

**REDRESS**

*Seeking Reparation for Torture Survivors*

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**PETITION TO THE INTER-AMERICAN COMMISSION OF  
HUMAN RIGHTS**

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15 MAY 2002

<b>1. STATEMENT OF FACTS.....</b>	<b>5</b>
<b>2. THE PETITIONER IS NOT OBLIGED TO EXHAUST LOCAL REMEDIES BECAUSE THERE ARE NO REMEDIES FOR THE VIOLATION ALLEGED....</b>	<b>8</b>
<b>2. CHILE IS BREACHING ITS INTERNATIONAL LEGAL OBLIGATION TO AFFORD ACCESS TO JUSTICE AND REPARATION FOR VICTIMS OF TORTURE.....</b>	<b>10</b>
A) CHILE IS OBLIGED UNDER TREATY AND CUSTOMARY INTERNATIONAL LAW TO AFFORD ADEQUATE REPARATION FOR TORTURE VICTIMS THROUGH EFFECTIVE LEGAL REMEDIES. .....	10
<i>i. Chile’s duty to provide reparation includes affording victims of torture access to justice and effective redress.....</i>	<i>11</i>
<i>ii. Chile is obliged to provide specific legal measures to guarantee adequate reparation to victims of torture.....</i>	<i>13</i>
1) Obligation of Adopting Domestic Legal Provisions (art 2 of the American Convention and art 9 of the Inter-American Torture Convention).....	13
2) The Gravity of the Crime of Torture Requires Specific Provisions.....	14
B) CHILE IS NOT FULFILLING ITS OBLIGATIONS UNDER THE AMERICAN CONVENTION AND THE INTER-AMERICAN TORTURE CONVENTION TO ENSURE EFFECTIVE REMEDIES FOR REPARATION TO VICTIMS OF TORTURE IN ITS DOMESTIC LEGAL SYSTEM. ....	15
<i>i. The current legal framework in Chile renders in practice the realizations of the torture victim’s right to adequate redress impossible .....</i>	<i>15</i>
1) Reparation remedies in Chile are not effective because they treat torture in the same manner as simple illicit acts.....	15
2) Chilean national laws on torture overlap between civil and military jurisdictions making all cases of torture fall within the jurisdiction of the military courts and rendering the right to reparation ineffective.....	16
3) Decree-Law N° 2191 prevents victims from past violations of torture to exercise their right to civil redress.....	19

a. Decree-Law No. 2191 is in violation of art 8 (right to a fair trial) of the American Convention for preventing victims to pursue remedies in court.....	20
b. Decree-Law No. 2191 is in violation of art 25 (right to judicial and effective redress) of the American Convention for preventing victims to peruse remedies in court. ....	21
c. Decree-Law No. 2191 violates the obligation of Chile to afford every person subject to its jurisdiction the right to a fair and effective remedy (art 1.1 in connection with art 8 and 25 of the American Convention).....	22
C) CHILEAN REPARATIONS MEASURES FOR VICTIMS OF PAST VIOLATIONS DO NOT COVER TORTURE SURVIVORS AND IN ANY CASE, ARE NOT SUFFICIENT UNDER INTERNATIONAL LAW. ....	22
<b>3. THE STATE OF CHILE IS RESPONSIBLE FOR BREACHING ITS OBLIGATIONS UNDER INTERNATIONAL LAW AND THEREFORE IS LIABLE TO PAY COMPENSATION. ....</b>	<b>25</b>

## **1. STATEMENT OF FACTS.**

### **Arrest and First Comisaria**

On 16 September 1973, the Petitioner was arbitrarily detained by “carabineros” (police) in the capital of Chile, Santiago, five blocks from the Palacio de Gobierno [Government Palace]. He was first taken to UNCTAD Building—where the son of Minister Carlos Cortez saw him—and from there to the Primera Comisaria de Carabineros [Police Station No. 1].

He was held incommunicado in the Comisaria, without charge or dictum. The authorities did not notify his family about his detention. Neither his wife nor anyone else knew of his whereabouts, and the authorities did not recognize him as a detainee.

Although the Petitioner at the time of the “arrest” was working in the Hippodrome of Chile, he had been keenly involved in political activities supporting Allende’s Socialist Party. In 1972 he appeared several times in public events next to important politicians like Minister Hernan del Canto and President Allende himself. In the funeral of Luciano Cruz, a leader of Movimiento de Izquierda Revolucionario, he appeared in a video (probably broadcasted in national television) next to Minister Suarez. When arresting him, the police actually claimed he was Carlos Altamirano’s (General Secretary of Unidad Popular) bodyguard.

The Petitioner has no names of the interrogators but he remembers that the officer, who received him in the Comisiaria, had his left eye damaged and was wearing a glass eye. He was small in height and fat, and he issued orders to put a hood on the Petitioner’s head.

During the time spent in the Comisiaria, the police tortured him in all kinds of ways. Every two or three hours, they tied up his hands and feet, blindfolded him, hit his head, and immersed him in water. As a result of the blows, he was constantly losing equilibrium and falling to the floor. On one occasion, when he was falling half unconscious, one of the carabineros hit the Petitioner with the machine gun and cut open his forehead. He almost lost sight of one eye, and still has the scars from the disfiguration of his face.

In between torture sessions, the Petitioner was interrogated as to the whereabouts of political leaders of the “Unidad Popular”. They threaten the Petitioner with killing him unless he gave them all the information he had; they sat him on a chair covered with blood stains telling him they had shot a lot of people already and that he was going to become one more. The police kept torturing him by threatening to bring his daughter Francisca and kill her in front of him, killing him afterwards.

## **Estadio Nacional (National Stadium)**

After almost two days of continuous torture and degrading treatment, the police transferred the Petitioner to the Estadio Nacional [National Stadium], where as has been well documented in many other cases, the tortured intensified. Among others, Doctor Manuel Ipinza saw the Petitioner when arriving from the Comisaria.

One of the forms of torture repeatedly inflicted upon the Petitioner was to tie his hands to a wooden pole lifted by a crane. Another continuing torture was the application of electric shocks: he was put on a barrel of water, and then after taking him out of the water but still with wet clothes, electricity was applied to him with the “picana” (a stick connected to the electricity supply).

Petitioner lost all his teeth as a result of the blows and beatings inflicted upon him. He also had his left arm fractured. The Petitioner was constantly beaten on his head with a truncheon covered with rubber. The innumerable blows have had serious lifetime health consequences for the Petitioner; he had been unable to work ever since and is registered as a disabled person in England, the country where he obtained refuge after he was expelled and has lived ever since.

Although his wife was never notified of his whereabouts she found out at work that he was detained in the national stadium. She was not told directly, but was informed indirectly when the fact became known by her co-workers and she was dismissed from her job. The Petitioner spent two months without a visit from his family and when his wife finally found out where he was and went to visit him, his wife was only allowed to see the Petitioner for about half an hour before the Petitioner was moved to “Chacabuco”, a concentration camp in Antofagasta, 2000 km from Santiago.

## **Concentration Camp “Chacabuco”**

When the Estadio Nacional was closed, detainees with no criminal charges were sent to Chacabuco instead of the National Penitentiary. On December 1973, the Petitioner, together with the rest of the political prisoners arrived to the concentration camp around 4:00 am. The prisoners were undressed for inspection and even though it was freezing were not given time afterwards to pick up their belongings: many, including the Petitioner, were left almost naked. The Petitioner believes that Teniente Minoletti was the name of one of the members of the military that ill-treated him on his arrival to Chacabuco.

The Petitioner spent approximately 13 months in the concentration camp. While there, the Petitioner had an emergency hernia operation (in the groin) resulting from the torture inflicted upon him in the national stadium. Doctor Danilo Bartulin, one of Allende’s personal doctors, advised the camp guards of the necessity of the operation. The

Petitioner was not taken to a hospital. The operation took place in the Polyclinic (a provisional hospital in the camp) by Air Force Doctors.

The Petitioner's experiences in Chacabuco are mentioned in a book written by Alberto Gamboa. He refers to him by his nickname "Filistoc". According to the Petitioner, it is by this name that his friends and *compañeros* knew him at that time.

During his detention the Petitioner was only allowed to see his family twice. For each visit, they had to travel for about 40 hours in a bus. The visiting times depended on the economic means of each family and the grant by the military authorities of special permission in Santiago.

While in Chacabuco, the Petitioner signed a *poder notarial* [power of attorney] giving authority to his friend Elenena Illanez Garrido to collect all of his unpaid salaries, participations and benefits from his job. Up to the present, the Petitioner has not been able to recover any of the money he had in his bank account (Caja de Ahorros "Ahorromet") or any of the monetary benefits he accrued from the years he worked and should have continue working at the Hippodrome. The *poder notarial* was accepted as evidence by the government to designate the Petitioner "Exonerado Politico" according to the provisions of Law No. 19.234. However he never obtained adequate compensation; contrary to his requests he has not received any of the money that was taken away from him nor has he been compensated for the benefits he should have received if none of these events had taken place.

### **Ritoque and Tres Álamos**

From Chacabuco, the Petitioner was transferred to Ritoque; he was held there for about a month. The prisoners were detained under very strict conditions and were constantly threaten to be killed if they didn't obey exact orders (to the extreme of being killed if moving when they were told not to). The only time when the Petitioner's wife could afford to visit him, she was unable to see him because on that very same day he was transferred without notification to Tres Álamos.

During this period (about three months) he was allowed visits from his wife and daughters once a week. After his decree of expulsion had been issued, enforced by the November 1974 Interior Ministry Law, he was interviewed by the ICRC and by CIMADE— a French NGO—for visa purposes. He was on the list of the first one hundred to be expelled.

He was escorted from Tres Álamos on 12 June 1975 to the airport. Since then he and his family had been living in the UK. He hasn't been able to work from that date until now as result of the injuries caused by the torture inflicted upon him while detained for fifteen months in Chile.

## **2. THE PETITIONER IS NOT OBLIGED TO EXHAUST LOCAL REMEDIES BECAUSE THERE ARE NO REMEDIES FOR THE VIOLATION ALLEGED.**

In the case at hand, the local remedies rule contained in art 46.1.a of the American Convention of Human Rights<sup>1</sup> is not applicable because Chile's domestic legislation lacks effective remedies to afford adequate reparation for torture victims. This case falls under the exception contained in art 46.2.a of the Convention.

The exhaustion rule in international law, as it has been interpreted and applied by courts including the Inter-American Court of Human Rights, requires that normal use be made of remedies which are likely to be adequate and effective to provide redress for the alleged wrong.<sup>2</sup> Accordingly, art 46.2.a of the American Convention explicitly establishes the exception to the rule of exhaustion of local remedies for denial of justice. Paragraph 46.2.a states:

2. The provisions of paragraphs 1.a and 1.b of this article shall not be applicable when:

a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated.

The Petitioner's claim before the Inter-American Commission of Human Rights for denial of justice is based on violations to art 1.1, 2, 8, and 25 of the American Convention and art 9 of the Inter-American Convention to Prevent and Punish Torture<sup>3</sup>. The denial of justice in this case is precisely the lack of effective remedies for torture victims affordable under Chilean legislation; thus, the exception to the rule of exhaustion of local remedies contained in art 46.2a is applicable.

Furthermore, as recognized by the Inter-American Commission, the Petitioner alleges Decree Law No. 2191<sup>4</sup> prevents victims from seeking reparations in civil courts<sup>5</sup>. The Chilean courts have repeatedly applied the decree and the Supreme Court has reaffirmed its constitutionality<sup>6</sup> thereby eliminating any prospect of success of an appeal to the

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<sup>1</sup> American Convention on Human Rights, O.A.S. Treaty Series No.36, 1144 U.N.T.S. 123 [Hereinafter American Convention]

<sup>2</sup> *Panevez v. Saldutiskis Railway case*, PCIJ, Series A/B, no. 76; *X v. Austria*, ILR 30, 268; *Lansman et al. v Finland case* (511/92) UN Human Rights Committee (UNHCR). See, also, *Caso Velazquez Rodriguez*, Indemnizacion Compensatoria, Sentencia de 21 Julio de 1989; *Caso Godinez Cruz*, Indemnizacion Compensatoria, Sentencia de 21 de Julio de 1989; See also, inter alia, *Van Oosterwick v Belgium A para 34* (1980) ECHR.

<sup>3</sup> Inter-American Convention to Prevent and Punish Torture, O.A.S. Treaty Series No. 67 [Hereinafter Inter-American Torture Convention]

<sup>4</sup> Decree Law. No. 2191 (Apr. 18, 1978), published in Diario Oficial, No. 30,042 (Apr. 19, 1978)

<sup>5</sup> See *Garay Hermosilla et al.*, case no. 10.8431996 [hereinafter *Hermosilla*].

<sup>6</sup> Supreme Court of Chile on August/1990 and refusal for clarification on September 1990. In January 1992 the Court Martial reaffirmed the original 1989 decision of the Second Military Tribunal to apply the amnesty law, and based its' ruling on the SC 1990 decision upholding the constitutionality of the decree law. See Quinn, Robert "Will the Rule of Law End? 62 Fordham L. Rev. 905.

domestic courts and constituting a final obstacle to obtain any form of reparation in his case.

The Inter-American Court has upheld the view that in international law the local remedies rule only applies when effective remedies are available in the national system<sup>7</sup>; no effective remedy is available if a point of law which could have been taken on appeal has previously been decided by the highest court.<sup>8</sup> The European Court has also established that applicants are not obliged to make use of remedies that, according to ‘settled legal opinion’ existing at the relevant time, do not provide for their complaints.<sup>9</sup> This exception is clearly explained by the Human Rights Committee in *Lansman et al. v Finland*:

“... wherever the jurisprudence of the highest domestic tribunal has decided the matter at issue, thereby eliminating any prospect of success of an appeal to the domestic courts, authors are not required to exhaust domestic remedies.”<sup>10</sup>

More importantly, the Inter-American Commission established in *Garay Herмосilla et al.*,<sup>11</sup> *Irma Reyes et al.*<sup>12</sup> and very recently in *Samuel Alfonso Catalan Lincoleo*,<sup>13</sup> that by holding constitutional the amnesty provisions in Chile, judicial proceedings involving Decree Law No. 2191 became futile. In these cases, as in the cases of Argentina and Uruguay where the respective amnesties laws were also declared constitutional,<sup>14</sup> the Commission rejected claims of inadmissibility by the Government based on art 46.1.a.

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<sup>7</sup> Velasquez Rodriguez; Godinez Cruz; see footnote 2. See also Raquel Martí de Mejía v. Perú, Case 10.970, Report No. 5/96, Inter Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 at 157 (1996) [hereinafter Mejía Egocheaga].

<sup>8</sup> *Panevez v. Saldutiskis Railway case*, PCIJ, Series A/B, no. 76; X v. Austria, ILR 30, 268. See Brownlie, Ian. “Principles of Public International Law”; Clarendon Press-Oxford, 1998, pg. 499.

<sup>9</sup> See foot note 2; see also De Wilde, Ooms and Versyp v Belgium A 12 p 33 (1971) (the Vargancy cases).

<sup>10</sup> *Lansman et al. v Finland case* (511/92) UNHRC.

<sup>11</sup> See *Herмосilla et al.*, .

<sup>12</sup> *Irma Reyes et al.*, cases 11.228 et al., 1996 [hereinafter Reyes]

<sup>13</sup> *Samuel Alfonso Catalan Lincoleo*, case no. 11.771 (2001)

<sup>14</sup> See Uruguay Cases, Inter-Am. CHR 154, PP 15-16 (1993); Argentina Cases, Inter-Am. CHR 41, PP 10, 19 (1993)

## **2. CHILE IS BREACHING ITS INTERNATIONAL LEGAL OBLIGATION TO AFFORD ACCESS TO JUSTICE AND REPARATION FOR VICTIMS OF TORTURE.**

### **A) Chile is obliged under treaty and customary international law to afford adequate reparation for torture victims through effective legal remedies.**

Chile is a state party to the American Convention and the Inter-American Torture Convention. Under both instruments, Chile has a duty to afford reparation to torture victims; the right to reparation is codified in arts 8 and 25 in connection with art 1 of the American Convention and in art 9 of the Inter-American Torture Convention. Chile has also ratified the United Nations Convention on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>15</sup> and the International Covenant on Civil and Political Rights<sup>16</sup> also containing provisions awarding reparation for torture victims.

The right to reparation is a fundamental right of general international law.<sup>17</sup> The inter-American Court of Human Rights refers to the right to a remedy as one of the basic pillars not only of the American Convention, but of the rule of law and a democratic society.<sup>18</sup>

Chile's obligation to afford remedies applies to all victims whose suffering has not been redressed. This is not a matter of retroactivity of the Convention because it is a continuing obligation; the passage of time after the violations were committed is not a relevant factor since no remedy was ever afforded.<sup>19</sup> Moreover, this continuing obligation was recognized by Chile when it implemented reparation measures for the families of victims who died as a consequence of the human right violations of the military regime. Chile's Law No 19.123 treats as a single act the violation of the victims' right from the time they were seized until the time justice was denied.<sup>20</sup> However, as it will be further described, survivors of human rights violations, including torture victims, were deprived

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<sup>15</sup> [Hereinafter UN Torture Convention]

<sup>16</sup> [Hereinafter ICCPR]

<sup>17</sup> *Factory at Chorzow, Jurisdiction*, Judgement No. 8, 1927, P.C.I.J., Series A, no. 17, p. 29 ; *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 184 ; *Interpretation des traites de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, deuxième phase*, avis consultatif, C.I.J., Recueil, 1950, p. 228.

<sup>18</sup> *Blake v. Guatemala* (Reparations), para.63; *Castillo Paez v. Peru*, (1997) 34 Inter-Am. Ct. H.R. (ser. C.), paras. 82, 83; *Suarez Rosero v. Ecuador*, (1998) 375 Inter-Am. Ct. H.R. (1985) 35 Inter-Am. Ct. H.R. (ser. C.) para 65; *Peru* (Reparations), judgment of 27 November 1998, para. 169; *Castillo Paez v. Peru* (Reparations), judgement of 27 November 1998, para. 106.

<sup>19</sup> *Garrido y Baigorria v. Argentina* (Reparations), Judgment of August 27<sup>th</sup>, 1998 39 Inter-Am. Ct.H.R.; See also UN Draft Basic Principles and Guidelines on the Right to Reparation for Gross Violations of Human Rights.

<sup>20</sup> Gary Hermosilla Report, para 52.

of any legal recourse and of any type of compensation.<sup>21</sup> In the case at hand, therefore, statutory limitations cannot run because no remedy was ever afforded.

**i. Chile's duty to provide reparation includes affording victims of torture access to justice and effective redress.**

All these instruments guarantee both the procedural right of effective access to a fair hearing and the substantive right to a remedy; the American Convention and the Inter-American Torture Convention explicitly call for the development in national legislations of judicial remedies for the rights they guarantee.<sup>22</sup>

Concerning the states' legal obligation to make effective internal remedies available, the Inter-American Court of Human Rights has asserted the following:

“Under the Convention, State Parties have an obligation to provide effective judicial remedies to the victims of human rights violations (art 25), remedies that must be sustained in accordance with the of rules due process of law (art 8.1), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subjected to their jurisdiction (art 1)”<sup>23</sup>

The Inter-American Court has further explained that for such remedies to be effective, they must be suitable to address the legal right that has been infringed<sup>24</sup> and that “the absence of an effective remedy for violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking”.<sup>25</sup>

In the case of *Blake v. Guatemala*<sup>26</sup> the decision of the Court reinforced the links between art 8.1, art 25 and art 1.1, emphasizing the need to combat against impunity. The Court held that art 8.1, which affirms the right to a fair hearing, together with arts 25 and 1.1 ensures each person that those responsible for violations of human rights will be judged and that victims can obtain a remedy for the damage suffered.

In cases of torture, the duty to provide remedies to victims includes an enforceable right to fair and adequate compensation. The Court interpreted in *Velasquez Rodriguez* that the obligation to afford remedies in art 25 together with the obligation under art 1.1 to guarantee the free and full exercise of the rights recognized by the Convention imposes

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<sup>21</sup> Garay Herмосilla, para 74.

<sup>22</sup> Art 2 of the American Convention and art 9 of the Inter-American Torture Convention.

<sup>23</sup> *Velasquez Rodriguez Case (Preliminary Exceptions)*, 1987 1 Inter-Am. Ct. H.R. (ser. C.) para 166.

<sup>24</sup> *Velasquez Rodriguez Case*, Judgment of July 29, 1989, Inter-Am. Ct. H.R., para 91. See footnote 2

<sup>25</sup> Advisory Opinion OC-9/87, Inter-Am. Ct H.R., para 24

<sup>26</sup> *Blake v. Guatemala (Merits)* judgments of 24 January 1998; (Reparations) judgment of 22 January 1999 Inter-Am. Ct H.R

on each state party a “legal duty to...ensure all victims adequate compensation.”<sup>27</sup> The right to adequate compensation for torture victims is clearly codified under art 9 of the Inter-American Torture Convention:

“The States Parties undertake to incorporate into their national laws regulations *guaranteeing suitable* compensation for victims of torture.”

The Inter-American Court in the Loayza Tamayo Case,<sup>28</sup> explained that although the consequences of a violation to article 5 (right to humane treatment) cannot be fully redressed, *alternative forms of reparation have to be found, such as pecuniary compensation for the victim and, where appropriate, her next of kin.*

“This compensation is mainly for injuries suffered and, as this Court has ruled previously, includes pecuniary as well as moral damages (Garrido and Baigorria Case, Reparations, *supra*, para. 43).”

This criterion was recently confirmed in the Cantoral Benavides decision.<sup>29</sup> Regarding the alleged violation of Article 5(1) and 5(2) of the Convention, the Court recognized that *the situation the victims went through, caused them severe suffering and anguish, and therefore the Tribunal needs to assess same when setting necessary reparations for proven violations of the American Convention:*

“The Court considers that reparations are in order for the situation created as a result of the violation of the rights specified in this case [art 5], which should include fair compensation”<sup>30</sup>

Furthermore, art 2.3 of the ICCPR<sup>31</sup> providing the right of every person to an effective remedy, has been interpreted by the Human Rights Committee in the same manner as the Inter-American Court of Human Rights: as the obligation of states to use their resources to investigate, to punish violators, and to compensate the victims of human rights violations.<sup>32</sup> In its General Comment interpreting article 7 (which prohibits torture and

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<sup>27</sup> Velasquez Rodriguez Case, see footnote 2

<sup>28</sup> Loayza Tamayo Case, Judgment of September 17, 1997. Series C No. 33, para. 58

<sup>29</sup> No. 69 Cantoral Benavides Case, Judgment of August 18, 2000

<sup>30</sup> See *idem* 29.

<sup>31</sup> Article 2.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

<sup>32</sup> In the Bleier case, for example, the Committee concluded that Uruguay "has the duty to investigate in good faith . . . [to] bring to justice any persons found to be responsible for [Bleier's] death . . . and to pay compensation." Communication No. R.7/30 (Bleier v. Uruguay), U.N. GAOR, 37th Sess., Supp. No. 40, at

cruel, inhuman or degrading treatment or punishment) the Committee makes clear the right of victims of torture to have effective remedies at their disposal, including the right to obtain compensation.<sup>33</sup> Finally, art 14 of the UN Torture Convention provides that:

“1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to *fair and adequate compensation*, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.”

Clearly the State of Chile as a signatory to the American Convention, the Covenant and the Inter-American and UN Torture Conventions has present-time obligations under the provisions in each treaty requiring effective judicial remedies to afford reparation, including compensation, for violations of protected rights such as the right to be free of torture.

**ii. Chile is obliged to provide specific legal measures to guarantee adequate reparation to victims of torture.**

1) Obligation of Adopting Domestic Legal Provisions (art 2 of the American Convention and art 9 of the Inter-American Torture Convention)

As explained by the Inter-American Commission, the state parties to the American Convention have undertaken the obligation of respecting and guaranteeing all the rights and freedoms protected by the Convention with the respect to persons under their jurisdiction and of adapting their legislation to permit the effective enjoyment and exercise of those rights and freedoms. Specifically, art 2 of the Convention establishes the obligation of states parties to adopt “such legislative or other measures as may be necessary” to give effect to the rights and freedoms enshrined therein.<sup>34</sup>

Chile has also ratified the Inter-American Torture Convention and is bound by art 9 “to incorporate into their national laws regulations guaranteeing suitable compensation for

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135-36, U.N. Doc. A/37/40 (1982). In the Quinteros case, the Committee similarly concluded that Uruguay “has a duty to conduct a full investigation . . . to bring to justice any persons found to be responsible for [Quinteros] disappearance and ill treatment . . . [and to] pay compensation for the wrongs suffered.” Communication No. 107/1981 (Quinteros v. Uruguay), U.N. GAOR, 38th Sess., Supp. No. 40, at 224, U.N. Doc. A/38/40 (1983).

<sup>33</sup> The Human Rights Committee has asserted: “It is not sufficient for the implementation of [article 7] to prohibit [torture or other cruel, inhuman or degrading] treatment or punishment or to make it a crime. Most States have penal provisions which are applicable to cases of torture or similar practices. Because such cases nevertheless occur, it follows from article 7, read together with article 2 of the Covenant, that States must ensure an effective protection through some machinery of control. Complaints about ill-treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible, *and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation*. See *idem* footnote 31; Report of the Human Rights Committee, 37 UN GAOR Supp. (No. 40), UN Doc. Annex V, general comment 7 (16), para 1 (1982).

<sup>34</sup> Samuel Alfonso Catalan Lincoleo, para 46, ICHR Case 11.771, Report No 61/01 (2001)

victims of torture”. This provision reinforces Chile’s obligations under the American Convention to adopt measures to guarantee the right to adequate remedy for torture victims and goes further in establishing an obligation to incorporate appropriate *legal regulations* without prejudice of existing rights under national remedies: “non of the provisions of this article [9] shall affect the right to receive compensation that the victim or other persons may have by virtue of existing national legislation.”<sup>35</sup>

## 2) The Gravity of the Crime of Torture Requires Specific Provisions.

In interpreting the obligation to afford effective remedies in national legislations under the American Convention, the Inter-American Court of Human Rights has said that:

“...it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress.”<sup>36</sup>

The prohibition against torture is a *jus cogens* norm<sup>37</sup> and therefore adequate torture remedies, including regulations guaranteeing suitable compensation for torture victims, should not treat torture as simple wrongful acts. The preamble of the Inter-American Torture Convention states that: “All acts of torture and any other cruel, inhuman, or degrading treatment or punishment constitute an offense against human dignity...and are violations of the fundamental human rights and freedoms”<sup>38</sup> and the OAS General Assembly has declared that crimes under international law [such as torture] require special treatment different from mere common crimes.<sup>39</sup>

This view was reflected in the report of the Catalan Case where the Inter-American Commission established that torture and related crimes, such as forced disappearances and summary executions are of such gravity they require specific measures.<sup>40</sup> In this sense, Chile has an obligation under the American Convention and the Inter-American Torture Convention to establish concrete legal regulations guaranteeing adequate reparation specifically for victims of torture. Failure to investigate, punish as well as provide compensation affords impunity in violation of these requirements.

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<sup>35</sup> Art 9 of the Inter.-American Torture Convention; see footnote 3

<sup>36</sup> Inter-Am. Ct. H.R., Advisory Opinion OC-9/87, Para 24

<sup>37</sup> Al-Adsani Case v United Kingdom (N° 35763/97) Final Judgment, ECHR, 21 November 2001; UN Special Rapporteur on torture, first report (UN doc. E/CN.4/1986/15, para.3).

<sup>38</sup> Id. preamble

<sup>39</sup> OAS General Assembly, Resolutions AG/RES. 443 (IX-0/79), 742 (xiv-0/84) 950 (xviii-0/88) 1022 (XIX-0/89) and 1044 (XX-0/90); IACHR, Annual Reports for 1978, 1980/81, 1981/82, 1985

<sup>40</sup> Samuel Alfonso Catalán Lincoleo, Case 11.771. Report No. 61/01 Inter-American Human Rights Commission, April 16, 2001

**B) Chile is not fulfilling its obligations under the American Convention and the Inter-American Torture Convention to ensure effective remedies for reparation to victims of torture in its domestic legal system.**

**i. The current legal framework in Chile renders in practice the realizations of the torture victim's right to adequate redress impossible**

Under Chilean law, the possibility of initiating a civil case does not necessarily depend on the results of criminal proceedings. Nonetheless, the civil claim must be lodged against a specific person in order to establish their responsibility for the acts, and determine the payment of compensation.<sup>41</sup> The unanimous jurisprudence of the Chilean courts indicates that civil actions may only proceed once the *corpus delicti* has been produced and the guilty party against whom such action is to be taken has been determined.<sup>42</sup>

In the Chilean Civil Code there are no specific provisions on reparation for torture victims. The only way a victim can obtain compensation is through the provisions in Section XXXV, Book IV, regarding monetary obligations as a consequence of illicit acts. These provisions do not afford remedies for torture victims because they treat torture as simple illicit acts; all cases of public official's misconduct fall within the jurisdiction of the military code containing statutory limitations and a very narrow definition of torture; and finally, Decree Law No. 2192 bans investigations of past violations necessary to determine individual responsibility in the present case [and all similar cases]. Currently there has not been a single successful civil suit for damages to torture survivors.<sup>43</sup>

1) Reparation remedies in Chile are not effective because they treat torture in the same manner as simple illicit acts.

Art 254 No 3 of the Code of Civil Procedure makes mandatory that a civil suit must contain the name, address and profession or office of the individual against whom the suit is brought. Clearly, this provision is not adequate for cases involving grave human rights violations (especially if systematic and widespread), but when the violations are acts of torture, these requirements are particularly unreasonable since identifying the perpetrator is almost impossible in the majority of the cases.<sup>44</sup> Moreover, art 40 of the Code of Criminal Procedure states that civil actions may be taken against the responsible party himself and against his heirs; this provision together with art 254 No 3 of the Code of Civil Procedure has been interpreted by the courts as limiting the scope of civil suits only against identifiable individuals, and therefore preventing claims against the State itself.<sup>45</sup>

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<sup>41</sup> Catalán Lincoleo, para 64, footnote 40

<sup>42</sup> Garay Hermosilla, para 9, footnote 11

<sup>43</sup> See "INFORME DE LA COMISION ETICA CONTRA LA TORTURA AL PRESIDENTE DE LA REPUBLICA, SR. RICARDO LAGOS" and other relevant documents in [www.CODEPU.cl](http://www.CODEPU.cl)

<sup>44</sup> Istanbul Protocol, United Nations High Commissioner for Human Rights, 9 August 1999; Peel and Lcompino, *The Medical Documentation of Torture*, 2002

<sup>45</sup> Garay Hermosilla, para 9, footnote 11

Furthermore, as it will be describe below, in the case at hand Decree Law No. 2191 prevents the judges from ordering investigations of the crimes alleged, making the right to compensation for damages not only illusory but also juridically impossible.<sup>46</sup>

2) Chilean national laws on torture overlap between civil and military jurisdictions making all cases of torture fall within the jurisdiction of the military courts and rendering the right to reparation ineffective.

The crime of torture is typified under article 150A and 150B of the Chilean Criminal Code<sup>47</sup> and under article 330 of the Code of Military Justice<sup>48</sup>. Neither provision uses the

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<sup>46</sup> “The Supreme Court, in both decisions, stated that the self amnesty decree law does not exclude the right of aggrieved parties to be duly compensated by the civil courts for any financial damages that the offences may have cause them. If the self-amnesty decree law, as interpreted by the Court, constitutes a rule that prevents the judge from ordering an investigation is already underway, requires that it be suspended immediately, then the right to compensation for damages is not only illusory but also juridically impossible...” Garay Hermosilla, para 9, footnote5; See also Reyes, footnote 12 and Catalan Lincoleo, footnote 13.

<sup>47</sup> Criminal Code of Chile :

Art. 150 A. El empleado público que aplicare a una persona privada de libertad tormentos o apremios ilegítimos, físicos o mentales, u ordenare o consintiere su aplicación, será castigado con las penas de presidio o reclusión menor en sus grados medio a máximo y la accesoria correspondiente.

Las mismas penas, disminuidas en un grado, se aplicarán al empleado público que, conociendo la ocurrencia de las conductas tipificadas en el inciso precedente, no las impidiere o hiciere cesar, teniendo la facultad o autoridad necesaria para ello.

Si mediante alguna de las conductas descritas en el inciso primero el empleado público compeliere al ofendido o a un tercero a efectuar una confesión, a prestar algún tipo de declaración o a entregar cualquier información, la pena será de presidio o reclusión menor en su grado máximo a presidio o reclusión mayor en su grado mínimo y la accesoria correspondiente.

Si de la realización de las conductas descritas en este artículo resultare alguna de las lesiones previstas en el artículo 397 o la muerte de la persona privada de libertad, siempre que el resultado fuere imputable a negligencia o imprudencia del empleado público, la pena será de presidio o reclusión mayor en su grado mínimo a medio y de inhabilitación absoluta perpetua. Art. 150 B. Al que, sin revestir la calidad de empleado público, participare en la comisión de los delitos sancionados en los dos artículos precedentes, se le impondrán las siguientes penas:

1§. Presidio o reclusión menor en su grado mínimo a medio, en los casos de los artículos 150 y 150 A, inciso primero;

2§. Presidio o reclusión menor en su grado medio a máximo, en el caso del inciso segundo del artículo 150 A, y

3§. Presidio o reclusión menor en su grado máximo a presidio o reclusión mayor en su grado mínimo, si se tratare de la figura del último inciso del artículo 150 A.

En todos estos casos se aplicarán, además, las penas accesorias que correspondan.

<sup>48</sup>Code of Military Justice modified by Law 19.683 June de 2000 S. 2. 2226. - Santiago, 19 December 1944. Art. 330. El militar que, con motivo de ejecutar alguna orden superior o en el ejercicio de funciones militares, empleare o hiciere emplear sin motivo racional, violencias innecesarias para la ejecución de los actos que debe practicar, será castigado:

1. - Con la pena de presidio mayor en sus grados mínimo a medio si causare la muerte del ofendido;

2.- Con la de presidio menor en su grado medio a presidio mayor en su grado mínimo si le causare lesiones graves;

3.- Con la de presidio menor en sus grados mínimo a medio si le causare lesiones menos graves, y

word *torture* to indicate the prohibited conduct nor do they use the concepts of cruel, inhuman or degrading treatment or punishment. The Criminal Code uses “Tormentos o Apremios Ilegítimos” (torments or illegitimate punishments) and the Military Code uses “Violencias Innecesarias” (unnecessary violence).<sup>49</sup>

Articles 150A and 150B are the result of recent modifications to the Criminal Code to adjust its provisions to torture definitions in international treaties.<sup>50</sup> However Article 5<sup>51</sup> of the Military Code of Justice transfers criminal jurisdiction to the Military Courts in cases that concern military crimes and according to this article, *military crimes are those contemplated by the Code itself*.<sup>52</sup> In this sense, any case involving torments or punishments committed by public officials fall within military jurisdiction.<sup>53</sup>

The fact that the two provisions are in force (art 5 read in connection with art 330 of the Code of Military Justice and with arts 150A/B of the Criminal Code) means in practice that conduct constituting the crime of ‘Apremios Ilegítimos’ (torture) under the Criminal Code is being investigated, judged and sentenced in Military Courts under the crime of ‘Violencias Innecesarias’.<sup>54</sup>

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4.- Con la de prisión en su grado máximo a presidio menor en su grado mínimo si no le causare lesiones o si éstas fueren leves.

Si las violencias se emplearen contra detenidos o presos con el objeto de obtener datos, informes documentos o especies relativos a la investigación de un hecho delictuoso, las penas se aumentarán en un grado.

<sup>49</sup> The then Special Rapporteur for Torture, Nigel Rodley, specifically recommended the State of Chile to characterize torture as an offence. Report to the Commission on Human Rights resolution 1997/38

<sup>50</sup> Law 19567--entered into force on July 1998-- modified Chilean Criminal Code concerning the crime of ‘apremios ilegítimos’ (illegitimate punishment)

<sup>51</sup> Military Code of Justice. Art. 5. Corresponde a la jurisdicción militar el conocimiento:

1. De las causas por delitos militares, entendiéndose por tales los contemplados en este Código, excepto aquellos a que dieran lugar los delitos cometidos por civiles previstos en los artículos 284 y 417, cuyo conocimiento corresponderá en todo caso a la justicia ordinaria, y también de las causas que leyes especiales sometan al conocimiento de los tribunales militares.

Conocerán también de las causas por infracciones contempladas en el Código Aeronáutico, en el decreto ley Número 2.306, de 1978, sobre Reclutamiento y Movilización y en la ley Número 18.953, sobre Movilización, aun cuando los agentes fueren exclusivamente civiles.

2. De los asuntos y causas expresados en los números 1. a 4. de la segunda parte del artículo 3.

3. De las causas por delitos comunes cometidos por militares durante el estado de guerra, estando en campaña, en acto del servicio militar o con ocasión de él, en los cuarteles, campamentos, vivaques, fortalezas, obras militares, almacenes, oficinas, dependencias, fundiciones, maestranzas, fábricas, parques, academias, escuelas, embarcaciones, arsenales, faros y demás recintos militares o policiales o establecimientos o dependencias de las Instituciones Armadas;

4. De las acciones civiles que nazcan de los delitos enumerados en los números 1 a 3, para obtener la restitución de la cosa o su valor.

<sup>52</sup> The Code considers only two exceptions, art 284 and art 417, regulating insult or offends to public officials. See Code of Military Justice

<sup>53</sup> As the Committee Against Torture established in its Concluding Observations to Chile in 26/07/95: “...the subjection of civilians to military jurisdiction, are not helpful as far as the prevention of torture is concerned”. A/50/44, paras. 52-61 Reparation is substantially related to prevention [ include source for that]

<sup>54</sup> Criminal judges and district attorneys are today declaring that the jurisdiction of the Military Courts is the appropriate jurisdiction under the Law to proceed with investigations into claims of torture based on

The situation of civilians subjected to military jurisdictions is itself a violation of the right to a fair trial. The Inter-American Court of Human Rights has established that:

“When a military court takes jurisdiction over a matter that regular courts should hear, the individual’s right to a hearing by a competent, independent and impartial tribunal previously established by law [for civilians] and, a fortiori, his right to due process are violated. That right to due process, in turn, is intimately linked to the very right to justice and access to courts”.<sup>55</sup>

This view is consistent with the interpretation by the Human Rights Committee of right to a fair trial under similar conditions:

“[I]n some countries such military and special courts do not afford the strict guaranteed of the proper administration of justice in accordance with the requirements of article 14 which is essential for the effective protection of human rights.”<sup>56</sup>

In 1985 the Inter-American Commission stated that the continuing expansion of the military court’s jurisdiction over civilians in Chile was gradually eroding the jurisdiction of the ordinary courts and adversely affected the exercise of the right to a fair trial.<sup>57</sup>

On the other hand, applying the provisions of the Military Code of Justice to torture cases affects the right of victims to obtain effective remedies. Art 330 of the Code of Military Justice contains a very narrow definition of the crime: contrary to international standards—including those of the Inter-American Torture Convention—it does not consider psychological harm or concomitant responsibility; it has statutory limitations

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article 150A/B [See DE BRITO, “Human Rights and Democratization in Latin America Uruguay and Chile”; 1998, Institute of Strategic and International Studies, Lisbon]. This has two important consequences: a) non-application of the new articles 150 A and 150 B of the Criminal Code adjusted to the international standards and b) the body that has jurisdiction on torture cases is basically the accused violating the basic principle of requiring independence of the judiciary (Art 10 of the Universal Declaration of Human Rights: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him and Art 14.1 International Covenant of Civil and Political Rights PR “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”).

<sup>55</sup> Inter-American Court of Human Rights; Castillo Petruzzi et al Case, Judgement of May 30, 1999

<sup>56</sup> UN Doc. CCPR/C/7 Add.77. April 1997, at para 13

<sup>57</sup> Report on the situation of Human Rights in Chile, OEA/Ser. L./V/II.66, doc. A, 1985, p. 183. In fact, the “Propuesta Programática de la Concertación” (Government Program) of 1989 established the necessity to reform the Military Code to restrict military jurisdiction to crimes committed by and against military and military institutions exclusively. However, 13 years have pass since the first “Concertation” government and this reform is still pending. See Concertación de Partidos por la Democracia. Programa de Gobierno, page 5, Editorial Jurídica Publibley Ltda., 1989, Santiago Chile.

and does not provide for universal jurisdiction.<sup>58</sup> These provisions clearly limit the scope of acts falling under the defined punishable conduct violating art 25 of the American Convention containing the right of victims to obtain adequate redress.

Furthermore, the overlapping of civil and military jurisdictions makes reparation provisions of the Civil Code, both inadequate and ineffective. As explained before, art 330 of the Military Code restricts the scope of acts falling under the defined punishable conduct and excludes psychological harm as a possible element of the crime. Applying this provision directly limits the adequate determination of damages caused to the victims. On the other hand, although civil suits for damages independent from criminal prosecution are possible under Chilean law<sup>59</sup> the practical effect of the Military Courts taking jurisdiction over torture cases significantly restricts victims' ability to peruse civil remedies. In practice, most of the cases under military jurisdiction are dismissed without determining criminal liability under statute of limitations or Decree Law 2191;<sup>60</sup> therefore preventing the victims from enjoying their right to a fair trial to duly determine their civil rights as established in art 8.1 of the American Convention.

3) Decree-Law N° 2191 prevents victims from past violations of torture to exercise their right to civil redress.

In the present case, Decree Law N 2191 is a further and final obstacle for the Petitioner to obtain redress through Chilean domestic legal remedies. Decree Law No 2191 is a blanket amnesty law covering acts committed during the first five years rule of the military junta (from September 11, 1973, the date of the military coup, through March 10, 1978). The amnesty decree law violates Chile's international treaty and customary obligations to provide victims with effective remedies, access to hearing and compensation.

Amnesty laws like Decree Law No 2191 have been widely typified as illegal under international law.<sup>61</sup> The Human Rights Committee declared in 1994 that:

“...amnesties for gross violations of human rights and legislation such as the amnesty laws are incompatible with the obligations under the Covenant. The committee notes with deep concern that the adoption of these laws effectively excludes...the investigations into past human rights abuses and thereby prevents the state parties from

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<sup>58</sup>See art 330 Code of Military Justice footnote 48 and Inter-American Torture Convention footnote 3

<sup>59</sup> Article 5 of the Código de Procedimientos Civiles

<sup>60</sup> CODEPU (Comité de Defensa de los Derechos del Pueblo) “Informe Sobre la Impunidad en Chile” Publicado por Equipo Nikzkor, Madrid, España. Septiembre de 1996.

<sup>61</sup> CASSEL, Douglas. “Accountability for International Crime and Serious Violations of Fundamental Human Rights: Lessons from the Americas: Guidelines for International Law Response to Amnesties for atrocities, 1996, 59 Law and Contemp. Prob. 197

discharging its responsibilities to provide effective remedies to victims of those abuses...”<sup>62</sup>

The Inter-American Commission of Human Rights has repeatedly provided that amnesties and the effects thereof cannot deprive victims, their family members, or survivors of the right to obtain, at minimum, adequate reparations for violations of human rights enshrined in the American Convention. This position derives largely from the Inter-American Court’s interpretation of the consequences of a state’s violation of its duty to guarantee human rights under art 1.1 thereof.<sup>63</sup>

Consistently the Commission held on several occasions Decree Law No 2191 incompatible with Chile’s international obligations under the American Convention. According to the Commission, and has decided that the legal consequences of the self-amnesty deny the victim his/her right to a fair trial, as guaranteed in art 8, and the right to judicial protection and effective redress contained in art 25.<sup>64</sup> Based on the power granted to it by arts 41 and 42 of the Convention and in accordance with the interpretation of same by the Court,<sup>65</sup> the Commission made each time specific recommendations to Chile to adapt its domestic laws to ensure the rights protected by the Convention in such a way, as to leave Decree-Law No 2191 without effect.<sup>66</sup> Contrary to these recommendations, the State of Chile is currently enforcing Decree Law No 2191.<sup>67</sup>

a. Decree-Law No. 2191 is in violation of art 8 (right to a fair trial) of the American Convention for preventing victims to pursue remedies in court.

As the Inter-American Commission has ruled before, the amnesty decree clearly affects the right of victims, which is recognized by Chile, to launch criminal actions before the courts against those responsible for the violations of their human rights.<sup>68</sup> But even if this is not the case, since the crimes in question here are public crimes—that is to say crimes that can be prosecuted *ex officio*—the State has the obligation to investigate them, an obligation that can be neither delegated nor renounced.<sup>69</sup> It is incumbent on the Chilean State to take punitive action and press forward with the various procedural stages, in the fulfillment of its duty of guaranteeing the right to justice of victims and their families.

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<sup>62</sup> See Rodriguez note P12.4

<sup>63</sup> Catalan Report, para 59

<sup>64</sup> Include par 50 of the Catalan case and Garay Herмосilla and Reyes also

<sup>65</sup> The Inter-American Court has stated: [ insert para of Mejia Egocheaga and another v Peru]

<sup>66</sup> Garay, Inter-American Commission on Human Rights: Garay Herмосilla and others v Chile (Case No 10, 843), 1996, Reyes, Cataln

<sup>67</sup> The decree law is still in force today. There has been no derogation and in fact Chile’s Supreme Court has declared it constitutional. See Quinn, Robert “ Will the rule of law end? 62 Fodham L. Rev. 905, February 1994 on the Supreme Court’s August 24, 1990 decision, upholding constitutionality of the amnesty law and subsequent Military decisions based in the Supreme Court ruling.

<sup>68</sup> Code of Civil Procedure, Chile, Title II, ‘Criminal Action and Civil Action in Criminal Trials’ art 10/41

<sup>69</sup> As established by the Court in Velasquez Rodriguez ‘*This task must be assumed by the state as its own legal duty, not as a step taken by private interests that depend upon the initiative of the victim or his family or upon their offer of proof*’ Velasquez Rodriguez Case (1988) Inter-Am Ct HUMAN RIGHTS, OAS/Ser L/V/III 19, doc 13, par 177.

This function must be assumed by the States as its own legal duty; it must not be a step taken by private interest that depend upon the initiative of those private individuals or upon offer of proof.<sup>70</sup>

The amnesty law also deprives victims and victim's families of the possibility of obtaining reparations through Chilean civil courts. As established by the Commission, even if the Chilean amnesty only applies to criminal responsibilities, without identification of the perpetrator is impossible to establish civil liability in Chilean courts. As explained before, civil claims must be lodged against a specific person in order to establish their responsibility for the alleged acts and determine the payment of compensation.

“The failure of the state to conduct investigations and to abolish the amnesty decree makes impossible to establish any such responsibility before the civil courts.”<sup>71</sup>

Contrary to Chile's obligation under art 8 of the American Convention the amnesty decree law prevents victims from seeking reparations in the civil courts.<sup>72</sup> As in the case of Chile, the Inter-American Commission found in Uruguay that even though the amnesty barred only criminal prosecution and civil suits for damages remained possible, by barring judicial investigations and hence the possibility of compelling military and police to testify, the practical effect of the amnesty “substantially restricted” victims' ability to pursue civil remedies.<sup>73</sup> The UN Human Rights Committee later reached the same conclusion.<sup>74</sup> The decisions of the Commission regarding Chile's Decree Law No.2191 established that the de facto Decree Law No 2191 utterly prevents victims to seek reparations in the civil courts by making it impossible to individualize or identify those responsible.<sup>75</sup>

b. Decree-Law No. 2191 is in violation of art 25 (right to judicial and effective redress) of the American Convention for preventing victims to peruse remedies in court.

As established by the Inter-American Court of Human Rights, the right to adequate compensation is also intertwined with the right to judicial protection enshrined in art 25 of the American Convention.<sup>76</sup> In the case at hand, the amnesty law deprives victims of their right to effective recourse against acts that violated their fundamental rights. As the

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<sup>70</sup> Cataln Report citing Inter-Am. Ct. H.R., Velasquez Rodriguez Case, Judgement of July 29, 1988, para 79. See footnote 13

<sup>71</sup> Garay Hermosilla, footnote 5

<sup>72</sup> Garay Hermosilla, footnote5; Reyes, footnote 12;Catalan footnote 13.

<sup>73</sup> See Hugo Leonardo et al., case nos. 10.029 et al., 1992-1993 ANN. REP. INT.-AM COMM'N RTS. 88 P1 154,161-62 P38 (1993) [hereinafter Leonardo]

<sup>74</sup> Hugo Rodriguez v. Uruguay, Comm. no. 322/1988, views of July 19, 1994, at 7 P12.2, UN Doc. CCPR/C/ 51/ D/ 1988 (1994)

<sup>75</sup> Garay Hermosilla, footnote5; Reyes, footnote 12;Catalan footnote 13.

<sup>76</sup> Inter-Am. Ct. H.R., Velasquez Rodriguez Case, para 174

Commission has established, through these legislative and judicial acts [the enactment and subsequent application by the courts] the State of Chile declines to punish serious crimes committed against person falling within its jurisdiction. In addition, the manner in which the Chilean courts have enforced the decree-law not only keeps perpetrators of human rights violations from being punished, but also ensures that no charges are brought against those responsible; as a result, under domestic law they are considered innocent.

The amnesty law renders the crimes without juridical effect. Since civil actions may only proceed once the corpus delicti has been produced and the guilty party against whom such action is to be taken has been determined,<sup>77</sup> victims like the Petitioner are left without any judicial recourse to obtain compensation. By enacting and enforcing Decree-Law No. 2191, the Chilean State has failed to guarantee the rights enshrined in art 25 of the American Convention.

c. Decree-Law No. 2191 violates the obligation of Chile to afford every person subject to its jurisdiction the right to a fair and effective remedy (art 1.1 in connection with art 8 and 25 of the American Convention)

Contrary to the non-discriminatory element of art 1.1, by upholding Decree Law No 2191 Chile continues to apply the discriminatory policies of the military junta regime. The amnesty law effectively excludes the same part of the population who were politically discriminated against during the military regime and who suffered grave human rights violations from currently enjoying the fundamental rights established in the Convention.<sup>78</sup>

**C) Chilean reparations measures for victims of past violations do not cover torture survivors and in any case, are not sufficient under international law.**

On 25 April 1990, a Supreme Decree from the new democratic government established the National Commission for Truth and Reconciliation. The powers of the National Commission (“the Retting Commission”) related to the investigation of serious violations of human rights perpetrated in Chile during the period of the military dictatorship. According to its mandate, serious violations of human rights meant violations to the right to life: disappearances, summary and extra-judicial executions, and torture *followed by death*. The Retting Commission had the power to institute proceedings but not to demand the appearances of witnesses to testify before it. It was expressly *barred from deciding on the responsibility of the individuals* for the acts being investigated.<sup>79</sup> Following the report of the Retting Commission, the government passed legislation providing assistance to victims and their families and created the National Corporation for Reparation and

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<sup>77</sup> Garay Hermsilla, para 9, footnote footnote5

<sup>78</sup> Garay Hermsilla, footnote5; Reyes, footnote 12; Catalan footnote 13.

<sup>79</sup> Report of the National Commission on Truth and Reconciliation 74 note j (Phillip E. Berryman, trans., 1993)

Reconciliation.<sup>80</sup> The National Corporation was charged with continuing to examine cases left unresolved by the Retting Commission and with providing compensation to victims' families.<sup>81</sup>

The reparations measures undertaken by the democratic Government to address human rights violations of the past did not include torture survivors, and even in the cases contemplated (violations to the right to life) failed to meet its international obligations. The Inter-American Commission on Human Rights clearly established in its Report of the Catalan Lincoleo Case that: "The (Chilean) government's recognition of responsibility, its partial investigation of the facts and its subsequent payment of compensation are not enough, in themselves, to fulfil its obligation under the article 1 (1) of the American Convention".<sup>82</sup>

Furthermore, art 1.1 of the American Convention establishes that States should guarantee the free and full exercise of those rights and freedom without discrimination. While many criticisms have been made to the Chilean reparation model,<sup>83</sup> the most disturbing is the fact that the narrow mandate of the Retting Commission and consequently the scope of the National Corporation left thousands of cases of violations of non-derogable human rights from which the victims survived—specifically cases of torture—without examination and consequently without any form of reparation.<sup>84</sup>

In this regard the Inter-American Commission affirmed that: "The National Commission for Truth and Reconciliation established by the democratic government to investigate previous human rights violations address a good portion of the total number of cases, and granted reparations to the victims or their families. Yet notwithstanding the investigations conducted by that Commission into cases of violation of the right to life, *the victims of*

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<sup>80</sup> See Law No. 19.123, published in Diario Oficial (Feb 8, 1992); reprinted in Ministry of Foreign Affairs, Republic of Chile, Law Nr. 19,123: Creating the National Corporation for Reparation and Reconciliation (1992).

<sup>81</sup> There has been other legislation providing reparations to victims of the military regime, like Ley 19.234 (sobre el Exonerado Politico), Ley 1907 or the PRAIS (Programa de Reparacion Integralde Salud) but none of them address the issue of reparation for torture survivors.

<sup>82</sup> N° 61/01 Report of the Catalan Lincoleo Case

<sup>83</sup> The Retting Commission's extra-judicial nature and its refusal to publish names of wrong doers failed to address the interest of the victims' families and society. Additionally, the services and pensions provided by the National Corporation cannot be considered to be fair compensation, or justifiable alternatives to the civil remedies precluded by the Amnesty law and otherwise mandated by Chile's treaty obligations. Furthermore, it is submitted that the policy of ignoring cases of torture, where the victim survived is completely inconsistent with Chile's obligations under the Convention.. See Quinn foot note 67, interview with Alejandro Gonzales, President of the National Corporation, in Santiago, Chile (Aug. 11, 1992)

<sup>84</sup> The primary failing is that the Retting Commission's Report, together with the amnesty decree, leaves survivors of torture without means to identify, and thus, bring actions against their torturers. Adding insult, many of the reparative measures recommended by the Commission did not apply to victims of torture because their cases were not included in the official report. See Jorge Correa S., Dealing With Past Human Rights Violations: The Chilean Case After Dictatorship, 67 Notre Dame L. Re. 1455, 1458-60 (1992)

*other violations, including torture, were deprived of any legal recourse and of any other type of compensation”.*<sup>85</sup>

The Inter-American Commission has constantly recommended Chile to adjust its domestic laws to ensure victims their rights to a fair hearing, judicial protection, and remedy under the American Convention. Up to the present, there are no laws affording effective judicial remedies to obtain reparation for torture; the government reparation measures do not cover torture survivors; and Decree Law No. 2191 is still in force denying torture [and other] victims and their families effective investigation and remedies for violations of protected rights.

For the above reasons, Chile is currently liable for violating the rights guaranteed in the American Convention in its art 8 (fair trial), 25 (judicial protection and effective redress) and articles 1.1 and 2 concerning the duty without discrimination to comply with and see to compliance with the provisions of the Convention, and to adapt its laws to give effect to the norms of the Convention.<sup>86</sup>

In the same manner, Chile is liable for violating its obligation under art 9 of the Inter-American Torture Convention to incorporate into its national law regulations guaranteeing suitable compensation specifically for victims of torture.<sup>87</sup>

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<sup>85</sup> See footnote

<sup>86</sup> Garay Hermosilla, Reyes, Catalan

<sup>87</sup> Inter-American Torture Convention, footnote 3

### **3. THE STATE OF CHILE IS RESPONSIBLE FOR BREACHING ITS OBLIGATIONS UNDER INTERNATIONAL LAW AND THEREFORE IS LIABLE TO PAY COMPENSATION.**

As stated above, the State of Chile is responsible for breaching its obligations under the American Convention on Human Rights and the Inter-American Convention to Prevent and Punish Torture and therefore is liable to pay compensation.

The American Convention on Human Rights establishes in its Article 63.1 that:

1. If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

The Inter-American Court of Human Rights has consistently stated in its jurisprudence that article 63 (1) articulates one of the fundamental principles of general international law: it “codifies a rule of customary law which is one of the fundamental principles of current international law and a responsibility of the States”.<sup>88</sup>

Because there are currently no laws affording effective judicial remedies in Chile to obtain reparation for torture; the government reparation measures do not cover torture survivors; and Decree Law No. 2191 is still in force denying torture [and other] victims and their families effective investigation and remedies for violations of protected rights,

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<sup>88</sup> *Castillo Paez Case. Reparations*, (Art. 63.(1) American Convention on Human Rights), Judgement of November 27, 1998, Series C, Decisions and Judgements No. 43, para 50. See also *Caso Velazquez Rodriguez*, Indemnizacion Compensatoria, Sentencia de 21 Julio de 1989, (Art. 63.1 de la Convencion Americana sobre Derechos Humanos), Serie C No. 7 para. 25 ; *Caso Godinez Cruz*, Indemnizacion Compensatoria, Sentencia de 21 de Julio de 1989, (Art. 63.1 Convencion Americana sobre Derechos Humanos), Serie C No. 8, para. 23 ; *Aloboetoe et. al. case, Reparations* (Art. 63(1) American Convention on Human Rights), Judgment of September 10, 1993. Series C No. 15, para. 43).

The Inter-American Court has supported such a view with the following authorities : *Factory at Chorzow, Jurisdiction*, Judgement No. 8, 1927, P.C.I.J., Series A, no. 17, p. 29 ; *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 184 ; *Interpretation des traites de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, deuxieme phase*, avis consultatif, C.I.J., Recueil, 1950, p. 228.

Thus, the Inter-American Court of Human Rights has established that it is a customary rule that “when a wrongful act occurs that is imputable to the State, the latter incurs international responsibility for violation of an international rule, and thus incurs a duty to make reparation”. (*Castillo Paez Case, Reparations*, para. 50)

the State of Chile is responsible under international law to redress the continuing violation and afford compensation.

The Chilean State is liable for the violations to the Petitioner's rights to personal liberty and humane treatment set forth in art I of the American Declaration and in art 5 and 7 of the American Convention. The Chilean State has further violated the rights enshrined in arts 8 and 25 of the American Convention in conjunction with arts 1.1 and 2 thereof. In the same manner the Chilean State is liable for violations to arts 1 and 9 of the Inter-American Torture Convention respectively.