

MEMORANDUM

TO: DLA Piper Rudnick Gray Cary Pro Bono Committee

FROM: Deborah E. McCrimmon

DATE: May 9, 2005

RE: Pro Bono Experience Prosecuting Adolfo Scilingo

Below is a summary of my experience assisting on the prosecution of Lieutenant Commander Adolfo Scilingo for crimes against humanity. On January 14, 2005, Adolfo Scilingo was placed on trial in Spain for genocide, crimes against humanity, and terrorism committed against Spanish nationals in Argentina during the Argentine dictatorship. On April 19, 2005, he was convicted of crimes against humanity and sentenced to 640 years in prison.

1. Factual Background

From 1976 until 1983, a military dictatorship governed Argentina. During the dictatorship, the military waged a war against “subversion,” known in the international press as the “dirty war,” and attempted to purge the country of all individuals they considered to be “subversives.” An estimated 30,000 people died at the hands of the military, which executed a systematic plan to exterminate subversives in over 340 concentration camps throughout Argentina.

The *Escuela Mecánica de la Armada* (ESMA) has been referred to by historians as the Auschwitz of Argentina. Located in Buenos Aires, the ESMA was an extermination camp run by the Argentine Navy. Of the thousands of people believed to have passed through its doors – according to Scilingo’s testimony around 5,000 – there are approximately only 175 survivors of this camp. Individuals were kidnapped and forced into vehicles (often times stolen from previous detainees) and immediately hooded so as to not know where they were being taken. After arriving at the ESMA, the victims were taken down to one of the various torture chambers in the basement. From there, the fate of each victim is different.

Adolfo Scilingo worked at the ESMA from 1976 to 1977. He even told an Argentine reporter once that he requested a transfer to the ESMA because it was the *crème de la crème* of the Argentine Naval concentration camps. At the ESMA, he was in charge of electronics and

automobiles. As head of electronics, he testified that on multiple occasions he repaired the motor to the elevator which ran from the basement of the ESMA, where prisoners were tortured, to the third floor, where prisoners were detained and housed between torture sessions. Being in charge of automobiles, he was in charge of assigning which vehicle was to be used to which operation and who would clean each vehicle after each operation.¹ He would also assign subordinates to alter vehicles stolen from the kidnapped or their families such that they could not be identified.²

After the dictatorship ended, nine of the twelve leading commanders were put on trial and found guilty of various crimes and convicted to serve various sentences. Investigations also began into the participation of various lower ranking individuals. However, about a year after the dictatorship ended, the Argentine legislature passed two amnesty laws thereby precluding any further prosecution of anyone for crimes arising out of the dictatorship. Soon thereafter, the then president pardoned the nine commanders who had been tried and found guilty. Thus, complete impunity existed for crimes committed by the military in Argentina under the dictatorship.

Years after the amnesty laws were passed, Scilingo wrote a book, "Por Siempre Nunca Más," which detailed his participation in the horrors of the dictatorship. In this book Scilingo confirmed what many people feared to be true – the Argentine military carried out "death flights" to dispose of detainees that were no longer useful. According to Scilingo, starting in 1977, every Wednesday and most Saturdays for over a year, a group of detainees were chosen "to fly." The chosen detainees, oblivious to their impending fate, were told they were being transferred to legitimate prisons. The detainees were led out of their cells, administered a sedative and loaded onto trucks. From the camp, they would travel to a military airport where they were put onto an airplane. Once in flight, the detainees received a second dosage of the sedative, which rendered them unconscious. They were then stripped of their clothing and thrown into the ocean alive.

Scilingo then recounted that he participated in two flights himself: one in June 1977 and the other in August of the same year. He confessed that during the two flights, he personally threw a total of thirty living people out of the planes. Apparently, during one of the flights, as he was throwing out a young man, Scilingo lost his balance and would have fallen into the ocean himself had a colleague not grabbed him and pulled him back. This slip and near fall has haunted Scilingo ever since.

Once Scilingo spoke out about what he and the military had done, his life, and that of his family, was at risk. He was threatened and kidnapped himself by the military. His family was continually threatened. In addition, Scilingo's career was ruined, as speaking out destroyed Scilingo's chances of promotion within the navy. At this point, Scilingo decided to travel to Spain to testify before Judge Baltazar Garzon, the investigating judge in the Spanish Case. Once Scilingo testified, and again confessed to throwing thirty people out of planes alive, Garzon placed Scilingo under arrest.

¹ Often times when vehicles returned to the ESMA after a kidnapping, the vehicles contained the blood of the victim either from a gunshot wound or as a byproduct of a scuffle between the military and the victim.

² After an individual was detained, the military often looted that individual and his or her family's goods. This looting often included the vehicles of the detainees. The *Conrado Higinio Gómez* case, involving a disappeared lawyer at the ESMA, is a model case for this and it also forms part of the case record.

2. The Spanish Case

At the same time that Scilingo began to talk in Argentina, attorneys in Spain brought a lawsuit on behalf of disappeared Spaniards in Argentina during the dictatorship (“the Spanish Case”). Coincidentally, the Spanish lawsuit was initiated at around the same time Scilingo started talking in Argentina, but the two events were wholly unrelated. The lawsuit was based on universal jurisdiction, which provides that Spain has jurisdiction over serious crimes committed extraterritorially – such as genocide – if the victim is a Spanish national.

In the Spanish Case, Garzon investigated many members of the Argentine military and attempted to extradite various military officials from Argentina to stand trial for crimes committed against Spanish nationals in Argentina. To approve an extradition request in Argentina, the request must first be approved by the executive branch and then by a judge. The Argentine executive branch rejected every request by Spain and not one individual was ever extradited to Spain from Argentina. Spain does not try individuals *in absentia* so without a live defendant, the Spanish Case had no chance of proceeding to trial. Thus, when Scilingo voluntarily traveled to Spain to testify, Spain finally had a defendant to prosecute.³

In Spain, lawyers bring a lawsuit to an investigating judge who then gathers evidence and interviews witnesses to determine if there is a sufficient basis for the claims alleged in the complaint. In Spain there exists an “acusación popular” (popular action) whereby an action may be brought by any Spanish citizen, regardless of injury or other standing, on behalf of the public's interest. <http://www.derechos.org/koaga/iii/5/wilson.html> - N 6 After the investigation, if it is determined that there is a sufficient basis for the claims, the investigating judge closes the investigation and passes the case to the next phase, the oral trial. If the judge determines there is not sufficient evidence, the case is closed.

In October 2003, the investigating judge in the Spanish Case closed the investigation and recommended the case for oral trial. At this point, the attorneys needed to present their trial briefs. To properly prepare a trial brief, an attorney must review the evidence to determine which causes of action are supported by the evidence. This was not as easy as it would seem in Spain.

The investigating judge divided the evidence he collected into two distinct sets of volumes. A copy of one of the sets, consisting of 104 volumes (known as the “pieza principal”), was given to the attorneys. The other set of volumes, known as the “pieza separada de documentación” (separate evidentiary record), amounting to 183 volumes, was not made available to the parties until the investigation phase of the proceedings concluded. At no point were the attorneys given a photocopy of or permitted to make a photocopy of the documents collected by the investigating judge in this second set – which, coincidentally, was where all the documentary evidence necessary to prove the commission of crimes against humanity was located. This second set included crucial witness testimony, secret military orders and directives showing the planning of the extermination campaign, documents supplied by International Rogatory Commissions, etc. To review that set of volumes, the attorneys were told to go to the courthouse library during a limited period of time (40 days initially, extended to a two

³ In 2000, Spain successfully extradited Lieutenant Miguel Ricardo Cavallo from Mexico for crimes committed against Spanish nationals in Argentina during the dictatorship. Cavallo, like Scilingo, also worked at the ESMA and was recognized by a journalist in Mexico, who obtained a photograph that was later ratified by survivors. Once he was identified, the Mexican police arrested him, and an Interpol officer in Mexico alerted Judge Baltazar Garzón who requested his extradition to Spain. Cavallo is currently awaiting trial in Spain which is expected to begin sometime in 2006.

month period at Equipo Nizkor's request) and read the 183 volumes, or approximately 53,000 pages. Given the difficulty to read and analyze this secret part of the case record during the courthouse's limited hours, Equipo Nizkor requested authorization through one of the private accusing parties to photograph relevant documents.

3. Equipo Nizkor and My Pre-Trial Involvement in the Case

Equipo Nizkor ("Nizkor") (<http://www.derechos.org/nizkor/eng.html>) is a human rights nonprofit that was heavily involved in the Spanish Case from virtually the beginning. It assisted in amending the complaint to accurately list the Spanish victims⁴, made contact with Scilingo when he decided to travel to Spain to testify, and worked with contacts in Argentina to assist the investigating judge in locating potential witnesses. Since 1995, Nizkor has prepared the legal strategy, written briefs and other documents for two of the accusing parties.

As of the date that the investigating judge closed the investigation, there were more than ten prosecuting attorneys. After reviewing the case record, each prosecuting attorney was entitled to submit their own trial briefs.⁵

In October 2003, prior to joining Gray Cary, I was recruited by Nizkor to travel to Spain to assist them in the review of the 183 volumes of documents they were not permitted to photocopy so that they could adequately prepare their trial brief. Under the strategic direction of Nizkor, we undertook a quick reading of the documents and made an inventory of the evidence collected by the investigating judge. Our team then met on a daily basis to analyze the evidence we had read in order to select those documents to be photographed.

I reviewed the volumes looking for any testimony or documentation relating to: (1) the ESMA; (2) evidence that the crimes committed were part of a systematic plan; and (3) evidence relating to Scilingo directly. By reviewing the volumes, I became very familiar with the evidence, the testimony, and the facts.

4. Trial Phase

While the trial briefs ("*calificaciones provisionales*") were submitted in December 2003, the trial date was not set until December 2004 for January 14, 2005. The Spanish government did not want the case to proceed to trial as it strained relations with Argentina. Some believe that the government pressured the judiciary to make the case disappear. Nor did Argentina want the case to proceed to trial because it did not believe that Spain had jurisdiction to prosecute crimes committed by Argentine citizens in Argentina. Yet, the Spanish judiciary surprised all when it set a trial date for January 2005.

The trial in Spain proceeded in four stages. First, Scilingo testified. Then, each side presented its witnesses. Next, each side presented its expert witnesses. Finally, each side was required to identify each of the documents in the two parts of the record that it believed were relevant to its case.

⁴ The first complaint, filed by Carlos Castresana, listed all victims he believed to be Spanish citizens together with the perpetrators. According to him, his list was compiled from Argentine newspaper articles. The list contained many errors. After the filing of the initial complaint, Equipo Nizkor worked together with the historical Argentine human rights organizations to compile an accurate list, which was submitted and accepted by the investigating judge.

⁵ In this brief, called "*escrito de calificación provisional*," the parties submit to the trial chamber their pre-trial conclusions.

I resumed working with Nizkor in early 2005 and spent six weeks in Madrid. Nizkor assisted three of the ten prosecuting attorneys on the case: Antonio Segura, who represented the Argentine Association for Human Rights in Madrid; Virginia Díaz, who represented *Izquierda Unida* or the United Left; and Enrique Santiago Romero, who represented Graciela Palacios de Lois, an individual whose husband, a Spanish citizen, disappeared at the ESMA. We prepared the only brief submitted ("*escrito de conclusiones finales*") that characterized the offenses committed by Scilingo as crimes against humanity based on international human rights law. We also prepared the documentary evidence supporting this claim. We drafted witness examination questions and consulted with the attorneys as to the relevancy of each witness. We identified relevant documents that needed to be presented to the Court in the last phase of the trial. Myself and the others at Nizkor were the only human rights attorneys working on the case, therefore, we held meetings during which we explained various concepts of international human rights law to the attorneys with whom we worked.

My work included summarizing current jurisprudence on command responsibility arising out of the International Criminal Tribunal for the Former Yugoslavia and the concept of due obedience in international law and explaining these concepts to the attorneys on the case. This research was included in our final trial brief. I also prepared witness examination questions for various witnesses. I prepared various documents used at trial. I participated in many meetings between Nizkor and the attorneys we supported regarding our strategy in the case.

Perhaps most importantly, I prepared a summary of Scilingo's prior confessions that were wholly inconsistent with the story he told at trial. At trial, Scilingo denied any involvement with the death flights, the ESMA, and the existence of systematic plans to eliminate subversives. I prepared a summary of his prior statements that ultimately was incorporated into the judges' final opinion.

At the conclusion of the trial, nine of the 10 prosecuting attorneys argued that the crimes committed by Scilingo constituted genocide and terrorism.

The line of argument defining the offenses as crimes against humanity was raised solely by the popular accusation of the Argentine Association for Human Rights in Madrid, represented by lawyer Antonio Segura.⁶ The argument was expressly opposed by the remaining popular and private accusations in the case. This is apparent in the [official minutes of the 43rd session](#) of the trial as well as the written statements of closing arguments submitted by the parties. The full text of these documents are all available on [Equipo Nizkor's dedicated web page](#) for the trial.

5. Verdict

The judges panel delivered its decision on April 19, 2005 and convicted Adolfo Scilingo of crimes against humanity. All arguments supporting a charge of genocide and terrorism were rejected. Nizkor's attorney was the only attorney who argued that the crimes committed by Scilingo were best typified as crimes against humanity. This argument was met with extreme resistance by the Spanish attorneys.⁷ The judges decision is reflected in an approximately 200-page decision. My work analyzing Scilingo's prior testimony before the investigating judge is included in the decision.

⁶ This argument was later supported by the popular accusation of the *Izquierda Unida* and the private accusation of Graciela Palacios de Lois.

⁷ At the final argument, the government prosecutor argued for a conviction based on genocide or, in the alternative, crimes against humanity.

6. Conclusion

I would like to thank DLA Piper Rudnick Gray Cary, the pro bono committee, and everyone else who made it possible for me to travel to Spain to assist on this trial. The trial team with which I worked was the only team that argued that that the crimes committed by Scilingo constituted crimes against humanity, which in the end was the only charge on which Scilingo was convicted.

This trial was the first of its kind – not only is Scilingo now the only Argentine currently convicted and serving time for crimes committed by the Argentine military during the dictatorship, but this trial marks the first time that a domestic court applied principles of international criminal jurisdiction and applied the principles of crimes against humanity. I am very grateful to DLA Piper for supporting me and allowing me to participate in this trial.