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Title/Style of Cause:	Hector Marcial Garay Hermosilla et al. v. Chile
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Decided by:	First Vice Chairman: Ambassador John S. Donaldson; Second Vice Chairman: Professor Carlos Ayala Corao; Members: Dr. Oscar Lujan Fappiano, Professor Robert Kogod Goldman, Dr. Jean Joseph Exume, Ambassador Alvaro Tirado Mejia. Commissioner Claudio Grossman, national of Chile, did not participate in the discussion and voting on this case, in accordance to Article 19 of the Regulations of the Commission.
Dated:	15 October 1996
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I. THE COMPLAINT AND PROCEEDINGS OF THE COMMISSION

1. On March 27, 1991, the Commission received a complaint against the State of Chile for violation of the right to justice, and for the situation of impunity with respect to those responsible for the arrest and disappearance of the following persons:

1. Garay Hermosilla, Héctor Marcial (8 July 1974); 2. Buzio Lorca, Jaime (13 July 1974); 3. Elgueta Pinto, Martín (15 July 1974); 4. Alvarado Borgel, María Inés (15 July 1974); 5. Chacón Olivares, Juan Rosendo (15 July 1974); 6. Guajardo Zamorano, Luis Julio (20 July 1974); 7. Tormen Méndez, Sergio Daniel (20 July 1974); 8. Andreoli Bravo, María Angélica (6 August 1974); 9. Dockendorff Navarrete, Muriel (6 August 1974); 10. Cabezas Quijada, Antonio Sergio (17 August 1974); 11. Barría Araneda, Arturo (28 August 1974); 12. Villalobos Díaz, Manuel Jesús (17 September 1974); 13. Rodríguez Araya, Juan Carlos (17 November 1974); 14. Castro Salvadores, Cecilia Gabriela (17 November 1974); 15. Reyes Navarrete, Sergio Alfonso (17 November 1974); 16. Pizarro Meniconi, Isidro Miguel Angel (19 November 1974); 17. Vera Almarza, Ida (19 November 1974); 18. Muller Silva, Jorge Hernán (29 November 1974); 19. Bueno Cifuentes, Carmen Cecilia (29 November 1974); 20. Silva Saldívar, Gerardo Ernesto (10 December 1974); 21.Urbina Chamorro, Gilberto Patricio (6 January 1975); 22. Contreras Hernández, Claudio Enrique (7 January 1975); 23. Flores Pérez, Julio Fidel (10 January 1975); 24. Molina Mogollones, Juan René (29 January 1975); 25. Bruce Catalán, Alan Roberto (13 February 1975); 26. Vásquez Sáenz, Jaime Enrique (13 February 1975); 27. Acuña Reyes, Roberto René (14 February 1975); 28. Perelman Ide, Juan Carlos (19 February 1975); 29. Lagos Salinas, Ricardo (24 June 1975); 30. Peña Herreros, Michelle (28 June 1975); 31. Rodríguez

Díaz, Mireya Herminia (25 June 1975); 32. Lorca Tobar, Carlos Enrique (25 June 1975); 33. Ferrús López, Santiago Abraham (11 December 1975); 34. Quezada Solís, Mario Luis (12 December 1975); 35. Ascencio Subiabre, José Ramón (29 December 1975). 36. Boettiger Vera, Octavio (17 January 1976); 37. Weibel Navarrete, José Arturo (29 March 1976); 38. Araya Zuleta, Bernardo (2 April 1976); 39. Flores Barraza, María Olga (2 April 1976); 40. Recabarren González, Luis Emilio (29 April 1976); 41. Recabarren González, Manuel Guillermo (29 April 1976); 42. Mena Alvarado, Nalvia Rosa (29 April 1976); 43. Recabarren Rojas, Manuel Segundo (30 April 1976); 44. Zamorano Donoso, Mario Jaime (4 May 1976); 45. Muñoz Poutays, Onofre Jorge (4 May 1976); 46. Donaire Cortéz, Uldarico (5 May 1976); 47. Donato Avendaño, Jaime Patricio (5 May 1976); 48. Escobar Cepeda, Elisa del Carmen (6 May 1976); 49. Díaz Silva, Lenín Adán (9 May 1976); 50. Concha Bascuñán, Marcelo Hernán (10 May 1976); 51. Espinoza Fernández, Eliana (12 May 1976); 52. Díaz López, Victor (12 May 1976); 53. Cerda Cuevas, Oscar Domingo (19 May 1976); 54. Rekas Urra, Elizabeth de las Mercedes (26 May 1976); 55. Elizondo Ormaechea, Antonio (26 May 1976); 56. Maino Canales, Juan Bosco (26 May 1976); 57. Maturana González, Luis Emilio Gerardo (8 June 1976); 58. Pardo Pedemonte, Sergio Raúl (16 June 1976); 59. Hinojoza Araos, José Santos (26 June 1976); 60. Martínez Quijón, Guillermo Albino (21 July 1976); 61. Canteros Prado, Eduardo (23 July 1976); 62. Canteros Torres, Clara Elena (23 July 1976); 63. Gianelli Company, Juan Antonio (26 July 1976); 64. Godoy Lagarrigue, Carlos Enrique (4 August 1976); 65. Insunza Bascuñán, Ivan Sergio (4 August 1976); 66. Vivanco Vega, Hugo Ernesto (4 August 1976); 67. Herrera Benítez, Alicia Mercedes (4 August 1976); 68. Ramos Garrido, Oscar Orlando (5 August 1976); 69. Ramos Vivanco, Oscar Arturo (5 August 1976); and, 70. Vargas Leiva, Manuel de la Cruz (7 August 1976).

2. In their complaint, the petitioners recount the judicial proceedings that were followed within the internal jurisdiction of Chile, as follows: in August 1978, acting on behalf of various relatives of the persons mentioned above, the Solidarity Office of the Archbishopric of Santiago brought criminal charges against General Manuel Contreras Sepúlveda, Director of the Dirección de Inteligencia Nacional (DINA), for the arrest and subsequent disappearance of those persons, between the years 1974 and 1976. The accusation was brought before the competent Criminal Court, alleging aggravated abduction as defined in Article 141 of the Penal Code of Chile. The Judge in charge of the investigation immediately declared himself incompetent to hear the case, on the grounds that the persons charged were subject to military law. The Solidarity Office appealed that decision before the Court of Appeals of Santiago, which confirmed the lower court's lack of jurisdiction.

3. The accusation was remitted to the Second Military Court of Santiago, which accepted jurisdiction, and ordered summary proceedings pursuant to the Code of Military Justice. The military tribunal decided to consider this case in conjunction with 35 other cases that were being processed before various criminal courts of Santiago, relating to the disappearance of some of the same persons mentioned in the accusation.

4. In the accusation itself, and subsequently during the proceedings before the military tribunal, it was requested that a substantive investigation of the facts should be conducted. Nevertheless, this request was denied by the military tribunal, with the result that the case remained paralyzed at the summary stage for 11 years, despite the abundant evidence that was submitted during the proceedings.

5. In December 1989, the Second Military Tribunal of Santiago, upon the request of the Fiscal Militar General (the Military Attorney General)--an institution created by the military government to represent the interests of the Army in litigation ---ordered the definitive dismissal of the charges, pursuant to Amnesty Decree Law (D.L.) 2191 that had been issued on 19 April 1978, approved by the military regime then in power with a view to pardoning the crimes committed by persons belonging to that regime between the years 1973 and 1978.

6. With a view to preventing the definitive closing of the investigation and determining the whereabouts of the victims and the responsibility of the persons accused, in January 1990 an appeal of inapplicability was brought, alleging the unconstitutionality of the self-amnesty DL on the basis of which the military tribunal had ordered definitive dismissal of the charges. In accordance with the laws of Chile, that appeal of inapplicability was submitted to the Supreme Court.

7. On August 24, 1990, the Supreme Court of Chile decided, unanimously, to reject the appeal and confirmed, consequently, the constitutionality of the self-amnesty DL of 1978. With respect to the possibility of a judicial investigation of the disappearances that occurred during the period covered by the self-amnesty DL, the Court stated that:

...the amnesty constitutes an act of the Legislative Power which has the objective effect of suspending the declaration of criminality under any other law, as a result of which the offense cannot be punished, because the penalty associated with the illicit acts is eliminated, and this prevents and paralyzes definitively or for ever, the exercise of any judicial action intended to prosecute them... The foregoing means that, since the amnesty law has been upheld as valid, the courts must apply it pursuant to the provisions of articles 107 and 408 No. 5 of the Code of Criminal Procedure, without regard to the provisions of Article 413 of that Code, which require that a decree of definitive dismissal is conditional upon having exhausted all investigative attempts to produce the corpus delicti and to determine the identify of the guilty party.

8. The aggrieved parties submitted before the Supreme Court a final appeal for clarification of the verdict, and its reversal. On 28 September 1990, the Supreme Court unanimously confirmed its decision on the constitutionality of the self-amnesty DL and added that:

once the validity of the amnesty or pardon law has been verified, the courts must apply it, and must terminate any judicial investigation or proceedings, as provided in Article 107 of the Code of Criminal Procedure, a rule that in this situation must take precedence over any other, because it obliges the court, in a case where the facts submitted show that the legal responsibility of the accused person has been extinguished, to refuse to proceed with criminal action, and this has the effect of dismissing the charges definitively.

9. 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, since 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. This is expressly prescribed in Article 40 of the Code of Criminal Procedure, in stating that civil action may be taken against the responsible party himself and against his heirs, and in Article 254 No. 3 of the Code of Civil Procedure, which makes it mandatory that a civil suit must contain the name, address and profession or office of the individual against whom the suit is brought.

10. In light of the foregoing, and in particular the fact that the Supreme Court has denied access to justice for 70 Chileans, in violation of the provisions of the American Convention, which is currently in force in Chile, and since the current Supreme Court can clearly be expected to maintain its position with respect to the limits imposed by the self-amnesty DL of 1978, the petitioners ask the Commission to declare that the State of Chile has violated Article 25 with respect to article 1.1 of the American Convention on Human Rights, and that, in light of the provisions of Articles 1.2 and 43 of that instrument, it declare that DL 2191 is incompatible with the obligations of Chile under the American Convention on Human Rights.

11. The Commission transmitted the relevant portions of the complaint to the Government of Chile on 1 April 1991, asking it to submit information on the alleged facts or any other pertinent information, within a period of 90 days.

On July 8, 1991, the Commission received a note from the Government, seeking a delay of 30 days to submit its response, which request was granted by the Commission in a note dated 11 July 1991.

On August 12, 1991, the Commission received a new petition for a delay of 30 days for responding to the complaint, and this was granted by the Commission on 16 August, 1991.

The Commission received the response of the Government on 11 September 1991. In it, the Government alleges that the remedies available within Chilean jurisdiction have not been exhausted. The response also states that the petition had been presented after the expiry of the 6-month period prescribed by Article 46 b of the Convention, and Articles 35 (b) and 38.1 of the Regulations of the Commission.

On November 15, 1994, the Commission sent to the Government and the petitioners a communication in which it offered its good offices to both parties to arrive at a friendly settlement of the matter.

On December 29, 1994, the petitioners sent their observations on the information presented by the Government of Chile regarding the case, and these were transmitted to the Government on 11 January 1995.

The Commission held a hearing on the case on 1 February 1995, with the participation of representatives of the petitioners and of the Government of Chile.

On February 11, 1995, a delay of 60 days was granted to the Government of Chile to prepare additional comments on the case.

On August 25, 1995, the Commission received the response of the Government.

On October 10, 1995, the Government was sent Report No. 19/95 on admissibility, which had been adopted by the Commission during its 90th Regular Session.

II. ADMISSIBILITY OF THE PRESENT CASE

12. Pursuant to the provisions of Article 44 of the American Convention on Human Rights (hereafter "the Convention"), to which Chile is a State Party, the Commission is competent to hear this case, because it deals with complaints that allege violations of rights that are guaranteed by the American Convention in Article 25, with respect to the right to effective judicial protection, and Articles 1.1, 2 and 43 on the duty of states to comply with and enforce the Convention, to adopt domestic legal provisions to give effect to the standards of the Convention and to report thereon to the Inter-American Commission on Human Rights.

13. The compliant therefore meets the formal requirements of admissibility contained in the American Convention on Human Rights, and in the Regulations of the Commission, as stated in Report 19/95 on admissibility, adopted by the Commission during its 90th Regular Session, in September 1995.

14. The current complaint is not pending in another international proceeding for settlement, nor is it a repetition of a petition previously studied by the Inter-American Commission on Human Rights.

III. FRIENDLY SETTLEMENT

15. During the course of the hearing held on 1 February 1995, the Commission reminded the representatives of the petitioners and the Government of Chile that, pursuant to the provisions of Article 48 paragraph f) of the Convention, it was obliged to put itself at the disposal of the parties with a view to reaching a friendly settlement of the matter, on the basis of respect for the human rights recognized in the Convention.

16. By means of a communication of 8 February 1995, ratified on 8 September 1995, the representatives of the victims refused to accept a friendly settlement under any condition, and asked that the proceedings be continued, as provided for in the American Convention.

Since no friendly settlement has been reached, the Commission must comply with the provisions of Article 50.1 of the Convention, by issuing its conclusions and recommendations on the matter submitted for its consideration.

IV. COMPLIANCE WITH THE PROCEDURES ESTABLISHED BY THE CONVENTION

17. During the proceedings regarding the present case, the Commission has given equal opportunity to the Government of Chile and to the petitioners to present arguments, and has weighed the evidence and allegations submitted by both parties with absolute objectivity.

In the handling of the present case, all legal and regulatory procedures established by the American Convention on Human Rights and by the regulations of the Commission have been observed, complied with and exhausted.

V. ARGUMENTS PRESENTED BY THE GOVERNMENT OF CHILE

18. The democratic Government of Chile argued that it has issued no amnesty law that is incompatible with the American Convention, since Decree Law 2191 was issued in 1978, under the de facto military regime.

19. The Government asked the Commission to consider the historical context in which the deeds took place, and the special conditions under which the country returned to a democratic regime, whereby the new Government was obliged to accept the rules imposed by the de facto military regime, and could modify them only in accordance with the law and the Constitution.

20. The Government has attempted to revoke the amnesty Decree Law, but the constitutional rules provide that initiatives relating to amnesty may only originate in the Senate [article 62 paragraph 2 of the Constitution], where it lacks a majority, due to the number of persons in that legislative chamber who were not elected by popular vote.

21. The democratic Government has urged the Supreme Court to declare that the amnesty currently in force cannot prevent the guilty parties from being investigated and prosecuted.

22. The National Commission for Truth and Reconciliation, in its report naming the victims whose basic rights had been violated under the military dictatorship, including the 70 persons included in this complaint, recognized that the cases of these persons constituted serious violations that involved agents of the State, and because the whereabouts of the victims was unknown, they were deemed to be “disappeared prisoners”.

23. By means of law 19123, issued by the democratic Government, the families of the victims were granted: a single life-time pension in an amount no less than the average compensation for a family in Chile; a special procedure declaring the victims to be presumed dead; special attention by the State with respect to health, education and housing; forgiveness of education, housing, tax and other debts to state agencies; and exemption from compulsory military service for the children of the victims.

24. The democratic Government expressed its agreement with the statement of the petitioners regarding the nature of Decree Law 2191 of 19 April 1978, which sought to exonerate responsibility for the most serious crimes ever committed in the history of Chile.

25. The Government asked the Inter-American Commission on Human Rights to declare in its final report that the Government of Chile was not guilty or liable in any way for the violations of rights that form the basis of the petitioners' complaint in this case.

VI. OBSERVATIONS OF THE COMMISSION ON THE ARGUMENTS PRESENTED BY THE PARTIES

A) Preliminary considerations

a. Status of the authorities who decreed the amnesty

26. The so-called "amnesty law" is an arbitrary act taken by the military regime that overthrew the constitutional Government of Dr. Salvador Allende. It is the act therefore of authorities who lacked any legitimacy or right, since there were not elected nor appointed in any manner, but rather installed themselves in power by force, after having deposed the legal government, in violation of the Constitution.

27. A de facto government lacks legal legitimacy, because if a state has adopted a Constitution, any act that is not in accordance with that constitution is contrary to Law. The installation of a de facto government in Chile was the result of force and not of popular consent.

28. The Commission cannot, even for the sake of preserving juridical security, place the legitimacy of a de jure government on an equal footing with the arbitrary and illegal behavior of a regime that has usurped power, the very possibility of which, by definition, gives rise to juridical insecurity. Such regimes deserve to be permanently repudiated in defence of the Constitutional State and the Rule of Law, and in regard for democratic life and the principle of the sovereignly of the people, based on full respect for human rights.

29. In the present case, those who benefitted from the amnesty were not foreigners or third parties, but people who were participants in the governing policies of the military regime. It is one thing to affirm the necessity of giving legitimacy to acts taken by society as a whole [to avoid collapsing into chaos] or acts that flow from international commitments, because obligations assumed in those fields cannot be circumvented, but is entirely another matter to extend similar treatment to those who collaborate with an illegitimate government in violation of the Constitution and the laws of Chile.

30. The Commission believes it would be absurd to pretend that the usurper and its successors could invoke the principles of the Constitution, which they themselves violated, in order to enjoy the benefits of security, which are only justified and merited for those who adhere rigorously to the Constitution. The acts of a usurper can have no validity or legitimacy either as regards the usurper himself or for his illegal or de facto functionaries. Because if those who collaborate with such governments are granted and assured impunity for their conduct under a usurping and illegitimate regime, there would be no difference between what is legal and what is illegal, between what is constitutional and what is unconstitutional, or between what is democratic and what is authoritarian.

31. The constitutional rule of law in Chile must, of necessity, ensure that the Government can comply with its fundamental goals, unencumbered by limitations that are contrary to law and that were imposed by a usurping military regime, since it is not juridically acceptable that such a regime should be able to restrict the actions of the constitutional Government succeeding it as it tries to consolidate the democratic system, nor is it acceptable that the acts of the de facto power should enjoy all those attributes that accrue to the legitimate acts of a de jure power. The de jure government derives its legitimacy, not from any rules handed down by the usurper, but from the will of the people who have elected it, since they alone can claim sovereign power.

b. The Constitutional rule of law in Chile

32. The position expressed in the preceding paragraph is consistent with Chilean constitutional law. The Constitution of Chile of 1833 provided, in Article 158, that “Any resolution issued by the President of the Republic, the Senate or the Chamber of Deputies, in the presence or at the instigation of an army, or of a general leading an armed force, or of any group of people, whether armed or not, that would disobey the authorities, is null and void and can produce no effect whatsoever." In turn, the Constitution of 1925 declared: “No power, no person or group of persons may take upon itself, even under the pretext of extraordinary circumstances, any authority or right other than what is expressly conferred upon it by law. Any act in contravention of this article is null and void." [Article 4].

Even the “constitution” sanctioned by Decree Law of the military regime expresses on this point: "No power, no person nor group of persons may take upon itself, even under the pretext of extraordinary circumstances, any authority or right other than what is expressly conferred upon it by the constitution or the law. Any act in contravention of this article is null and shall give rise to the liabilities and penalties that the law provides” [Article 7, second paragraph}.[FN1] Similarly, Article 5 of that document provides that “the exercise of sovereignly is limited with respect to the essential rights that emanate from the nature of humanity”, and states that no individual nor group of people can claim to exercise it.

[FN1] Political Constitution of the Republic of Chile, Sanctioned by Decree Law Nº 3464 of August 11, 1980.

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c. Basic rights and freedoms of persons and of the state

33. Similarly, fundamental rights and freedoms do not cease to exist under a de facto government, since they predate both the State and the Constitution, which may recognize and guarantee them, but did not create them. It is therefore erroneous to maintain that a de facto regime has no limits to its power to act in an arbitrary or unconstitutional way. From this it follows that a government that is accused of the systematic violation of the fundamental rights of its subjects and that tries to excuse itself through an amnesty thereby commits a serious abuse of power.

34. In this regard, professor Christian Tomuschat says: “To maintain that in certain cases we must obey a corrupt law and yield to the demands of its perpetrators, would be to make of the State a divinely inspired fetish, unstained by the most atrocious and odious acts” (See “On resistance to the violation of human rights," UNESCO, 1984, page 26).

d. The international law of human rights

35. International human rights law reaffirms this concept, as in the provisions of Article XX of the American Declaration and Article 23.1 a and b of the Convention, which cannot be suspended, according to Article 27.2 of the Convention.

Other inter-American instruments reaffirm the foregoing, such as Article 3 of the OAS Charter, which bases the principle of solidarity of the American states upon the common denominator of “the effective exercise of representative democracy”.

The Inter-American Court of Human Rights

36. The inter-American Court of Human Rights defines as “laws”, those “legal rules of a general character, intended to serve the public good, issued by legislative bodies that are constitutionally established and democratically elected, and elaborated in accordance with the procedures set out in the constitutions of the States Parties for the formulation of laws” (our underlining) (OC/6, paragraph 38). It arrived at this definition on the basis of analyzing the principles of “legality” and legitimacy” and of the democratic regime within which the inter-American system of human rights must be comprehended (OC/6, paragraphs 23 and 32), as is explicit in its OC/13, paragraph 25. For the Court, “the principle of legality, democratic institutions and the rule of law are inseparable” (OC/8, paragraph 24). Strict adherence to a democratic regime has been stressed by the Court: “Representative democracy is the determining factor in the entire system of which the Convention is a part” (OC/13, paragraph 34), and this stands in complement to its standards on “the just demands of democracy” that must guide the interpretation of the Convention, and especially of those precepts that are critically related to the preservation and functioning of democratic institutions (OC/5, paragraphs 44; 67 and 69). Nor should it be forgotten that the doctrine of the Court stresses the importance of the elected legislature in the guarding of fundamental rights (OC/8, paragraphs 22 and 23), and it also stresses the role of the Judiciary in reviewing the legitimacy of the acts of the Executive Power (OC/8, paragraphs 29 and 30; OC/9, paragraph 20).

The Inter-American Commission on Human Rights

37. The IACHR has pronounced itself on this theme on many occasions. For example, it has stated that “the democratic context is the necessary element for the establishment of a political society where human rights can thrive to their fullest” [See, Ten Years of Activities 1971-1981, page 331], where it refers to the according of dominant power to bodies that do not represent the popular will (id, page 270]. In its Report on Panama (1978), page 114, paragraph 3. Annual Report 1978/80, page 123/24; analyzing a draft political Constitution for Uruguay; in its report on Suriname regarding public participation, even in the preparation of constitutional texts (1983), page 43 paragraph 41; its decision regarding the plebiscite in Chile, questioning its validity for

having been held during a time when public freedoms were suspended [Report 1978/80, page 115]; and in the results of the case of "Ríos Montt v/Guatemala)."

The universal system

38. With respect to the universal system, the following should be noted: a) the Charter of the United Nations and its preamble (“We, the people of the United Nations..."); in its reference to the “free self-determination of peoples” and to "developing and encouraging respect for human rights and fundamental freedoms for all..."; b) the Universal Declaration, in its article 29; c) The International Covenant on Civil and Political Rights and d) the statement by the Human Rights Committee in "Ngaluba v/Zaire", paragraphs 8.2 and 10 on the denial of the right to participate, under conditions of equality, in the management of public affairs, due to sanctions imposed on eight parliamentarians.

Usurper governments and democratic governments

39. For the reasons discussed above, the Commission considers that representative democracy constitutes the essential precondition for the political and juridical organization of the American States, and consequently it deems the acts of a usurper or de facto government to be, of and by themselves, incompatible with the provisions of the American Convention of Human Rights.

B) General considerations

40. The Commission considers that in the present case, the petition poses a question of law and seeks to determine if the decree-law referred to, and the form in which it was applied by the Chilean courts, is compatible with the Convention, given that none of the alleged deeds has been denied, and it is not necessary to confirm any facts.

41. Although the democratic Government denied its responsibility for the deeds perpetrated by the military dictatorship, it did recognize its obligation to investigate previous violations of human rights, and it established a Truth Commission to verify the facts and to publish its results. As a measure of reparation, ex-President Aylwin asked for forgiveness, on behalf of the State of Chile, from the relatives of the victims. Moreover, the ex-President issued a public protest over the decision of the Supreme Court which ruled that the amnesty decree-law must be applied so as to suspend any investigation of the facts.[FN2] The democratic Government, invoking its inability to amend or annul the amnesty decree-law and its obligation to respect the decisions of the Judiciary, argued that the measures it had already taken were both effective and sufficient to comply with the obligations of Chile under the Constitution, and that these measures rendered any further action unnecessary.

[FN2] President Aylwin stated that: "Justice also demands that we clarify the whereabouts of those who have disappeared, and that we determine individual responsibilities. On the first point, the truth as established in the report (of the Commission for Truth and Reconciliation) is incomplete, since in most of the cases where prisoners disappeared or were executed without

their bodies' being returned to their families, the Commission had no means to locate their whereabouts."

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42. The petitioners, while they recognize the efforts made by the Government, maintain that those efforts were neither sufficient nor effective, and that the Government is under a permanent obligation to conduct a full and complete investigation of the facts of the case, establish responsibility and prosecute the parties guilty of past violations of human rights.

43. The Commission notes that, as has been demonstrated in the preceding section, the adoption of the self-amnesty decree-law was in conflict with the provisions of the Chilean constitution in force at the time it was issued. Moreover, regardless of the legality or constitutionality of the laws under the Chilean Constitution, the Commission is competent to examine the legal effects of a legislative, judicial or any other kind of measure to the extent that it is incompatible with the rights and guarantees protected under the American Convention.[FN3]

[FN3] Inter-American Court of Human Rights, OC-13 of 16 July 1993, in which it states, "the Commission is competent, under the terms of the attributes conferred on it by Articles 41 and 42 of the Convention, to declare any rule of Domestic Law of a State Party to be in violation of the obligations that the State assumed in ratifying the Convention" (Resolutory Part I).

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44. In its decision relating to international responsibility regarding the application and enforcement of laws that violate the Convention (Articles 1 and 2 of the Convention), the Court declared that: "as a result of this power, the Commission may recommend that the State revoke or revise the offending rule, and in order to make such a recommendation it is sufficient that the rule have come to the Commission's attention by one means or another."[FN4]

[FN4] Inter-American Court of Human Rights, International responsibility for adopting and enforcing laws that violate the Convention (Articles 1 and 2 of the American Convention on Human Rights), Advisory Opinion OC-14 of 9 December, 1994, paragraph 39.

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45. Article 2 of the Convention establishes the duty of States Parties to adopt "such legislative or other measures as may be necessary" to give effect to the rights and freedoms enshrined in the Convention. Therefore, the Commission or the Court is empowered to examine--under the terms of the Convention-- internal laws that are alleged to suppress or violate the rights and freedoms enshrined therein.[FN5]

[FN5] Inter-American Commission on Human Rights, Annual Report 1992-1993, Report 29/92, paragraph 32.

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46. In examining this matter, it is important to consider the nature and severity of the alleged crimes that were covered by the amnesty decree. The military government that ruled the country from 11 September 1973 until 11 March 1990 conducted a systematic policy of repression that resulted in thousands of victims of “disappearances”, summary or illegal executions and torture. The Commission, in referring to the practices of that military government, stated that:

... that Government (had) used virtually every known means of physical elimination against dissidents, including: disappearances, summary executions of individuals and groups, executions decreed in trials without due process, and torture.[FN6]

[FN6] Inter-American Yearbook on Human Rights/Anuario Interamericano de Derechos Humanos, 1985, Martinus Nijhoff Pub., 1987, page 1063.

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47. Some of these crimes were deemed sufficiently serious that they have been used to justify the adoption, in various international instruments, of measures specifically aimed at avoiding impunity, including universal jurisdiction and the removal of all time limitations with respect to prosecuting those crimes.[FN7]

[FN7] Both the Inter-American Convention to Prevent and Punish Torture and the Inter-American Convention on Forced Disappearance of Persons establish universal jurisdiction over the crimes in question (Article 11 and Articles V and VI respectively.) The Inter-American Convention on Forced Disappearance of Persons also establishes, in Article VII, that there should be no applicable statute of limitations, or if this is not possible, that any periods of limitation should be those applicable to the gravest crimes.

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48. With respect to disappearances, the General Assembly of the Organization of American States has declared that ".. The forced disappearance of persons in America is an affront to the conscience of the whole hemisphere, and constitutes a crime against humanity."[FN8] In its decision of 1988 in the case of "Velásquez Rodríguez" the Inter-American Court noted that international practice and doctrine have on many occasions deemed disappearances to be a crime against humanity.[FN9] The Inter-American Convention on the Forced Disappearance of Persons reaffirms in its preamble that “the systematic practice of forced disappearances constitutes a crime against humanity."[FN10] The social necessity to clarify and investigate such crimes cannot be compared with that of a mere common felony.[FN11]

[FN8] Res. AG/RES. 666 (XII-0/83).

[FN9] The Velásquez Rodríguez case, Judgment of 29 July 1988, Series C, No. 4, paragraph 153.

[FN10] Inter-American Convention on Forced Disappearance of Persons, Resolution adopted at the Seventh Plenary Session, 9 June 1994. OAS/Ser.P AG/doc.3114/94 rev.

[FN11] See: AG/RES. 443 (IX-0/79); 742 (XIV-0/84); 950 (XVIII-0/88); 1022 (XIX-0/89) and 1044 (XX-0/90) and IACHR, Annual Reports 1978; 1980/81; 1981-82; 1985/86; 1986/87 and special reports, such as that on Argentina (1980), Chile (1985) and Guatemala (1985), all of which were approved by the General Assembly.

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a) The question of the Self-Amnesty Decree-Law

49. The Commission has on a number of occasions considered the question of amnesties, in relation to complaints against States Parties to the American Convention that, in searching for a mechanism to restore peace or achieve national reconciliation, have resorted to amnesties, at the expense of groups of people among whom were many innocent victims of violence, who have thus seen themselves deprived of their right to due process for their just complaints against persons who had committed excesses and acts of barbarism against them.[FN12]

[FN12] See Annual Report of the Inter-American Commission on Human Rights 1985-1986, page 204.

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50. The Commission has repeatedly stated that the application of amnesties renders ineffective and worthless the obligations that States Parties have assumed under Article 1.1 of the Convention, and thus constitute a violation of that article and eliminate the most effective means for protecting such rights, which is to ensure the trial and punishment of the offenders.[FN13]

[FN13] Inter-American Commission on Human Rights, Reports 28/92 (Argentina) and 29/92 (Uruguay).

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51. What is at issue here, as the petitioners have made perfectly clear, is not the violations of human rights involved in the illegal detention and disappearance of the 70 persons named in their complaint, a deed committed by agents of the State of Chile during the previous military regime, but more fundamentally two problems: A) failure to revoke--and hence allowing to remain in force--the amnesty decree-law 2191 that was issued by that military government, but which has remained in force under the democratic Government, even after Chile ratified the American Convention and assumed the commitment to comply with it; and B) failure to investigate, to identify the responsible parties and to prosecute the authors of those deeds, which failure began during the military government, and has continued during the democratic and constitutional Government.

52. The democratic Government of Chile recognized the close relationship that exists in this case between amnesty and impunity, and therefore issued Law No. 19.123, which offers compensation to the families of the victims of human rights violations, and treats as a single act

the violation of the victims' rights, from the time they were seized until the time justice was denied.

53. The deeds alleged against the democratic Government relate, on one hand, to non-compliance with the obligations assumed by the State of Chile to adapt its domestic legal standards to the precepts of the American Convention, which non-compliance violates Articles 1.1 and 2; and on the other hand to its actions, which imply the denial of justice for the 70 disappeared persons named in the complaint, which violates Articles 8 and 25 in connection with Article 1.1.

54. The Commission has taken note that the democratic Government approached the Supreme Court in March 1991, seeking that it do justice to the cases of the disappeared persons, and that it rule that the self-amnesty in force should not and could not prevent the conduct of a legal investigation to determine the corresponding responsibilities; the Commission has also noted that the Government vetoed a law that would have added to the amnesty.

55. Not only does the Government of Chile agree with the petitioners with respect to the violation of rights represented by Decree Law 2191, it also considers that in addition to the articles cited by the petitioners in support of their petition, the Commission should also take account of the provisions of Article 8 paragraph 1, which guarantees the right of every person to be heard before a competent, independent and impartial tribunal, for the determination of his rights.

56. Special recognition is merited by the creation of the National Commission for Truth and Reconciliation, and to the work that that Commission has done in compiling files on violations of human rights and on the disappeared prisoners, the report from which specified the victims--including the cases of the 70 persons included in the complaint--and the efforts to establish their whereabouts and the measures of compensation for each of them; it recognized that the cases of those persons constitute serious violations of fundamental rights, and that agents of the State were involved in those violations; and it recognized them, in the absence of knowledge of their whereabouts, as "disappeared prisoners."

57. Similar recognition is merited for law No. 19.123, an initiative of the democratic Government, which granted to the families of the victims: a) a single life-time pension in an amount no less than the average compensation for a family in Chile; b) a special procedure to declare the victims as presumed dead; c) special attention by the State with respect to health, education and housing; d) forgiveness of education, housing, tax and other debts owing to state agencies; and e) exemption from compulsory military service for the children of the victims.

58. Nevertheless, such measures are not sufficient to guarantee respect for the human rights of the petitioners, in accordance with the provisions of Articles 1.1 and 2 of the American Convention on Human Rights, as long as they are denied the right to justice.

b) The denial of justice

59. The violation of the right to justice, and the consequent impunity that is created in the present case, constitutes a chain of acts that began, as it has been established, when the military government issued, in its own favor and that of its agents who committed violations of human rights, a series of rules designed to form a complete legal bulwark of impunity, beginning formally in the year 1978 with the military government's Decree-Law No. 2191 on self-amnesty.

60. The democratic Government has joined in condemning the self-amnesty decree-law, and has told this Commission that: "the constitutional Government cannot but agree with the petitioners on the nature of Decree-Law No. 2191 of 19 April 1978, which sought to exonerate responsibility for the most serious crimes committed in our history."

61. Consequently, the Chilean State, through its Legislative Power, is responsible for failure to amend or revoke the de facto Decree-Law No. 2191 of 19 April 1978, and is thereby in violation of the obligations it has undertaken to adjust its laws to the precepts of the Convention, pursuant to Articles 1.1 and 2.

c) Violation of the right to a fair trial (Article 8)

62. It is alleged that the legal consequences of the self-amnesty are incompatible with the Convention, since they transgress on the right of the victim to a fair trial, as guaranteed in Article 8.

63. That article protects the right of the accused to a fair trial "in the substantiation of any accusation of a criminal nature made against him...". The State has the duty to provide effective recourse (Article 25), which must be "substantiated in accordance with the rules of due legal process (Article 8.1).[FN14] It is important to note that in many of the criminal law systems of Latin America, the victim has the right to bring charges in a criminal action. In systems such as that of Chile, which permit this, the victim of a crime has the fundamental right to turn to the courts.[FN15] This right is essential to activate the criminal process and to move it forward. The amnesty decree clearly affected the right of the victims, which is recognized in Chile, to launch criminal action before the courts against those responsible for violations of their human rights.

[FN14] Inter-American Court of Human Rights. Velásquez Rodríguez case, Preliminary Exceptions; Decision of 26 June 1987, paragraph 91.

[FN15] Code of Civil Procedure, Chile, Title II, "Criminal Action and Civil Action in Criminal Trials," Articles 10/41.

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64. Even if this were not the case, since the crimes in question here are public crimes, that is to say they can be prosecuted ex officio, the State has the obligation to investigate them, an obligation that can be neither delegated nor renounced. Thus, in any case, the Chilean State is empowered to take punitive action and is obliged to press forward with the various procedural stages, in fulfillment of its duty to guarantee the right to justice for the victim and his family. This task must be assumed by the state as its own legal duty, not as a step taken by private

interests that depends upon the initiative of the victim or his family or upon their offer of proof.[FN16]

[FN16] Inter-American Court of Human Rights. Velásquez Rodríguez case, Judgment of 29 July 1988, paragraph 177.

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65. The petitioners allege furthermore that the Amnesty Decree-Law prevented the families of the victims from seeking reparations in the civil courts. Article 8 provides that:

Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law...for the determination of his rights and obligations of a civil, labor, fiscal or any other nature.

66. In Chile, the ability to bring civil action is not necessarily linked to the results of the criminal proceedings. Civil charges, however, must be brought against a specified person in order to establish the responsibility for the alleged deeds and to determine the payment of compensation. The failure of the state to conduct an investigation made it virtually impossible to establish any such responsibility before the civil courts. Notwithstanding the fact that the Supreme Court stressed that civil and criminal proceedings are independent,[FN17] the manner in which the amnesty was applied by the courts clearly affected the right to seek reparations in the civil courts, by making it impossible to individualize or identify those responsible.

[FN17] Supreme Court of Chile. Decision on recourse of inapplicability of Decree‑Law 2191, 24 August 1990, paragraph 15. Same Court. Decision on recourse of clarification of 28 September 1990, paragraph 4.

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67. The de facto Decree-Law 2191, as it was applied and interpreted by the courts of Chile, prevented the petitioners from exercising their right to a fair trial to determine their civil rights, as guaranteed in article 8.1 of the Convention.

d) Violation of the right to judicial protection (article 25)

68. The petitioners claim that the victims and their families were deprived of their right to effective recourse against the violation of the their rights, as protected in Article 25 of the Convention.

69. The Inter-American Court of Human Rights has ruled that states have the legal duty to provide domestic recourse. On this point, the Court stated that:

Under the Convention, States Parties have an obligation to provide effective judicial remedies to victim of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of the process of law (Art. 8(1), all in keeping with the general obligation of such

States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Art. 1).[FN18]

[FN18] Inter-American Court of Human Rights. Velásquez Rodríguez case, Preliminary Exceptions, paragraph 91.

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70. The Court went on to establish that: "Adequate domestic remedies are those which are suitable to address an infringement of a legal right."[FN19]

...the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress.[FN20]

[FN19] Inter-American Court of Human Rights. Velásquez Rodríguez case, Judgment of 29 July 1988, paragraph 64.
[FN20] Inter-American Court of Human Rights. OC-9/87, paragraph 24.

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71. The self-amnesty was a general procedure by which the State refused to prosecute serious crimes. Moreover, because of the way it was applied by the Chilean courts, the decree not only prevented the possibility of prosecuting the authors of the human rights violations, but also ensured that no accusation could be brought, and that the names of the responsible parties (beneficiaries) would not be known, so that, legally, those persons were considered as if they had never committed any illegal act at all. The amnesty decree-law rendered the crimes legally without effect, and deprived the victims and their families of any legal recourse through which they might identify those responsible for violating their human rights during the military dictatorship, and bring them to justice.

72. In promulgating and enforcing the de facto Decree-Law 2191, the Chilean State failed to guarantee the right to judicial protection as stipulated in Article 25 of the Convention.

e) Failure to fulfill the duty to investigate

73. The Inter-American Court of Human Rights, in its interpretation of Article 1.1 of the Convention, has ruled that "The second obligation of the States Parties is to 'ensure' the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention."[FN21] The Court then devoted several paragraphs to analyzing this concept:

What is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the Government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible."[FN22] "The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry-out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation..."[FN23] "If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction."[FN24] With respect to the duty to investigate, the Court has stated that the investigation "...must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government."[FN25]

[FN21] Inter-American Court of Human Rights. Velásquez Rodríguez case, Decision of 29 July 1988, paragraph 166.
[FN22] Idem., paragraph 173.
[FN23] Idem., paragraph 174.
[FN24] Idem., paragraph 176.
[FN25] Idem., paragraph 177.

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74. The National Commission for Truth and Reconciliation established by the democratic Government to investigate previous human rights violations addressed a good portion of the total number of cases, and granted reparations to the victims or their families. Yet notwithstanding the investigations conducted by that Commission into cases of violation of the right to life, the victims of other violations, including torture, were deprived of any legal recourse and of any other type of compensation.

75. Moreover, that Commission was not a judicial body and its work was limited to establishing the identity of the victims whose right to life had been violated. Under the terms of its mandate, the Commission was not empowered to publish the names of those who had committed the crimes, nor to impose any type of sanction on them. For this reason, despite its important role in establishing the facts and granting compensation, the Truth Commission cannot be regarded as an adequate substitute for the judicial process.

76. The Truth Commission concluded in its report as follows:

From the strictly preventive viewpoint, this Commission believes that, as an indispensable element for achieving national reconciliation and avoiding the repetition of the deeds that have occurred, the State must exercise fully its powers of prosecution. Human rights can only be effectively protected under the true rule of law. And the rule of law presupposes that all citizens are subject to the law and to the courts of justice, which involves the application of the penalties

provided in criminal legislation, on an equal basis, to all those who violate the standards that govern respect for human rights."[FN26]

[FN26] Rettig Report. February 1991, Volume 2, page 868.

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77. The Government's recognition of responsibility, its partial investigation of the facts and its subsequent payment of compensation are not enough, in themselves, to fulfil its obligations under the Convention. According to the provisions of Article 1.1, the State has the obligation to investigate all violations that have been committed within its jurisdiction, for the purpose of identifying the persons responsible, imposing appropriate punishment on them, and ensuring adequate reparations for the victims."[FN27]

[FN27] Inter-American Court of Human Rights, Velásquez Rodríguez case, Judgment of 29 July 1988, paragraph 174.

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78. In sanctioning the de facto Decree-Law 2191 on self-amnesty, the State of Chile failed to comply fully with the duty stipulated in Article 1.1 of the Convention, and violated to the prejudice of the petitioners the human rights recognized by the American Convention.

f) The international responsibility of the State

79. What is at issue in this case is not the responsibility of the Government of Chile or of the other organs of public authority, but the international responsibility of the Chilean State.

80. During the proceedings under this case, it has been demonstrated, and the Government has at no time denied, that there was both active and passive involvement of agents of the Chilean State as authors and perpetrators of the deeds alleged by the petitioners.

81. The Government is in agreement that Decree 2191 is contrary to law; it recognizes the strict relationship between amnesty and impunity; it admits that the successive acts committed in violation of the right to justice represented a single and continuous act in violation of human rights, from the time the victims were seized until justice was denied, and has stated that the amnesty decree-law "represents within a single act a policy of massive and systematic violations of human rights that, in the cases of forced disappearance, begins with the abduction of the victim, continues with hiding him, then his death, persists with denial of the deed and concludes with the amnesty granted to public agents."[FN28]

[FN28] Government of Chile. Note of 20 May 1994, page 5, paragraph 17.

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82. The Government of Chile maintains that, as an organ of the Executive Power, it cannot be held responsible or liable for any of the violations alleged by the petitioners, because, with respect to the self-amnesty, the democratic Government has never decreed an amnesty law; and with respect to the revocation of that law, because it is impossible to do so, for the reasons stated; that this same limitation exists with respect to adapting its internal standards to those of the American Convention on Human Rights; that with respect to the application of the amnesty it can act only within the bounds of law and the Constitution which determine its competence, responsibilities and capacities.

83. The fact that Decree-Law 2191 was promulgated by the military regime cannot lead to the conclusion that it is impossible to separate that decree and its legal effects from the general practice of human rights violations of that time. While it is true that the Decree-Law was issued during the military regime, it continues to be applied whenever a complaint is brought before Chilean courts against an alleged violator of human rights. What has been denounced as incompatible with the Convention is the continuous legal consequence of the Decree-Law on self-amnesty.[FN29]

[FN29] See also, Inter-American Commission on Human Rights, Reports 28/92 and 29/92.

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84. While the Executive, Legislative and Judicial powers may indeed be distinct and independent internally, the three powers of the State represent a single and indivisible unit which is the State of Chile and which, at the international level, cannot be treated separately, and thus Chile must assume the international responsibility for the acts of its public authorities that violate its international commitments deriving from international treaties.[FN30]

[FN30] Brownlie: "Principles of Public International Law". Clarendon Press. Oxford, 1990, 4º ed. pages. 446/52. Benadava: "Derecho Internacional Público". Ed. Jurídica de Chile, 1976, page. 151.

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85. The Chilean State cannot under international law justify its failure to comply with the Convention by alleging that the self-amnesty was decreed by a previous government, or that the abstention and failure of the Legislative Power to revoke that Decree-Law, or the acts of the Judicial Power confirming its application, have nothing to do with the position and responsibility of the democratic Government, since the Vienna Convention on the Law of Treaties provides in Article 27 that a State Party cannot invoke the provisions of its domestic law as a justification for non-compliance with a treaty.

86. The Inter-American Court has ruled that "under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law."[FN31]

[FN31] Inter-American Court of Human Rights. Velásquez Rodríguez case, Judgment of 29 July 1988, para. 170.

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87. The responsibility for the violations caused by the de facto Decree-Law 2191, which was promulgated by the military regime that seized power in an arbitrary and illegal manner, which was not revoked by the current Legislative power, and which is still applied by the Judicial power, lies squarely with the State of Chile, regardless of the regime that issued it or the branch of the State that applied it or made possible its application. There can be no doubt whatever that the Chilean State bears the international responsibility for deeds that, while they may have occurred under the military government, have still not been investigated or punished. Consistent with the principle of the continuity of the State, international responsibility exists independently of changes of government. In this respect, the Inter-American Court of Human Rights has said: "According to the principle of the continuity of the State in international law, responsibility exists both independently of changes of government over a period of time and continuously from the time of the act that creates responsibility to the time when the act is declared illegal. The foregoing is also valid in the area of human rights although, from an ethical or political point of view, the attitude of the new government may be much more respectful of those rights than that of the government in power when the violations occurred."[FN32]

[FN32] Idem., paragraph 184.

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88. The following facts confirm the failure of the State of Chile to comply with the provisions of Articles 1 and 2 of the Convention: Decree-Law 2191 issued by the military dictatorship that ruled Chile between 1973 and 1990 has not been revoked by the legislative Power, but has remained in force; that internal legislation of Chile has not been adjusted to reflect the standards of the Convention; and that legislation continues to be applicable to judicial proceedings now underway, as declared by the current Judicial Power.

89. The failure to revoke the de facto Decree-Law upon ratification of the Convention, the failure to amend internal standards so as to give effect to the Convention within Chile, and the application of that Decree-Law to the case in question, by the Legislative and Judicial powers according to their respective competencies, mean that the Chilean State stands in violation of the Convention.

90. While the self-amnesty was promulgated prior to the inauguration of the democratic Government and the ratification of the Convention, the responsibility attributable to the State of Chile for this question derives form the fact that its internal legislation has not been adapted to the terms of the Convention and that, having been declared [in an arbitrary manner] constitutional by the Judicial Power, its effects have been maintained over time, as validating the arbitrary act that violated human rights.

91. It is important to note that a representative of the regime installed by the military action that overthrew President Allende declared before the United Nations Human Rights Committee that the Covenant on Civil and Political Rights has been in force in Chile since 1976.[FN33]

[FN33] See: Committee, 4º Session. Review of reports submitted by States Parties ...Initial Reports.... Chile. CCPR/C/1Add. 25, page 48, 27 April 1976.

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92. It should be noted as well that, according to Article 5.2 of the Political Constitution of Chile, the courts of Chile are bound to reconcile international and national law in their decision.[FN34]

[FN34] See: Detzner: "Tribunales chilenos y Derecho Internacional de los Derechos Humanos". Comisión Chilena de Derechos Humanos/Academia de Humanismo Cristiano. Santiago, 1988. Capítulo IV, page 182.

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93. The States Parties to the Convention assume, as States, the responsibility and duty to respect, enforce and guarantee all of the rights and freedoms recognized therein for all persons subject to their jurisdiction, and to change or amend their legislation to give effect to the full and free exercise of those rights and freedoms. By failing to fulfill this commitment, the Chilean State has infringed Articles 1 and 2 of the Convention.

VII. FINAL PROCEEDINGS UNDER THE PRESENT CASE

94. During its 92nd Special Session held between 29 April and 3 May 1996, the Commission adopted Report 24/96, which was transmitted to the Government of Chile with the request that it submit any observations it deemed pertinent within a period of 60 days of that transmission.

VIII. RESPONSE OF THE GOVERNMENT OF CHILE

95. On 30 September 1996, the Government of Chile transmitted its response to the Commission, in which it stated the following:

96. The Government of Chile reiterates the recognition it accords to the international system for the protection of human rights, both at the international and regional level, and contributing to the reinforcement and effectiveness of that system in defence of the individual is one of the goals of Chilean foreign policy. As a consequence of that recognition, the State of Chile - once it was restored to democracy - has signed important international instruments in this regard, including the American Convention on Human Rights of 1969 and the Optional Protocol of the International Covenant on Civil and Political Rights of 1966.

97. In this connection, our country attaches special significance to the inter-American system for the protection of human rights, and in particular the work of the Inter-American Commission

on Human Rights. Consequently, it has attempted to promote and support the various initiatives directed at strengthening that system, specifically its basic organs, i.e. the Commission and the Inter-American Court of Human Rights.

98. In its report, the Inter-American Commission does not question the attitude of the democratic governments of Chile, since it was not they who promulgated decree-law No. 2191 of 1978 on amnesty, nor have they issued any new legal rules that would impede the investigation or prosecution of the deeds in question by the Courts of Justice.

99. The Inter-American Commission is aware that the democratic Government of Chile does not share the view adopted by the Supreme Court of Chile with respect to the interpretation and scope of the amnesty decree-law, but that it must nevertheless, for both constitutional and international reasons, preserve the independence of the judiciary and guarantee that its rulings are given legal effect.

100. The Government of Chile appreciates the positive light in which the Inter-American Commission has viewed the efforts made to establish the truth, to enforce justice and to provide reparations in the case of the most serious violations of human rights, through the work of the National Commission for Truth and Reconciliation and subsequently through the National Corporation for Reparations and Reconciliation.

101. It is important to reiterate that the democratic governments that followed the military regime fully support the criticisms that have been brought against the amnesty decree-law of 1978, and that they have never promulgated any legal rules that would impede an investigation of the serious human rights violations that occurred in the past. On the contrary, they have sponsored legal initiatives to establish the truth of what happened in the case of persons who were executed or disappeared at the hands of agents of the State, with a view to obtaining justice and reparation wherever possible.

102. With respect to the legislative amendment measures that the democratic Government has undertaken, the Inter-American Commission must be aware of the difficulties that this matter has posed for the Executive Power, as a result of the peculiar characteristics of the process of transition from an autocratic to a democratic regime in Chile. As is generally known, the Senate, the upper chamber of the Chilean Congress, is not composed in its entirely by members who have been democratically elected, but has a significant number of senators appointed by the former military regime. This fact has the undeniable political effect of distorting the popular will and preventing progress in the reform of democratic institutions, including efforts to amend or revoke the decree-law on amnesty of 1978.

103. It should be noted that, in full respect for the rule of law and the independence of the various branches of state power, the Government has adopted certain initiatives intended to adapt the country’s domestic criminal justice system so as to ensure that the courts have the tools necessary to proceed with the investigations until the truth is established, and to accept civil suits brought under articles 279 bis, 413 and 421 of the Code of Criminal Procedure, consistent with the international treaties that Chile has ratified and that are currently in force.

IX. CONCLUSIONS

104. On the basis of the consideration presented in this report, the Commission has arrived at the following conclusions:

105. The action by which the military regime that had seized power in Chile issued the 1978 Decree-Law No. 2191 declaring amnesty for itself is incompatible with the provisions of the American Convention on Human Rights, which was ratified by Chile on 21 August 1990.

106. The judgment of the Supreme Court of Chile, rendered on 28 August 1990, and its confirmation on 28 September of that year, declaring that Decree-Law 2191 was constitutional and that is enforcement by the Judiciary was mandatory although the American Convention on Human Rights had already entered into force in Chile, violates the provisions of Articles 1.1 and 2 of that Convention.

107. The judicial rulings of definitive dismissal issued in the criminal charges brought in connection with the detention and disappearance of the 70 persons in whose name the present case was initiated, not only aggravated the situation of impunity, but were also in clear violation of the right to justice pertaining to the families of the victims in seeking to identify the authors of those acts, to establish the corresponding responsibilities and penalties, and to obtain legal satisfaction from them.

108. With respect to the 70 persons in whose name the present case has been brought, the State of Chile has failed to fulfill its duty to recognize and guarantee the rights enshrined in articles 8 and 25, in relation to Articles 1.1 and 2, of the American Convention on Human Rights, to which Chile is a State Party.

109. The State of Chile has not complied with the standards contained in Article 2 of the American Convention on Human Rights, by virtue of having failed to amend its legislation on amnesty to reflect the provisions of that Convention. Without prejudice to that fact, the Commission views positively the initiatives by which the Government has attempted to have the competent bodies adopt legislative or other measures in accordance with prevailing constitutional and legal procedures as needed to give effect to the right of the persons mentioned to obtain justice.

X. RECOMMENDATIONS

110. For the reasons explained above, the Inter-American Commission on Human Rights, consistent with the analysis of the facts and of the international standards that have been invoked,

DECIDES:

111. To recommend to the State of Chile that it amend its domestic legislation to reflect the provisions of the American Convention on Human Rights, so that violations of human rights by the "de facto" military government may be investigated, with a view to identifying the guilty

parties, establishing their responsibilities and effectively prosecuting them, thereby guaranteeing to the victims and their families the right to justice that pertains to them.

112. To recommend to the State of Chile that it enable the families of the victims to whom the present case refers to be effectively compensated for the damages inflicted.

112. To publish the present report in the Annual Report to the General Assembly of the OAS, pursuant to Article 48 of its Regulations and 51.3 of the Convention, because the Government of Chile did not adopt measures to correct the situation denounced within the time period.

CONCURRING VOTE OF COMMISSIONER

DR. OSCAR LUJÁN FAPPIANO

I agree in full with the report that the Commission has prepared. I wish merely to make the following additions to the “preliminary considerations” contained in chapter VI, part "A)" of that report:

BY WAY OF INTRODUCTION

1. It is worthwhile emphasizing that the role of the Commission, in analyzing the question brought for its consideration, consists in determining the sense of the standards in the American Convention according to the interpretative methods of juridical science, and that in this work of the Commission there is no place for ideological connotations, which it does not profess, nor for any partiality in favor of, or any bias against, any government, persons or group of persons, which it does not entertain.

THE QUALITY OF THE AUTHORITIES THAT DECREED THE AMNESTY

2. In light of the foregoing, the question is to establish, at the outset, whether the so-called “amnesty law” constitutes an arbitrary act of the authorities that arose upon the military overthrow of the constitutional government of Dr. Salvador Allende, and whether for that reason those authorities had no right or legitimacy, since they were neither elected nor appointed by any legitimate means, but were installed in power by force, after the legal government had been deposed in violation of the constitution. In this case, in the strict application of juridical orthodoxy, we are dealing with a “usurper government”.

3. In fact, although they are commonly known under the generic term of “de facto” governments, there are two kinds of illegal governments: de facto and usurper. The first is a government which, while it may not have been appointed under the terms of the constitution and prevailing laws, acts “under a veneer of legitimacy” because its authority derives, seemingly, from a regular appointment or election. The second, on the other hand, lacks all legitimacy, since it was neither elected nor appointed in any manner, but was installed in power by force.[FNi]

[FNi].1.Constantineau: "Tratado de la doctrina de facto". Ed. Depalma. Bs.As., 1945. To. I, pp. 31 ff. Antokoletz: "Tratado de derecho constitucional y administrativo". Bs.As., 1933. Vol.I, p. 60.

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4. A government de facto is not a government de jure, because it is outside or contrary to law, because it has no legal basis and because if a State has taken to itself a constitution, then anything that departs therefrom is illegal. It is consistent with neither the letter nor the spirit of a constitution to overthrow a duly instituted government. The installation of a de facto government is the product of force rather than of consent, which of course causes no compunctions to those who regard might as the source of all right, and who see the “rule of law” and the “constitutional state" as merely “schemes” that will collapse in the face of the “realism” of a dictatorship, such as those that have plagued our hemisphere.[FNii]

[FNii].Cf.: Bielsa: "Régimen de facto y ley de acefalía". Ed. Depalma. Bs.As., 1963. pp. 26/30.

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5. But to those who would argue thus, we may reply with the words of Bluntschli: "Just as they recognize no rights other than those of their momentary triumph, so they admit no error other than the overthrow itself. In their eyes, any rebellion deserves to be punished if it fails, but is perfectly legal if it succeeds. Any usurpation they will condemn if it collapses in the attempt, just as they will recognize any that achieves its objective. The only standard in their eyes is that of change, even when it comes to law. They allow themselves to be swept along by opinion and they change their color and loyalties whenever they feel the mood shifting. They would have us believe that they are defending the status quo, but in reality they are destroying it. They pride themselves on their ability to bring about real transformation, and yet they concern themselves only with the immediate business at hand. They have no ethical or intellectual concept of law."[FNiii]

[FNiii].Antokoletz: op./loc. cit.

ILLEGAL GOVERNMENTS AND THE INVALIDITY OF THEIR ACTS

6. The acts of a usurper have no juridical value, whatever their nature. We cannot speak here of “objective legality”, since the mere observance of the forms of “true legality” is not sufficient if the usurper lacks the constitutional authority that would give him legal standing to act. Nor can we speak of laws or “decree-laws” as such, and much less can we speak of these as acts of “delegated legislation”, since the Congress did not, and could not, delegate anything to a de facto regime.[FNiv]

[FNiv].See Bielsa: "Régimen"..., cit. pp.17; 23; 24, n.5; 35 y ss. Id.: "Estudios de derecho público". Ed. Depalma. Bs.As. 1952. To. III, pp. 431/78.

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7. Not even for the laudable goal of preserving juridical security can we place on an equal footing the constitutional legality of a de jure government with the authoritarian and unconstitutional illegality of a usurper government, whose very existence is the fountain of juridical insecurity. To accord any such recognition would be to place a seal of approval on such governments and become their accomplice, whereas we should steadfastly repudiate them in defence of the rule of law, constitutional order, commitment to democracy and the principle of the sovereignty of the people, based on the full respect of human rights. If those who collaborate with such governments are assured of impunity for their conduct under a usurping and illegitimate regime, then there will be no difference between good and evil, between legal and illegal, between constitutional and unconstitutional, between right and wrong, between democratic and authoritarian, and there would be no reason to refuse to be an accomplice of such illegitimate regimes. What juridical security can we hope for if we place on an equal footing "de jure" rule - which means basing our security on the constitution - and the "de facto" rule of the usurpers who have disrupted and violated that constitution?

8. We cannot give the stamp of legitimacy to something that owes its very existence to the trampling of legitimacy.

9. We cannot allow that solid line to be erased that separates constitutional rule from those who refuse to live under its system of freedoms, rights and guarantees that is the hard-won prize of so many struggles and sufferings by the men and women of our hemisphere, who have sought to live in peace and tolerance and mutual respect for our human dignity.

10. Hence, the most important point to establish is the inviolability of the juridical regime conceived as the rule of law. In the face of acts and presumptuous laws of a government imposed solely by force, the first point to make clear, without hesitation, is their glaring invalidity, their absolute nullity. They cannot be even suggested to have the slightest shred of legitimacy, since they are the unacceptable result of rebellion against the fundamental law, which is the pillar of juridical security.

11. The foregoing applies a fortiori in the present case, where the beneficiaries of the amnesty are not foreigners or third parties but integral participants in the designs of the usurper. It is one thing to proclaim the need to legitimize the acts of society as a whole, or those taken under international responsibility, when they stem from obligations that cannot be avoided without plunging the country into chaos, and it is quite another thing to extend equal treatment to acts that imply complicity with an illegitimate government. It is simply absurd to pretend that the usurper and his henchmen can invoke the principles of constitutional law, which they themselves have violated, in order to enjoy the benefits of security that are only justified and merited for those who adhere rigorously to that law. Complicity and bad faith can never be protected, even in acts that are otherwise legal. Crime does not give rise to rights.

12. We are trying here to interpret the Constitution correctly, starting from the need to invalidate any act that violates or contradicts it. We are trying to apply the weight of that law, now that it is once again fully in force. We are trying, in short, to ensure the supremacy of a

democratic regime that has recovered its full strength, which it should never have lost, and whose stability the Commission must promote and defend, because the solidarity of the American States rests on the common denominator of the “effective exercise of representative democracy” (OAS Charter, Article 3), and because “no problem that any State member might encounter can justify the disruption of a representative democratic regime” (Declaration of Managua. AG/OAS. Nicaragua, 1993).

13. To the arguments heard during the present case to the effect that it is impossible to abrogate the self-amnesty, we must respond that the now-restored constitutional order must of necessity guarantee the government the ability to fulfill its fundamental duties, free of the inconceivable limitations imposed on it by the usurper. Indeed, the whole structure would collapse if it did not. This point is consistent, for example with the doctrine of the United States Supreme Court established long ago in the case of "Horn v. Lockhardt", in 1873: "We accept that acts taken in wartime by those (Confederate) States as individual entities, through their different branches of government - executive, legislative and judicial - must be deemed, in general, to be valid and compelling, to the extent that they do not affect or tend to affect the supremacy of the national authority and of the just rights of citizens that are guaranteed by the Constitution." Along the same line of thought, the Supreme Court of Argentina held that to deny to a constitutional government the power to annul the validity of its effects would imply, directly, “a harmful limitation on its efforts to consolidate the democratic system, and moreover would mean granting it - the de facto act in question - the full validity that can only be reasonably attributed to legitimate acts of a de jure power."[FNv]

[FNv]."Gamberale de Manzur v/ U.N.R."., decision of 6 April 1989.

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14. Even the most steadfast supporters of the notion of legal continuity of the state admit the validity of actions of a de facto government only with respect to third parties, since they draw a clear distinction between the official with “plausible investiture” and the usurper with “the veneer of legitimacy”. As stated by Antokoletz, “the Anglo-American model only admits the acts of ‘de facto’ officials as valid as far as they affect the public: i.e., to the extent that they are of public benefit. It does not regard them as legitimate in themselves, nor to the extent that they benefit the illegal official. The official’s responsibility for having performed his public functions improperly does not disappear."[FNvi]

[FNvi].Antokoletz: op. citada, pp. 72/73.

AMERICAN CONSTITUTIONAL LAW

15. The constitutional law of the states of the region is concordant with this doctrine. Antokoletz points out that those systems that deem illegitimate any power not emanating from the Constitution declare all of the acts of such a power to be null. This concept of nullity is

expressly established in the constitutions of Honduras, Nicaragua, Costa Rica, Peru, El Salvador, Venezuela and Chile.[FNvii]

[FNvii].Antokoletz: op./loc. cit. in previous note.

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16. A survey that we conducted of the constitutions of member states of the Organization confirmed this statement. The thesis of nullity of the acts of a usurper is enshrined in the following constitutions: Bolivia (1967), Article 3; Costa Rica (1949), Article 10 (earlier, Article 17); Chile (1980), Articles 5 and 7; Dominican Republic (1966), Article 99; Guatemala (1985), Article 152; Honduras (1982), arts. 2 and 3; Paraguay (1992), Article 138; Peru (1993), Articles 45 and 46; Venezuela (1961), arts. 119 and 120. As a result of the reforms introduced to its text in 1994, the Constitution of Argentina has incorporated a similar provision to make explicit what had previously been known as the “unwritten clause”, as the logical consequence of the precepts in its Articles 22 and 33. In effect, the current Article 36, first paragraph, provides: “This Constitution shall take precedence even if its observance should be interrupted by acts of force against the constitutional order and the democratic system. Those acts shall be irredeemably null”.. In its following provisions, it makes the authors of such acts liable for punishment such as that reserved for the infamous “traitors of their country."

17. On the basis of the precept cited from the earlier Constitution, the Argentine Congress was able validly to revoke the so-called “self-amnesty” decreed by the military regime (law 23040), and to adopt law 23062 which, with respect to the point at issue, establishes the following: “In defence of the republican constitutional order based on the principle of popular sovereignty, no juridical validity whatsoever shall attach to any law or administrative act issued by de fact authorities who have taken power through an act of rebellion...even if they pretend to base them on powers acquired by right of revolution."

18. The 1833 constitution of Chile declares in Article 158: “Any resolution issued by the President of the Republic, the Senate or the Chamber of Deputies, in the presence or at the instigation of an army, or of a general leading an armed force, or of any group of people, whether armed or not, that would disobey the authorities, is null and void and can produce no effect whatsoever."[FNviii] The Constitution of 18 November 1928, in turn, declares similarly: "No entity, no person or group of persons may take upon itself, even under the pretext of extraordinary circumstances, any authority or rights other than those expressly conferred upon it by law. Any action in contravention of this Article is null”. Even the “constitution” issued by decree-law No. 3464 of 11 August 1980 repeats the Article of its predecessor almost letter for letter (Article 7).

[FNviii].Adopted as a precedent by J.B. Alberdi in writing the draft text of a constitution for the Province of Mendoza (Argentina).

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19. Consequently, we can say that American constitutional law is unanimous in its concept of the people's sovereignty, and therefore a de facto government is repugnant to the Constitution, and hence, the overthrow of the constitutional authorities creates no rights in favor of the seditious military leader or rebel. A fortiori, there can be no presumption to any legitimacy when the case involves not a single de facto functionary, but an entire regime that is unconstitutional, since a regime that is totally de facto is neither democratic nor republican.

20. Many centuries ago the Romans inscribed over an archway the words "Senatus Populusque Romani" to give expression to the harmonious unity of governed and governors.

21. Pursuing the line of thought upheld by the Commission in its report No. 30/93, it should be noted also that in the present case, the nullity of the acts of a usurper is a normal constitutional clause with a solid tradition in the hemisphere.[FNix]

[FNix].Case 10.804. "Ríos Montt v/ Guatemala". CIDH Annual Report 1993, p. 296, para. 29.

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22. It is also instructive to compare the jurisprudence of some of the Region's courts. The Argentine Supreme Court did not hesitate to declare the illegality of laws created by de facto governments, and to refuse to recognize in such laws those qualities that can for good reason only be attributed to legitimate acts of a de jure power. In the words of the Court,[FNx] "there can be no question as to the illegitimacy of an act dictated under the shadow of a de facto legislative power that is not instituted by our Fundamental Charter".

[FNx]."Gamberale de Manzur v/ U.N.R.", decision of 6 April 1989. Note that this pronouncement predates the constitutional reform of 1994.

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23. But above all, we must point to the transcendental judgment of the Constitutional Court of Guatemala, issued in light of the events surrounding ex-President Serrano.[FNxi]

[FNxi].See: "La Corte y el Sistema Interamericano de Derechos Humanos". Rafael Nieto Navia Editor. San José, Costa Rica. 1994, pp. 199 y ss.

PARLIAMENTARY DEBATE AS A GUARANTEE

24. Moreover, constitutional law establishes an irreplaceable procedure for formulating and adopting laws, which is in essence a guarantee that arbitrary acts, misnamed "laws", of a de facto government, drafted and issued behind closed doors, sometimes by their own beneficiaries, as in the heyday of the absolute monarchies, are absolutely and irrevocably null and void.

25. Such arbitrary acts are not subject to healthy public debate. Such debate represents not only homage to democracy, but also fulfillment of constitutional precepts dealing with the formulation and adoption of laws, and which serve as authentic guarantees of fundamental rights and freedoms, as we now see reaffirmed in the provisions of Article 23.1 of the Convention.

26. The omission of public debate, moreover, causes grave damage to the people, since it destroys their trust in the law, it undermines their sense of legality and destroys the “legal fiber” of the country, as the philosopher Vanni has put it.[FNxii]

[FNxii].Bielsa: "Régimen...", citado, pp. 36; 38; 41; 42; 46 and 68.

FUNDAMENTAL RIGHTS AND THE STATE

27. Our fundamental rights and freedoms are not extinguished by a de facto government, because they predate both the state and the constitution, which merely recognize and guarantee them, but did not create them. Thus it is an error to claim that a de facto regime has no limits on its arbitrary and unconstitutional powers, i.e. that it can proceed "de legibus solutus" [exempt from the laws], or according to the maxim of "quod principii placuit, legis habet vigorem" [What pleases the ruler has the force of law]. Hence, an amnesty dictated by a government that stands accused of grave and systematic violations of human rights and that attempts in this way to exculpate itself is just such a practice and is therefore an abuse of power.

28. In this regard, Tomuschat writes: "A regime that makes a practice of genocide loses even the appearance of legitimacy. To maintain that in certain cases we must obey a corrupt law and yield to the demands of its perpetrators, would be to make of the State a divinely inspired fetish, unstained by the most atrocious and odious acts."[FNxiii]

[FNxiii].Tomuschat: "On Resistance to Violations of Human Rights", UNESCO, 1984, p. 26.

THE INTERNATIONAL LAW OF HUMAN RIGHTS

29. This dimension is confirmed by the provisions of Article 3 of the OAS Charter, Articles XX and XXVIII of the American Declaration, the preamble to the Convention and its Articles 23.1 a and b, which cannot be suspended, according to its Articles 27.2, 29 and 32.

30. In order to convert human rights into a legal reality, the first requisite is to ensure a stable constitutional state, which embraces, in effect, two other requisites: a) for a state to be free, the people who comprise it must have the ability to choose their own destiny (the principle of self-determination), and b) the people must determine, freely and by means of generally applicable (not personal) laws, the legal system that is to establish their human rights (the rule of law).[FNxiv]

[FNxiv].Vasak: "Human Rights as legal reality." In: "The International Dimensions of Human Rights." UNESCO. Barcelona. 1984. Vol. 1, p. 27.

THE INTER-AMERICAN COURT OF HUMAN RIGHTS

31. The approach taken here accords with the judgments of the Inter-American Court of Human Rights, which has defined “laws” as “a general legal norm tied to the general welfare, passes by democratically elected legislative bodies established by the constitution, and formulated according to the procedures set forth by the constitution or the States Parties for that purpose." (OC/6, paragraph 38). It arrived at this definition on the basis of analyzing the principles of “legality” and “legitimacy” and of the democratic regime within which the inter-American system of human rights must be comprehended(OC/6, paragraphs 23 and 32), as is explicit in its OC/13, paragraph 25. For the Court, “the principle of legality, democratic institutions and the rule of law are inseparable” (OC/8, paragraph 24). Strict adherence to a democratic regime has been stressed by the Court in these terms: “Representative democracy is the determining factor in the entire system of which the Convention is a part” (OC/13, paragraph 34), and this stands in complement to its standards on “the just demands of democracy” that must guide the interpretation of the Convention, especially of those precepts that are critically related to the preservation and functioning of democratic institutions (OC/5, paragraphs 44; 67 and 69). Nor should it be forgotten that the doctrine of the Court stresses the importance of the elected legislature in guarding our fundamental rights (OC/8, paragraphs 22 and 23), and it also stresses the role of the Judiciary in reviewing the legitimacy of the acts of the Executive Power (OC/8, paragraphs 29 and 30; OC/9, paragraph 20).

THE INTER-AMERICAN COMMISSION

32. The Commission has been blazing similar trails in its work, as follows: a) when it states that the democratic context is a necessary element for the establishment of a political society in which human values can flourish freely ("Ten Years...”, p. 331); b) when it alluded to the granting of overriding powers to bodies that are not representative of the popular will (id., p. 270. Report on Panama, 1978, p. 114, paragraph 3. Annual Report 1978/80, p. 123/24, analyzing a new draft constitution for Uruguay); c) when it sets out its criteria for public participation at the drafting stage for constitutions (report on Suriname, 1983, p. 43, paragraph 41); d) when it question the validity of the plebiscite in Chile, for having been held during a time when public freedoms were suspended [Report 1978/80, page. 115]; and e) in its Report 30/93 on the case of Ríos Montt v/Guatemala.

THE UNIVERSAL SYSTEM

33. With respect to the universal system, the following should be noted: a) the Charter of the United Nations and its preamble (“We, the people of the United Nations..."), in its reference to the “free self-determination of peoples” and to "developing and encouraging respect for human rights and fundamental freedoms for all..."; b) the Universal Declaration, in its Article 29; c) The International Covenant on Civil and Political Rights and d) the statement by the Human Rights

Committee in "Ngaluba v/Zaire", paragraphs. 8.2 and 10 on the denial of the right to participate, under conditions of equality, in the management of public affairs, due to sanctions imposed on eight parliamentarians.[FNxv]

[FNxv].For a more recent, full and analytic discussion of this topic, see Cançado Trindade: "Democracia y Derechos Humanos..." in the collection: "La Corte y el Sistema Interamericano de Derechos Humanos", op. cit.

USURPER GOVERNMENTS AND DEMOCRACY

34. For the above reasons, it can be concluded that democracy and rights are inseparable terms in one and the same equation that has been postulated in the philosophy that underlies the political and institutional organization of the American States, and consequently any act taken by a usurper or de facto government is in and of itself incompatible with the letter and the spirit of the American Convention.

CHILE AND THE INTERNATIONAL TREATIES

35. We have already reviewed the Chilean constitutions as relates to the treatment they have accorded "governments" by usurpation. We have seen that even the "Constitution" promulgated by the military regime itself declares the nullity of acts of a usurper. We shall now look at another aspect of the title of this paragraph.

36. Article 27 of the Vienna Convention on the Law of Treaties was accorded special recognition by Chile at the adopting Conference. Its representative, Mr. Barros, stated: "There is nothing to prevent a state from invoking its constitution as grounds for refusing to sign a treaty, but once a state has committed itself under a treaty, it cannot subsequently attempt to circumvent its commitments by invoking its constitution, still less its ordinary national legislation."[FNxvi]

[FNxvi].See Diaz Albónico: "la Convención de Viena...", in: "Estudios". 1982. Sociedad Chilena de Derecho Internacional, pp. 147/74.

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37. Moreover, the regime that arose from the military overthrow of President Allende maintained before the Human Rights Committee that the Covenant on Civil and Political Rights had been in force in Chile since 1976.[FNxvii]

[FNxvii].See Comité, fourth session. Review of reports submitted by the States Parties... Initial reports... Chile. CCPR/C/1Add. 25, 48pp. 27 April 1976.

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38. Again, according to the provisions of Article 5.2 of the Constitution of Chile, it is a mandatory duty of the courts to reconcile international and national standards.[FNxviii]

[FNxviii].See Detzner: "Tribunales chilenos y derecho internacional de derechos humanos". Comisión Chilena de Derechos Humanos/Academia de Humanismo Cristiano. Santiago, 1988. Cap. IV. p. 182.

A FINAL WORD

39. The Commission can only applaud the efforts made in this hemisphere and around the world to anathematize, now and forever, all those who would disrupt constitutional order and overthrow democratic regimes; to affirm that in the Americas the only route to power is through direct or indirect suffrage, and not by coup d'état; and to demonstrate that constitutions and the standards they uphold are not, as some seem to believe, so weak that they will crumble at the first shout of a mob. The Commission affirms the sanctity of the principle of legality, of democratic institutions, of the rule of law and the sovereignty of the people, in full respect for human rights, since this was the reason for which it was created.

40. Reviewing the political history of our peoples brings to mind the compelling statement of Ramella: "What we have before us is a somber spectacle indeed. The destruction of institutions by de facto governments has disrupted the constitutional order, and has created a climate of disrespect for the legitimate authorities and sown scepticism about the political process in the minds of our youth."[FNxix]

[FNxix].Ramella: "Derecho Constitucional". Depalma. Bs.As. 1986, 2da. ed., p. 700.

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41. There is among our people a certain scepticism about laws and the meaning of constitutions.

42. To paraphrase Bielsa, we may say that in times such as these, when history seems to be unfolding so rapidly and unexpectedly, we must take advantage of the few lucky things that have happened to the peoples of America. America has something better to offer. There are many--the vast majority--who have remained loyal to the Constitution, to the law and to civic virtues, and who ardently desire to see democratic regimes firmly established. There are citizens of sound conduct who not only reproach transgressors, but all manifestations of mis-government, who do not lust after the trappings of power, and who do not believe that public duty means seizing power outside the law.[FNxx]

[FNxx].Bielsa: "Régimen...", cit., pp. 66/67.

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43. It is with those citizens, with those young generations of America to whom Ramella alluded, that the Commission makes its pact, and that commitment can only be fulfilled if we give an example of standing up for democracy in a way that will banish their disbelief and help to strengthen their faith in the rule of law and the constitutional state.

44. To that end, we must approach this question with our eyes firmly set on the highest statement of our principles, for a jurist, a man of law, cannot abandon a doctrine just because it has been put to ill use. The lawyers of America, at their 21st Inter-American Conference, issued a ringing call: "...In the face of the many distortions that these principles have suffered at the hands of various autocratic forms of government...we must seek to proclaim clearly and categorically that the lawyers of America stand squarely for the survival of a form of government that meets the tests of a constitutional and pluralist democracy...".[FNxxi]

[FNxxi].San Juan, Puerto Rico, 1979.

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45. Again, at the 22nd Conference, they declared: "...If we conceive of representative democracy as the system that offers the greatest respect for people's rights, then it is incumbent upon us, wherever there is a change of regime or whenever a government sets itself up in defiance of the constitution, to preserve inviolate the principle that the people are sovereign, and also that public authority must be exercised in full respect for the inherent values of human dignity.[FNxxii]

[FNxxii].Quito, Ecuador, 1981.

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46. This means that, while social upheavals cannot always be avoided, the only honest response when they do occur is to remain steadfastly loyal to the rule of law, which is the only way of life in a democratic society.

47. A former member of the Inter-American Juridical Committee, Jorge R. Vanossi, writes: "Over this long journey, the price to be paid has been very high: disregard for legality, acquiescence in autocratic lawgivers on a more-or-less frequent and more-or-less permanent basis, confusion between what is anomalous and ephemeral and what is normal and lasting, the breakdown, if you will, of a certain constitutional rigidity. The almost unthinking comparison between legislation that is 'de jure' and laws that are 'de facto' leads inevitably to identifying any 'government' by the mere fact that it makes its dictates effective (however coercively), in utter disregard for legal procedures and organs that have come to be viewed by the predominant juridical conscience as irrelevant. We must recant in this matter.... but all men of law are called upon to examine carefully all those tendencies of resigned obedience to validating doctrines, and to offer an analytic and thoughtful alternative for reformulating them so that we may avoid yet another manifestation--perhaps the most discouraging of all--of that phenomenon that Ripert referred to as 'the decline of law'."[FNxxiii]

[FNxxiii].Vanossi: "El estado de derecho en el constitucionalismo social". EUDEBA. Bs.As. 1987, pp. 468/469.

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48. And that alternative so dramatically evoked by Vanossi for escaping from the “monologue and the mausoleum” to which, in the unforgettable phrase of Octavio Paz, every dictatorship is inevitably consigned, is the one that an enlightened man of this land once opened for us: “That we here highly resolve that these dead shall not have died in vain, that this nation, under God, shall have a new birth of freedom, and that government of the people, by the people and for the people shall not perish from the earth.".[FNxxiv]

[FNxxiv]. Lincoln. Gettysburg Address.
