

REDRESS

Seeking Reparation for Torture Survivors

COMMITTEE AGAINST TORTURE (CAT)

OBSERVATIONS TO THE REPORT SUBMITTED BY CHILE UNDER ARTICLE 19 OF THE CONVENTION (CAT/C/39/ADD.14)

THIRD PERIODIC REPORTS DUE IN 1997

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I. INTRODUCTION

The Redress Trust (REDRESS) is an international non-governmental organisation with a mandate to assist torture survivors to seek justice and reparations. It fulfils this mandate through a variety of means, including casework, law reform, research and advocacy. Over the past 12 years, it has accumulated a wide expertise on the rights of victims of torture. REDRESS regularly takes up cases on behalf of individual survivors and has wide experience with interventions before national and international tribunals. REDRESS' expertise on remedies has been internationally recognised and its recent comparative study on reparation for torture in 31 countries worldwide (that included Chile) was submitted by the United Nations Special Rapporteur on Torture to the United Nations General Assembly for its consideration.

Based on this experience, the present document analyses some of the measures described by Chile in its report to the Committee Against Torture (submitted for its consideration at the 32nd Session) as "*adopted to give effect to the Provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*".¹ The measures scrutinized in this document are those covering the right to reparation for victims of torture in Chile. We hope that this document will be useful to the Committee in its assessment of the reported submitted by Chile.

II. LEGAL AND POLITICAL FRAMEWORK

A) Domestic Implementation of the Convention Against Torture

¹ See Introduction, Chile's 2002 Report to Committee Against Torture; CAT/C/39/Add.14 (28 October 2002).

The State of Chile is party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture) since 30 September 1988.² Chile has not adopted any specific laws implementing the Convention against Torture but the Convention can and has been invoked by the courts and the administration.

No express norms govern the incorporation of either international treaties or customary international law into Chilean law. As held in Chilean jurisprudence, an international treaty is incorporated in the internal legal order by way of approval by the National Congress, followed by its promulgation by the President of the Republic, and finally the publication in the *Diario Oficial* (Official Gazette) of the text of the treaty and of the decree of promulgation. Once an international treaty has been approved according to the procedure just outlined, the courts and the administration may apply its provisions as valid Chilean law. A treaty has the same status as statutory legislation.³

International human rights treaties binding on Chile have been accorded a special status in Article 5 (2) of the Chilean Constitution: "It is the duty of the organs of the State to respect and promote these rights as guaranteed by this Constitution, and by the international treaties which have been ratified by Chile and are in force." Accordingly, such treaties are viewed as adding to and complementing the rights laid down in Article 19 of the Constitution and share their constitutional status.⁴ Customary international law has been attributed legal validity in jurisprudence and may therefore be, or even have to be where so provided, directly applied.⁵

B) The practice of Torture⁶

² Additionally, Chile has become party to the following relevant international treaties:

- The two 1949 Geneva Conventions, 1949 (12 October 1950)
- Convention on the Prevention and Punishment of the Crime of Genocide (3 June 1953)
- International Convention on the Elimination of All Forms of Racial Discrimination (20 October 1971)
- Convention on the Status of Refugees (28 January 1972)
- International Covenant on Civil and Political Rights (10 February 1972)
- International Covenant on Social, Economic and Cultural Rights (10 February 1972)
- Inter-American Convention to Prevent and Punish Torture (30 September 1988)
- Convention on the Elimination of All Forms of Discrimination against Women (7 December 1989)
- Convention on the Rights of the Child (13 August 1990)
- American Convention on Human Rights ("Pact of San José, Costa Rica") (21 August 1990)
- The two 1977 Additional Protocols to the Geneva Conventions (24 April 1991)
- Optional Protocol to the International Convention on Civil and Political Rights (28 May 1992)
- Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belém do Pará") (15 November 1996).

³ See REDRESS, *Reparation for Torture: A Survey of Law and Practice in Chile*, 2003 (available at <http://www.redress.org/publications/Audit/Chile.pdf>)

⁴ *Idem*. As stated by the Chilean Government, in its 2002 Report to CAT, *supra*, para. 3: "There is, however, no provision within the Chilean legal system which expressly stipulates that, in the event of a conflict of provisions, those of the human rights treaty shall prevail. The continuing debate in Chile about the violation of human rights during the military regime has made it difficult to reach a firm consensus on doctrine and jurisprudence relating to the constitutional standing of these conventions. It should nevertheless be emphasized that the rulings of the Supreme Court during recent years have recognized the importance of the international treaties relating to human rights and humanitarian law, giving effect to their provisions and drawing attention to their value in a number of cases."

⁵ *Idem*.

⁶ For a more comprehensive analysis see REDRESS, *Reparation for Torture: A Survey of Law and Practice in Chile*, 2003 (available at <http://www.redress.org/publications/Audit/Chile.pdf>)

It is well known that during the Pinochet regime, state agents systematically used torture to eliminate political opposition. Torture took place in both official and clandestine detention centres. It is estimated that between 300,000 and 500,000 people were systematically tortured in Chile between 1973 and 1990 and more than 3,000 were “disappeared” by the security forces of the military regime: the DINA (*Dirección de Inteligencia Nacional*) and its successor, the C.N.I. (*Corporación Nacional de Informaciones*), the *Carabineros*,⁷ the Army, the *Comando Conjunto* (Command formed by civilians and military officers) and *Operación Cóndor*, an intelligence unit formed by agents of the five dictatorships of the Southern Cone (Chile, Argentina, Paraguay, Uruguay and Brazil).⁸

With the arrival of democracy, torture became less common and is no longer used as a matter of state policy. However, illegal methods and excessive violence are sometimes used by the *Carabineros* when dispersing demonstrations and while the protesters are arrested and detained in police stations. Sporadic use of torture and ill-treatment by the police during interrogation as a means to obtain information continues to be reported. The main victims of torture are peasants, the *mapuche* (one of Chile’s indigenous groups), common criminals, youth from poor sectors of society and, in some cases, conscripts undergoing compulsory military service. Some instances have also been reported where women were subjected to sexual violence.⁹

Prisons are overcrowded.¹⁰ Prisoners have complained to NGOs about beatings from prison guards, and the courts have received numerous complaints of mistreatment of prisoners. Prison guards have been accused of using excessive force to stop attempted prison breaks.¹¹ Moreover, prisoners in maximum-security prisons and prisoners with HIV/AIDS and mental illnesses often do not receive adequate medical attention.¹²

III. REPARATION FOR TORTURE

In summary, although Chile has implemented several measures of reparations for the victims of human rights violations during the Pinochet regime, none of these measures comply with required standards under international law. Furthermore, until the very recent attempts to afford reparation to torture victims,¹³ the measures undertaken by the Chilean Government to address human rights

⁷ The *Carabineros* (uniformed police) and the Police Department are in charge of public security. *Carabineros* fall under the auspices of the Ministry of Defense, and the Police Department reports to the Ministry of the Interior (in accordance with Decree Law N° 444, 1974). See on this Chile’s 2002 Report to CAT, supra, paras. 38 et seq.

⁸ See CECT, SERPAJ, CODEPU, et. al., *Pacto Social y Moral Contra la Tortura* (unpublished, on file with REDRESS).

⁹ See, *Corporación de Promoción y Defensa de los Derechos del Pueblo* (CODEPU), “Informe de Derechos Humanos 1990-2000”, *Serie Retrospectiva y Reflexión*, <http://www.derechos.org/nizkor/chile/doc/codepu00/>.

¹⁰ The Ministry of Justice stated that in October 2001 there were 34,335 prisoners in prisons designed to lodge 23,025 inmates. US DOS, Country Reports on Human Rights Practices 2001: Chile, 4 March 2002.

¹¹ Human Rights Watch, World Report 2003, Chile.

¹² See CODEPU report, supra.

¹³ The recent measures undertaken by the Government to afford some form of reparation to torture victims (*Comisión Nacional sobre Prisión y Tortura*, Decreto No. 1.040) will be analyzed in this report. However, this analysis will not be as comprehensive, since the current report by Chile under scrutiny by the Committee does not address them (the period covered is from 1994-2001).

violations of the past excluded torture survivors and those cases that were included (violations to the right to life), failed to meet Chile's international obligations.¹⁴

Moreover, as it will be described, the current legal framework in Chile fails to afford effective remedies and adequate reparations to all victims of torture (from past and present acts). The State of Chile therefore, is breaching its obligations under Articles 13 and 14 of the Convention Against Torture.

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

It is a well-established principle of international law that the breach of an international obligation entails the duty to make reparation.¹⁶ International human rights law is not an exception to this principle; the responsibility of States to provide reparation arises when there is a breach of an international obligation whatever its origin.¹⁷ The violation of the obligation of States to respect and ensure respect for human rights, including freedom from torture, gives rise to an independent international obligation to provide reparation. This is supported by both international human rights treaties and declarative instruments,¹⁸ and has been recognized by international tribunals.¹⁹

Under article 14 of the Convention Against Torture, Chile is obliged to provide victims of torture adequate reparation through effective legal remedies:

¹⁴ As illustrated by the Inter-American Commission on Human Rights Report of the Catalan Lincoleo Case: "The (Chilean) government's recognition of responsibility, its partial investigation of the facts and its subsequent payment of compensation are not enough". *Report No. 61/01, Case No. 11.771* (Catalan Lincoleo v. Chile), Inter-American Commission on Human Rights, April 16, 2001.

¹⁵ *Idem*.

¹⁶ *Chorzow Factory Case* (Ger. v. Pol.), (1928) P.C.I.J., Sr. A, No.17, at 47 (September 13); *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. U.S.), Merits 1986 ICJ Report, 14, 114 (June 27); *Corfu Channel Case*; (UK v. Albania), ICJ Reports 23 (1949).

¹⁷ See Report of the International Law Commission - 53rd session (23 April - 1st June, 1 June and 2nd July - 10 August 2002) Official document of the General Assembly, 56th Session, Addendum No 10 (A/56/10).

¹⁸ At the Universal level it is possible to find among other: the Universal Declaration of Human Rights (Art. 8), the International Covenant on Civil and Political Rights (art.2.3, 9.5 and 14.6), the International Convention on the Elimination of All Forms of Racial Discrimination (art 6), the Convention of the Rights of the Child (art. 39), the Convention against Torture and other Cruel Inhuman and Degrading Treatment, (art.14) and the Rome Statute of the International Criminal Court (art. 75). It is also established in the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda (Rule 106), as well as in several regional instruments, e.g. the European Convention on Human Rights (art 5,5 13 41) the Inter-American Convention on Human Rights (arts 25, 68 and 63.1), the African Charter of Human and Peoples' Rights (art. 21.2). It is also important to mention the following international standards: Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by General Assembly resolution 40/34 of 29 November 1985; Declaration on the Protection of all Persons from Enforced Disappearance (art 19), General Assembly resolution 47/133 of 18 December 1992; Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Principle 20), Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989; and Declaration on the Elimination of Violence against Women.

¹⁹ See, e.g. ruling of the Inter-American Court of Human Rights on the *Velásquez Rodríguez Case*. Serial C, No 4 (1989), par. 174 -. See also *Papamichalopoulos vs. Greece* (Art. 50) E.C.H.R. Serial A, No 330-B (1995), Page 36.

“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.”

Additionally, Art 13 imposes on Chile an obligation to guarantee effectively the right of individuals to complain and to be protected against intimidation and ill-treatment resulting from the submission of the complaint:

“Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given”.

Chile has ratified the International Covenant on Civil and Political Rights,²⁰ the American Convention of Human Rights²¹ and the Inter-American Convention to Prevent and Punish Torture.²² Under these instruments, Chile also has an explicit duty to afford adequate reparation for torture victims through effective legal remedies.

B) Chile is not fulfilling its obligations under the Convention Against Torture 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 realisation of torture victims' right to adequate redress impossible

Under Chilean law, the possibility of initiating a civil claim for damages 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.²³ 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.²⁴

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,

²⁰ Hereinafter ICCPR.

²¹ American Convention on Human Rights, O.A.S. Treaty Series No.36, 1144 U.N.T.S. 123 [Hereinafter American Convention].

²² Inter-American Convention to Prevent and Punish Torture, O.A.S. Treaty Series No. 67 [Hereinafter Inter-American Torture Convention].

²³ *Report No. 61/01, Case No. 11.771* (Catalan Lincoleo v. Chile), Inter-American Commission on Human Rights, April 16, 2001.

²⁴ *Garay Hermosilla et al. v. Chile, Caso 10.843, Informe No. 36/96, Inter. Am.C.H.R.,OEA/Ser.L/V/II.95 Doc. 7 rev. en 156* (1997).

regarding monetary obligations as a consequence of illicit acts. These provisions do not afford effective remedies for torture victims because a) they treat torture as a simple illicit act; b) all cases of public officials' misconduct fall within the jurisdiction of the military code containing statutory limitations and a very narrow definition of torture; and finally, c) Decree Law No. 2192 bans investigations of past violations necessary to determine individual responsibility. Currently there has not been a single successful civil suit for damages in relation to the harm suffered by torture survivors and/or their families.²⁵

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

Article 254 No 3 of the Code of Civil Procedure makes it mandatory that a civil suit contains the name, address and profession or office of the individual against whom the suit is brought. This provision is not adequate for any case 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 virtually impossible in most cases.²⁶ 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 to identifiable individuals, and preventing claims against the State itself.²⁷

As has been established, under international law, States are responsible to afford reparation for human rights violations.²⁸ When the Committee Against Torture referred to questions about the persons or authorities that are responsible for redress or compensation it observed: “the State is itself responsible for compensation and redress”.²⁹ Members considered the existence of such an independent compensation system to be important also because a torturer often has only limited financial resources at his disposal.³⁰ The view of the Committee is that direct responsibility of the State should exist for providing compensation and rehabilitation, regardless of whether the responsibility of an individual government official has been established.³¹ In the conclusions and

²⁵ A December 2002 civil action in the Santiago Appeals Court for US\$28.1 million, initiated by the Association of ex-Political Prisoners and People Fired for Political Reasons against the Chilean state, was blocked, as was a demand made by 400 ex-political prisoners seven months before. Furthermore, up until now, no one has been prosecuted or sentenced for inflicting torture, See generally “INFORME DE LA COMISION ETICA CONTRA LA TORTURA AL PRESIDENTE DE LA REPUBLICA, SR. RICARDO LAGOS” and other relevant documents available at www.CODEPU.cl.

²⁶Istanbul Protocol, United Nations High Commissioner for Human Rights, 9 August 1999; Peel and **Lcompino**, *The Medical Documentation of Torture*, 2002.

²⁷ Garay Hermosilla et al. v. Chile, Caso 10.843, Informe No. 36/96, Inter. Am.C.H.R.,OEA/Ser.L/V/II.95 Doc. 7 rev. en 156 (1997).

²⁸ See van Boven E/CN.4/Sub.2/1993/8, 137.

²⁹CAT/C/SR.10 No. 25; CAT/C/SR.12 No. 16; CAT/C/SR.91, No. 67; CAT/C/SR.95, No. 33; CAT/C/SR. 109, No. 27, A/47/44, No. 337 (Committee as a whole).

³⁰ CAT/C/SR.107,§ 34.

³¹ CAT/C/SR. 18§ 13; CAT/C/SR.27, §29; CAT/C/SR. 34, §§ 40 and 68; CAT/C/SR.46, §65; CAT/C/SR.63, §45, A/46/46, §262 (Committee as a whole); CAT/C/SR.191, §41 and 59; CAT/C/SR.193, §58; CAT/C/SR.195, §13; CAT/C/SR197, §21; CAT/C/SR.203, §30 and 68; CAT/C/SR.211, §45; CAT/C/SR.219, §29; CAT/C/SR. 228, §32; CAT/C/SR.274, §21.

recommendations of the consideration of the report of Italy,³² the Committee referred to “[...] the right of a torture victim to be compensated by the State and to be offered a rehabilitation”.³³

Furthermore, as it will be described below, in cases of torture committed during the first five years rule of the military junta (from 11 September 1973, the date of the military coup, through 10 March 1978), 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.³⁴

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.*

Acts that would constitute torture are punishable under article 150A and 150B of the Chilean Criminal Code³⁵ and article 330 of the Code of Military Justice³⁶. Neither provision uses the 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*”

³² CAT/C/Add.4.

³³ CAT/C/SR. 215, §36, under E, 2 (Committee as a whole).

³⁴ “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 et al. v. Chile, Caso 10.843, Informe No. 36/96, Inter. Am.C.H.R.,OEA/Ser.L/V/II.95 Doc. 7 rev. en 156 (1997).; Report No. 61/01, Case No. 11.771 (Catalan Lincoleo v. Chile), Inter-American Commission on Human Rights, April 16, 2001.

³⁵ 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.

³⁶Code of Military Justice modified by Law 19.683 of June 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*
- 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.

(torments or illegitimate punishments) and the Military Code uses “*Violencias Innecesarias*” (unnecessary violence).³⁷

As mentioned in the 2002 report of Chile,³⁸ currently under consideration by the Committee, Articles 150A and 150B are the result of recent modifications to the Criminal Code to adjust its provisions to torture definitions in international treaties.³⁹ However Article 5⁴⁰ 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*.⁴¹ In this sense, any case involving torments or punishments committed by public officials fall within the jurisdiction of the military courts.⁴²

The fact that the two provisions (art 5 read in connection with art 330 of the Code of Military Justice and with arts 150A/B of the Criminal Code) are in force 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*’.⁴³

³⁷ The then Special Rapporteur for Torture, Nigel Rodley, specifically recommended the State of Chile to characterize torture as a specific offence. Report to the Commission on Human Rights resolution 1997/38.

³⁸ “Following a recent reform of the Penal Code, the Chilean domestic legal order has characterized and laid down penalties for torture pursuant to the definition contained in article 1 of the Convention”. Para 27 CAT/C/39/Add.14.

³⁹ Law 19,567--entered into force on July 1998-- modified the Chilean Criminal Code concerning the crime of ‘*apremios ilegítimos*’ (illegitimate punishment)

⁴⁰ 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.*

⁴¹ The Code considers only two exceptions, art 284 and art 417, regulating insult or offenses to public officials. See Code of Military Justice

⁴² 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 (see van Boven, E/CN.4/Sub.2/1993/8, 137)

⁴³ 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 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”).

The existence of special courts and procedures for the trial of members of security forces and military personnel has been a matter of concern for the Committee Against Torture. The Committee has regularly referred to the lack of fair and equal treatment in such trials.⁴⁴ Similarly, 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”.⁴⁵

This view is consistent with the interpretation by the Human Rights Committee of the 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.”⁴⁶

In 1985 the Inter-American Commission on Human Rights 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.⁴⁷ In a similar way, the Committee Against Torture raised its concerns in its recommendations to Colombia that “the light penalties for the offence of torture in the Code of Military Justice do not seem to be acceptable, nor does the extension of military jurisdiction to deal with ordinary crime...”⁴⁸

Furthermore, 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 Convention Against Torture— it does not consider psychological harm or concomitant responsibility; it contains statutory limitations and does not provide for universal jurisdiction.⁴⁹ These provisions clearly limit the scope of acts falling under the defined punishable conduct, violating the right of victims to obtain adequate redress, as provided for in Art 14 of the Convention Against Torture.

⁴⁴ CAT/C/SR. 12, §19; CAT/C/SR. 60, §28; CAT/C/SR. 193, §55 and 57; CAT/C/SR. 219, §33, UNDER d, 4 *Committee as a whole); CAT/C/SR. 238, §38; CAT/C/SR.242/Add.1 §2, under D, 11 (committee as a whole).

⁴⁵ Inter-American Court of Human Rights; Castillo Petruzzi et al Case, Judgement of May 30, 1999.

⁴⁶ UN Doc. CCPR/C/7 Add.77. April 1997, at para 13.

⁴⁷ 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.

⁴⁸ A/51/44, 9 July 1996.

⁴⁹See art 330 Code of Military Justice and Inter-American Torture Convention.

Furthermore, the overlapping of civil and military jurisdictions makes the reparation provisions of the Civil Code, both inadequate and ineffective. As explained above, 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 law⁵⁰ the practical effect of the Military Courts exercising jurisdiction over torture cases significantly restricts victims' ability to pursue civil remedies. In practice, most of the cases under military jurisdiction are dismissed without determining criminal liability as a result of the statute of limitations or Decree Law 2191;⁵¹ therefore preventing victims from enjoying their right to have their complaints promptly and impartially examined and to have their enforceable right to compensation as established in Arts 13 and 14 of the Convention Against Torture.

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

a. States enforcing blanket amnesties cannot fulfill their obligation to afford redress for victims of torture in the sense of Article 14 of the Convention Against Torture.

For the majority of victims, Decree Law No. 2191 is a further and final obstacle to obtain redress through Chilean domestic legal remedies. Decree Law No. 2191 is a blanket amnesty law covering acts committed from 11 September 1973 through 10 March 1978. The amnesty decree law violates Chile's international treaty and customary obligations to provide victims with effective remedies, access to justice and adequate compensation (including the means for as full rehabilitation as possible).

Amnesty laws such as Decree Law No 2191 have been widely typified as illegal under international law.⁵² The Committee Against Torture noted:

“Thus, even before the entry into force of the Convention Against Torture, there existed a general rule of international law which should oblige all States to take effective measures to prevent torture and punish acts of torture. In this context, it would seem that Argentine Act No. 23,521 on ‘due obedience’ pardons the acts of torture that occurred during the ‘dirty war’. The Committee further urged “the State party not to leave the victims of torture and their dependants wholly without a remedy”.⁵³

⁵⁰ Article 5 of the *Código de Procedimientos Civiles*.

⁵¹ CODEPU (Comité de Defensa de los Derechos del Pueblo) “Informe Sobre la Impunidad en Chile” Publicado por Equipo Nikzkor, Madrid, España. September 1996.

⁵² 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.

⁵³ United Nations Committee against Torture, Decision concerning communications 1/1988, 2/1988 and 3/1988 (Argentina), 23 November 1989, paragraph 7.2, in United Nations document General Assembly, Official Reports, Forty-fifth Session, Supplement Nr. 44 (A/45/44), 1990.

In the same way, 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 discharging its responsibilities to provide effective remedies to victims of those abuses...”⁵⁴

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.

Consistently the Inter-American Commission held on several occasions Decree Law No 2191 to be incompatible with Chile’s international obligations under the American Convention. According to the Inter-American Commission, the legal consequences of the self-amnesty deny the victim his/her right to a fair trial, and the right to judicial protection and effective redress.⁵⁵ 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.⁵⁶

In the same way, the Human Rights Committee specifically determined that:

“The Amnesty Decree Law, under which persons who committed offences between 11 September 1973 and 10 March 1978 are granted amnesty, prevents the State party from complying with its obligation under article 2, paragraph 3, to ensure an effective remedy to anyone whose rights and freedoms under the Covenant have been violated.”⁵⁷

Contrary to these recommendations, Decree Law No 2191 is still in force.⁵⁸ Thus, the State of Chile is in breach of its international obligations, including those arising from arts 2, 7, 13 and 14 of the Convention Against Torture to afford effective domestic remedies and adequate reparations to victims of torture.

⁵⁴ See Rodriguez note P12.4.

⁵⁵ See para 50 of *Report No. 61/01, Case No. 11.771* (Catalan Lincoleo v. Chile), Inter-American Commission on Human Rights, April 16, 2001.

⁵⁶ Garay, Inter-American Commission on Human Rights: *Garay Hermosilla and others v Chile* (Case No 10, 843), 1996, Reyes, Catalan.

⁵⁷ Concluding Observations of the Human Rights Committee, Chile, U.N. Doc. CCPR/C/79/Add.104 (1999).

⁵⁸ 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 24 August 1990 decision, upholding the constitutionality of the amnesty law and subsequent Military decisions based on the Supreme Court ruling.

b. Decree-Law No. 2191 is in violation of Arts 13 and 14 of the Convention Against Torture for preventing victims to have their complaints promptly and impartially examined and to pursue civil remedies to obtain compensation.

The amnesty decree clearly affects the right of victims to launch private *criminal actions* before the courts against those responsible for the violations of their human rights.⁵⁹

Contrary to Art 13 of the Convention Against Torture, the amnesty decree prevents the competent authorities from examining *ex officio* complaints of torture promptly and impartially.

As 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 by way of an amnesty or other means.⁶⁰ It is therefore 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. This function must be assumed by the State as its own legal duty; it must not be a step taken by private interests (if it were possible to lodge a private criminal action) that depend upon the initiative of those private individuals or upon offer of proof.⁶¹

Contrary to Chile's obligation under Art 14 of the Convention against Torture, the amnesty decree law prevents victims from seeking reparations in civil courts. In a similar context, the Inter-American Commission found in respect to 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.⁶³ The decisions of the same 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.⁶⁴ The UN Human Rights Committee later reached the same conclusion.⁶⁵

The amnesty law deprives victims of their right to effective recourse against acts that violated their fundamental rights. 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. By so doing, Chile is clearly breaching its obligations under

⁵⁹ Code of Civil Procedure, Chile, Title II, 'Criminal Action and Civil Action in Criminal Trials' art 10/41.

⁶⁰As 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.

⁶¹ Velazques Rodriguez Case (Preliminary Exceptions), 1987 1 Inter-Am. Ct. H.R. (ser. C.) para 79.

⁶² Garay Herмосilla, supra.

⁶³ 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].

⁶⁴ Garay Herмосilla, supra; Reyes, supra; Catalan footnote supra.

⁶⁵ 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).

Articles 4, 5 and 12 of the Convention Against Torture to investigate and prosecute where appropriate, acts of torture.⁶⁶

Furthermore, 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,⁶⁷ victims 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 14 of the Convention Against Torture.

C) Chilean reparations measures for victims of past violations did not originally 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.⁶⁸ 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 Reconciliation.⁶⁹ The National Corporation was charged with continuing to examine cases left unresolved by the Retting Commission and with providing compensation to victims’ families.⁷⁰

While many criticisms have been made in respect of the Chilean reparation model,⁷¹ the most disturbing aspect 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.⁷² Until 26 September 2003, the reparations measures

⁶⁶ Conclusions and recommendations of the Committee against Torture, Kyrgyzstan, A/55/44, paras.70-75, 18 November 1999.

⁶⁷ See Garay Hermosilla, *supra*.

⁶⁸ Report of the National Commission on Truth and Reconciliation 74 note j (Phillip E. Berryman, trans., 1993).

⁶⁹ 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).

⁷⁰ There has been other legislation providing reparations to victims of the military regime, like Ley 19.234 (sobre el Exonerado Político), Ley 1907 or the PRAIS (Programa de Reparación Integral de Salud) but none of them address the issue of reparation for torture survivors.

⁷¹ The Retting Commission’s extra-judicial nature and its refusal to publish names of wrongdoers failed to address the interest of 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, fn 58, interview with Alejandro Gonzales, President of the National Corporation, in Santiago, Chile (11 August 1992).

⁷² 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 to bring actions against their torturers. Adding insult, many of the reparative measures recommended by the

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.

Further, the military legacy of political, legal and intuitional protections shield officials from justice quite effectively. It has only been in the past few years, that Chile has made substantial progress in holding accountable those responsible for crimes under the military rule. Notably, the courts have recently convicted several former military officers for heinous crimes committed during the period covered by the amnesty decree.⁷³ Although not for acts of torture, the courts have held the amnesty to be inapplicable (as opposed to unlawful), ruling that enforced disappearance is an ongoing crime. But because the convictions of former military officers have yet to be affirmed on appeal, the future of such prosecutions depends on the appellate courts, including, ultimately, the Supreme Court (which has previously ruled that the amnesty decree is lawful according to both international and national law).⁷⁴

On 12 August 2003, the Executive announced an array of new proposals relating to criminal prosecution of former member of the military and reparations for victims of past human rights violations. Yet there remain clear limits to Chile's efforts to deal with its abusive past. In Congress, significantly, no proposals have been introduced to repeal or annul the amnesty decree.

The creation of a Commission to deal with the thousands of cases of torture victims was part of the package of proposals. On 26 September 2003, a Commission for Torture and Political Imprisonment⁷⁵ was set up by Decree Law 1.040. Although its establishment is a first recognition of the need to redress torture victims, the terms of this Commission fall short of international standards.

Contrary to Art 14 of the Convention Against Torture, the Commission for Torture and Political Imprisonment will only afford "symbolic and austere compensation". It also limits its mandate to those that suffered torture for political reasons, and directly by the hands of officials or persons under their directive. This is contrary to the definition of torture contained in Art 1 of the Convention, which includes "any reason based on discrimination of any kind" and when it "is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity".

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).

⁷³ See *Discreet Path to Justice?: Chile, Thirty Years After the Military Coup*, A Human Rights Watch Briefing Paper, September 2003 (<http://www.hrw.org/background/america/chile>).

⁷⁴ The Supreme Court not only declared the amnesty constitutional but affirmed that amnesties were valid under international humanitarian law. It stated "In these circumstances omitting to apply these provisions [of the Geneva Conventions of 1949 and the International Covenant on Civil and Political Rights] constitutes an error in law which must be rectified by means of this application, particularly bearing in mind that, in accordance with the principles of international law, international treaties must be interpreted and complied with in good faith by States; from this it is inferred that domestic law must be brought into line with them and the legislature must harmonize the new provisions which it enunciates with these international instruments, avoiding infringement of their principles, failing prior denunciation of the instruments in question." See Chile's Report to CAT, *supra*, Para 3. See also footnote 58.

⁷⁵ COMISIÓN NACIONAL SOBRE PRISIÓN POLÍTICA Y TORTURA, PARA EL ESCLARECIMIENTO DE LA VERDAD ACERCA DE LAS VIOLACIONES DE DERECHO HUMANOS EN CHILE.

As well, the Commission will not afford compensation to victims that have received compensation from other types of programs such as the Program for the Recognition of Dismissed Public Sector Employees (*Exonerados*).⁷⁶ This cannot be considered to be consistent with the obligations arising from Art 14 of the Convention Against Torture, particularly because the compensation afforded under other programs/measures was not afforded to specifically redress the suffering caused by the torture but for other reasons. For example, the Program for the *Exonerados* afforded, in theory, restitution of labor rights and in some cases a compensation for lost benefits/profits (compensatory pensions). Furthermore, as it is well documented, the pensions awarded to the *Exonerados* were below living standards even for those residing in Chile⁷⁷ and the process for obtaining the pensions as well as the amounts awarded caused more damage than healing or redress.⁷⁸

Finally, the Commission's terms of reference fail to include the receipt of all the information provided by victims and witnesses and the disclosure of such information and the relevant investigations. With this, Chile is not only failing to comply with the standards of reparation required by Art 14, but is failing to investigate and if appropriate, to prosecute torture cases as required by Arts 7 and 13 of the Convention.

Up to the present, there are no laws affording effective judicial means to obtain reparation for torture; the new government reparation measures do not afford adequate reparation for torture survivors of the past; 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.

⁷⁶ Ley No 19.234 Programa de Reconocimiento al Exonerado Político.

⁷⁷ According to Juan Swaers, Head of the Committee of *Exonerados Políticos*, the "*Exonerados* need to be covered not only by senior citizen programs but by anti-poverty programs as well. It should be obvious that a person who earns a pension of 40,000 pesos is in a situation of extreme poverty". (EXONERADOS FIGHT FOR COMPENSATION: Workers Dismissed By Military Regime Still Active In Their Quest; LA NACION, April 1, 1996).

⁷⁸ *En el caso de los exonerados, la insuficiencia de las pensiones y la arbitrariedad en los cálculos de las mismas han hecho crecer la desilusión y la desconfianza de aquellas personas cuyo sufrimiento de años exige reparación.* (HEMOS TOCADO FONDO HEADLINE: Portada, Abril, 2003); "There was the infamous case of Enrico Carrillo, a former bank employee, who was only given the grand total of 400 pesos (US\$0.80) by national pension fund (INP). That was the total sum he got which was what led him to commit suicide." (EXONERADOS FIGHT FOR COMPENSATION: Workers Dismissed By Military Regime Still Active In Their Quest; LA NACION, 1 April 1996).