REDRESS

Seeking Reparation for Torture Survivors

OBSERVATIONS TO THE COMMITTEE AGAINST TORTURE FOR THE CONSIDERATION OF THE FIFTH PERIODIC REPORT SUBMITTED BY CHILE

April 2009

The Redress Trust (REDRESS)
87 Vauxhall Walk
London, SE11 5HJ
Tel. +44 (0) 20 77931777
Fax: +44 (0) 20 7793 1719
Email: lorna@redress.org
Web: www.redress.org

THE REDRESS TRUST AND THE PRESENT SUBMISSION

1. The Redress Trust (REDRESS) is a non-governmental organisation with a mandate to assist torture survivors who seek justice and reparations. REDRESS fulfils this mandate through a variety of means, including casework, law reform at the national and international level, and research in areas that require legal clarification. Through its work, REDRESS has accumulated a vast and rich experience in the field of the rights of victims of torture for over 15 years.

2. REDRESS has had a leading role in the litigation of torture cases in the UK as well as in other countries and at the international level. Through these cases and research, REDRESS has gained a wide understanding about the situation in Chile concerning the treatment of torture cases that took place during the Pinochet dictatorship and thereafter. This is why REDRESS has prepared this report with the objective of providing valuable information to the Committee against Torture for its consideration of the fifth periodic report submitted by Chile under article 19 of the Convention against Torture.

3. This report complements the information provided by REDRESS to the Committee against Torture in 2004, in relation to Chile's third periodic report.[1]

TORTURE AND ACCESS TO JUSTICE IN CHILE

4. The State of Chile is part of the Convention against Torture and Other Cruel, Inhuman and Degrading since 30 September 1988.

[1] REDRESS, Observations to the Report Submitted by Chile Under Article 19 of the Convention (CAT/C/29/ADD.14), 27 April 2004. Available at: http://www.redress.org/publications/Chile_Report%20to%20the%20CAT.pdf

5. According to the Convention, Chile is obliged to investigate, promptly and impartially, every act of torture[2] as well as to provide redress and a "fair and adequate" compensation to any victim of torture.[3] In connection with these obligations, REDRESS argues that Chile has violated and continues to violate the rights protected in these articles, despite the changes that have taken place in the country.

A. Access to Justice in Criminal Matters: Decree-Law No. 2191 (Amnesty Law) is Still in Force

6. As the honourable Committee is aware, the Decree-Law 2191 was promulgated on 18 April 1978. Through this Decree-Law the Chilean military junta, led by Augusto Pinochet, granted amnesty to "all persons who committed, as perpetrators, accomplices or conspirators criminal offenses … between 11 September 1973 and 10 March 1978, provided they are not currently subject to a trial or convicted."[4] This Decree-Law legitimized and legalized impunity in Chile for crimes against humanity during the dictatorship and thereafter. That Decree-Law was not removed from the Chilean legal system, and remains in force despite what the Inter-American Court of Human Rights stated in the case *Almonacid Arellano v. Chile* and the unanimous position of the Inter-American system, of which Chile is part, that this Decree-Law is blatantly contrary to the American Convention, given that:

> ... all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because

[2] Convention against Torture, Article 12.

[3] *Ibid.*, Article 14.

[4] Decree-Law 2.191/1978, Article 1.

> they violate non-derogable rights recognized by international human rights law.[5]

7. Despite this incompatibility, the State of Chile argues that the tendency of the Chilean courts is to not apply the Decree-Law and that thus there are effective remedies available to investigate, prosecute and, if appropriate, punish those responsible for serious human rights violations. However, the honourable Committee against Torture in its Conclusions and Recommendations in 2004, has informed Chile of its concern that the Decree-Law 2.191 remained in force, thus constituting a mechanism of impunity.[6]

8. In relation to this Decree-Law, REDRESS acknowledges that while it remains in force in the Chilean legal system, it has experienced various stages of implementation since its entry into force. All of them, in one degree or another, allow impunity to exist in Chile to this day.

(1) First Stage

9. During the first stage, that ranges from the time when it was adopted until 1998 – and that covers the last years of the dictatorship and the transition to democracy in Chile - the Decree-Law was continuously applied by the Chilean ordinary criminal courts and military courts. The application of the Decree-Law during the Pinochet dictatorship does not require any evidence given that its implementation was generalised and widely known. What is important, therefore, is to analyze their applicability after the dictatorship fell and Chile ratified the Convention against Torture. In this regard it is worth remembering what was stated by the expert Humberto Nogueira Alcalá, who gave testimony before the honourable Inter-American Court in the case of *Almonacid Arellano* at the request of the Inter-American Commission:

[5] Inter-American Court of Human Rights, *Barrios Altos v. Peru,* Judgment of 14 March 2001 (Merits), para. 41.

[6] Committee against Torture, Conclusions and Recommendations: Chile, Thirty-second session, CAT/C/CR/32/5, 14 June 2004, para. 6(b).

> From 1990 to September 1998, the Amnesty Decree[Law] [was] applied as a rule of thumb and by operation of law as soon as there [was] an indication that the event investigated [consisted] of a crime committed during the time period [covered by the] Decree [...].[7]

10. This conclusion is also evident in the cases decided by the Inter-American Court[8] and Commission.[9] In fact, the honourable Commission found that "the Chilean courts have ruled it [the Decree-Law N° 2191] to be constitutional and have applied it in hundreds of cases".[10]

11. This position was maintained not only by lower or mid-level ordinary or military courts but also by the Supreme Court on several occasions. The expert Nogueira stated that the Supreme Court of Chile "supported the military authoritarian regime".[11] Thus, for example, on 24 August 1990, the Court rejected the appeal on the inapplicability of Decree-Law No. 2.191, on the basis that

> ... the amnesty is an act of the Legislature that in an objective manner suspends the criminal consequences of an crime established by another law, because it negates the crime is punishable by eliminating the penalty and all its effects on the wrongful acts it involves and finally, it stops or paralyzes or forever

[7] Inter-American Court of Human Rights, *Almonacid Arellano et al v. Chile,* Judgment of 26 September 2006 (Preliminary Objections, Merits, Reparations and Costs), para. 72(c).

[8] *Ibid*, para. 82.

[9] Inter-American Commission of Human Rights, *Samuel Alfonso Catalán Lincoleo v. Chile*, Report N° 61/01, case 11.771, 16 April 2001, paras. 20-21; report no. 25/98, cases 11.505, *Alfonso René Chanfeau Oryce*; 11.532, *Agustín Eduardo Reyes González*; 11.541, *Jorge Elías Andrónico Antequera y su hermano Juan Carlos y Luis Francisco González Manríquez*; 11.546, *William Robert Millar Sanhueza y Jorge Rogelio Marín Rossel*; 11.549, *Luis Armando Arias Ramírez*, *José Delimiro Fierro Morales*, *Mario Alejandro Valdés Chávez*, *Jorge Enrique Vásquez Escobar y Jaime Pascual Arias Ramírez*; 11.569, *Juan Carlos Perelman y Gladys Díaz Armijo*; 11.572, *Luis Alberto Sánchez Mejías*; 11.573, *Francisco Eduardo Aedo Carrasco*; 11.583, *Carlos Eduardo Guerrero Gutiérrez*; 11.585, *Máximo Antonio Gedda Ortiz*; 11.595, *Joel Huaiquiñir Benavides*; 11.652, *Guillermo González de Asís*; 11.657, *Lumy Videla Moya*; 11.675, *Eulogio del Carmen Ortiz Fritz Monsalve*; y 11.705, *Mauricio Eduardo Jorquera Encina*, 13 April 1998, pp. 520-559; Annual Report 1996, Report N° 36/96 and 34/96, Chile, pp. 162-240.

[10] Inter-American Commission of Human Rights, *Samuel Alfonso Catalán Lincoleo v. Chile*, *ibid*, para. 50.

[11] Inter-American Court of Human Rights, *Almonacid Arellano et al v. Chile,* supra note 7, para. 72(c).

> prevents the course of any judicial action that tends to punish them... This means that once you have verified the validity of the amnesty law, the judges should declare it in accordance with sections 107 and 408 No. 5 of the Code of Criminal Procedure, therefore, Article 413 of the Code is not of binding application. It requires that to close a case, its full investigation had to have been exhausted aiming to identify the elements of the crime and the identity of the offender..[12]

12. In this way, the existence and application of Decree-Law 2.191 during this period results in that a criminal complaint "becomes a formality that is rendered meaningless"[13] given that the argument that was meant to be brought before the court is sacrificed in order to protect the amnesty. In this way, the Chilean state does not fulfil its international obligation to investigate and prosecute *ex officio* the perpetrators of serious human rights violations, and the victims of torture do not have recourse to the judicial system to obtain justice in their cases and to the reparation they deserve.

(2) Second Stage

13. Although the Decree-Law was continuously applied by the Chilean justice system, there was a significant change in the jurisprudence of the Supreme Court in 1998.[14] In an appeal filled in the case of *Don Pedro Poblete Córdoba*,[15] the Supreme Court overturned the final dismissal by the Martial Court in a judgment of January 2008 and ordered the re-opening of the investigation and the identification of those responsible for the disappearance of Don Pedro (crime of kidnapping in the domestic legislation) in order to apply the amnesty law. According to the Court, in order to grant amnesty, it was

[12] Supreme Court of Chile, Sentence of Inapplicability, RoI 27.640, 24 August1990, para. 15.

[13] Inter-American Court of Human Rights, *Velásquez Rodriguez v Honduras,* Judgment 29 July 1998, para. 68.

[14] R. Pica, "La Convención Americana de Derechos Humanos y las Autoamnistías de los Estados por Violaciones a los Derechos Humanos, Chile y el DL 2191" in 3(2) *Revista Semestral del Centro de Estudios Constitucionales, Universidad de Talca* (2005), pp. 144.

[15] Supreme Court of Chile, Appeal on Annulment of Sentence, *Don Pedro Poblete Córdoba*, RoI 8895-96, 9 September 1998.

essential to identify its beneficiary.[16] This decision marked the beginning of a second phase in the application of the amnesty law.

14. This case, however, initiated only one of a number of trends in the Chilean justice system given that after this case there were decisions contrary to it. Such decisions show that despite the fact that the Decree-Law 2.191 is not used as often, the Chilean justice system begins to use new judicial instruments to allow impunity for crimes against humanity committed during the dictatorship. For example, the judgment of 4 August 2005 of the Criminal Division of the Supreme Court in the case of the disappearance and death of *Ricardo Rioseco Montoya* and *Luis Cotal*, revoked the sentence of the Court of Appeals of Temuco. This sentence had applied the International Covenant on Civil and Political Rights and the American Convention, sentencing Colonel Joaquín Rivera Gonzalez to 10 years imprisonment for the deaths of the two youths. The Supreme Court reversed this judgment changing the qualification of the crimes in question and stating that the legal proceedings had prescribed.[17]

15. Although the Decree-Law 2.191 was applied to a lesser extent by the Chilean justice system since 1998, the Inter-American Commission reached the following conclusions in its final arguments before the Court in the case of *Almonacid Arrellano v. Chile*, in May 2006, following the statements made before the Court by the experts Humberto Nogueira Alcalá and Jorge Correa:

> l) The self-amnesty Decree-Law 2.191 continues to be applied by the Chilean courts of various levels;
>
> m) While the Supreme Court of Chile has declared the inapplicability of the self-amnesty Decree-Law in a few cases of forced disappearances (the jursiprudence in this regard is not uniform), so far the Chilean Supreme Court

[16] See the opinion of Humberto Raúl Nogueira Alcalá, expert presented by the Inter-American Commission on Human Rights in the case *Almonacid Arellano v. Chile*, supra note 7, paras. 22-24.

[17] Supreme Court of Chile, Criminal Chamber, *Ricardo Rioseco Montoya* and *Luis Cotal*, 4 August 2005.

has never declared inapplicable the self-amnesty Decree-Law 2.191 to a case involving extrajudicial killings;

n) In cases involving extrajudicial killings in which the lower courts have decided not to apply the self-amnesty Decree-Law, the Chilean Supreme Court has decided to apply the statute of limitations;

o) It is a widely known fact that after the public hearing in this case, the Chilean courts have applied again the self-amnesty Decree-Law.[18]

16. Thus, while it is true that since 2005 there were significant changes in the handling of the 2.191 Decree-Law by the Chilean justice system, it is also true that such treatment was not generalized and that the decisions not to apply this Decree-Law were made in cases of enforced disappearances but not in cases of extrajudicial executions and torture. It is important to emphasize that the non application of the 2.191 Decree-Law to cases of torture is central to ensure compliance with obligations under the Convention against Torture.

(3) Third Stage

17. A final phase started in 2007 and has been consolidating in 2008 given that the Supreme Court of Chile, and various Courts of Appeals began to declare in a more consistent manner that the 2.191 Decree-Law is not applicable.[19] Several of these

[18] Inter-American Commission on Human Rights, Final Arguments, case *Almonacid Arellano v. Chile*, 22 May 2006, para. 45.

[19] It is too early to predict what will be the handling of the Amnesty Law in the future by the Chilean justice system. Also, it is important not to overemphasize the progress that has been made in recent years. In this regard it is worth noting that the President of the Inter-American Court, Cecilia Medina, a Chilean national, has stated that "there has been rulings that did not apply the amnesty law, including by the Supreme Court. But these are isolated cases, it is not a trend", 4 August 2008, available at http://www.newsmatic.e-pol.com.ar/index.php?pub_id=99&sid=616&aid=33897&eid=39&NombreSeccion=Derechos%20Humanos&Accion=VerArticulo.

decisions also consider that the statute of limitations do not apply to crimes against humanity. In one of its most recent judgments (out of 12 in 2008) the Supreme Court, in the case *Liquiñe*, which concerned the disappearance of 12 peasants in the village with the same name, found that the amnesty law and the statute of limitation did not apply in the criminal proceedings,[20] and sentenced Hugo Alberto Guerra Jorquera to 5 years in prison and Luis Osvaldo Garcia Guzman to 3 years and one day in prison. Both individuals were granted freedom on probation.

18. While REDRESS acknowledges the progress that has taken place in Chile in the handling of Decree-Law 2.191, that position has not been clear in relation to torture or ill-treatment according to their definition in the Penal Code of Chile. In fact, until now there have been only two judgments issued by the Chilean courts determining the non-application of the Decree-Law to persons who committed acts of torture during the dictatorship. One of these decisions was taken in the case of Edgar Benjamín Cevallos Jones and Ramón Pedro Cáceres Jorquera by the special investigating judge Juan Eduardo Fuentes Velmar on 30 April 2007. Following the arguments of other judgments in this period, it recognises that during the years of dictatorship in Chile there was a 'state of war' that triggered the application of the Geneva Conventions and Common Article 3, ratified by Chile in 1951, which prohibits the commission of crimes against the civilian population, including torture, disappearances and extrajudicial executions, resulting in that these crimes are not eligible for amnesty and are not subject to statutes of limitation.[21] In this case, both individuals were sentenced to 541 days in prison. Cevallos was granted the benefit of night-time incarceration and Cáceres Jorquera was granted suspended sentence. This decision is on appeal in the Court of Appeals of Santiago.

[20] Supreme Court of Chile, Second Chamber, *Liquiñe*, Rol 4.662-07, 25 September 2008.

[21] Judge Juan Eduardo Fuentes Velmar, *Edgar Benjamin Cevallos Jones*, Rol 1058-MEV, 30 April 2007, ground 16. The other decision in this matter was by the Court of Appeals of Talca, Regiment of Artillery of Linares, Rol 40-2008, 9 October 2008.

19. It is worth reiterating that even if some or several decisions of the Supreme Court of Chile have not applied the amnesty law in cases of torture or of other crimes occurred during the dictatorship in Chile, it is not enough for Chile to claim that the law is not an obstacle to access justice. According to what has been stated by the Inter-American Court, the amnesty law would need to be declared invalid or unconstitutional.[22]

20. The findings in this section allow us to conclude that Chile has violated its obligations under Articles 12 and 13 of the Convention against Torture given that the amnesty law, which remains in force, has prevented torture survivors and other victims from accessing effective judicial remedies for the investigation, prosecution, and if appropriate, punishment of the perpetrators of such crimes.

CHILE IS NOT FULFILLING ITS OBLIGATIONS UNDER ARTICLE 14 OF THE CONVENTION AGAINST TORTURE TO ENSURE EFFECTIVE REMEDIES FOR REPARATION TO VICTIMS OF TORTURE

21. The Chilean law contains several obstacles that prevent victims of torture from accessing reparation and/or adequate reparation for harm suffered as a result of systematic torture which took place in Chile during the Pinochet dictatorship in civil proceedings both against the perpetrators of such crime and against the State of Chile. Such obstacles, as explained below, violate Articles 13 and 14 of the Convention against Torture.

22. REDRESS acknowledges that Chile has put in place a reparation program at the national level to repair the harm suffered by the victims of military dictatorship. However, that system is inadequate to repair the harm suffered by victims of torture, and in particular of victims of torture who are in exile. The latter point requires careful consideration by the Committee against Torture.

[22] Inter-American Court of Human Rights, *Almonacid Arellano et al v Chile*, supra note 7, para. 121.

A. The existing judicial remedies in Chile are not adequate for repairing the harm in cases of torture and thus are ineffective

23. Under international law, as widely supported by international treaties and by customary law, when a state violates, by act or omission, an international obligation, it is obliged to provide adequate reparation for the harm caused, to cease the violation, to comply with the international obligation, and to provide guarantees of non repetition. [23]

24. In order to be adequate, the obligation to repair, in most cases, requires various measures of reparation such as restitution (when possible), compensation for moral and material damages, other forms of satisfaction, rehabilitation and guarantees of non-repetition.[24]

25. This obligation is also enshrined in Article 14 of the Convention against Torture which states that "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."

26. The Human Rights Committee has interpreted Article 2.3 of the International Covenant on Civil and Political Rights on the right to an effective remedy as including the obligation of States to use the means at its disposal to investigate and punish perpetrators and to ensure reparation for victims of human rights violations. In its

[23] Permanent Court of International Justice, *Chorzow Factory, (Germany v. Poland)*, 13 September 1929, para. 47. See also, United Nations International Law Commission, *Draft Articles on State Responsibility*, 2001, Articles 1 and 29-37.

[24] *Ibid*. See also, United Nations General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Resolution 60/147 (16 December 2005), principles 15 and 19-23.

General Comment on the interpretation of Article 7 (prohibiting torture and cruel, inhuman or degrading treatment), the Committee clarifies and confirms the right of victims of torture to effective remedies, including the right to compensation.

27. In its General Comment 32 the Committee has reaffirmed that without reparation the obligation to ensure that victims have an effective remedy will not be fulfilled, and has stated that adequate reparation may include, as appropriate, restitution, rehabilitation, measures of satisfaction such as an apology, the construction of a memorial, guarantees of non repetition, law reform as well as bringing perpetrators of grave human rights violations to justice.[25]

28. Therefore, Chile, as a signatory to the International Covenant on Civil and Political Rights and the Convention against Torture has a clear obligation under these treaties to provide effective judicial remedies that ensure adequate reparation, including compensation, for violations of protected rights such as the right to be free from torture as well as for the denial of justice.

29. This obligation means that Chile has to provide for specific legal measures to ensure adequate reparation for victims of torture and to bring its domestic legislation in line with those international instruments.

i. There are no provisions or effective remedies in the Chilean Civil Code for reparation of torture victims

30. The only way in which a victim can obtain compensation in Chile for acts of torture is through the provisions of Title XXXV, Book IV of the Civil Code concerning the economic obligations arising from illicit acts. These provisions do not provide a specific remedy for victims of torture given that such acts are treated generally as simple illicit

[25] Human Rights Committee, General Comment No. 31 to the International Covenant on Civil and Political Rights, on the Nature of the General Obligation Imposed on States Parties to the Covenant, CCPR/C/21.Rev.1/Add.13 (26 May 2004), para. 16.

acts. This violates the Convention against Torture given that it does not address adequately the severity and specificity of the crime of torture and the reparation required to mitigate the harm resulting thereof.

31. The prohibition of torture is a *jus cogens* norm[26] and, therefore, effective remedies, including provisions for adequate compensation to the victims, can not deal with the crime of torture as a simple crime.

ii. Civil claims within criminal or civil proceedings are rendered meaningless in cases of torture

32. Chilean law establishes two regimes for civil claims for reparations when a crime has been committed: inside or outside the criminal process. Article 59 of the Criminal Procedural Code establishes that any civil claim that seeks restitution must be filed "always in the respective criminal proceedings." The same article, however, provides that the victim can always choose to file the civil claim inside the criminal proceedings or in separate civil proceedings in cases of reparation claims, other than restitution. Thus, the Chilean law contemplates the possibility of the victim choosing to pursue a civil claim within the criminal proceedings or in separate civil proceedings. If the civil claim is pursued by a person other than the victim, such claim must be filed in the appropriate civil court.[27]

33. Despite this, Article 60 of the Criminal Procedural Code[28] provides that in order to file a civil claim as part of the criminal proceedings or not, the following requirements, established in Article 254 of the Civil Procedural Code, must be met: the claim must

[26] Inter-American Court of Human Rights, *Tibi v Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment 7 September 2004, para. 143. *See also*: International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Delalic and others* (1998), *Prosecutor v. Kunarac* (2001, para. 466), and *Prosecutor v. Furundzija* (1998), and also Lord Browne-Wilkinson, *R v Bow Street Metropolitan Stipendiary Magistrate ex p Pinochet* (No 3) [1999] 2 WLR 827.

[27] Article 59 of the Criminal Procedural Code, available at http://www.cajpe.org.pe/RIJ/bases/legisla/chile/ncpp.html

[28] *Ibid*, Article 60.

include, *inter alia*, the name, address and profession or occupation of the individual against whom the claim is brought. Clearly, this provision is inadequate in cases of serious violations of human rights (especially if they are massive and systematic) and it is particularly unreasonable in relation to acts of torture since the identification of the perpetrator is almost impossible in most of the cases.[29]

34. In this regard, it must be noted that international law is unanimous in holding that it is the State the one required to identify the perpetrators of acts of torture taking place in sites that are under its control. This has been affirmed both in the jurisprudence of the European Court of Human Rights - among others, in the *Selmouni v France* case[30] - and of the Inter-American Court of Human Rights, for example, in the case of *Bulacio v Argentina*, in which the Court held:

> The State must provide a satisfactory explanation for what has happened to a person whose physical conditions were normal when custody began, and during it or at the end of it they worsened. The State is also "under the obligation to create the necessary conditions for any remedy [in favor of the detainee] to be able" to attain effective results.[31]

Therefore, it is the State who is under the obligation to identify the perpetrator of torture.

35. In the cases of victims of the military dictatorship of Pinochet, the inadequacy of the civil action is reinforced by the existence and validity of Decree-Law No. 2.191. This Decree-Law has rendered civil claims inside or outside criminal proceedings illusory and legally impossible given that it has for a long time prevented the competent judge from

[29] Office of the High Commissioner for Human Rights, Istanbul Protocol, 9 August 1999; Peel and Lacopino, *The Medical Documentation of Torture*, 2002.

[30] European Court of Human Rights, *Selmouni v France*, App. No. 25803/94, Judgment 28 July 1999, para. 87.

[31] Inter-American Court of Human Rights, *Bulacios v Argentina*, Judgment of 18 December 2003, para. 127.

ordering an investigation of allegations of torture,[32] and that those responsible for such crime would be identified. To this day, either because the amnesty law is still in force or with the aim of preserving *de facto* impunity, the Chilean authorities have not initiated *ex officio* a diligent investigation into the facts in several cases. As a result, the use of the civil action would be virtually impossible because the perpetrators of such serious human rights violations have not been identified, but in exceptional cases. This is a blatant violation of the right to an effective remedy and to adequate reparation, pursuant to Article 14 of the Convention against Torture.

B. The Provisions on Prescription of Civil Proceedings in Chile Renders the Right of Victims of Torture to an Adequate Reparation Derisory

36. While the Supreme Court of Chile and other high courts have held that the prosecution of crimes against humanity, including torture, is not subject to statutes of limitation,[33] the Chilean judiciary has not given equal treatment to civil actions for reparation claims against the State, but also in some cases, against the perpetrators of such crimes.

37. This position violates provisions of the American Convention on Human Rights, as stated by the Inter-American Court in the case of *Barrios Altos v. Peru*. According to Court:

> [A]ll amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they

[32] "The Supreme Court, in both of these decisions, stated that the self-amnesty DL does not exclude the right of the aggrieved parties to be duly compensated by the civil courts for any financial damages that the offenses may have caused them. If the self-amnesty DL, as interpreted by the Court, constitutes a rule that prevents the judge from ordering an investigation, or, if 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 …", Inter-American Commission on Human Rights, *Garay Hermosilla and others v. Chile*, Case 10.843, Report No. 36/96, para. 9, and also *Meneses Reyes and others. v. Chile*, Cases 11.228, 11.229, 11.231 y 11282, Report No. 34/96, and *Catalán Lincoleo v. Chile,* case 11.771, Report No. 61/01.

[33] See, for example, the two cases mentioned in this submission: Supreme Court of Chile, Second Chamber, *Liquiñe* and Court of Appeals of Santiago, *Edgar Benjamin Cevallos Jones,* ground 16.

> are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.[34][emphasis added]

38. This position is also contrary to the updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, which establishes in principle 23 that,

> Prescription - of prosecution or penalty - in criminal cases shall not run for such period as no effective remedy is available. Prescription shall not apply to crimes under international law that are by their nature imprescriptible. When it does apply, prescription shall not be effective against civil or administrative actions brought by victims seeking reparation for their injuries.[35]

39. Moreover, according to the independent expert on the subject Professor Diane Orentlicher, and based on international law, this principle applies not only to international crimes such as crimes against humanity or war crimes, but also to serious human rights violations such as torture.[36]

40. In this way, the position of the justice system, and mainly of the Supreme Court of Chile, denies the right of victims of crimes against humanity to obtain adequate reparation for the harm they suffered.

41. In the above-mentioned case of *Edgar Benjamin Cevallos Jones* and *Ramón Pedro Cáceres Jonquera*, which is related to torture, the plaintiffs sought reparation for moral

[34] Inter-American Court of Human Rights, *Barrios Altos v Peru,* Judgment 14 March 2001, para. 41.

[35] Report of the Independent Expert to update the Set of Principles to Combat Impunity, Diane Orentlicher, "Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity", E/CN.4/2005/102/Add.1 (8 February 2005).

[36] Report of Diane Orentlicher, E/CN.4/2005/102 (18 February 2005), para. 47.

damages from both the State of Chile and from Cevallos and Cáceres.[37] The special investigating judge granted the exception of prescription of the civil action for compensation for damages brought filed by the State of Chile and Cáceres. The judge concluded that the civil action prescribed after 4 years "from the perpetration of the act" as provided by article 2332 of the Chilean Civil Code.[38] Therefore, neither the State nor Cáceres were made to provide reparations.

42. The prescription of civil actions against the State has taken place not only in the above mentioned case but also in cases of enforced disappearances and extrajudicial executions, and has been consistently reiterated by the Supreme Court of Chile. Thus, in the case of *Josefa Martínez Ruiz and others*, relating to enforced disappearances, the Supreme Court held in 2006 held that in the absence of a rule of prescription for civil action against the State, Article 2332 of the Chilean Civil Code should be applied and that, in the interests of legal certainty, the civil action for reparation should be declared to have prescribed. The Court also added that the American Convention was not applicable since the events preceded the ratification of the Convention by Chile.[39] The case of *Gloria Neira Rivas*, also on enforced disappearances, confirmed this stance in 2007.[40] The Supreme Court once again reaffirmed its position in the case of *Pedro Ruz Castillo and others* in 2008.[41]

43. At the time of writing, only one case was found in which the Supreme Court held that the civil action could not prescribe. In the case of *Sergio Arellano Stark and others*, concerning extrajudicial executions, the court decided on 15 October 2008 that "the

[37] *Edgar Benjamín Cevallos Jones* and *Ramón Pedro Cáceres Jonquera*, supra note 33, p. 3493.

[38] The civil action did not prescribe in relation to the second accused in the case, Mr. Cevallos as he did not challenge the claim nor filed an exception. The judge ordered Cevallos to pay 10,000,000 Chilean pesos to each of the plaintiffs in connection with the psychological harm suffered by them as a result of abuse the treatment they were subjected to. *Ibid.*, p. 3498-3499.

[39] Supreme Court of Chile, *Josefa Martínez Ruiz and others v State of Chile*, Compensation of Damages, Appeal on merits, Rol 6049-2005, 27 December 2006, grounds 18-20.

[40] Supreme Court of Chile, *Gloria Neira Rivas v State of Chile*, Compensation of Damages, Sentence, Rol 1133-06, 24 July 2007.

[41] Supreme Court of Chile, *Pedro Ruz Castillo and others v State of Chile*, Rol 743-2007, Judgment 25 March 2008, ground 8.

State of Chile can not evade its legal responsibility to repair such debt de jure, given that its efforts to prosecute the crime were neither sufficient or complete" and added that "the right of victims and their families to receive the corresponding compensation implies, undoubtedly, the reparation of all harm that has been caused to them."[42]

44. However, the case of *Sergio Arellano Stark and others* remains an isolated case and it is not possible to infer from it that the Court has changed its position on the issue. In fact, this case has a dissenting vote by judge Ballesteros, which denotes the lack of unanimity of the Supreme Court on the issue and the remaining differences of opinion on it.[43]

45. These decisions, with the exception of the one mentioned in the previous paragraph, disallow other minority decisions within the Chilean justice system which have tried to refuse the prescription of civil actions against the state. In the case of *Pedro Ruz,* the Santiago Court of Appeals held that when the crimes against humanity are at stake, and given that they are prohibited by norms of *jus cogens* which prevail over domestic law, the "the exception of prescription formulated by the State of Chile"[44] must be refused. The Court concluded that "the domestic provisions included in the Civil Code on prescription of common civil actions for compensation of damages, invoked by the State of Chile, being in open contradiction with the norms of international human rights law which protect the right of victims and families to receive reparation, of an international normative status recognised by Chile, are considered irrelevant".[45] However, as noted above, this is not the majority position at the Chilean Supreme Court – the same court that in this case revoked the decision taken by the Court of Appeals of Santiago in the point under discussion.

---

[42] Supreme Court of Chile, Appeal of annulment of sentence, *Sergio Arellano Stark and others,* Rol 4723/2007, Replacing sentence, 15 October 2008, grounds 8-10.

[43] *Ibid.*

[44] Court of Appeals of Santiago, *Pedro Ruz Castillo and others v State of Chile,* Rol 4.464-2001, judgment of 16 November 2006, ground 9.

[45] *Ibid.*, ground 10.

46. The fact that there is not a strong stance in the Chilean judicial system, including in the Supreme Court, against the prescription of civil actions in cases involving crimes against humanity or serious human rights violations results in that there are no effective domestic remedies to ensure adequate compensation to victims of torture.

C. 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

47. In Chile there is an overlap of jurisdiction in cases of torture between the ordinary criminal courts and the military courts. The priority sometimes given to the application of the Code of Military Justice to torture affects the right of victims to obtain adequate remedies. Article 330 of the Code of Military Justice, as also discussed in relation to the Chilean Criminal Code contains a very narrow definition of torture. This Code does not consider psychological harm or concomitant responsibility; it contains statutory limitations, does not provide for universal jurisdiction,[46] and worse, seems to authorize the use of unnecessary violence, as was noted by the Human Rights Committee.[47] 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 Article 14 of the Convention against Torture, which recognizes the right of victims to seek appropriate redress and Article 2 given that Chile has not taken the necessary steps to bring its domestic legislation in line with the Convention with the aim of preventing acts of torture.

48. In addition to the restrictions of the definition contained in article 330 of the Code of Military Justice, it is also important to stress that most of the cases under military

[46] See Article 330 of the Code of Military Justice and Inter-American Convention to Prevent and Punish Torture.

[47] Human Rights Committee, Concluding Observations: Chile, CCPR/C/CHL/C/5, 18 May 2007, para. 12, p. 4.

jurisdiction are dismissed without determining criminal liability as a result of the statute of limitations or Decree-Law 2.191 therefore preventing victims from enjoying their right to have their complaints promptly and impartially examined and to have their enforceable right to compensation.[48]

49. Decree-Law 2.191 prevents victims of past violations of torture, to exercise their right to civil compensation.

50. As indicated above, REDRESS considers that Decree-Law 2.191 is an obstacle to victims of torture or other serious violation of human rights to obtain compensation through the existing domestic remedies in Chilean law. Decree-Law 2.191 is a blanket amnesty law covering acts, including serious human rights violations, committed during the first five years of rule by the military junta. The statement made in this section applies to all the stages identified in the section on access to justice in criminal matters of this document.

51. During the first two stages of the implementation of the amnesty law (from its adoption until early 2007) it was clear that this law prevented the victims and their families from seeking reparation in Chilean civil courts. As established by the Inter-American Commission on Human Rights, although the Chilean amnesty only applied to criminal responsibility, it was impossible to establish civil responsibility without the identification of the responsible person given that civil claims must be brought against a concrete person in order to determine his/her responsibility for the alleged acts and to determine the payment of compensation. In this regard, the Inter-American Commission has held that "[t] he lack of investigation by the state - and the abolition of the amnesty law – made it virtually impossible to establish liability in the civil courts."[49]

[48] CODEPU (Comité de Defensa de los Derechos del Pueblo) "Informe Sobre la Impunidad en Chile" Published by Nikzkor, Madrid, Spain, September 996.

[49] Inter-American Commission on Human Rights, *Hermosilla*, supra note 32.

52. As is the case in Chile, the Commission found that in Uruguay in practice the amnesty substantially restricted the ability of victims to access civil remedies. While the Commission was aware that the Uruguayan amnesty only covered criminal prosecution – thus still allowing civil claims for damages - it concluded that the exercise and effectiveness of civil remedies was restricted in practice because of the impediments to criminal investigations, and therefore the impossibility of forcing the military and police to testify.[50] The UN Human Rights Committee subsequently came to the same conclusion.[51] The decisions of the Inter-American Commission in relation to Chile's amnesty law established that this law entirely prevented victims from seeking reparations in the civil courts by making it impossible to identify those responsible.[52]

53. The problem goes beyond the existence in Chile of *de jure* impunity in the access to remedies by victims of torture. Currently Chile considers that the Decree-Law 2.191 is not being implemented and therefore, the Decree-Law does not constitute an obstacle to bringing a civil claim for reparation against the State.

54. REDRESS considers that this claim is false given that the mere existence of the Decree-Law within the Chilean legal system creates serious legal uncertainty as there is no formal source of law recognized in Chile establishing that the Decree-Law is unconstitutional or invalid. Therefore any member of the justice system could apply the Decree-Law again with the aim of preventing criminal investigations as well as reparation. This position has been sustained not only by the Inter-American Commission and Court, but also by the Human Rights Committee, which has said:

> The Committee reiterates its concern regarding the 1978 Amnesty Decree-Law No. 2.191. While noting that according to the State party this Decree-Law is no longer applied by the courts, it considers that the fact that the

[50] Inter-American Commission on Human Rights, case *Hugo Leonardo et al*, 10.029 et al., 1992-1993 Annual Report of the Inter-American Commission on Human Rights, 88 Pl 154, 161-62 P38 (1993).

[51] Human Rights Committee, *Hugo Rodriguez v Uruguay,* 322/1988, CCPR/C/51/D/1988, 19 July 1994.

[52] Inter-American Commission on Human Rights, cases *Hermosilla, Reyes, y Catalán Lincoleo*, supra note 32.

> Decree-Law remains in force leaves open the possibility that it might be applied. The Committee draws attention to its general comment No. 20 concerning the prohibition of torture and other cruel, inhuman and degrading treatment or punishment, which states that amnesties for human rights violations are generally incompatible with the State party's duty to investigate such violations, to guarantee freedom from such violations within their jurisdiction and to ensure that similar violations are not committed in the future (article 2 of the Covenant).[53]

55. The legitimacy and legality that the Decree-Law still enjoys blatantly violates Chile's obligation under Article 14 of the Convention against Torture given that this Decree-Law prevents victims from seeking reparations in the civil courts.[54] Chile is also in violation of Article 2 of the Convention given that it has not taken the necessary legislative measures to bring its domestic legislation in line with the provisions of the Convention aiming at preventing acts of torture.

56. This allows us to conclude that the few legal remedies available in Chile to obtain reparation for the harm suffered by victims of the dictatorship are inadequate and/or ineffective for that purpose. Accordingly, Chile has violated and continues to violate Articles 2 and 14 of the Convention against Torture.

D. The Reparation Measures Adopted by Chile to Repair the Harm Caused to Victims of Torture are Inadequate

57. REDRESS contends that the denial of justice in Chile has not only operated in relation to the investigation, prosecution and punishment of those responsible for acts of torture and to the lack of adequate and effective remedies for obtaining reparation through the justice system but has also been the result of the lack of adequate and full reparation to torture survivors and their families, including those who are in exile, for

[53] Human Rights Committee, CCPR/C/CHL/C/5, Concluding Observations: Chile, 18 May 2007, para. 5.

[54] Inter-American Commission on Human Rights, cases *Hermosilla, Reyes, y Catalán Lincoleo*, supra note 32.

the harm they suffered arising from torture and from the denial of justice within the reparations program developed by the Chilean State.

i. The Valech Commission (2003)

58. As is well known, Chile was negligent regarding the adoption of reparation measures in relation to torture survivors. Thus, it was not until 2004, almost 15 years after the transition to democracy in Chile, that a remedy was made available in Chile to obtain some form of redress for acts of torture. This was, however, not a judicial remedy. The Valech Commission was established in order to identify those who suffered arbitrary deprivation of liberty and torture by state agents between 11 September 1973 and 10 March 1990.

59. The report of the Valech Commission was published in 2004. It was expected that with the publication of that report the situation of torture survivors in Chile would begin to change. However, and despite the existence of Law 19.992, which was adopted to provide reparations to torture victims, such reparation is inadequate for several reasons.

60. First of all, although the Valech Commission was created in 2003 to establish the historical – not judicial – truth relating to the people who were tortured during the dictatorship and the context of such practice, the Law 19.992 established that all information received except that which was made public in the report was to be kept "secret" for a period of 50 (Article 15). This secrecy maintains impunity in Chile given that it allows the anonymity of the perpetrators of torture to persist and continues to impede the investigation and possible prosecution of these individuals. This violates Articles 6 and 7 of the Convention against Torture and is contrary to what this Committee has stated in its General Comment No. 2:

> It is a matter of urgency that each State party should closely monitor its officials and those acting on its behalf and should identify and report to the Committee

> any incidents of torture or ill-treatment as a consequence of anti-terrorism measures, among others, and the measures taken to investigate, punish, and prevent further torture or ill-treatment in the future, with particular attention to the legal responsibility of both the direct perpetrators and officials in the chain of command, whether by acts of instigation, consent or acquiescence.[55]

61. Such secrecy furthermore violates one of the most important elements of the State's obligation to provide an adequate remedy for serious human rights violations, which is to investigate, prosecute and, if appropriate, to punish the persons who committed such crimes under the veil of the state or with its acquiescence. Similarly, the lack of such an investigation as a form of reparation violates, in turn, the obligation of the State of Chile to adopt guarantees of non repetition as there are no clear and effective measures to prevent the commission of such crimes given that they remain unpunished. Finally, the State also fails to cease the violation and to investigate, prosecute and punish perpetrators of such crimes.

62. Moreover, the torture survivors in Chile who were also qualified as *exonerados* (dismissed public sector employees) were forced to choose one of two reparation systems: the one established by the Program for the Recognition of Dismissed Public Sector Employees, or the one established by Law 19.992. If the person chose the former, that person would only be entitled to a single award of 3,000,000 Chilean pesos (5,847.939 USD), as stipulated by Law 19.992. As a result, many *exonerados* opted to be considered as such and claimed the single award provided by Law 19.992.

63. Thirdly, the Law 19.992, issued with the aim of providing "austere and symbolic"[56] reparation, attempted to repair the harm arising from torture but not from the denial of justice in the investigation, punishment and reparation of such crime. This Law forced to choose between the benefits it stipulates or those of the Law 19.234, with no

[55] Committee against Torture, General Comment No. 2, Implementation of Article 2 by State Parties, CAT/C/GC/2, 24 January 2008, para. 7.
[56] Supreme Decree-Law 1.040 which creates the National Commission for Torture and Political Imprisonment, Article 2.

justification for the fact that a person who qualifies as *exonerado* has to choose between such a status and that stipulated by Law 19.992 given that the source for reparation in each law is fundamentally different.

64. It is also important to note that one of the reasons why several *exonerados* have chosen to opt for the benefits of Law 19.234 is because its Article 15 allows them to transfer their pension to their successors, a possibility which is not provided for in Law 19.992 on reparation for victims of torture and which neglects, therefore, the situation of vulnerability which the family of a victim of torture has and may continue to experience.

65. Fourth, while victims of torture have access to the health and education system "PRAIS" in Chile, such benefits do not apply to torture survivors who went into exile when Chile expelled them during the dictatorship, or because they had to leave the country in order to protect their lives and personal integrity. Chile has not established cooperation agreements with those countries where Chilean exiles live so that they can have access to the same type of medical treatment which they need because of having suffered torture. The only exception is the cooperation between Chile and Argentina in the matter.

66. In the case of access to education, it is important to emphasize that such benefit would be important if it could be transferred to the children of the torture survivors as direct victims, as a general rule, are not in a physical or mental capacity to undertake such studies. The vast majority of these survivors are currently over 55 years old. Thus, this measure of reparation is not effective and does not afford adequate redress for the damage because it cannot be enjoyed neither by the torture survivors nor by their next of kin. The Inter-American Court has previously recognised that under certain conditions, there is a need to provide reparation to the young generations because of the harm caused to the parents.[57] According to the Court, the need to provide

[57] Inter-American Court of Human Rights, *Gómez Palomino v. Perú,* Judgment 22 October 2005, paras. 144-148.

reparations for future generations is reinforced when the victim of the violation was the breadwinner in the household.

67. Fifth, given the reasons above explained and the description of the Valech reparation program, it is evident that the existing measures of reparation in Chile do not provide adequate remedies to the victims of torture. But more than that, such measures do not provide adequate remedies to torture survivors who are in exile following decisions taken by the State of Chile, which create greater vulnerability of these victims and give rise to discriminatory treatment in comparison to other victims.

68. In this regard it is important to emphasize that the Inter-American Court has recognised on several occasions that reparations for moral and material damages must be provided to those who had to leave their country of origin.[58] In this way, the Court takes into account both the rupture between the victim and his/her the family as well as with his/her country and the additional costs and burdens generated by the arrival in another country.

[58] Inter-American Court of Human Rights, *Gutiérrez Soler v Colombia*, Judgment 12 September 2005 and *Castillo Páez v Peru*, Judgment 27 November 1998.