing those who, according to intelligence reports, might be suspected of having links with subversion; b) taking them to places within military units or other places under their

¹¹ CFCCF, verdict in case 13/84, Rulings 309: 319.

control; c) once there, interrogating them under torture in order to obtain as much information as possible about other persons involved in such actions; d) subjecting them to inhumane living conditions with the aim of breaking their moral resistance; e) carrying out all of the aforementioned in absolute secrecy, which required the kidnappers to conceal their identity and carry out operations preferably at night, keeping the victims completely isolated and blindfolded, and denying knowledge of the existence of any kidnapped person and any possible place of detention to any authority, family member, relative or friend; f) granting lower-ranking officers the freedom to determine the fate of such captive individual, who could then be released, placed at the disposal of the National Executive Branch, subjected to military or civil trial, or else be physically eliminated".¹²

The final verdict found that the commanders ordered illegal repression through the chain of command, overriding legal directives regarding detention centers, treatment of prisoners, intervention of the military or civil courts of justice, and submission to the National Executive Branch. The defendants ensured the impunity of those who carried out such orders, guaranteeing that such actions were carried out without interference and in secrecy. The existence of the facts was denied to the authorities and to the families of the victims. False answers were given to judges, the publication of news about disappearances or the discovery of corpses was avoided, and investigations were simulated. Reports of such crimes were presented as a campaign promoted from abroad.

On December 9, 1985, the verdict was announced. It convicted five of the accused commanders and acquitted four. Videla and Massera were sentenced to life imprisonment; Viola to 17 years in prison; Lambruschini to 8 years in prison; and Agosti to 4 years and 6 months in prison. They were all dismissed from the armed forces. Graffigna, Galtieri, Lami Dozo, and Anaya were acquitted.

The verdict was confirmed by the Supreme Court of Justice of the Nation on December 30, 1986.¹³

¹² CFCCF, verdict in case 13/84, Rulings 309:256.

¹³ CSJN, Volume 309 of the collection of rulings.

P. DE LOS LIBROS, 2 de Abril de 1947

[Signature]

ROBERTO EDUARDO VIOLA
TENIENTE. R. 27.

V^o

B^o

[Signature]



CARLOS ALBERTO PADULA
Teniente Coronel - Jefe R. 27



Personnel file from the Argentine
Army Archive. Argentina.

the trial of the repression circuit's authors in the province of Buenos Aires

1986

The second and last trial was conducted and completed during the 1980s. It centered on the crimes committed by the dictatorship. The accused were the members of the group that led the illegal repression in the province of Buenos Aires between 1976 and 1977.

This trial was initiated pursuant to a decree from the President of the Nation that ordered CONSUFA to prosecute the accused within the framework of the Code of Military Justice.¹⁴ The trial was held in 1986. In their decision, the judges of the Federal Higher Court addressed 308 cases brought to trial by the Prosecutor's Office, many of which had been used the previous year to determine the charges against the members of the juntas. The Prosecutor's Office that participated in this case was the same one that had participated in the Trial of the Juntas.

45

The trial had the same characteristics as the previous one, and the final verdict was announced on December 2, 1986. Five of the seven individuals accused were sentenced to prison, while the other two were acquitted.

Both the verdict of the Trial of the Juntas and the verdict of the repressive circuit in the province of Buenos Aires clearly decided to continue with the investigation of senior officers and operational leaders of the Armed Forces and security forces. Thus, a new series of trials began that did away with the government's idea of judging only the highest-ranking officials for serious violations of human rights and exonerating those who had followed orders.

14 Decree-Law 280/84.

the trials of high-ranking officials and the individuals responsible for operations in the 1980s

The judicial decision to investigate the involvement of those below in the chain of command led to further trials across the different regions of the country. These trials were based on the organization of the repression implemented by the military juntas. CONSUFA began to hear all the cases. However, the military judges did not act, and so the federal higher courts claimed the files and continued with the proceedings.

The lawyers representing the victims were the main driving force behind such proceedings. They were mostly members of human rights organizations. They were the ones who fostered complaints, gathered the evidence, and provided it for the files. Moreover, they drove the processes forward.

The progress in the investigations and pretrial detention of some accused individuals led to uprisings in military barracks. Faced with such pressure, the government negotiated the closing of the process of justice. The Due Obedience and Clean Slate Acts marked the end of this first cycle of trials.

By the end of the eighties, only ten individuals had been convicted all the violations perpetrated during the dictatorship, who would then be pardoned. The following years were blighted by total impunity.

3. legal proceedings

The impunity *impasse* that affected criminal prosecution in both Germany and Argentina is crucial to understanding how political factors impinge on the prosecution of massive crimes. In West Germany, the progress of the trials was hindered by the priority given to national reconstruction within the context of the Cold War. As we have explained, East Germany chose to turn prosecution into a political instrument. In turn, this led to a distinct development. In Argentina, the tension between the need to stabilize democracy and the need to condemn those responsible was intense. The periods of impunity resulted in severe consequences.

the second phase

the years of impunity

Alemania

the clemency period

1950 - 1958

During the Cold War, the Allied Powers were divided in two blocs. As a result, the condemnation of German military, political, and economic elites ceased to be a priority for the victorious Western forces, which needed to integrate Germany into their geopolitical bloc. The main focus in West Germany was on the political and moral recovery of the elites, who were weakened by the criminal convictions of some of their members. These elites were exerting pressure to get war criminals released and the "former Nazis" reinserted into society. In turn, it is said that a significant portion of the population considered the trials unfair.¹⁵

Historian Devin Pendas states that between 1950 and 1958, West Germany experienced a substantial decline in the prosecutions for Nazi crimes. Such decline was the result of amnesties for "minor" Nazi criminals, intense German pressure on the Allies to release German war criminals, and the systematic reinsertion of former Nazis into society.

According to this author, East Germany also experienced a substantial plunge in the number of prosecutions for Nazi crimes.¹⁶ During this time, judicial activity in the Democratic Republic was significantly more intense. Among other factors, jurisprudence took a clear stance on objective responsibility for crimes against

¹⁵ Tony Judt; *Postwar. A History of Europe Since 1945*, Penguin Press, 2005, p. 65.

¹⁶ Pendas, Devin; *Seeking Justice, Finding Law*, *The Journal of Modern History* 81 (June 2009); University of Chicago, p. 361.

humanity and political denunciations. This approach disregarded the subjective intentions of the authors and instead focused on their affiliation with the Nazi regime to determine sentences.

Meanwhile, trials faced budget cuts and lost momentum in West Germany. Efforts to capture suspects who had not yet been detained decreased, and many received lesser sentences. This stage is known as the phase of amnesty and clemency.

The investigations of Nazi crimes were handled by German courts pursuant to the provisions of the German criminal code. By ceasing to apply the Allied Control Council Act No. 10, the courts could no longer pursue prosecution of crimes against humanity or war crimes because they were not covered by the legislation, which also prohibited retroactive enforcement of criminal laws.

The criminal code made a clear distinction between those who committed crimes with intent and will and those who prompted or participated as accomplices. The penalties for accomplices were significantly lower than those for perpetrators. To consider someone a perpetrator, it was necessary to prove his individual intention or desire to commit the crime. If the accused committed the crime himself, but his individual intention to commit such a crime was not proven, or he exceeded the orders given, he was considered an accomplice and not a direct perpetrator.

Proving the subjective element of a crime was difficult, but proving the motive in racial hate crimes was even more intricate, as the code only provided for motivations such as "the desire to kill, sexual desire, and other vile motives."

Another restraining issue was the statute of limitations for criminal prosecution. In the cases of crimes punishable with life imprisonment, the statute of limitations established a term of twenty years; in the cases of crimes punished with imprisonment terms exceeding ten years, such as homicide, it established a term of fifteen years; while in the cases of other criminal acts, it established a term of ten years. As a result, after 1965, homicides committed during the Nazi period could no longer be prosecuted, and this imposed significant restrictions on justice.

The jurisdiction of German courts also had restraints for criminal prosecution. According to procedural legislation, courts and prosecutors only had jurisdiction over crimes committed within their jurisdictions. The Auschwitz crimes actually occurred in Poland, but this country could not judge them because the perpetrators were not Polish and were not on its territory. The issue was resolved by the German Supreme Court, which expanded the jurisdiction of the courts to those who had been born within the court's jurisdiction or had lived there for some time.

Between 1951 and 1955, just a few trials progressed, and those that did so mostly convicted the accused for complicity in the commission of homicides, resulting in short sentences.

According to Wittmann, in addition to legislative factors, the trials had to face other obstacles. The young prosecutors lacked information and did not know how to approach the prosecution of such crimes, while many of the older prosecutors had been members of the Nazi party and, therefore, had no interest in pursuing queries.¹⁷

As of 1958, the momentum would experience a recovery following the creation of the Central Office for the Investigation of National Socialist Crimes, an agency focused on identifying and finding Nazi criminals.

17 [1] Rebecca Wittman; The Wheels of Justice Turn Slowly: The Pretrial Investigations of the Frankfurt Auschwitz Trial 1963-65, Central European History, Vol. 35, No. 3 (2002), pp. 345-378.



A defendant accused of participating in operations at the Buchenwald concentration camp during the trial for crimes committed there. 1947, Germany.

Argentina

the impunity period

1986 - 2001

Argentina passed a series of regulations after the first phase of prosecutions. These regulations ensured complete impunity for the crimes committed by the dictatorship.

In an effort to limit prosecution and in response to mounting pressure from the military, President Raúl Alfonsín introduced the Clean Slate Act in 1986. The law set a sixty-day timeframe to charge suspects, after which, any criminal action was to be considered time-barred. This standard faced widespread opposition at the door of the national Congress. However, it was ultimately passed on December 23 of that same year.¹⁸

The quick reaction of human rights organizations and prosecutors made it possible to collect evidence to summon all the accused in record time. This dismantled the government's intent to ensure impunity. More than 450 members of the armed and security forces were charged in trials.

¹⁸ No. 23,492.

Six months later, the Due Obedience Act (*Ley de Obediencia Debida*)¹⁹ was passed as a response to a military uprising.²⁰ The standard put an end to the trials after determining that defendants had acted under coercion following the orders of their superiors, which they could not disobey. This presumption could not be reviewed by judges, and therefore, all defendants who were not high-rank officers regained their freedom. Notably, the only crimes not covered by the act were child theft, rape, and theft.

Although both acts were challenged in court, the Supreme Court of Justice of the Nation upheld them.²¹

Impunity was completed after the enactment of a series of pardons signed by President Carlos Menem. On October 7, 1989, four decrees were issued. They pardoned 220 military officers and 70 civilians. This pardon excluded the military leaders previously prosecuted who had not benefited from the Clean Slate and Due Obedience Acts (*Leyes de Punto Final y Obediencia Debida*), with the exception of former division general Guillermo Suárez Mason, who had been extradited from the United States.²² On December 29, 1990, another series of pardons benefited the former members of the military junta commanders convicted in the Trial of the Juntas held in 1985 – namely, Jorge Rafael Videla, Emilio Massera, Orlando Ramón Agosti, Roberto Viola, and Armando Lambruschini; convicts Ramón Camps and Ovidio Riccheri; and defendants José Alfredo Martínez de Hoz – former Minister of Economy – and Guillermo Suárez Mason.²³

Eventually, these pardons encompassed all individuals who had been convicted and those who were still undergoing trial.

19 No. 23,521, from 06/08/1987.

20 On April 15, 1987, Major Barreiro was summoned by the Federal Court of Córdoba in connection with the trial of the events occurred at La Perla detention center, where he was accused of torture and kidnappings. Barreiro disobeyed the judicial decision and took refuge in the 14th Infantry Regiment. Twenty-four hours later, General Aldo Rico took the Infantry School of Campo de Mayo. The uprising began in solidarity with Barreiro and as a protest against the trials. The uprising concluded when the rebels received assurances that the government would present a Due Obedience Act to put an end to the trials.

21 Supreme Court of Justice of the Nation, “Ramón Juan Alberto Camps et. al,” volume 310, page 1162, verdict dated 06/22/1987.

22 Decree-Act 1002/89. The pardons also benefited leaders and members of guerrilla groups; the participants in the military rebellions during the Holy Week, Monte Caseros in 1987, and Villa Martelli in 1988; and former members of the Military Junta Commanders Leopoldo Galtieri, Jorge Isaac Anaya, and Basilio Lami Dozo, convicted for the crimes committed while they led the Falklands War (Decrees 1003, 1004, and 1005, respectively).

23 Decree-Acts No. 2741, 2745, and 2746 from 1990.

Concurrently, the Argentine courts reached divergent conclusions regarding Nazi officials who had sought refuge within the national territory. They were granted impunity, in stark contrast to the approach adopted in the case of Argentine criminals.

In 1989, the judiciary authorized the extradition of SS officer Josef Schwammberger, observing the request filed by the German state to be further tried for the crimes committed during the Nazi regime. The intervening court ruled that these crimes were not subject to any statute of limitations, based on Argentina's obligations under the human rights treaties timely subscribed and the *jus cogens* nature of the prohibitions involved.²⁴ In the eyes of international law, *jus cogens* refers to the fundamental standards accepted and recognized by the international community as unalterable and mandatory in nature. These standards are so essential that they cannot be modified or violated by any country. The Supreme Court confirmed this reasoning when deciding the extradition of another Nazi officer, Eric Priebke, to Italy in 1995.²⁵

The Argentine courts' recognition of the international nature of the Nazi crimes did not extend at that time to the serious crimes committed by the dictatorship, whose prosecution was mostly closed.

54

For more than a decade, the judicial system failed to respond. During this period, human rights organizations did not abandon their pursuit of justice. They condemned the impunity in every international human rights forum. The Inter-American Commission on Human Rights published a report stating that the Clean Slate and Due Obedience Acts were incompatible with the American Convention on Human Rights. Furthermore, they called upon the State to take action to clarify the facts and identify the individuals responsible.²⁶

In the quest to restore the leading role that the judiciary had played in the early years of democracy, human rights organizations asked the Trial Court for the Juntas to recognize the right of victims and society to know the truth in 1995. This right prevailed independently of their right to justice. The presentation was part of a broader social debate sparked by the disclosure of a Navy officer who had publicly acknowledged having participated in the flights where prisoners from clandestine detention centers had been thrown alive into the sea.²⁷

24 Supreme Court of Justice of the Nation, Schwammberger, Josef Franz Leo on extradition, 03/20/1990.

25 Supreme Court of Justice of the Nation, Priebke, Erich on extradition request, 11/02/1995.

26 IACHR, Report 28/92.

27 Corvette captain (Retired) Adolfo Francisco Scilingo, former vehicles head ESMA or Escuela de Mecánica de la Armada (known as Navy Petty-Officers School of Higher School of Mechanics of the Navy), reported that between 1500 and 2000 detainees were thrown alive onto the Atlantic Ocean, intoxicated and naked, from warships and naval patrol airplanes in the years 1976 and 1977. He claimed that the orders were organically given through the chain of command of the forces.

The “right to the truth” invoked was based on developments by the Inter-American Court of Human Rights. Since the contentious case known as *Velázquez Rodríguez v. Honduras*, the Court recognized that States are compelled to investigate, prosecute, judge the responsible parties, and compensate the victims of forced disappearance. These obligations are independent of each other. Accordingly, it was possible to proceed with the investigations even if legally prevented from imposing criminal sanctions.

The recognition of the right to truth paved the way for a new phase of judicial action. Without an act setting forth a legal procedure, the judges implemented mechanisms to ensure it. Many used the evidentiary resources embodied in the code of criminal procedure, such as search warrants, summons to witnesses, document seizure, and summons to suspects. Alternatively, others chose to go for civil procedures, less suitable for gathering information. The aim was to give an answer to the families regarding the circumstances of the crimes and the fate of the bodies of the disappeared. These trials led to significant advances in a number of areas and were crucial for the subsequent reopening of criminal trials.

The trials for the truth were held across the country and encouraged the victims to appear before the courts to give their testimonies. Many wrongdoers were also summoned to testify as witnesses.

The emphasis on the pursuit of justice during those years focused on trials concerning children abduction and identity substitution, which were not covered by the scope of the impunity laws. However, these cases faced an obstacle in the statute of limitations for criminal actions, as approximately twenty years had elapsed since they had been committed. In 1999, the Federal Court of Appeals of Buenos Aires ruled that these acts, including forced disappearances, fell under the category of crimes against humanity according to *jus cogens*. Therefore, they were imprescriptible, meaning that they could not be reversed by either national or international standards. This ruling revived the argument that had led to the extradition of Josef Schwammberger some years before.

Another key action in the fight against impunity consisted of prosecuting military personnel responsible for human rights violations in courts of other countries. This approach took into account the nationality of the victims and used universal jurisdiction when applicable. Emblematic cases, such as those heard by the Spanish judge Baltasar Garzón, who issued massive arrest warrants against former

Argentine military personnel, are examples of such a strategy.²⁸ These international actions not only sought justice for the victims but were also intended to influence the Argentine government to reopen trials in the country.

The pressure exerted by the requests for the extradition of Argentine military personnel was combined with local political factors that paved the way for the annulment of the impunity laws.

The Poblete-Hlaczik case—a couple who disappeared along with their daughter, who had been appropriated by a military family—became a turning point. The complaint, supported by the Center for Legal and Social Studies (Centro de Estudios Legales y Sociales, CELS) and Grandmothers of Plaza de Mayo (Abuelas de Plaza de Mayo), focused on the legal paradox that the perpetrators could be convicted for the abduction, retention, and concealment of the girl, but not for the disappearance of her mother, which had occurred simultaneously. The argument was based on the fact that forced disappearance is a crime against humanity, which excludes the possibility of amnesties, pardons, and statutes of limitations.

This argument was not new, as it had been established during the 1980s by a group of jurists convened by the Latin American Federation of Associations of Families of Detained-Disappeared Persons (Federación Latinoamericana de Asociaciones de Familiares de Detenidos-Desaparecidos, FEDEFAM). They were working on a draft international treaty against forced disappearance. Researcher Daniel Stahl explains that they defined disappearance as a crime against humanity to ensure that the principles applied in Nuremberg were also valid for cases in Latin America. As a result of these discussions, the classification of forced disappearance as a crime against humanity became a key element in the strategy pursued by the families of those who were disappeared.²⁹

In 2001, the judge hearing Poblete case ruled that the Clean Slate and Due Obedience laws were unconstitutional. He argued that, pursuant to the principle of *jus cogens*, crimes against humanity could not be amnestied. This ruling was confirmed in 2003 by the Court of Appeals and then ratified in 2005 by the Supreme Court of Justice of the Nation.³⁰

28 Trials were conducted against Argentine military personnel in France, Italy, and Germany. They were based on the principle of passive nationality - i.e., the nationality of the victim. In the United States, the trials were conducted under a law known as the Alien Tort Act, which allows for a civil trial in said country for acts that breach the law of nations or a treaty to which the United States is a party, provided that the accused is in its territory.

29 Daniel Stahl, *La invención de una tradición transcontinental. El Tribunal de Nuremberg y la transformación del derecho penal a finales del siglo XX*, (The Invention of a Transcontinental Tradition. The Nuremberg Tribunal and the Transformation of Criminal Law by the End of the 20th Century), paper presented at the Symposium "The Present Past," March 12, 2024, in Bogotá.

30 Supreme Court of Justice of the Nation, Simón, Julio Héctor et al. on false imprisonment, 06/14/2005.



Sign in front of Congress during the debate on the Full Stop Law. December 23, 1986. Argentina.

The repeal of impunity laws was also politically motivated. In August 2003, the National Congress passed legislation that repealed the Clean Slate and Due Obedience laws.³¹ Such legislative decision was a response to the growing social demand for justice and the shift in state policy towards the defense of human rights. This legislation was subsequently upheld by the Supreme Court of Justice in 2005, when it ratified the unconstitutionality of such laws. The annulment in the National Congress reflected the commitment of the Argentine State to prosecute and condemn the individuals responsible.

³¹ Act No. 25,779.

the third phase

reopening of the trials

Germany

Auschwitz trials in Frankfurt 1958 and onwards

As of 1955, certain trials moved forward, mostly driven by survivors who identified the individuals who had tortured them in concentration camps and exerted pressure to bring them to trial. It became evident that numerous Nazi criminals –including military personnel, police officers, judges, and bureaucrats– were living in Germany and no effort had been made to find and prosecute them.

The case of Bernhard Fischer-Schweder in 1958 is a clear example of such unwillingness. A former chief of police officer in Memel, Lithuania, Fischer-Schweder was accused of having participated in the murder of thousands of Jews as a member of an operating group in 1941. He remained unidentified until he sued the state to be reinstated as the director of a refugee camp in Ulm and was recognized by survivors.

Despite the evidence of his active and direct involvement in the massacre, the court sentenced him to a ten-year term in prison as an accomplice. The court determined that both he and the other defendants had acted following orders and did not show “any perpetrator’s intent.” The other nine defendants were punished with prison terms ranging from three to fifteen years.

Norbert Frei states that around 1959–1960, a thoughtful process of change began. It affected “the scandalously careless criminal confrontation with Nazism and the no less scandalous personal continuity with Nazism within the judicial system.” The author asserts that “this change was mainly driven from ‘outside’: through

Israel, which, as the victims' country, tracked down Nazi criminals living outside Germany unnoticed by the German authorities, and managed to arrest Eichmann in Argentina in the spring of 1960³²; and the Eastern bloc states, which, now that even the most atrocious crimes were near the term defined by the statute of limitations, began to produce documents and former victims of the German search for 'Lebensraum in the East' began to appear; and mainly East Germany, which since the mid-1950s had been trying, with great conspiratorial energy, to use the problem of an 'unresolved past' as a way to destabilize the Federal Republic.³³

The criticism that arose both in Germany and overseas led to the creation of the Central Office for the Investigation of National Socialist Crimes in 1958. Its mission was to identify and find Nazi criminals. As a research body, it resolved jurisdictional difficulties by coordinating the prosecutors' efforts who had previously acted individually. Its main task was to investigate crimes and gather information about possible authors. The results of these investigations were sent to the prosecutors, who had the authority to draft formal charges.

In its first year of operations, it drove more than 400 criminal prosecutions.³⁴

In 1958, a public prosecutor's investigation into Auschwitz crimes began in Germany. The prosecution prepared the indictment taking into account the evidence gathered against the perpetrators, being careful not to give rise to a massive trial that would be impossible to conduct. Files were compiled about suspects who were not brought to trial but reserved for later stages. The criterion concerning which cases were to be tried was based on the feasibility of the convictions.

The indictment was disclosed on April 16, 1963. It included representatives from the camp administration, the Gestapo present in such camp, the SS medical staff, concentration camp assistants, and a kapo.³⁵

32 Adolf Eichmann was a Nazi Party member and SS officer known as one of the main architects of the Holocaust. He participated in the Wannsee Conference in January 1942, where the implementation of the Final Solution to the Jewish Issue was planned. From then on, he was responsible for facilitating and managing the logistics for the mass deportation of millions of Jews to ghettos and Nazi extermination camps throughout German-occupied Europe. Captured by the Allies in 1945, he managed to escape and settled in Argentina. In May 1960, he was found and captured by the Israeli intelligence agency known as Mossad. Subsequently, he was tried before the Supreme Court of Israel. The trial ended with his conviction in Jerusalem. He was executed by hanging in 1962.

33 Norbert Frei; *Adenauer's Germany and the Nazi Past. The Politics of Amnesty and Integration*, Columbia University Press, New York (2002), p. 312.

34 Rebecca Wittman; *id.*, p. 350.

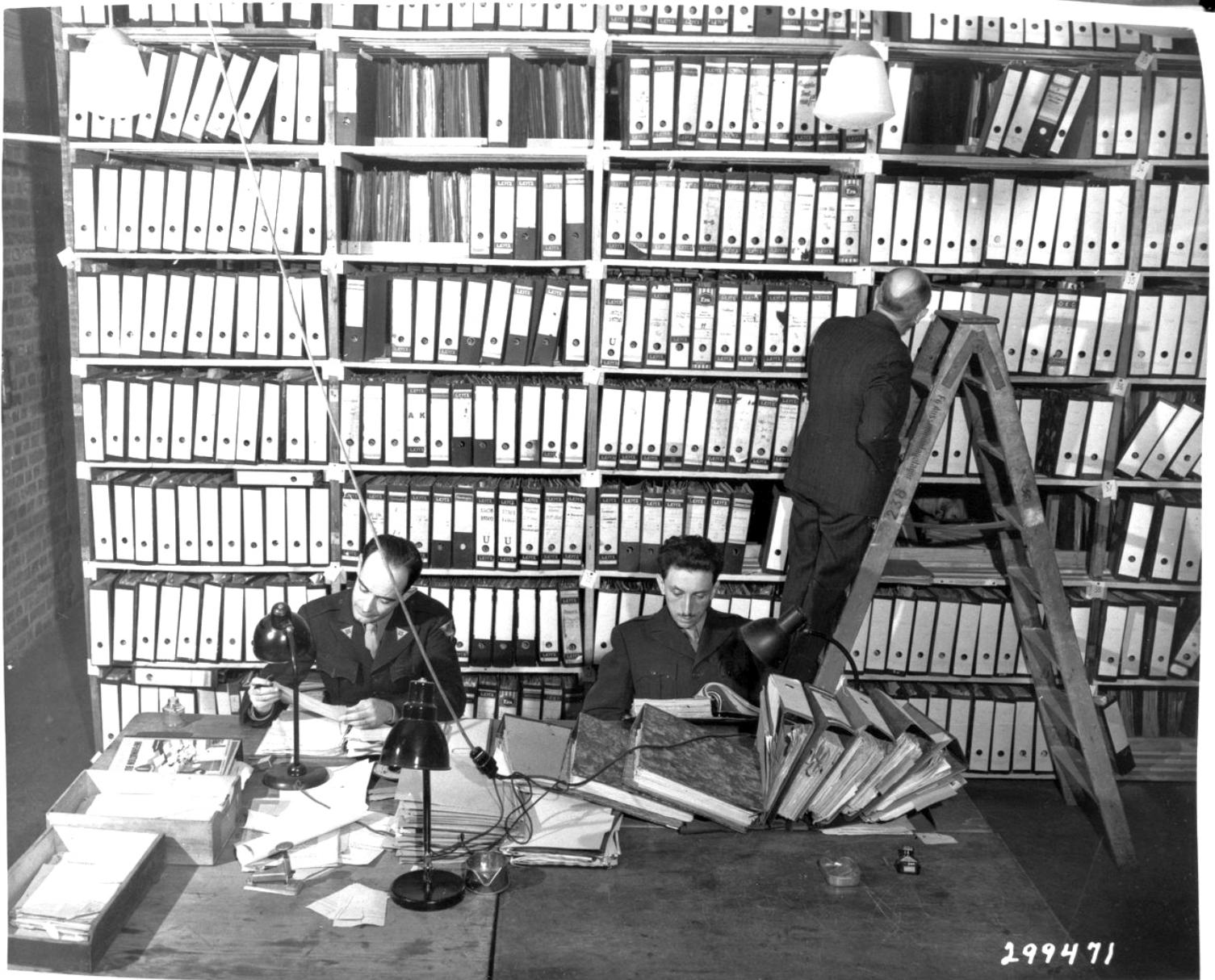
35 The term Kapo refers to the prisoners whom the SS officers designated to supervise other prisoners in the concentration camps. The Kapos were used by the Nazi regime as an extension of their control and repression apparatus within the camps.

The crime of genocide was introduced into German laws after the war. Yet, as we said, it could not be invoked due to the prohibition against applying criminal law retroactively. Defendants were charged with homicide: eleven as perpetrators and eleven as accomplices. The charges fell into two categories: homicides as part of the general extermination process in Auschwitz, generally through their role in the selection of prisoners for the gas chambers; and direct homicides resulting from executions, torture, medical killing, or other acts considered excessive. In approximately half of the cases, defendants were charged with specific excessive acts, that is, for having killed one or more prisoners using their own hands.

The trial took place in Frankfurt am Main, Hesse, from December 1963 to August 1965. Approximately 400 witnesses provided their testimony. There was a prolonged debate about the value of the survivors' testimonies, mainly because twenty or more years had passed after the events, and memory could have been altered. The prosecution summoned and interrogated a vast number of survivors on several occasions to identify those who were likely to be accepted in trial without question. In general, it chose those whose testimonies were validated by other witnesses or by documentary evidence.

The trial resulted in seven out of twenty defendants being convicted as perpetrators of the crimes. The others were punished with prison sentences of ten years on average, with no more than fifteen years in any case. The restrictions imposed by the criminal code caused the trial to focus on individual responsibility and prevented a broad public acknowledgment of the systematic nature of the Nazi crimes.

Album 5565



299471

U.S. military lawyers searching for evidence of war crimes. Circa 1945, Germany.

current trials in Germany

Criminal proceedings against Nazi leaders continued, although the number of cases decreased and ended with minor sentences or acquittals that revoked previous convictions. An example is the case of Friedrich Engel, former head of the SS Security Service. In 1999, he was convicted in absentia by an Italian military court on 246 counts of homicide. Then, in 2002, he was sentenced to serve seven years in prison for 59 counts of murder by a Hamburg court. In June 2004, the Federal Court of Justice of Germany overturned the 2002 sentence because it determined that such murders could not be proved as having occurred. As Engel was over 90 years old at the time, he was allowed to remain free while the case was reviewed. He died before the case was resolved.

In 2011, jurisprudence experienced a radical change in the legal interpretation of the criminal responsibility of Nazi perpetrators. Within the context of the trial against John Demjanjuk. This was unprecedented in German judicial history. The Munich Regional Court determined that it was possible to convict concentration camp personnel for the crime of murder without the need to prove that the individual had specifically committed the act of killing. The legal interpretation of the case determined that the mere fact of having worked in the extermination camp was sufficient as evidence. In other words, in a camp whose main function was the extermination of detainees, it was enough to prove that the accused had been there to prove complicity in such homicides.

The new jurisprudence implied that it was no longer necessary to have witnesses prove that the homicides had occurred or that the accused had been directly involved. Instead, in this trial and the subsequent ones, the presence of experts, particularly historians, became much more relevant. They were the ones who could shed light on the characteristics of the camp in question and how anyone employed there was functional to the extermination. This change is particularly relevant in a context where only a few witnesses are still alive.

Despite the relevance of the case, the response from critics of the German trial was not effusive. After all, this transformation occurred decades after the events, when the perpetrators were very old and the chances of prosecuting them were minimal. Moreover, Valeria Vegh Weis explains that, as a general characteristic, the trials target low-rank individuals with limited decision-making power regarding the crimes committed. Specifically, the accused, John Demjanjuk, was a man from Eastern Europe, born in Ukraine and forcibly recruited by the SS, who ended up as a guard at the Sobibor extermination camp in 1943.

Vegh Weis adds that, despite the innovative nature of this trial, another essential element that ensured minor sentences was still in effect: the interpretation that it was not possible to convict the defendants as perpetrators of the crime of homicide due to the impracticality of proving the subjective requirements of authorship, that is, the intention to cause death. Indeed, Demjanjuk was not an exception, and on May 12, 2011, he was convicted as an accomplice on 27,900 counts of homicide and sentenced to only five years in prison. Demjanjuk appealed the ruling and died at the age of 91 in a nursing home without a final verdict. Even with these limitations, the trial against Demjanjuk in Germany and its impact on jurisprudence would not have been possible without the victims. Three survivors, Jules Schelvis, Philip Bialowitz, and Thomas Blatt, and more than thirty relatives of other victims murdered in Sobibor, almost all Dutch, appeared as plaintiffs and testified.

Since then, a few more cases have been opened. Since 2012, there have been six convictions, and nine other cases are still pending. In 2014, the case against Siert Bruins, who was a volunteer in the SS and a member of the Nazi intelligence unit, was closed due to the lack of evidence.

In 2015, Oskar Gröning, an SS sergeant known as “the Accountant of Auschwitz,” was convicted as an accomplice to murder under the same terms as Demjanjuk for having served in an extermination camp. The novelty of the case is that, unlike Sobibor, Auschwitz had a dual function as a detention camp and as an extermination camp. The evidence gathered for the trials in the 1960s and the testimonies were sufficient to prove that the accused had a role in certain parts of the camp used for extermination. According to Vegh Weis, the role of the victims was also crucial here. There were a total of fifty plaintiffs who managed to expose the systematic nature of the genocide and the extent of suffering that the Nazi massacre entailed for millions of people. Although it was no longer necessary for their testimonies to provide concrete evidence of the accused’s actions in the homicides, their voices highlighted the atrocious experiences suffered and

invigorated the memory of the Holocaust. However, the sentence was minimal: on July 15, 2015, Gröning was punished with four years in prison. He died at the age of 96 in 2018 in a hospital without having served his sentence.

Other trials followed a similar line. In 2016, Reinhold Hanning, a former SS guard at Auschwitz, was condemned to five years in prison. In 2020, Bruno Dey, a former SS guard at Stutthof, was condemned to serve two years in prison. The latter was tried by a juvenile court because he was 17 years old when the events occurred. In 2022, Irmgard Furchner, a former secretary at Stutthof, was sentenced to imprisonment for two years in suspense as an accomplice to murder in 10,500 cases. In 2022, Josef Schütz, who worked at the Sachsenhausen concentration camp, was sentenced to five years in prison as an accomplice in the murder of 3,500 people. In 2024, the trial of Gregor Formanek, who had also worked in the SS at the Sachsenhausen camp, was suspended because the court considered the defendant incapable of facing the trial due to his physical and mental condition.

Argentina

reopening of the trials

2003 and onwards

Following the annulment of the Clean Slate and Due Obedience laws, trials were extended to military personnel from all forces, the security forces, and civilians. Investigations reached both the intellectual and indirect authors as well as the direct perpetrators who belonged to the task forces and had committed crimes in the clandestine detention centers. In turn, these investigations extended to all regions of the country where illegal repression had taken place.

The trials clearly reflect the organization of the repression. It was structured into zones, subzones, and areas. It operated in clandestine centers. Military and security forces, and in some cases civilians, acted simultaneously in these centers. This structure is seen in the trials, which reached defendants with different hierarchical levels within the same jurisdiction. Some trials focused on clandestine detention centers. Others assessed the responsibility of zone and subzone chiefs. Multiple secret prisons were located in these zones and subzones.

The first perpetrators charged after the reopening were those who had been identified during and after the Trial of the Juntas. In the beginning of this second round of trials, proceedings resumed where they had left off on the day the Law of Due Obedience was enacted because those cases were already ready to be judged. This initial criterion allowed for results to be obtained more or less quickly. Later on, new investigations were initiated, and it was necessary to make decisions concerning the organization of the trials.



Mothers of Plaza de Mayo
outside a federal courthouse.
2009, Argentina.

It was a great challenge for the Judiciary and the Public Prosecutor's Office to organize this new stage with a certain degree of national coordination. In the trials for crimes against humanity, prosecutors and courts from 22 of the 24 jurisdictions of the country are involved.

A specialized Prosecution Unit was created within the Public Prosecutor's Office to define the criteria to manage the largest number of cases in the shortest possible time. The decision was made to organize the trials based on each clandestine detention center and to group the individuals responsible for those centers, just as CONADEP had done. In addition, priority was given to the cases for which there was more evidence. On the other hand, efforts were made to train prosecutors and to strengthen human resources for prosecutor's offices in different jurisdictions.

The Supreme Court of Justice of the Nation established the Interbranch Commission to ensure more effective collaboration among different governmental branches, the Congress, and the Judiciary to address the complexity of such trials. This coordination was initially successful, but its effectiveness waned over time.

Just like in Germany, the passage of time has undoubtedly posed challenges in identifying possible defendants, as well as the additional difficulty due to the death of several accused and witnesses. The latter are subjected to the strain of testifying during both the investigation phase and the trial, in multiple cases.

The first conviction after the reopening of the trials was issued in 2005 against Julio Héctor Simón. He was sentenced to twenty-five years of imprisonment for the disappearance of Poblete-Hlaczik couple. The nullity of the laws of impunity had been declared in this case.

From then on, 353 trials were concluded. Some of them are mentioned below.

The first conviction against members of the Army after the Trial of the Juntas occurred in 2007. It was the case known as Counteroffensive I, which established the responsibility of high-ranking officials of the Army's 601st Intelligence Battalion in the false imprisonment and torture of militants from armed political organizations. For these acts, retired General Cristino Nicolaides and other members of the Army and police forces were sentenced to prison for more than twenty years.

In 2008, oral trials were held. Then, the prosecution was extended to other high-ranking Army officials and some task forces operating clandestine detention centers in the provinces of Córdoba, Tucumán, Neuquén, and Misiones. That same year, the first conviction of members of the Air Force was secured in the trial of crimes committed at the clandestine detention center known as Mansión Seré. The sentences were twenty-five years of imprisonment and life imprisonment.

The first conviction against members of the Navy after the reopening of the trials was delayed until 2010, when three individuals were sentenced to life imprisonment for the crimes committed at the naval base in Mar del Plata. In 2011, the first sentence was handed down for events that had occurred at the ESMA or Escuela de Mecánica de la Armada (known as the Navy Petty-Officers School or the Higher School of Mechanics of the Navy), when twelve individuals were sentenced to life imprisonment, two to more than twenty-five years in prison, one to imprisonment for twenty years, another to imprisonment for eighteen years, while two other were acquitted.

The biggest trial in the country was ESMA mega-case. It was even bigger than the Trial of the Juntas. This center was one of the largest clandestine detention centers and was under the jurisdiction of the Argentine Navy, although other forces such as the Federal Police Force, the Border Patrol, and the Naval Patrol also operated there. The verdict sentenced twenty-nine of the defendants to life imprisonment, eighteen to prison terms ranging from eight to twenty-five years, and acquitted six other defendants.

Former de facto presidents and members of the military juntas Jorge Rafael Videla and Reynaldo Bignone were also sentenced. The former was sentenced to fifty years in prison for crimes of torture, murder, and false imprisonment committed in the province of Córdoba, and the latter was sentenced to twenty-five years in prison for crimes committed in the clandestine detention center of Campo de Mayo, in the province of Buenos Aires. Additionally, Videla was sentenced to prison for fifty years in 2012 in the trial for the systematic children kidnapping plan. This sentence had long been expected since the dictator's acquittal of that crime during the Trials of the Juntas. Furthermore, Omar Graffigna, a member of the Air Force and a member of the Second Military Junta who had been acquitted in the Trial of the Juntas, was sentenced to imprisonment for a term of twenty-five years in 2016.

Police officers from the provinces of Buenos Aires, Santiago del Estero, La Pampa, Chaco, Mendoza, Corrientes, and other provinces were prosecuted and convicted. Members of different ranks were accused, as well as police lawyers and physicians.

In the proceedings concerning the clandestine detention center known as Automotores Orletti held in 2011, sentences were handed down against former intelligence agents. The sentences included life imprisonment in one case and prison sentences for twenty-five and twenty years.

A sentence was also issued against a Uruguayan military officer in the trial of Operation Condor, the repressive coordination of the Southern Cone dictatorships. Thus, he was convicted of crimes committed against 174 victims of different nationalities. In this trial, fifteen prison sentences were handed down. Their terms ranged from eight to twenty-five years. Yet, they included two acquittals.

Members of the penitentiary service of the Province of Buenos Aires were convicted of torture and homicide. This proves that the political persecution of the dictatorship was not limited to clandestine detention centers, but also included detainees who were not in hiding.

To date, more than a thousand former members of the armed and security forces have been convicted of crimes in connection with state-sponsored terrorism.

The first conviction of a civilian in Argentina was possible in 2007. It was against the Catholic priest Cristian von Wernich, who profited from his religious role to gather information from victims in detention centers. He was sentenced to life imprisonment. Other religious figures have been prosecuted for complicity or involvement in state-sponsored terrorism.



Sentencing day in the “Saint Amant I” trial for crimes against humanity committed in the province of Santa Fe. 2012, Argentina.

The trials also reached the judiciary of the time. Several judges, prosecutors, and public defenders were convicted for legalizing the detention of people who had passed through clandestine detention centers, for failing to investigate the crimes, and even for participating in such actions. People who held political positions during the dictatorship were also prosecuted and sentenced. An example is Jaime Lamont Smart, former Minister of Government of Buenos Aires.

The responsibility of businessmen was also judged, as happened in the case known as La Veloz del Norte in Salta, where Marcos Jacobo Levin was sentenced to eighteen years in prison for his cooperation with the military and the police forces in a labor dispute. In 2018, in the case known as the Ford case, former executives of Ford Argentina were sentenced to ten and twelve years in prison for their collaboration with the armed forces to repress their unionized employees. Although some investigations did not reach company executives, corporate responsibility in the repression of workers was evident, as in the case of Mercedes Benz and the shipyards in the Delta del Tigre.

Among the civilians were physicians. They were convicted for their involvement in the abduction, retention, and concealment of children.

To date, nearly 200 civilians have been convicted of crimes related to state-sponsored terrorism.

Sexual crimes were introduced late in the process. Initially, they were considered part of the crime of torture and not as separate crimes. The first conviction for rape came in 2010. It was a sentence to life imprisonment for crimes committed against forty victims in La Cueva clandestine detention center in Mar del Plata, Province of Buenos Aires. During the trial, a member of the Armed Forces was found guilty for the first time in connection with two cases of rape. In addition, he was found guilty of homicide and false imprisonment. Since then, 85 trials for sexual offenses have been pursued.

Argentina's jurisprudence is featured by the imposition of severe sentences consisting of confinement or imprisonment, depending on the nature of the crimes committed. The severity in the sentences is partly due to the ongoing scrutiny of victims and plaintiff groups. Moreover, the application of the theory of de facto domination and indirect authorship, which considers the State as an instrument of crime, plays a decisive role. This theory implies that the high-ranking officials who planned and ordered the crimes are directly responsible. This is so because they had control over the actions of their subordinates. Unlike the subjective theories implemented in Germany, which led to the classification of perpetrators as participants or accomplices, these doctrines have made it possible to consider the perpetrators as direct authors or co-authors of the crimes. This approach helps to define greater criminal responsibility and strengthens the authority of the courts to impose punishments that are proportional to the magnitude of the criminal acts committed during the times of State-sponsored terrorism.



Artistic intervention at the Espacio Memoria y Derechos Humanos (Ex ESMA). Argentina.

final conclusions

final conclusions

74

There is a continuity between the experience of prosecution in Germany and Argentina. This is based on the creation of the concept of crimes against humanity in the Nuremberg Statute and its foundation in *jus cogens* or the law of nations. The prohibition of such crimes is included in international law and, accordingly, there is no border that hinders their prosecution and punishment; there is no formal or material obstacle and no fictitious or simulated trial accepted; there is no room for amnesty, pardon, or forgiveness, and the mere passage of time cannot be used as an argument to halt the prosecution of trials up to their final consequences.

As Daniel Rafecas and Daniel Stahl accurately point out, this has had a decisive impact on the progress of trials in Argentina as it has paved the way for the creation of legal instruments against enforced disappearances, alternative ways to confront impunity, the repeal of amnesty and pardon laws, and the prevention of the passage of time as an obstacle to prosecution.¹

This legal concept has been pivotal in the development of an Inter-American jurisprudence that urges the States of the region to guarantee the right to truth,

¹ Daniel Rafecas; “El juicio de Nüremberg: una perspectiva a 75 años” (The Nuremberg Trial: A 75-Year Perspective” in Haroldo Magazine, November 2020. Available at <https://revistaharoldo.com.ar/nota.php?id=553>.

justice, and reparation to the victims of serious human rights violations. This has been recognized by the Inter-American Court of Human Rights in the case of *Barrios Altos v. Peru*, in 2001, which established the inadmissibility of the actions adopted by a State to hinder the prosecution of such crimes.²

Nuremberg and its influence are also the foundations of the international conventions against enforced disappearance, which have been promoted since the 1980s by organizations of victims' families in Latin America and approved in 1994 by the Organization of American States and in 2010 by the United Nations General Assembly.

The concept of crimes against humanity is also the legal basis for the rulings delivered by the Argentine Supreme Court, which repealed the Clean Slate and Due Obedience laws and the pardons, and which reopened full trials for all such crimes.

Beyond the recognition of such influence in jurisprudence and legal standards, the truth is that, as Alejandro Chehtman accurately points out, the process of justice in Argentina has largely been "a local effort based on grassroots initiatives led by victims, victims' organizations, and a number of attorneys committed to the cause." Indeed, these local actors were the ones who sought solutions in foreign fora and institutions to advance their accountability agenda, rather than simply being the subject of pedagogical interventions or the influence of a universalist agenda against impunity. Most of the key ideas and strategic moves came from local actors.³

Even within the framework of such diverse and complex contexts, both countries show a deep commitment to the persistence of criminal prosecution to prevent such atrocities from recurring. Indeed, the victims' communities in Argentina and Germany, as well as the institutions involved in the judicial processes in both countries, have been guided not only by a conviction of a compensatory nature, but also by confidence in the deterrent effects of these trials. The question that still remains is: What has been the actual impact of these efforts on contemporary societies? Have these trials contributed to the consolidation of democracy and to ensuring the principle of non-recurrence and the enforcement of human rights today? Only continuous assessment and critical reflection will make it possible to understand the scope and legacy of such actions in our societies and to strive to make them effective.

² Alejandro Chehtman, Re-constructing criminal accountability for human rights abuses: Argentina 1990-2024, *Modern Criminal Law Review* 1:1, p.93.

³ Alejandro Chehtman, Re-constructing criminal accountability for human rights abuses: Argentina 1990-2024, *Modern Criminal Law Review* 1:1, p.93.



bibliographical reference

Chehtman, Alejandro (2024), Re-constructing criminal accountability for human rights abuses: Argentina 1990-2024, *Modern Criminal Law Review* 1:1.

Crenzel, Emilio (2008), La historia política del Nunca Más. La memoria de las desapariciones en la Argentina, Siglo XXI, Buenos Aires.

Crenzel Emilio (2015), Una lectura de Carlos Nino Juicio al mal absoluto. ¿Hasta dónde debe llegar la justicia retroactiva en casos de violaciones masivas a los derechos humanos? *Revista Argentina de Teoría Jurídica* Vol. 16 No.2, Buenos Aires, Siglo XXI.

Heller, Kevin Jon (2011). *The Nuremberg Military Tribunals and the Origins of International Criminal Law*. Oxford University Press.

Albert G. D. Levy. (1943). The Law and Procedure of War Crime Trials. *The American Political Science Review*, 37(6), 1052–1081.
<https://doi.org/10.2307/1949826>

Pendas, D. O. (2014). The Fate of Nuremberg.: The Legacy and Impact of the Subsequent Nuremberg Trials in Postwar Germany. In K. C. Priemel & A. Stiller (Eds.), *Reassessing the Nuremberg Military Tribunals: Transitional Justice, Trial Narratives, and Historiography* (1st ed., pp. 249–275). Berghahn Books.
<http://www.jstor.org/stable/j.ctt9qd0zg.15>

Pendas, D. O. (2010). Retroactive Law and Proactive Justice: Debating Crimes against Humanity in Germany, 1945–1950. *Central European History*, 43(3), 428–463.
<http://www.jstor.org/stable/27856215>

Pendas, D. O. (2007). "Eichmann in Jerusalem", Arendt in Frankfurt: The Eichmann Trial, the Auschwitz Trial, and the Banality of Justice. *New German Critique*, 100, 77–109.
<http://www.jstor.org/stable/27669188>.

Pendas, D. O. (2009). Seeking Justice, Finding Law: Nazi Trials in Postwar Europe. *The Journal of Modern History*, 81(2), 347–368.
<https://doi.org/10.1086/598922>.

Pendas, D. O. (2009). Seeking Justice, Finding Law: Nazi Trials in Postwar Europe. *The Journal of Modern History*, 81(2), 347–368.
<https://doi.org/10.1086/598922>

Rafecas, D, "Luces y sombras de los juicios", *Revista Haroldo*, 2015.

Wittmann, R. E. (2002). The Wheels of Justice Turn Slowly: The Pretrial Investigations of the Frankfurt Auschwitz Trial 1963–65. *Central European History*, 35(3), 345–378.
<http://www.jstor.org/stable/4547212>.

Woetzel, R. K. (1965). Reflections on the Auschwitz Trial. *The World Today*, 21(11), 494–498.
<http://www.jstor.org/stable/40393686>.

credits

Main research and writing by María José Guembe.
Editing by Ximena Tordini and Verónica Torras.

External consultants: Daniel Rafecas, Daniel Sthal,
and Valeria Vegh Weiss. Research collaborators:
Monica Zwaig (Argentine section) and
Flavio de Leao Bastos Pereira (German section).

Design: Mariana Migueles.

Photographs

cover. Hearing of the "Operativo Independencia" trial,
city of San Miguel de Tucumán, 2017. Diego Aráoz.
Fototeca ARGRA

p. 4. Leo Vaca

pp. 8, 51, and 62. United States Holocaust Memorial
Museum, courtesy of the National Archives and
Records Administration, College Park

pp. 16 and 23. Charles Alexander. United States
Holocaust Memorial Museum, courtesy of the National
Archives and Records Administration, College Park

p. 19. Dani Yako. Asociación de Reporteros Gráficos de
la República Argentina Collection, Memoria Abierta

p. 25. Enrique Shore, CONADEP Collection,
Memoria Abierta Archive

p. 27. Leo Vaca

p. 32. Ray D'Addario. United States Holocaust Memorial
Museum, courtesy of the National Archives and
Records Administration, College Park

p. 36. United States Holocaust Memorial Museum,
courtesy of Albert Barkin

p. 41. Eduardo Longoni. Asociación de Reporteros
Gráficos de la República Argentina Collection,
Memoria Abierta

p. 44. Leo Vaca

p. 57. Alejandro Cherep. Asociación de Reporteros
Gráficos de la República Argentina, Memoria Abierta

p. 67. Sandra Cartasso

p. 70. Matías Sarlo

p. 72. Leo Vaca

p. 76. Leo Vaca

p. 79. United States Holocaust Memorial Museum
Collection, gift of the estate of Robert L. White



Commemorative ribbon for the 50th anniversary of the liberation of the Dachau concentration camp. The phrase "Never Again" is embroidered in French, English, German and Russian. 1995.

