Institution:	Inter-American Court of Human Rights
Title/Style of Cause:	Luis Alfredo Almonacid-Arellano, Elvira del Rosario Gomez-Olivares, Alfredo Almonacid-Gomez, Alexis Almonacid-Gomez and Jose Luis Almonacid-Gomez v. Chile
Doc. Type:	Judgement (Preliminary Objections, Merits, Reparations and Costs)
Decided by:	President: Sergio Garcia-Ramirez; Vice President: Alirio Abreu-Burelli; Judges: Antonio A. Cancado-Trindade; Manuel E. Ventura-Robles; Diego Garcia-Sayan Judge Oliver Jackman informed the Court that, for reasons of force majeure, he would not take part in the deliberation and passing of this Judgment. Judge Cecilia Medina-Quiroga, of Chilean nationality, declined to take part in the deliberation and passing of this judgment.
Dated:	26 September 2006
Citation:	Almonacid-Arellano v. Chile, Judgement (IACtHR, 26 Sep. 2006)
Represented by:	APPLICANT: Mario Marquez-Maldonado

In the case of Almonacid-Arellano et al,

The Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court"), pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and Articles 29, 31, 53(2), 55, 56 and 58 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"), delivers the following Judgment.

I. INTRODUCTION TO THE CASE

1. On July 11 2005, pursuant to the provisions of Articles 50 and 61 of the American Convention, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") filed before the Court an application against the Republic of Chile (hereinafter "the State" or "the Chilean State") originating in petition No. 12.057, received at the Secretariat of the Commission on September 15, 1998.

2. The Commission filed the application in the instant case before the Court so that it decide whether the State has violated the rights enshrined in Articles 8 (Judicial Guarantees) and 25 (Judicial Protection) of the American Convention, in relation to Article 1(1) (Obligation to Respect Rights) thereof, to the prejudice of Luis Alfredo Almonacid-Arellano's next of kin. Furthermore, the Commission requested the Court to declare that the State has violated the

obligation arising from Article 2 (Obligation to Adopt Domestic Legal Remedies) of the Convention.

3. The facts set forth in the application filed by the Commission are related to the alleged failure to investigate and punish all those persons responsible for the extra-legal execution of Mr. Almonacid-Arellano, based on the Amnesty Law enacted in Chile by Decree Law No. 2.191 of 1978, as well as to the alleged lack of reparation in favor of his next of kin.

4. Furthermore, the Commission requested the Inter-American Court to order the State, under Article 63(1) of the Convention, to take the measures of reparation detailed in the application (infra para. 139). Lastly, the Commission requested the Court to order the State to pay the costs and expenses arising from the domestic legal proceedings and from the proceedings before the Inter-American System of Human Rights.

II. COMPETENCE

5. Chile has been a State Party to the American Convention since August 21, 1990, when it recognized the contentious jurisdiction of the Court. On that occasion it declared that it recognized the jurisdiction of the Court pursuant to the provisions of Article 62 of the Convention, only as regards the "events subsequent to the date on which such Instrument of Ratification was deposited, or in any case, as regards the events which took place after March 11, 1990." In its preliminary objections, the State alleged that the Court is not competent to hear the instant case (infra para. 38). Therefore, the Court shall first decide on the preliminary objections filed by the Chilean State and, if legally relevant, it shall then decide on the merits and the reparations and indemnities requested in the instant case.

III. PROCEEDING BEFORE THE COMMISSION

6. On September 15, 1998 Mario Márquez-Maldonado and Elvira del Rosario Gómez-Olivares filed a petition before the Inter-American Commission which was admitted under No. 12.057.

7. On October 9, 2002, during its 116th Session, the Inter-American Commission issued Report No. 44/02, wherein it found the foregoing petition to be admissible in relation to Articles 1(1), 8 and 25 of the American Convention. Such report was passed on the State and the petitioners on October 29, 2002.

8. On March 7, 2005, at its 122nd Session, the Commission issued Report on the Merits No. 30/05, pursuant to Article 50 of the Convention. In said report, it concluded that the State has violated the rights enshrined in Articles 8 and 25 of the American Convention, in relation to Articles 1(1) and 2 thereof, to the prejudice of Mr. Almonacid-Arellano's next of kin, and made a number of recommendations in order to repair such violations.

9. On April 11, 2005 notice was served on the State of the Report on the Merits and a two-month term was set for the State to inform the Commission of the measures adopted regarding the above recommendations. On June 24, 2005 the State requested the Commission that the term

set for filing its response be extended until July 8, 2005. The Commission granted the extension requested by the State, but up to July 1, 2005.

10. On June 20, 2005, pursuant to the provisions of Article 43(3) of the Rules of Procedure, the Commission informed the petitioners of the adoption of the Report on the Merits and of service thereof on the State, and requested them to state their position as to bringing the case before the Inter-American Court. By means of communication of June 27, 2005, the petitioners requested that the Commission submit the case to the Court.

11. On July 11, 2005, due to the failure of the State to reply regarding the adoption of the recommendations contained in the Report adopted pursuant to Article 50 of the American Convention (supra para. 8) and in compliance with Article 51(1) thereof and Article 44 of the Rules of Procedure, the Inter-American Commission decided to submit the instant case to the jurisdiction of the Court. On that same day, the State submitted to the Court its report on the measures adopted to comply with the recommendations contained in Report on the Merits No. 30/05 beyond the deadline set to that purpose (supra para. 9).

IV. PROCEEDING BEFORE THE COURT

12. On July 11, 2005 the Commission filed an application before the Court in relation to the instant case. The appendixes to the application were submitted on July 18, 2005. The Commission appointed Judicial Officer Evelio Fernández-Arévalos and Executive Secretary Santiago A. Canton as Delegates before the Court, and Ariel E. Dulitzky, Víctor H. Madrigal-Borloz, Juan Pablo Albán, and Christina M. Cerna as legal counsels.

13. On July 27, 2005, the Secretariat of the Court (hereinafter "the Secretariat"), once the application had been examined by the President of the Court (hereinafter "the President"), served said application and the appendixes thereto on the State, which was also notified of the term within which it was to answer the application and appoint its agents in the proceeding. On that same day, in compliance with the provisions of Article 35(1)(d) and (e) of the Rules of Procedure, the Secretariat served the application on Mario Márquez-Maldonado, appointed therein as representative of the alleged victim and his next of kin (hereinafter "the representative"), and informed him that a two-month term had been set for filing the brief containing the requests, arguments, and evidence (hereinafter "brief of requests and arguments").

14. On August 22, 2005 the State appointed Amira Esquivel-Utreras as Agent and Miguel González-Morales as Deputy Agent.

15. On September 26, 2005, the representative filed the brief of requests and arguments and on September 29, 2005 he filed the appendixes thereto.

16. On November 18 and 25, 2005 the State informed the Court that on October 17 of that year the Inter-American Commission had inquired the State whether "it was interested in starting a process of amicable solution."

17. On November 26, 2005, the State filed a brief with its preliminary objections, the answer to the application, and its comments on the brief of requests and arguments (hereinafter "answer to the application"). The preliminary objections raised were related to the alleged lack of ratione temporis competence of the Court to hear the instant case and to an alleged procedural violation during the proceeding of the instant case before the Commission which allegedly constituted a violation of the right of the State to be heard. On December 23, 2005 the State filed the appendixes to its answer to the application.

18. On December 8, 2005 the Secretariat, pursuant to Article 37(4) of the Rules of Procedure, granted the Commission and the representatives a term of thirty days to submit their written comments regarding the preliminary objections raised by the State (supra para. 17). The representative did not file any comments.

19. On January 6, 2006 the Commission filed its written comments on the preliminary objections raised by the State, attaching documentary evidence thereto.

20. On February 7, 2006 the Court issued an Order wherein it considered it relevant to admit the testimony of Cristián Correa-Montt, witness proposed by the State, by means of an affidavit. Furthermore, the President summoned the Commission, the representative, and the State to a public hearing which was to be held at the seat of the High Court of Justice of Brazil, Brasilia, on March 29, 2006, to hear their final oral arguments on the preliminary objections; merits, reparations, and costs in the instant case, as well as the testimony of Elvira Gómez-Olivares, proposed as witness by the representative, of Jorge Correa-Sutil, proposed as witness by the State, of Humberto Raúl Ignacio Nogueira-Alcala, proposed as expert witness by the Commission, and of Cristián Maturana-Miquel, proposed as expert witness by the State. By means of said Order, the President also informed the parties that they were entitled to submit their final written arguments regarding the preliminary objections; merits, reparations and indemnities; and legal costs and expenses until May 12, 2006.

21. On March 10, 2006 the State submitted the statement given by Cristián Correa-Montt, which had been requested by the Court (supra para. 20). On March 21, 2006, the State filed the appendixes thereto.

22. On March 16, 2006 the State informed that, for reasons beyond his will, expert witness Cristián Maturana-Miquel, summoned to give testimony before the Inter-American Court at a public hearing (supra para. 20) would be unable to go to Brasilia, wherefore he would not give testimony. Due to the foregoing, the State requested the Court that it allow the expert statement to be given by the above expert witness to be replaced by the expert statement of Alejandro Salinas-Rivera and that Mr. Maturana-Miquel be authorized to give testimony by means of an affidavit. On that same day, the Secretary, on instructions from the President, requested the Commission and the representative to submit their comments on the request made by the State.

23. On March 17, 2006 the Commission filed its comments, wherein it stated that it did not oppose the request made by the State so that Mr. Maturana-Miquel be authorized to give testimony through an affidavit. Furthermore, the Commission pointed out that the request made by the State for Mr. Salinas-Rivera to be admitted as an alternative expert witness "was not

relevant," on the grounds of the estoppel principle and the fact that the State had not filed it at the appropriate procedural stage," and considered that the proposal of Mr. Salinas-Rivera "is not a replacement, but an addition." Furthermore, the Commission stated that Mr. Salinas-Rivera "is not qualified" to give testimony, since "the alleged issue was submitted to the jurisdiction of the Inter-American System [...] when Mr. Salinas-Rivera was already working in the area of Human Rights of the Ministry of Foreign Affairs of Chile."

24. On March 17, 2006 the representative of the alleged victims filed a brief containing their comments regarding the statement given by Cristián Correa-Montt (supra para. 21).

25. On March 21, 2006 the State informed that it would withdraw the petition wherein Alejandro Salinas-Rivera was proposed "as expert witness, on the grounds that the reasons asserted by the Inter-American Commission were admissible" (supra para. 23) and proposed Jean Pierre Matus-Acuña to act as expert witness in his place. Furthermore, in its request the State insisted "that Cristián Maturana-Miquel be authorized to give his expert statement by means of an affidavit."

26. On March 22, 2006 the Commission filed its comments on the statement given by witness Cristián Correa-Montt. On that same day, it filed its comments on the request made by the State so that the expert statement of Jean Pierre Matus-Acuña (supra para. 25) be admitted, objecting to it on the grounds that it "was not a substitute statement but an addition."

27. On March 24, 2006 the President of the Inter-American Court issued an Order, whereby it was decided to accept that expert witness Cristián Maturana-Miquel give his expert statement by means of an affidavit, and that Jean Pierre Matus-Acuña be summoned to give his expert statement at the public hearing convened by the Court (supra para. 20).

28. On March 29, 2006 the above mentioned public hearing was held in Brasilia, Brazil, at which there appeared: a) for the Inter-American Commission: Evelio Fernández-Arévalos and Santiago Canton, Delegates; Víctor H. Madrigal-Borloz and Juan Pablo Albán, Counsels; b) for the Representatives: Mario Eugenio Márquez-Maldonado and Ricardo Zúñiga-Lizama, and c) for the State: Amira Esquivel-Utreras, Agent; René Ruidíaz-Pérez, First Secretary of the Embassy of Chile in Brazil; Patricio Aguirre-Vacchieri, Second Secretary of the Department of Human Rights of the Ministry of Foreign Affairs of Chile; and Virginia Barahona, legal advisor to the Department of Human Rights of the Ministry of Foreign Affairs of Chile. Also present at such hearing were Elvira Gómez-Olivares, witness proposed by the representative, and Jorge Correa-Sutil, witness proposed by the State, and Humberto Raúl Ignacio Nogueira-Alcala and Jean Pierre Matus-Acuña, expert witnesses proposed by the Commission and the State, respectively. Expert witnesses Humberto Raúl Ignacio Nogueira-Alcala and Jean Pierre Matus-Acuña tendered documentation at such public hearing. Furthermore, during the hearing the Court requested the State to forward the documentary evidence.

29. On April 19, 2006 the State forwarded the expert statement given by Cristián Maturana-Miquel.

30. On April 19, 2006 the Asociación Americana de Juristas de Valparaíso /Aconcagua (American Association of Legal Scholars of Valparaíso/Aconcagua) filed a brief as amicus curiae, attaching documentation thereto.

31. On April 28, 2006, the representative of the alleged victims filed their final written arguments, attaching documentary evidence thereto.

32. On May 2, 2006 the Commission filed its comments on the expert statement given by Cristián Maturana-Miquel by means of an affidavit. The Commission requested the Court that "the statement given by Mr. Maturana-Miquel be dismissed on the grounds that it was not in accordance with the object for which it had been requested."

33. On May 22, 2006, the State and the Commission submitted their final written arguments. The State attached documentary evidence thereto, as well as the documents requested by the Court at the public hearing (supra para. 28).

34. On June 14, 2006 the Commission challenged the appendixes to the final written arguments filed by the State. The Commission stated that "by virtue of the estoppel principle" and the fact that the State had not filed such documents at the proper procedural stage, "they were to be dismissed outright." Furthermore, the Commission requested that "should the [...] Court admit the documents that have been challenged [...], the procedural equality for the parties is to be ensured, granting each of them the opportunity to file their comments on the content of the documents submitted."

35. On June 14, 2006 the Secretariat, on instructions from the President, informed the Commission that the Court, seeking the fulfillment of the procedural equality for the parties and the principle of the adversary proceeding, always notifies the parties of all the documents filed by one of them so that they may file their comments thereon. To this purpose, the Court does not set a term, in the understanding that filing comments is a right of, but not an obligation for the interested party. In the instant case, the Secretariat forwarded the Inter-American Commission and the representative the documents tendered by the Illustrated State together with its final written arguments. The Commission was entitled to file comments on such documents, which it actually did through brief of June 14, 2006 (supra para. 34). Furthermore, the Secretariat informed the Commission that in case it wished to expand its comments, these should be forwarded to the Court as soon as possible. The Commission did not file any additional comments.

36. On July 6, 2006 the representative of the alleged victims forwarded legible copies of some of the documents filed together with their final written arguments (supra para. 31), as well as additional documents.

37. On July 27, 2006 the State filed its comments and documentary evidence attached thereto regarding the comments filed on May 2, 2006 by the Commission on the expert statement given by Cristián Maturana-Miquel (supra para. 32).

PRELIMINARY OBJECTIONS

38. In its answer to the application (supra para. 17) the State expressly stated two preliminary objections, to wit: i) the lack of ratione temporis competence of the Court to hear the instant case, and ii) the violations committed during the proceeding before the Inter-American Commission. Notwithstanding, the Court understands that another objection to the jurisdiction of the Court may be inferred from the various arguments filed by the Chilean State: the failure to exhaust the domestic remedies. Though the State did not claim this argument as a preliminary objection, the Court deems it relevant to issue a ruling on this matter in this chapter.

FIRST PRELIMINARY OBJECTION: RATIONE TEMPORIS COMPETENCE OF THE COURT

39. Arguments of the State

a) upon depositing the Instrument of Ratification of the Convention and recognizing the jurisdiction of the Inter-American Court on August 21, 1990, the Chilean State declared that its recognition of the jurisdiction of the Court refers to "the events subsequent to the date on which such Instrument of Ratification was deposited, or in any case, to events which took place after March 11, 1990;"
b) the event that gives grounds for the criminal action is the crime of murder against Mr. Almonacid-Arellano, committed on September 17, 1973, and which falls within the scope of the declaration of lack of ratione temporis competence of the Court made by the State, as such murder took place before March 11, 1990;
c) the criminal investigation is a single and ongoing unity which is permanent in time. It is a judicial proceeding which started in September 1973 and since then has been dismissed time and time again. The proceeding cannot be partitioned, divided, separated or disassociated, not even materially or formally, for it is and has always invariably and permanently been a single proceeding, the processing of which has been ongoing, as has the numbering of the case file under which it was started, and
d) the judicial actions started by the victim's next of kin after 1990 are not "independent events," a characteristic which is far from the material, formal, and legal reality.

40. Arguments of the Commission

a) various independent events and effects which started and took place after the recognition of the contentious jurisdiction of the Court by the State and which have persisted and been recurrent, and are related to the violation of Articles 8 and 25 of the Convention, can be claimed to have occurred, among them:
i) the transfer of the proceedings on December 5, 1996, to the military courts, though they were started on the grounds of ordinary crimes which do not refer to acts committed by the staff involved in the course of the official duties thereof;
ii) the failure to investigate, prosecute, and punish all those persons who were responsible for the death of Mr. Almonacid-Arellano since March 11, 1990;
iii) the judgment of January 28, 1997 rendered by the lower military court which acquitted the alleged person responsible for the death of Mr. Almonacid-Arellano;

iv) the ratification of such judgment by the Court-Martial on March 25, 1998, which further established that the 1978 Self-Amnesty Law was applicable;

v) the failure by the Military Prosecutor's Office to challenge the decision rendered by the Court-Martial on March 25, 1998; and

vi) the failure by the Supreme Court of Justice of Chile to control the constitutionality of the Amnesty Law enacted by Decree Law No. 2.191 of 1978, pursuant to the provisions of Article 80 of the Constitution;

b) these actions or omissions by judicial authorities constitute a failure by the State to comply with its obligations to conduct an effective investigation and to provide an effective remedy which punishes the accused for the commission of the crime. In all cases, there have been specific and independent violations of the Convention, which were subsequent to the recognition of the jurisdiction of the Inter-American Court, and

c) the acts in violation of the obligation of the State to adapt its legislation to the provisions of the Convention are also issues over which the Court has jurisdiction. In the specific case of laws opposing the American Convention, their ongoing effectiveness, regardless of the date of enactment thereof, is, in fact, a repetitive violation of the obligations set forth in Article 2 of the Convention. Additionally, any act in application of such law which affects the rights and liberties protected by the Convention should be deemed as an independent violation.

41. Arguments of the Representative

a) this international proceeding was not started on the grounds of the murder of Mr. Almonacid-Arellano, which occurred in September 1973, but on the grounds of the denial of justice in the investigation into said crime, which constitutes an independent violation, though related to said murder;

b) denial of justice started on September 25, 1996, when the military courts claimed to have jurisdiction over the crime of murder; it continued with Order of December 5, 1996 issued by the Supreme Court, which in deciding whether the military or civilian courts were competent to hear the instant case decided for the former; it later continued with Order of January 28, 1997 issued by the Second Military Court of Santiago, which dismissed the case, and was finally completed with Order of March 25, 1998 issued by the Court-Martial, which upheld the prior dismissal of the case. Therefore, all the events which constituted denial of justice were subsequent to March 12, 1990, and

c) the legal interest protected regarding the crime of murder is the right to life and that protected regarding denial of justice is the integrity of justice. Therefore, murder and denial of justice are related acts, though legally independent and autonomous.

Considerations of the Court

42. The grounds for the first preliminary objection raised by the State lies in the "declaration" it made upon recognizing the jurisdiction of the Court on August 21, 1990, which states that:

[…]
The State of Chile declares that it recognizes as binding de jure the jurisdiction of the Inter-American Court of Human Rights on all matters relating to the interpretation and application of this Convention pursuant to the provisions of Article 62 thereof.

[...] the State of Chile expresses that its recognition of the jurisdiction of the Court refers only to events which were subsequent to the date on which this Instrument of Ratification was deposited or, in any case, to events which started after March 11, 1990. Likewise, the State of Chile, in recognizing the jurisdiction of the Commission and of the Inter-American Court of Human Rights, declares that pursuant to the provisions of the second paragraph of Article 21 of the Convention these bodies may not rule on the reasons of public utility or social interest that have been taken into consideration when depriving a person of his property.

43. In line with prior decisions taken by the Court, it is to be understood that the "declaration" made by the Chilean State rather than a "reservation" is a time limitation to the recognition of the jurisdiction of the Court. As a matter of fact, the Court has stated that

[the] "acceptance of the jurisdiction" of the Court [...] is a unilateral act of each State[,] governed by the terms of the Inter-American Convention as a whole and, therefore, not subject to reservations. Although some doctrine refers to "reservations" to the acceptance of the jurisdiction of an international court, in reality, this refers to limitations to the acceptance of the jurisdiction and not technically to reservations to a multilateral treaty. [FN1]

[FN1] Cf. Case of the Serrano-Cruz Sisters. Preliminary Objections. Judgment of November 23, 2004. Series C No. 118, para. 61; Case of Alfonso Martín del Campo-Dodd. Preliminary Objections. Judgment of September 3, 2004. Series C No. 113, para. 68; and Case of Cantos. Preliminary Objections. Judgment of September 7, 2001. Series C No. 85, para. 34.

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44. Furthermore, pursuant to prior decisions taken by the Court, this type of time limitations to the recognition of the jurisdiction of the Court are based on the provisions of Article 62 of the Convention, which grants the States Parties which recognize the jurisdiction of the Court the power to limit such jurisdiction to a specified period. [FN2] Therefore, such limitation is contemplated in the Convention itself.

[FN2] Cf. Case of the Serrano-Cruz Sisters. Preliminary Objections, supra note 1, para. 73.

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45. In view of the foregoing principles and standards, it is, therefore, incumbent upon the Court to decide whether it is competent to hear the facts regarding the events which are the grounds for the alleged violations of the Convention in the instant case. The Court further notes that, pursuant to the compétence de la compétence principle, it is not to be left to the will of the States to decide which facts are excluded from its jurisdiction. This decision is a duty which is to be fulfilled by the Court in the exercise of its jurisdictional functions. [FN3]

[FN3] Cf. Case of the Serrano-Cruz Sisters. Preliminary Objections, supra note 1, para. 74.

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46. The Commission and the representative have pointed out that the Court is competent to hear the facts regarding the events which, in its discretion, started after the recognition of the jurisdiction of the Court (supra paras. 40(a) and 41(b)). These facts are basically related to three issues, to wit: i) the transfer of the proceedings to the military courts in detriment of the civil courts, ii) the enforcement of Decree Law No. 2.191 after the Chilean State accepted the jurisdiction of the American Convention, and iii) the application of such Decree Law in the instant case by the judicial military authorities. The foregoing facts constitute alleged violations to the prejudice of Mr. Almonacid-Arellano's next of kin. Neither the Commission nor the representative have requested that the Court decide on the detention and death of Mr. Almonacid-Arellano, nor have they claimed any procedural defect or violation, or any other event occurred before the ratification of the Convention.

47. Furthermore, the State alleged that "the criminal investigation [...] is a single and ongoing unity which is permanent in time," which "cannot be partitioned, divided, separated or disassociated, not even materially or formally." Thus, the State has concluded that the alleged violation started prior to the recognition of the jurisdiction of the Court, as the investigation proceeding regarding the death of Mr. Almonacid-Arellano was started in September 1973.

48. The Court deems that during the course of a proceeding separate facts might occur which constitute specific and independent violations arising from denial of justice. [FN4] For instance, the decision of a judge not to allow the counsel for the defense to participate in the proceeding; [FN5] the prohibition imposed on the counsels for the defense to interview their clients in private, to duly examine the record of the case, to forward evidence for the defense, to challenge incriminating evidence, and to prepare the arguments in due time; [FN6] the intervention of 'faceless' judges and prosecutors; [FN7] the torture or ill-treatment inflicted on the defendant to exact a confession from him; [FN8] the failure to inform foreign detainees of their right to have consular assistance; [FN9] and the violation of the principle of coherence or correlation between the charges and the judgment, [FN10] among others.

[FN4] Cf. Case of the Serrano-Cruz Sisters. Preliminary Objections, supra note 1, para. 84.
[FN5] Cf. Case of the Indigenous Community Yakye Axa . Judgment of June 17, 2005. Series C No. 125, para. 117.
[FN6] Cf. Case of Castillo-Petruzzi et al. Judgment of May 30, 1999. Series C No. 52, paras. 135 to 156.
[FN7] Cf. Case of Lori Berenson-Mejía. Judgment of November 25, 2004. Series C No. 119, para. 147.
[FN8] Cf. Case of Tibi. Judgment of September 7, 2004. Series C No. 114, para. 146.
[FN9] Cf. Case of Acosta-Calderón. Judgment of June 24, 2005. Series C No. 129, para. 125.
[FN10] Cf. Case of Fermín Ramírez. Judgment of June 20, 2005. Series C No. 126, paras. 65 to 69.

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49. In view of the foregoing, the Court finds that it has jurisdiction over the facts set forth by the Commission and by the representatives regarding the transfer of the case to the military courts to the prejudice of the civil courts, and the application of the Amnesty Law in the instant

case by the military judicial authorities, as such facts were subsequent to August 21, 1990. Said facts are set forth in detail in paras. 82(11) to 82(23) hereof and may constitute independent violations of Articles 8(1) and 25 of the Convention, in relation to Article 1(1) thereof. Therefore, the Court considers that they are not excluded by the limitation asserted by the State. Furthermore, as regards the alleged "failure to investigate, prosecute, and punish those persons responsible for the murder of Luis Almonacid" claimed by the Commission (supra para. 40(a)(ii)), the Court notes that neither the Commission nor the representative described such failures, thus preventing the Court from establishing the facts they refer to and, therefore, the date on which they occurred, whereby said argument is dismissed.

50. As to the effectiveness of Decree Law No. 2.191, it cannot be claimed that the alleged violation of Article 2 of the American Convention started as a result of the entry of such decree law into force and that, therefore, the Court is not competent to hear this fact. Such violation of Article 2 of the American Convention started when the State bound itself to adapt its domestic legislation to the provisions of the Convention, that is, at the moment the State ratified the Convention. In other words, the Court is not competent to declare that an alleged violation of Article 2 of the Convention was committed at the moment such decree-law was enacted (1978), nor as regards the effectiveness and enforcement thereof up to August 21, 1990, for until such date the State did not have the duty to adapt its domestic legislation to the standards of the American Convention. Notwithstanding, since that date the Chilean State has had the duty to do so and the Court is competent to declare whether it has complied with it or not.

51. In view of the foregoing, the first preliminary objection is dismissed.

SECOND PRELIMINARY OBJECTION: VIOLATIONS IN THE PROCESSING BEFORE THE COMMISSION

52. Arguments of the State

a) by means of communication of April 11, 2005, the Inter-American Commission informed the State that it had issued Report on the Merits No. 30/05 on March 7, 2005. In said communication the State was also requested to inform the Commission within two months as from the date of service of such Report on the measures adopted to comply with the recommendations of the Commission therein contained;
b) on April 15, 2005, the State requested an extension of the term set to accomplish the foregoing, on the grounds that the Report on the Merits had not been attached in full to the communication of April 11. The entire version of the Report was received a month later, on May 12, 2005. This resulted in unfavorable conditions for the State regarding the term it had been granted to inform the Commission on the measures adopted to comply with its recommendations, as the original two-month term to accomplish it was not extended;
c) again, on June 15, 2005, the State requested that an extension of such term be granted so that it may have the three-month term set forth in Article 51 of the Convention, which was dismissed;
d) on July 11, 2005 the State filed with the Commission its report on the measures adopted to comply with the recommendations contained in Report on the Merits No. 30/05, thus fulfilling its duty to inform the Commission of such measures within the term set to that purpose;

e) it is to be assumed with good reason that the application against the Chilean State was drawn up without having seen, or even hurriedly considered, the communication of July 11, 2005 on the measures adopted to comply with the recommendations contained in the Report on the Merits and, therefore, that the right of the Chilean State to be heard was allegedly violated;
f) prior to the date on which the State was informed of the extension granted to file its report on compliance, the decision to refer the case to the Inter-American Court had already been taken and the representative of the alleged victims had been requested to refer the facts regarding the case by means of an e-mail, and
g) after taking cognizance of the report on compliance of the State, the Commission decided to request the State to inform whether it was interested in starting a process of amicable solution as provided for in Article 48(1)(f) of the Convention and 41 of the Rules of Procedure.

53. Arguments of the Commission

a) on April 11, 2005 the Commission informed the State of the Report issued on the merits of the case, granting it a term up to June 11, 2005 to inform the Commission on the measures adopted to comply with its recommendations;
b) on June 24, 2005 the State requested the Commission an extension of such term until July 8, 2005. On June 27, 2005 the Commission granted the State an extension until July 1, 2005 to submit a report to the Commission on the measures adopted to comply with its recommendations. Said term expired without the State having forwarded any information on the matter;
c) the e-mail of the representative of the alleged victim to which the State made reference contains the answer of the representative to the inquiry made by the Commission in accordance with Article 43(3) of its Rules of Procedure;
d) upon failure of the State to submit a report, on July 11, 2005, the last day of the term set pursuant to Article 51(1) of the Convention, and the non-compliance by the State of the recommendations contained in the Report on the Merits, the Commission referred the case to the Court, and
e) after the case had been referred to the Court, a communication of the State was received regarding its compliance with the recommendations, wherein it stated that it was interested in starting a process of amicable solution; the report does not prove the compliance with the recommendations of the Commission, as it was stated in the answer to the application; instead, it contains the reasons why the State considers that it is unable to entirely fulfill such recommendations, together with the reiteration of the various measures adopted in order to palliate impunity.

54. Arguments of the Representative

The representative did not file any arguments regarding the alleged violation in the processing of the case.

Considerations of the Court

55. The second preliminary objection raised by the State is related to two main issues: i) the “hasty” referral of the instant case to the Court by the Commission without having considered

the report submitted by the State regarding its compliance with the recommendations contained in the Report on the Merits issued by the Commission, and ii) the fact that the decision of the Commission to refer the instant case to the Court was prior to the submission of such report by the State, since the representative of the alleged victims had been allegedly requested to refer the "facts regarding the case."

56. As to the first argument submitted by the State, it is relevant to refer to the provisions of Article 51(1) of the American Convention:

If, within a period of three months from the date of the transmittal of the report of the Commission to the states concerned, the matter has not either been settled or submitted by the Commission or by the state concerned to the Court and its jurisdiction accepted, the Commission may, by the vote of an absolute majority of its members, set forth its opinion and conclusions concerning the question submitted for its consideration.

57. For its part, Article 43 of the Rules of Procedure of the Commission states that:

After the deliberation and vote on the merits of the case, the Commission shall proceed as follows:

[…]
2. If it establishes one or more violations, it shall prepare a preliminary report with the proposals and recommendations it deems pertinent and shall transmit it to the State in question. In so doing, it shall set a deadline by which the State in question must report on the measures adopted to comply with the recommendations. The State shall not be authorized to publish the report until the Commission adopts a decision in this regard.
[…]

58. The deadlines set in the foregoing articles are not the same. The term of three months set in Article 51(1) of the Convention is the maximum term within which the Inter-American Commission may submit a case to the contentious jurisdiction of the Court, after which this power of the Commission expires. For its part, Article 43(2) of the Rules of Procedure of the Commission sets the maximum term allowed for a State to inform the Commission regarding the measures adopted to comply with its recommendations, term which is set by the Commission itself.

59. In the instant case, no controversy was aroused by the parties over the fact that the Commission informed the State of Report on the Merits No. 30/05 on April 11, 2005, by means of a communication which set June 11, 2005 as the deadline for the State to inform the Commission regarding the measures adopted to comply with its recommendations. Notwithstanding, on that date (April 11, 2005) the State did not receive the full version of Report No. 30/05, which was received by the State on May 12, 2005. This delay gave grounds to the request filed by the State on June 24, 2005 so that an extension of the term set to file the report on compliance be granted thereto. [FN11] The State requested that such extension be granted until July 8, 2005. On June 27, 2005 the Inter-American Commission informed the State that an

extension of said term was granted up to July 1, 2005. The State submitted its report on the measures adopted to comply with the recommendations of the Commission on July 11, 2005.

[FN11] In the case file of the instant case placed on record at the Court there is no evidence of the alleged request for an extension submitted by the State on April 15, 2005 (supra para. 52 (b)).

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60. As it can be seen from the foregoing paragraph, two different terms were simultaneously going by, namely: the term set for the State to submit its report on the measures adopted to comply with the recommendations of the Commission, which expired on July 1, 2005 (Article 43(2) of the Rules of Procedure of the Commission), and the term for the Court to submit the instant case to the jurisdiction of the Court, which expired on July 11, 2005 (Article 51(1) of the Convention). Consequently, the State made a mistake when considering that the term set in Article 51(1) of the Convention was applicable thereto, when, as a matter of fact, it was subject to the term set by the Commission pursuant to the provisions of Article 43(2) of its Rules of Procedure.

61. Due to the foregoing, the Court finds that the State submitted its report beyond the deadline set to that purpose, and that the Commission proceeded pursuant to its Rules of Procedure and those of the American Convention. The fact that the full version of Report No. 30/05 was forwarded to the State on May 12, 2005 does not affect the foregoing conclusion, since the Commission, taking into consideration that such report had not been forwarded in due time, granted the State an additional extension from June 11 to July 1, 2005. Furthermore, the Court considers that the fact that the Commission inquired the State about its interest in starting a process of amicable solution on October 17, 2005, when the case was already being heard by the Court, though not understandable, does not affect the decision of the Court to consider that the State submitted its report on compliance beyond the deadline set to that purpose.

62. As to the second argument filed by the State regarding the fact that the Commission had allegedly taken the decision to submit the instant case to the jurisdiction of the Court prior to the submission of the report on compliance by the State, based on the request that was allegedly made to the victims' representative by e-mail about the facts regarding the case, the Court notes that the foregoing did not take place. In fact, from the case file placed on record at the Court it is derived that the e-mail to which the State refers is the communication filed before the Commission on June 24, 2005 by the representative of the alleged victims, wherein he forwarded the information requested by the Commission on June 20, 2005, pursuant to Article 43(3) of the Rules of Procedure thereof, which provides that:

After the deliberation and vote on the merits of the case, the Commission shall proceed as follows:

[…]
3. It shall notify the petitioner of the adoption of the report and its transmittal to the State. In the case of State Parties to the American Convention that have accepted the contentious jurisdiction of the Inter-American Court, upon notifying the petitioner, the Commission shall

give him or her one month to present his or her position as to whether the case should be submitted to the Court. When the petitioner is interested in the petition of the case he or she should present the following:

a. the position of the victim or the victim's family members, if different from that of the petitioner;
b. the personal data relative to the victim and the victim's family members;
c. the reasons why he or she considers that the case should be referred to the Court;
d. the documentary, testimonial, and expert evidence available; and
e. the claims concerning reparations and costs.

63. In view of the foregoing considerations, the Court dismisses the second preliminary objection raised by the State.

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64. The Court notes that, though the State has not raised the formal objection of lack of exhaustion of domestic remedies, it has pointed out, inter alia, that "[t]he representatives of the victim's next of kin who acted as private prosecutors, have not filed the remedies available thereto in order to submit the decision on this matter to the jurisdiction of the Supreme Court of Justice of Chile." In this regard, the Court reaffirms the criteria concerning the filing of the objection for failure to exhaust the domestic remedies, which are to be considered in the instant case. Firstly, the Court has pointed out that the matter regarding the failure to exhaust remedies is one of pure admissibility and that the State which alleges it must express which domestic remedies should be exhausted, as well as prove the effectiveness thereof. Secondly, for the objection for failure to exhaust the domestic remedies to be held timely, it should be filed at the admissibility stage of the proceeding before the Commission, that is, before considering the merits of the case; otherwise, the State shall be assumed to have waived constructively its right to resort to it. Thirdly, the respondent State may waive, either expressly or implicitly, the right to raise an objection to exhaust the domestic remedies. [FN12]

[FN12] Cf. Case of Acevedo-Jaramillo et al. Judgment of February 7, 2006. Series C No. 144, para. 124.

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65. The Court has noted that during the proceeding before the Commission the State did not invoke the failure to exhaust the domestic remedies (supra para. 7). Therefore, as a result of having failed to raise the procedural objection for failure to exhaust the domestic remedies in due time, the Court concludes that the State –by virtue of the estoppel principle- is hindered from filing it before the Court, [FN13] as it has implicitly waived it. Therefore, it dismisses the argument of the State regarding the lack of exhaustion of the domestic remedies.

[FN13] Cf. Case of Durand and Ugarte. Preliminary Objections. Judgment of May 28, 1999. Series C No. 50, para. 38. Case of Mayagna (Sumo) Awas Tingni Community. Preliminary

Objections. Judgment of February 1, 2000. Series C No. 66, paras. 56 and 57; and Case of Herrera-Ulloa. Judgment of July 2, 2004. Series C No. 107, para. 83.

VI. EVIDENCE

66. Before examining the evidence submitted, the Court shall, in the light of the provisions set forth in Articles 44 and 45 of the Rules of Procedure, make some considerations that arise from prior cases heard by the Court and which are applicable to the instant case.

67. Evidence is governed by the adversary principle, which embodies due respect for the parties' right to defense, which is one of the pillars of Article 44 of the Rules of Procedure concerning the proper time at which to tender evidence, in order to secure equality between the parties. [FN14]

[FN14] Cf. Case of Ximenes-Lopes. Judgment of July 4, 2006. Series C No. 149, para. 42; Case of the Ituango Massacres. Judgment of July 1, 2006. Series C No. 148, para. 106; and Case of Baldeón-García. Judgment of April 6, 2006. Series C No. 147, para. 60.

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68. According to the usual practice of the Court, at the commencement of each procedural stage, the parties must state the evidence they intend to offer in the first written brief they submit. Furthermore, the Court or the President of the Court, exercising the discretionary authority under Article 45 of the Rules of Procedure, may ask the parties to supply additional items, as evidence to facilitate the adjudication of the case, without thereby affording a fresh opportunity to expand or complement their arguments, unless by express leave of the Court. [FN15]

[FN15] Cf. Case of Ximenes-Lopes, supra note 14, para. 43; Case of the Ituango Massacres, supra note 14, para. 107; and Case of Baldeón-García, supra note 14, para. 61.

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69. The Court has pointed out before that in admitting and assessing evidence, the procedures observed before this Court are not subject to the same formalities as those required in domestic judicial actions and that the admission of certain items into the body of evidence must be made paying special attention to the circumstances of the specific case, and bearing in mind the limits set by respect for legal certainty and for the procedural equality for the parties. The Court has further taken into account international precedents, according to which international courts are deemed to have authority to appraise and assess evidence based on the rules of reasonable credit and weight analysis, and has always avoided rigidly setting the quantum of evidence required to reach a decision. This criterion is especially valid regarding international human rights courts, which, for the purpose of the determination of the international liability of a State for the violation of the rights of a person, are flexible in the assessment and weighing of the evidence submitted for their consideration regarding any relevant matters of fact, following the rules of logic and based on experience. [FN16]

[FN16] Cf. Case of Ximenes-Lopes, supra note 14, para. 44; Case of the Ituango Massacres, supra note 14, para. 108; and Case of Baldeón-García, supra note 14, para. 62.

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70. Based on the foregoing, the Court shall now examine and assess the documentary evidence submitted by the Commission, the representatives and the State at various procedural stages (supra paras. 12, 15, 17, 19, 31, 33, 36, and 37), and the expert and testimonial evidence submitted to the Court during the public hearing, which altogether constitutes the body of evidence in the instant case. In doing so, the Court shall follow the rules of reasonable credit and weight analysis, within the applicable legal framework.

A) Documentary Evidence

71. The documentary evidence submitted by the State includes a witness statement in response to the Order of the Court of February 7, 2006 (supra para. 20) and an expert report pursuant to the Order of the President of the Court of March 24, 2006 (supra para. 27). Such testimonies are summarized as follows:

a) Statement of Mr. Cristián Correa-Montt, witness proposed by the State

The witness made a statement "concerning the reparation measures established by the Chilean State in favor of the victims of human rights violations committed by the dictatorship that ruled from 1973 to 1990."
According to the witness, as a result of its efforts, the Comisión Nacional de Verdad y Reconciliación (National Truth and Reconciliation Commission) "submitted a report with facts concerning the way human rights were violated, including a summary of the main facts of all the prosecutions that resulted in convictions and a list of all pending cases."
As part of the recommendations of the Comisión Nacional de Verdad y Reconciliación (National Truth and Reconciliation Commission), and in order to implement a policy of reparation for the victim's next of kin, the Corporación Nacional de Reparación y Reconciliación (National Corporation for Reparation and Reconciliation) was created under Law No. 19.123 of February 8, 1992 (hereinafter "Law No. 19.123"). Its purpose "was to coordinate, implement and promote all such actions as were necessary for complying with the recommendations of the Report issued by the Commission." In addition, Law No. 19.123 provided for other reparation measures: a reparation pension, the amount of which should vary according to the kinship with the victim; health benefits consisting of free assistance in institutions depending on the National Health Care System; educational benefits and the option to be exempted from mandatory military service for the children of victims.
As the process leading to the recognition of human rights violations and reconciliation continued, the State instituted several reparation measures, including:

a) "Programa de Apoyo a los Presos Políticos (Political Prisoners Support Program)" for individuals kept in custody as of March 11, 1990, which sought to provide financial support to assist them in reintegrating into society and being pardoned and/or in having their sentences commuted in order for them to regain freedom;

b) “Programa de Reparación y Atención Integral de Salud (PRAIS) (Comprehensive Health Service and Reparation Program)” for those affected by human rights violations;

c) “Corporación Nacional de Reparación y Reconciliación (National Reparation and Reconciliation Corporation),” created by Law No. 19.123 as the follow-up to the Comisión Nacional de Verdad y Reconciliación (National Truth and Reconciliation Commission), its main task being to examine the 634 cases left unsolved by its predecessor, with further powers to hear new cases;

d) “Programa de Derechos Humanos del Ministerio del Interior (Human Rights Program of the Department of the Interior),” which is the follow-up to the Corporación Nacional de Reparación y Reconciliación (National Corporation for Reparation and Reconciliation), its main task being to provide advisory assistance and institute legal proceedings to establish the circumstances of the disappearance and/or death of the victims and locate their remains;

e) “Servicio Médico Legal (Legal Medical Service),” which seeks to identify the remains of detained-disappeared persons;

f) “Oficina Nacional del Retorno (Nacional Return Office),” which was created by Law No.18.994 and “assisted persons who were sentenced and whose sentence was commuted to deportation under Supreme Decree [No.] 504; persons who were expelled or forced to leave the country under a resolution by the administrative authorities; persons who were banned from entering the country; persons who left the country through asylum protection; and persons who were accorded the United Nations Status of Refugees and obtained asylum in other countries for humanitarian reasons.” This office “provided primary assistance and referral to other public services and non-governmental organizations” and provided “administrative and reintegration measures;”

g) “Programa para Exonerados Políticos (Political Exoneration Program),” whereby the State granted benefits to individuals who were dismissed from a Government Agency or from a company owned or managed by the State.” Moreover, “subsistence, non-contributory pensions, and grace period allowances were granted as benefits;”

h) “Restitución o Indemnización por Bienes Confiscados y Adquiridos por el Estado (Restitution of or Compensation for Property Seized or Acquired by the State)” through Decree Laws No. 12, 77 and 133 of 1973; No. 1.697 of 1977, and No. 2.346 of 1978;

i) “Mesa de Diálogo sobre Derechos Humanos (Human Rights Conversation Table),” whose primary purpose was to “further the investigation to find out the fate of detained-disappeared persons.”

j) “Presidential Initiative “No hay mañana sin ayer” (“Yesterday for Tomorrow”), established to “continue making progress in the delicate process of healing the wounds caused by severe human rights violations” including measures aimed at “maximizing the search for truth and justice,” “improving social reparation to victims” and “empowering the society and its institutions so as to prevent human rights violations from happening again” and

k) “Comisión Nacional sobre Prisión Política y Tortura (National Commission on Political Imprisonment and Torture),” which was created in November 2003 as part of the abovementioned presidential initiative and was aimed at “gathering information concerning violations of the right to personal liberty and to humane treatment and physical safety committed for political reasons.” Its purpose was to identify “the individuals who were deprived of their liberty or subjected to torture for political reasons as a result of acts of Government officials or other persons under their authority” and to “propose reparation measures.”

As for the measures that have benefited Mr. Almonacid-Arellano's next of kin, the witness pointed out that all the members of the nuclear family have been entitled to the abovementioned health reparation measures. "Mr. Almonacid's wife has received the pension [...]. Their children received the bonus […]. Throughout the years these measures have been effective, the nuclear family have received money transfers […] for some US$ 98,000.00 (ninety-eight thousand United States Dollars) altogether. In addition, two of the children availed themselves of the right to receive higher education grants under Law No. 19.123. [...] The nuclear family has received student grants for a total sum of US$ 12,180.00 (twelve thousand one hundred and eighty United States Dollars)."
Lastly, the witness stated that "all of these reparation measures reflect the State's will to recognize the human rights violations committed, including an individual recognition of the victims and their significance, and to adopt all such financial, health, educational, housing, and other measures as are necessary to meet the victim's needs."

b) Expert Opinion of Mr. Cristián Maturana-Miquel, expert witness proposed by the State

According to the expert witness, "after the [American] Convention was ratified, it was necessary to constrain its initial scope by means of a Declaration made by the Chilean State, taking into account that democracy cannot be restored immediately but gradually."
"Said Declaration, which is not a reservation, bars the Commission and the Court from hearing cases that concern events arising from circumstances that took place before March 11, 1990."
"The first recommendation [of the Inter-American Commission], which is to establish responsibility for the extra-legal execution of Luis Alfredo Almonacid-Arellano through a fair trial and a thorough and unbiased investigation of the facts, [...] requires the State to go back to an event that took place before March 11, 1990 and thus, pursuant to the Declaration made by the Chilean State, neither the Commission nor the Inter-American Court have competent jurisdiction."
The same is true of the second recommendation made by the Commission consisting of "adjusting these legislative or other measures so as to set aside Decree Law No. 2.191, known as the 'self-amnesty' law" inasmuch as "such Decree Law dates back to 1978 and therefore falls under the scope of the Declaration."
As regards "the adjustment of domestic legislation to Human Rights laws," the expert witness stated that Chile "has slowly yet steadily introduced significant changes in that direction."
As for military criminal courts, the expert witness stated that "the scope of their jurisdiction has been restricted through Law No. 19.047, published in the Official Gazette of February 14, 1991" and "several changes have been introduced and granted constitutional status."
In addition, the expert witness deemed that "repealing or declaring the amnesty law null through an act of the legislature may pose bigger legal obstacles than relying on the courts' interpretation that international rules should take precedence over domestic ones and should thus prevail in their application [...]." "In fact, even if the amnesty law were repealed or declared null, that would still not settle, at least on the domestic level, the conflict with the constitutional status rule that the most favorable law should be applied to the accused and that no accusation may be made or punishment meted out for acts committed before the criminal law became effective."

B) Testimony of Witnesses and Experts

72. On March 29 2006, the Court held a public hearing to receive the statements of the witnesses and expert witnesses proposed by the parties (supra para. 28). The Court shall now summarize such witness statements and expert opinions.

a) `Statement of Elvira Gómez-Olivares, Luis Alfredo Almonacid-Arellano's wife, witness proposed by the representative

According to the witness, "on September 14, [1973] a patrol came to [her] home looking for [her] husband, who was not at home at that moment. They searched [the] house […] and pointed a gun [at her]. [She] was eight months and a half pregnant. They searched all over the place and left."
"On [September] 16, [1973] at eleven in the morning, [her husband] went home to see [her], as he was not living [there] for safety reasons. [At about] half past eleven in the morning a patrol came for him[.] The police pushed him out of the house, without even letting him put his coat on, and took him away […]. He went nervously with his hands held up as the police pushed him. [Her] husband wore eyeglasses. [Upon reaching] the corner of the street […], [she] saw in the tumult that [her] husband stumbled and tried to catch his glasses, which were about to drop, and [she] felt the hail of machine gun fire […]. It was two police officers who were with him at that time. He fell, severely wounded, but he was alive; [the witness] went to his aid, [she] hesitated; [her] two-year-old son was coming behind [her], and [she] reached him to [her] nine-year-old son, who was coming behind him, so that he would take him inside." The witness tried to get near Mr. Almonacid, "but [she] was discouraged by the expression in the face of the lieutenant who was with him holding a machine gun, so [she] stood two meters away from him against a wall, to see what they did to [Mr. Almonacid]. The sergeant went for a truck. They brought it. [...] They took [Mr. Almonacid] like a bag of potatoes and threw him onto it. They got on the truck. Afterwards, several other police officers arrived [...] and took him to hospital[.] He was operated [...], but died the next day."
"At the very moment [her] husband was shot, [she] suffered a placental abruption, and [her] child also died." Following the death of Mr. Almonacid-Arellano, her "whole family was destroyed, because [her] brothers lost their jobs; [her] eldest brother, who was the family's breadwinner, was exiled; and […] [she] was being watched all day, every day."
She was summoned once by the Criminal Court, but she has never been summoned by the Military Prosecutor's Office; nor has the Defense Council of the State offered to judicially take over the case. She testified before the Comisión Nacional de Verdad y Reconciliación (National Truth and Reconciliation Commission), and the account of her husband's extra-legal execution and his name appear in the final report issued by the Commission.
She has received a pension from the Chilean State since 1992. Before she started receiving her pension, she survived "doing sewing jobs at [her] home, and thanks to the aid of many people who helped [her] at that time." Her current income is "just enough for her to get by, since [she has] a very ill health." Two of their three children received student grants and have become professionals. In addition, they use the free health care card in the public health system. She has not been able to use the card, "not because it is no good for [her], but because [her] health is so poor" that she "must rely on whatever assistance [she] can get the earliest." However, she believes that "[she] will eventually need it and [she is] willing to use it when the time comes."
As a symbolic reparation measure, her husband's name is included in the memorial of the

victims of the repression of the military dictatorship set up in the general cemetery; in addition, there is a street and a village called "Luis Almonacid" in the city of Rancagua.
She expects the Inter-American Court to "do justice, [...] vindicate the memory of [her] husband, and carry out a fair trial […], for as long as […] justice is served, no one else will have to suffer what [she] went through." In addition, she stated that she wishes "that [Decree]Law No. 2.191 were repealed, thus showing that the amnesty law is no good."

b) Statement of Jorge Correa-Sutil, witness proposed by the State

In his opinion, "the policies of the democratic government from 1990 to the present have been mostly aimed at two goals, namely, to deter future human rights violations and to make reparations to the victims."
"To that end, the first important measure […] was the creation of the Comisión Nacional de Verdad y Reconciliación (National Truth and Reconciliation Commission), [which made] an express account of each of those persons as victims, which was later completed by a second commission, i.e. the Corporación Nacional de Reparación y Reconciliación (National Reparation and Reconciliation Corporation), between 1992 and 1996, identifying approximately over 3,000 victims. The Chilean State through the legislative power solemnly established the right of each of the victims to know the truth and the fate of detained-disappeared persons and of the executed persons whose bodies were never delivered, and provided for a series of reparation measures. Perhaps most importantly, [the Truth Commission] issued a Report, which meant introducing into the public opinion the possibility of a social condemnation of acts that had been denied or grossly distorted by the military government such as the deaths and disappearances. The honor of those who had died, disappeared or gone into exile, which had been marred by accusations of terrorism, was restored, or at least that was meant to be done." As regards each of them, reparation measures were taken, including life pensions for their widows, student grants for the victims' next of kin […] and other kinds of measures concerning health and exemption from mandatory military service for the children of the victim's next of kin. Likewise, the State was compelled to further the remembrance of these cases through memorials or other ways to recall the events and channel social condemnation."
"The State continues with this policy of reparation and […] a second wave of official action came after […] some resounding judicial cases, [particularly] the imprisonment of General Contreras, who had been the chief of the Secret Police in Chile […], and the arrest of General Pinochet in London." These cases "renewed public awareness of the unresolved issues regarding human rights, at the time of the so-called Mesa de Diálogo (Conversation Table)[,] another landmark of these efforts. The Armed Forces' recognition of the harm caused meant not only that the truth about the most serious human rights violations was revealed, but also [...] that, for the first time in Chile, the truth was recognized by the authors of such violations."
"A third moment of official action […] came in 2003, when certain political events triggered a nationwide debate concerning the work done so far in the field of human rights, and the Government took action again to create a commission [i.e., the Comisión Nacional sobre Prisión Política y Tortura (National Commission on Political Imprisonment and Torture), with] a public policy aimed at addressing this issue, first and foremost, by creating a Commission, popularly known as the Valech Commission after its president, whose task was analogue to that of the Corporación Nacional de Reparación y Reconciliación (National Reparation and Reconciliation Corporation), but this time addressing those persons who had suffered political imprisonment

and torture. [… I]t also furnished a general account and then tagged almost 30,000 cases […] as persons who had unjustly suffered political imprisonment or torture. Furthermore, on President Lagos' initiative, the National Congress granted a reparation pension to each of them [...]."
The witness deemed such reparation policy to be efficient, highlighting the fact that "the policy was actually put into practice: all promises made by the Government have been carried out. It has been a socially legitimate policy, in the sense that it has not been questioned. Even the victims' next of kin have accepted it [...] thanks to the recognition of the harm caused."
In addition, he called the policy "an incremental reparation policy," since it has included "more and more victims, sometimes raising monetary reparations, increasingly establishing landmarks and moments for the remembrance of the victims, with a high level of public acceptance."
"The Government as such never proposed any bill to set aside the Amnesty Decree Law, but several congressmen of the government coalition did so instead. [This] was rather a testimonial or political gesture, in the sense that it raised public awareness," as there has never been a majority to do it. "Today for the first time, political forces have made a favorable shift towards repudiating the Amnesty Decree Law." "No one ha[d] considered the possibility of declaring the law invalid because that was not part of the tradition; [...] Congress has never declared the invalidity of law," and "the Constitutional Court now also has the power to declare the law invalid" with more stringent requirements.
"The arguments for invalidating [the Amnesty Decree Law] have been strongly focused on [its] immorality, since it was issued by the authors of the crimes themselves." It is immoral to "use a legal instrument to violate long-established principles of international law, at least with regard to the most serious crimes against humanity."
The arguments against invalidating the Amnesty Decree Law are as follows: Firstly, "if the rules created by the de facto governments in Chile were declared invalid, much [of the] legal system would collapse, including many of the rules that legitimize the current political system. [...] Secondly, the Decree Law has arguably come to pacify the country, and at the time it was praised, [among others], by the Catholic Church, [and] represented [...] the end of […] political repression in Chile." "Thirdly, the application of this Amnesty Decree Law has already benefited many people."

c) Expert Opinion of Humberto Raúl Ignacio Nogueira-Alcala, expert witness proposed by the Commission

According to the expert witness, during the military rule, the Supreme Court of Chile "supported the military authoritarian regime." "From 1990 to September 1998, the Amnesty Decree[Law] [was] applied as a rule of thumb and by operation of law as soon as there [was] an indication that the event investigated [consisted] of a crime committed during the time period [covered by the] Decree [...]."
"In September 1998, a second stage began [...] with the Case of Poblete Córdoba, in which the court decided that in order for amnesty to be applicable, [the perpetrator] must have been identified beyond all reasonable doubt and prosecuted; otherwise the crime may not be condoned. At this second stage, no punishment is meted out, but the Amnesty [Decree]Law shall apply when the perpetrator is identified. Thus, the author is not punishe[d]."
"On January 7, 1999, in the Case of Gómez-Segovia […], the court decided that, in the case of detained-disappeared persons whose disappearance generally qualifies as kidnapping or illegal detention, the Amnesty Decree Law may not be applied, since kidnapping or illegal detention is

an ongoing crime, and as such it goes beyond the time period covered by the amnesty […]. In sum, amnesty cannot be applied because the crime continues."
"The judgment of the Criminal Chamber of the Supreme Court of November 17, 2004 [...] upheld a decision of the Appeals Court which not only supports the ongoing crime doctrine, but also goes as far as [...] to apply and recognize for the first time the Geneva Conventions of 1948, [and] expressly acknowledges that there was a state of war in 1973, the period when the events [in the instant case] took place."
"In the decision of August 4, 2005 […] in the Case of Colonel Rivera […], the Criminal Chamber of the Supreme Court reversed the judgment of the Appeals Court of Temuco, which embraced international law, relying on the International Covenant on Civil and Political Rights, […] the American Convention [on] Human Rights, the American Declaration of the Rights and Duties of Man, and on customary law and the principles of jus cogens." In this case, "the Criminal Chamber of the Supreme Court reviewed its own prior decisions, saying that there [had been] no state of war in Chile, [and] that, therefore, the Geneva Conventions were not applicable […], and that neither was […] the International Covenant on Civil and Political Rights, not because it had not been ratified, but rather, because it had not been published in the Official Gazette […]. Such an interpretation ultimately seeks to sustain a position that goes against doing justice in the case. [A]nalyzing the entire period [...], whenever [the Supreme Court] has imposed punishments, it has done so because it has understood that the crime has gone beyond the period set forth by the Amnesty Decree Law […], but it has always held [that] if the crime is committed within the time period covered by the Amnesty Decree Law, this should be applied." "The courts of justice as bodies of the Chilean State, in short, have always given precedence to the Amnesty Decree Law over international law." "In 1994, the Appeals Courts and the trial courts started a trend towards directly applying international law."
"The issue here is not only the Amnesty Decree Law but also the statute of limitations for crimes against humanity or war crimes, because the Court has been gradually leaving aside the Decree Law [...] and has been increasingly applying the statute of limitations instead."

d) Statement of Jean Pierre Matus-Acuña, expert proposed by the Chilean State

According to the expert witness, during the first years in which the American Convention was in force "and until well into 1998 [...], the decisions of the Supreme Court in most of the cases submitted to it applied self-amnesty Decree Law No. 2.191 restrictively, explaining that its purpose was to prevent the events from being investigated […] in order to maintain public peace under the terms of such Decree Law. However, even at that time, the doctrine of the Court was not uniform, and it made a radical shift in 1998 towards the non-application of Decree Law [No.] 2.191, that is, through procedural artifices that have made it possible to carry out judicial investigations, establish the events investigated, and identify and punish those responsible, either recognizing [...] the conflict existing between this Decree Law and the democratic system and the human rights treaties in force in Chile." In fact, a decision of September 30, 1994 "laid the legal foundations for rendering the Amnesty Decree Law invalid in the Chilean system." "According to the main whereas clauses of such judgment, the higher courts of justice in Chile have tended to favor the Treaties over the domestic law[.] [A]s far as human rights are concerned, a judge must, in interpreting the Treaties, always have in mind their ultimate purpose, which is to protect the rights of human beings." "Thus, there is complete harmony between the law of treaties in force in Chile in connection with human rights and its Constitution. In addition,

laws are valid to the extent that they are observed and human rights are safeguarded, so the Court concludes that crimes of kidnapping-disappearance which amount to serious violations of the Geneva Conventions are not susceptible of amnesty pursuant to the Chilean domestic law."
"Unfortunately, at that time the prevailing criterion of the Supreme Court favored a more or less flexible application of the Amnesty Decree Law, so this decision was reversed on October 26, 1995, and the case was dismissed on August 19, 1998, just before the Court changed its doctrine."
"In fact, by looking closely at the case law on amnesty […], it can be seen that the Supreme Court has both expressly and implicitly rejected in fact and in law the application of Amnesty Decree Law [No.] 2.191 in the most serious cases of violations of rights in Chile during the military dictatorship. This has been so on some rare occasions since 1990, but increasingly and consistently since 1998."
"Pursuant to this trend installed in the Supreme Court, 300 decisions of the Appeals Court of Santiago have convicted the authors of serious human rights violations, rendering the Amnesty Decree Law ineffective in fact and in law.
According to him, "what we have in Chile [...] is a written piece of paper containing a resolution issued by the de facto government, a number and some whereas clauses, which we call the Amnesty Decree Law, but it is virtually inexistent as a rule in force in Chile [...], since the courts systematically ignore it."

C) Evidence Assessment

73. In this section, the Court shall assess the body of evidence submitted to it.

74. In the instant case, as in others, [FN17] the Court recognizes the evidentiary value of the documents submitted by the parties at the appropriate procedural stage, which have neither been disputed nor challenged, and whose authenticity has not been questioned.

[FN17] Cf. Case of Ximenes-Lopes, supra note 14, para. 48; Case of the Ituango Massacres, supra note 14, para. 112; and Case of Baldeón-García, supra note 14, para. 65.
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75. With regard to the statement rendered by Cristián Correa-Montt (supra para. 21), the Court admits it insofar as it addresses its purpose, as stated in Order of the Court of February 7, 2006 (supra para. 20), taking into account the observations made by the representative (supra para. 24) and by the Commission (supra para. 26). In addition, the Court admits the documents submitted by Mr. Correa-Montt together with his statement, and assesses them as part of the body of evidence, on the basis of sound judgment.

76. As regards the statement of expert witness Cristián Maturana-Miquel (supra para. 29), the Court endorses the considerations of the Inter-American Commission (supra para. 32), in that such statement addresses issues that go beyond the scope of the purpose for which it was required under Order of the President of the Court of March 24, 2006 (supra para. 27). Notwithstanding the foregoing, the Court admits it inasmuch as it deems it useful for adjudicating the instant case, and assesses it as part of the body of evidence, on the basis of

sound judgment, taking into account the observations made by the Commission, and those made by the State in that regard (supra para. 37).

77. Even though the two statements mentioned in the previous paragraphs were submitted to a notary public to have their authors' signatures acknowledged and thus they are not formally affidavits, the Court accepts them inasmuch as no harm has been done to legal certainty or to the procedural equality between the parties.

78. As regards the statements made at the public hearing by witness Jorge Correa-Sutil and by expert witnesses Raúl Ignacio Nogueira-Alcala and Jean Pierre Matus-Acuña, the Court admits them insofar as they address their purpose as stated in Orders of February 7 (supra para. 20) and March 24, 2006 (supra para. 27), and recognizes their evidentiary value. The Court considers that the statement given by Elvira Gómez-Olivares (supra para. 28), which is useful in the instant case, cannot be assessed separately for she is an alleged victim with an interest in the outcome of the instant case, but rather it must be assessed as a whole with the rest of the body of evidence in the case. [FN18] In addition, as regards the documents submitted by expert witnesses Raúl Ignacio Nogueira-Alcala and Jean Pierre Matus-Acuña during the public hearing of the instant case (supra para. 28), the Court admits them, inasmuch as they are useful in the instant case and form the grounds for their expert opinions.

[FN18] Cf. Case of Ximenes-Lopes, supra note 14, para. 48; Case of the Ituango Massacres, supra note 14, para. 121; and Case of Baldeón-García, supra note 14, para. 66.

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79. As regards the documentary evidence submitted by the parties after their submission of the main pleadings (supra paras. 19, 31, 33, 36 and 37), only the Inter-American Commission raised objections concerning only the evidence submitted by the State together with its final arguments (supra para. 34). None of the other documents tendered by the parties were objected to by any of them. The Court notes that part of the evidence submitted by the State together with its final written arguments corresponds to the evidence required by the Court during the public hearing held in the instant case (supra para. 28), whereby it admits it. As regards the rest of the evidence submitted by the parties, the Court likewise admits it, as it deems it useful for the adjudication of the instant case. Therefore, the Court incorporates all of these documents to the body of evidence.

80. As regards the documents submitted by the Asociación Americana de Juristas de Valparaíso/Aconcagua (American Association of Legal Scholars of Valparaíso/Aconcagua) as attachments to their amicus curiae, the Court admits them, since they contain information which is useful and relevant to the instant case.

81. Finally, as to the press documents submitted by the parties, the Court has considered that they may be assessed insofar as they contain public and notorious facts or statements given by State officials or confirm aspects related to the case. [FN19]

[FN19] Cf. Case of Ximenes-Lopes, supra note 14, para. 55; Case of the Ituango-Massacres, supra note 17, para. 122; and Case of Baldeón-García, supra note 14, para. 70.

VII. PROVEN FACTS

82. After analyzing the evidence, the testimonies of witnesses and expert witnesses and the arguments of the Inter-American Commission, of the representatives and of the State, the Court finds the following facts to be proven. Mention must be made that the State did not challenge at any procedural stage the facts detailed in paragraphs 1 to 23 of this Chapter. Similarly, the Commission and the representatives did not challenge the facts specified in paragraphs 24 and 26 to 35 herein. Moreover, the Court points out that the facts described in infra subparagraph b) regarding the events occurred prior to the ratification of the jurisdiction of the Court by the Chilean State can only be considered precedents for the purpose of providing context for the facts mentioned in subsequent subparagraphs. [FN20] Lastly, the Court remarks that the information on the events described in subparagraph b(i) was entirely gathered from three official reports about the events occurred from September 11, 1973 to March 10, 1990, i.e. the Report of the Comisión Nacional de Verdad y Reconciliación (National Truth and Reconciliation Commission), the Report on the classification of victims of human rights violations and political violence of the Corporación Nacional de Reparación y Reconciliación (National Reparation and Reconciliation Corporation), and the Report of the Comisión Nacional sobre Prisión Política y Tortura (National Commission on Political Imprisonment and Torture).

[FN20] As stated by the European Court, even if there is only ratione temporis jurisdiction regarding events occurred after the ratification of the European Convention, “it could have regard to the facts prior to ratification inasmuch as they [...] might be relevant for the understanding of facts occurring after that date.” ECHR, Case of Broniowski v Poland [GC]. Judgment of 22 June 2004, Application No. 31433/96, para. 122.

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a) Almonacid-Arellano, Gómez-Olivares and their children

82(1) Luis Alfredo Almonacid-Arellano and Elvira del Rosario Gómez-Olivares got married [FN21] and had three children: Alfredo, Alexis, and José Luis Almonacid-Gómez.

[FN21] Cf. Certificate of marriage issued by the Registrar of Life Statistics of Rancagua, (record of appendixes to the State’s final written arguments, Appendix 1, folio 1675).

82(2) Mr. Almonacid-Arellano “was an elementary education teacher and activist in the Chilean Communist Party, party director candidate, provincial secretary of Central Unitaria de Trabajadores - CUT (Central Labor Union) and union leader of Sindicato Unido de Trabajadores de Educación – SUTE (Education Labor Union).” [FN22]

[FN22] Cf. Report of the Comisión Nacional de la Verdad y Reconciliación (National Truth and Reconciliation Commission), Volume III, page 18, (record of appendixes to the State's final written arguments, Appendix 2, folio 2572).

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b) Background: events occurred before August 21, 1990

i) Context

82(3) On September 11, 1973 a military coup d'etat overthrew the Government of President Salvador Allende in Chile. "The armed forces, through the Military Junta, took over the executive power first (Decree Law No. 1) and then the constituent and legislative power (Decree Law No. 128)." [FN23] The new President of the Republic/Commander in Chief enjoyed "a number of powers without precedents in Chile. Not only did the leader rule and administer the country, but he was also a member and the president of the Military Junta –therefore, legislation could only be passed and the Constitution could only be amended upon his participation. He was also the Commander in Chief of the Army." [FN24] Decree Law No. 5 of September 22, 1973, "established that the state of siege for the civil commotion in which the country was enmeshed should be construed as a 'state or time of war'." [FN25]

[FN23] Cf. Report of the Comisión Nacional de la Verdad y Reconciliación (National Truth and Reconciliation Commission), Volume I, page 42, (record of appendixes to the State's final written arguments, Appendix 2, folio 2101).
[FN24] Cf. Report of the Comisión Nacional de la Verdad y Reconciliación (National Truth and Reconciliation Commission), Volume I, page 47, (record of appendixes to the State's final written arguments, Appendix 2, folio 2103).
[FN25] Cf. Report of the Comisión Nacional de la Verdad y Reconciliación (National Truth and Reconciliation Commission), Volume I, page 60, (record of appendixes to the State's final written arguments, Appendix 2, folio 2110).

82(4) Widespread repression against alleged opponents to the regime (infra para. 82(6)) was a standard State policy from that date until the end of the military rule on March 10, 1990, "though subject to changing intensity and various selectivity levels [FN26] for choosing victims." [FN27] Said repression was characterized by systematic and massive [FN28] arbitrary and summary executions, torture (including rape, mainly of women), and arbitrary detention at facilities not subject to legal control, forced disappearances and other human right violations committed by State officials, sometimes with the aid of civilians. Repression was applied in almost all regions of the country. [FN29]

[FN26] Cf. Report of the Comisión Nacional de la Verdad y Reconciliación (National Truth and Reconciliation Commission), Volume I, page 115, (record of appendixes to the State's final written arguments, Appendix 2, folio 2137).

[FN27] Cf. Report of the Comisión Nacional sobre prisión política y tortura (National Commission on Political Imprisonment and Torture), page 177, (record of appendixes to the State's final written arguments, Appendix 4, folio 3583).
[FN28] Cf. Report of the Comisión Nacional de la Verdad y Reconciliación (National Truth and Reconciliation Commission), Part One, chapter II and Part Two, pages 15 to 104 (record of appendixes to the State's final written arguments, Appendix 2); and Report on the classification of victims of human right violations and political violence of the Corporación Nacional de Reparación y Reconciliación (National Reparation and Reconciliation Corporation), page 37, (record of appendixes to the State's final written arguments, Appendix 3, folio 2822).
[FN29] Cf. Report of the Comisión Nacional de Verdad y Reconciliación (National Truth and Reconciliation Commission), page 19 (record of appendixes to the State's final written arguments, Appendix 2, folio 2089); Report on the classification of victims of human right violations and political violence of the Corporación Nacional de Reparación y Reconciliación (National Reparation and Reconciliation Corporation) (record of appendixes to the State's final written arguments, Appendix 3); and Report of the Comisión Nacional sobre Prisión Política y Tortura (National Commission on Political Imprisonment and Torture) (record of appendixes to the State's final written arguments, Appendix 4).

82(5) The first months of the de facto government were the most violent stage of the repressive period. Exactly 1,823 out of 3,197 [FN30] total cases of identified victims of executions and forced disappearances during the military rule took place in 1973. [FN31] Moreover, "61 percent of the 33,221 arrests classified by the Comisión Nacional sobre Prisión Política y Tortura (National Commission on Political Imprisonment and Torture) refer to arrests made in 1973." [FN32] Said Commission pointed out that "more than 94 percent of the victims of political imprisonment" alleged to have been tortured by State officials. [FN33]

[FN30] Cf. Chart 16 "Victims recognized by the State, classified as disappeared or dead," Appendix 1 to the Report on the classification of victims of human right violations and political violence of the Corporación Nacional de Reparación y Reconciliación (National Reparation and Reconciliation Corporation), page 576, (record of appendixes to the State's final written arguments, Appendix 3, folio 3356).
[FN31] Cf. Chart 17 "Complaints researched and victims recognized by the State, according to the year in which the events occurred," Appendix 1 to the Report on the classification of victims of human right violations and political violence of the Corporación Nacional de Reparación y Reconciliación (National Reparation and Reconciliation Corporation), page 577, (record of appendixes to the State's final written arguments, Appendix 3, folio 3357).
[FN32] Cf. Report of the Comisión Nacional sobre Prisión Política y Tortura (National Commission on Political Imprisonment and Torture), page 178, (record of appendixes to the State's final written arguments, Appendix 4, folio 3584).
[FN33] Cf. Report of the Comisión Nacional sobre Prisión Política y Tortura (National Commission on Political Imprisonment and Torture), page 177, (record of appendixes to the State's final written arguments, Appendix 4, folio 3583).

82(6) The victims of all these violations were renowned officials of the overthrown government and important left-wing figures; ordinary and common militants; political, trade union, community, student (university and high school education) and indigenous leaders and heads; representatives of community-based organizations participating in social claim movements. "However, [that] such political relationships existed was often deduced from the fact that the victims had been involved in 'conflictive' behavior, such as strikes, stoppages, occupation of lands or buildings, street demonstrations, and the like." [FN34] These killings are part of the climate prevailing immediately after September 11, 1973, namely the attempt to carry out a 'cleanup' operation aimed at those who were regarded as dangerous by reason of their ideas and activities and to instill fear into their colleagues who eventually might be a 'threat'." [FN35] Notwithstanding the foregoing, during the initial repression stage, the selection of victims was largely carried out arbitrarily. [FN36]

[FN34] Cf. Report of the Comisión Nacional de Verdad y Reconciliación (National Truth and Reconciliation Commission), Volume I, page 114, (record of appendixes to the State's final written arguments, Appendix 2, folio 2137).
[FN35] Cf. Report of the Comisión Nacional de Verdad y Reconciliación (National Truth and Reconciliation Commission), Volume I, page 115, (record of appendixes to the State's final written arguments, Appendix 2, folio 2137).
[FN36] Cf. Report of the Comisión Nacional de Verdad y Reconciliación (National Truth and Reconciliation Commission), (record of appendixes to the State's final written arguments, Appendix 2); Report on the classification of victims of human right violations and political violence of the Corporación Nacional de Reparación y Reconciliación (National Reparation and Reconciliation Corporation) (record of appendixes to the State's final written arguments, Appendix 3); and Report of the Comisión Nacional sobre prisión política y tortura (National Commission on Political Imprisonment and Torture) (record of appendixes to the State's final written arguments, Appendix 4).

82(7) As regards extra-legal executions –the crime committed in the instant case-, "as a rule, those killed were already in custody, and the killing took place in isolated areas and at night. […] Especially in the southern regions [of the country], in which people already taken into custody were executed in the presence of their families." [FN37]

[FN37] Cf. Report of the Comisión Nacional de Verdad y Reconciliación (National Truth and Reconciliation Commission), Volume I, page 117, (record of appendixes to the State's final written arguments, Appendix 2, folio 2138).
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ii) Execution of Mr. Almonacid-Arellano and commencement of criminal proceedings on the grounds of that event

82(8) "He [Mr. Almonacid-Arellano, 42 years old] was arrested at his home in the city of Rancagua by the police on September 16, 1973. As he was leaving his house to get into the

police truck, his captors shot him. Police took him to Rancagua hospital, where he died the following day." [FN38]

[FN38] Cf. Report of the Comisión Nacional de Verdad y Reconciliación (National Truth and Reconciliation Commission), Volume III, page 18, (record of appendixes to the State's final written arguments, Appendix 2, folio 2572).

82(9) On October 3, 1973, the First Criminal Court of Rancagua initiated an investigation under case No. 40.184 for the death of Mr. Almonacid-Arellano, [FN39] which was dismissed by the Court on November 7, 1973. [FN40] The Appeals Court of Rancagua revoked said dismissal on December 7, 1973. [FN41] After that date, the case was dismissed time and time again by the Criminal Court, [FN42] while the Appeals Court continued revoking the dismissals ordered, [FN43] until the temporary dismissal of the case was confirmed on September 4, 1974. [FN44]

[FN39] Cf. Order of the First Criminal Court of Rancagua of October 3, 1973, (record of appendixes to the State's final written arguments, Appendix 1, folio 1628).
[FN40] Cf. Resolution of the First Criminal Court of Rancagua of November 7, 1973, (record of appendixes to the State's final written arguments, Appendix 1, folio 1631).
[FN41] Cf. Resolution of the Appeals Court of Rancagua of December 7, 1973, (record of appendixes to the State's final written arguments, Appendix 1, folio 1634).
[FN42] Cf. Resolutions of the First Criminal Court of Rancagua of April 8 (record of appendixes to the State's final written arguments, Appendix 1, folio 1631), May 17 (record of appendixes to the State's final written arguments, Appendix 1, folio 1658), and August 7, 1974 (record of appendixes to the State's final written arguments, Appendix 1, folio 1666).
[FN43] Cf. Resolutions of the Appeals Court of Rancagua of April 30 and June 18, 1974, (record of appendixes to the State's final written arguments, Appendix 1, folios 1655 and 1661).
[FN44] Cf. Resolution of the Appeals Court of Rancagua of September 4, 1974, (record of appendixes to the State's final written arguments, Appendix 1, folio 1669).

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iii) Decree Law No. 2.191

82(10) On April 18, 1978, the de facto government ruling the country issued Decree Law No. 2.191, whereby it granted amnesty as follows:

Whereas:

1°- The country is now enjoying general peace, order and quietness, and the civil commotion stage has been overcome, thus leading to the conclusion of the state of siege and curfew in the entire national territory;
2°- Ethics demand the best efforts to strengthen the relations that join Chile as one nation, overcoming hostilities that are meaningless today and promoting initiatives to consolidate the reunification of the Chilean people;

3°- It is necessary to rely on strong national unity to support progress towards new institutions to rule the destiny of Chile.

The Government has decided to issue the following Decree Law:

Section 1 - Amnesty shall be granted to all individuals who performed illegal acts, whether as perpetrators, accomplices or accessories after the fact, during the state of siege in force from September 11, 1973 to March 10, 1978, provided they are not currently subject to legal proceedings or have been already sentenced.
Section 2 - Amnesty shall be further granted to those individuals who, to the date of this Decree Law, have been sentenced by military courts, after September 11, 1973.
Section 3 - Amnesty, as specified in Section 1 above, shall not apply to any individuals against whom criminal actions are pending for parricide, infanticide, robbery aggravated by violence or intimidation, drug production or dealing, abduction of minors, corruption of minors, arson and other damage to property; rape, statutory rape, incest, driving under the influence of alcohol, embezzlement, swindling and illegal exaction, other fraudulent practices and deceit, indecent assault, crimes included in Decree Law No. 280 of 1974, as amended; bribery, fraud and smuggling, and crimes included in the Tax Code.
Section 4 - The provisions of Section 1 shall not apply to any individuals allegedly responsible, whether as perpetrators, accomplices or accessories after the facts, for the events investigated under proceedings No. 192-78 before the Military Court of Santiago, Ad Hoc Prosecutor's Office.
Section 5 - Any individual subject to this decree law who is not present in the territory of the Republic shall abide by the provisions of Section 3 of Decree Law No. 81 of 1973, to enter the country.

c) Events subsequent to August 21, 1990

i) Domestic judicial proceedings

82(11) On November 4, 1992 Mrs. Gómez-Olivares, through her representative, brought criminal charges before the First Criminal Court of Rancagua and requested the reopening of case No. 40.184. [FN45] Based on the foregoing, the Court set aside the temporary dismissal of the case [FN46] (supra para. 82(9)), and received the testimony of Manuel Segundo Castro-Osorio [FN47] and Raúl Hernán Neveu-Cortesi, [FN48] allegedly responsible for the death of Mr. Almonacid.

[FN45] Cf. Criminal charges brought by Elvira del Rosario Gómez-Olivares on November 4, 1992, (record of appendixes to the State's final written arguments, Appendix 1, folios 1694 to 1696).
[FN46] Cf. Resolution of the First Criminal Court of Rancagua of November 5, 1992, (record of appendixes to the State's final written arguments, Appendix 1, folio 1697).
[FN47] Cf. Testimony of Castro-Osorio of November 18, 1992 before the First Criminal Court of Rancagua, (record of appendixes to the State's final written arguments, Appendix 1, folios 1698 to 1700).

[FN48] Cf. Testimony of Neveu-Cortesi of January 12, 1993 before the First Criminal Court of Rancagua, (record of appendixes to the State's final written arguments, Appendix 1, folio 1707).

82(12) Through the resolutions of February 3 [FN49] and June 3, 1993, [FN50] and April 5, 1994, [FN51] the First Criminal Court of Rancagua found it had no jurisdiction to decide on the case and ordered that the proceedings be transferred to the Military and Police Prosecutor's Office of San Fernando. In view of these resolutions, Mrs. Gómez-Olivares, through her representative, filed motions for reconsideration and appeal on February 9 [FN52] and June 5, 1993, [FN53] and April 8, 1994, [FN54] respectively. The First Criminal Court of Rancagua overruled the motion for reconsideration through the resolutions of February 25, [FN55] and June 7, 1993, [FN56] and April 9, 1994, [FN57] respectively, and forwarded the case to the Appeals Court to decide on the motions for appeal. The Appeals Court revoked the resolutions whereby the First Criminal Court of Rancagua had found it had no jurisdiction through the resolutions of April 5, [FN58] and November 9, 1993, [FN59] and October 11, 1994, [FN60] respectively, on the grounds that the investigation stage had not been concluded and that there was no sufficient certainty to establish the civil or military status of the individuals involved in the events. Therefore, the investigation stage was not closed.

[FN49] Cf. Resolution of the First Criminal Court of Rancagua of February 3, 1993, (record of appendixes to the State's final written arguments, Appendix 1, folio 1711).
[FN50] Cf. Resolution of the First Criminal Court of Rancagua of June 3, 1993, (record of appendixes to the State's final written arguments, Appendix 1, folio 1740).
[FN51] Cf. Resolution of the First Criminal Court of Rancagua of April 5, 1994, (record of appendixes to the State's final written arguments, Appendix 1, folio 1774).
[FN52] Cf. Motions for reconsideration and appeal filed by the representative of Mrs. Gómez-Olivares on February 9, 1993, (record of appendixes to the State's final written arguments, Appendix 1, folios 1718 and 1719).
[FN53] Cf. Motions for reconsideration and appeal filed by the representative of Mrs. Gómez-Olivares on June 5, 1993, (record of appendixes to the State's final written arguments, Appendix 1, folios 1741 and 1742).
[FN54] Cf. Motions for reconsideration and appeal filed by the representative of Mrs. Gómez-Olivares on April 8, 1994, (record of appendixes to the State's final written arguments, Appendix 1, folios 1777 and 1778).
[FN55] Cf. Resolution of the First Criminal Court of Rancagua of February 25, 1993, (record of appendixes to the State's final written arguments, Appendix 1, folio 1721).
[FN56] Cf. Resolution of the First Criminal Court of Rancagua of June 7, 1993, (record of appendixes to the State's final written arguments, Appendix 1, folio 1742).
[FN57] Cf. Resolution of the First Criminal Court of Rancagua of April 9, 1994, (record of appendixes to the State's final written arguments, Appendix 1, folio 1779).
[FN58] Cf. Resolution of the Appeals Court of Rancagua of April 5, 1993, (record of appendixes to the State's final written arguments, Appendix 1, folio 1730).
[FN59] Cf. Resolution of the Appeals Court of Rancagua of November 9, 1993, (record of appendixes to the State's final written arguments, Appendix 1, folio 1747).

[FN60] Cf. Resolution of the Appeals Court of Rancagua of October 11, 1994, (record of appendixes to the State's final written arguments, Appendix 1, folio 1788).

82(13) On December 23, 1994, the First Criminal Court of Rancagua declared the preliminary investigation stage concluded, [FN61] and on December 28 that year Mrs. Gómez-Olivares, through her representative, requested the Court to "annul" said resolution. [FN62] On January 2, 1995, the Court set aside its prior resolution. [FN63] However, on February 8, 1995, the Court declared the conclusion of the investigation stage again. [FN64] Later, on February 15, 1995, the Court ordered the final dismissal of the proceedings, pursuant to Decree Law No. 2.191 [FN65] (supra para. 82(10)). On November 3, 1995, the Appeals Court decided to revoke said dismissal and to reopen the investigation proceedings "since the investigation had not been concluded." [FN66] On June 5, 1996, the First Criminal Court of Rancagua declared the investigation proceedings closed once again. [FN67] The Appeals Court decided to revoke said resolution and, additionally, ordered the Court "to impose penalties for criminal liability" upon the alleged offender Neveu-Cortesi. [FN68]

[FN61] Cf. Resolution of the First Criminal Court of Rancagua of December 23, 1994, (record of appendixes to the State's final written arguments, Appendix 1, folio 1796).
[FN62] Cf. Brief of December 28, 1994 filed by the representative of Mrs. Gómez-Olivares, (record of appendixes to the State's final written arguments, Appendix 1, folios 1797 and 1798).
[FN63] Cf. Resolution of the First Criminal Court of Rancagua of January 2, 1995, (record of appendixes to the State's final written arguments, Appendix 1, folio 1798).
[FN64] Cf. Resolution of the First Criminal Court of Rancagua of February 8, 1995, (record of appendixes to the State's final written arguments, Appendix 1, folio 1802).
[FN65] Cf. Resolution of the First Criminal Court of Rancagua of February 15, 1995, (record of appendixes to the State's final written arguments, Appendix 1, folio 1803).
[FN66] Cf. Resolution of the Appeals Court of Rancagua of November 3, 1995, (record of appendixes to the State's final written arguments, Appendix 1, folio 1817).
[FN67] Cf. Resolution of the First Criminal Court of Rancagua of June 5, 1996, (record of appendixes to the State's final written arguments, Appendix 1, folio 1854).
[FN68] Cf. Resolution of the Appeals Court of Rancagua of August 28, 1996, (record of appendixes to the State's final written arguments, Appendix 1, folios 1873 and 1874).

82(14) On August 31, 1996, the First Criminal Court of Rancagua passed a resolution whereby "legal proceedings were brought against [Manuel Segundo Castro-Osorio], as accomplice[,] and [Raúl Hernán Neveu-Cortesi], as perpetrator of the murder of Luis Alfredo Almonacid-Arellano." Furthermore, the Court ordered the arrest of Castro-Osorio and instructed the Prefectura de Carabineros (Police Department) of Curicó to bring Neveu-Cortesi before the Court. [FN69]

[FN69] Cf. Resolution of the First Criminal Court of Rancagua of August 31, 1996, (record of appendixes to the State's final written arguments, Appendix 1, folios 1877 and 1878).

82(15) On October 3, 1996, the First Criminal Court of Rancagua decided to release Mr. Castro-Osorio [FN70] on bail, a decision that was confirmed by the Appeals Court on October 4, 1996. [FN71] Immediately afterwards, on October 5, 1996, Castro-Osorio filed a motion for appeal against the decision of the First Criminal Court of Rancagua that initiated proceedings against him [FN72] (supra para. 82(14)). The Appeals Court decided to revoke the resolution appealed and declared Mr. Castro-Osorio as non-indicted. [FN73]

[FN70] Cf. Resolution of the First Criminal Court of Rancagua of October 3, 1996, (record of appendixes to the State's final written arguments, Appendix 1, folio 1902).
[FN71] Cf. Resolution of the Appeals Court of Rancagua of October 4, 1996, (record of appendixes to the State's final written arguments, Appendix 1, folio 1907).
[FN72] Cf. Motion for appeal filed by the representative of Mrs. Gómez-Olivares on October 5, 1996, (record of appendixes to the State's final written arguments, Appendix 1, folios 1917 and 1918).
[FN73] Cf. Resolution of the Appeals Court of Rancagua of October 30, 1996, (record of appendixes to the State's final written arguments, Appendix 1, folio 2044).

82(16) On September 27, 1996, the Second Military Court of Santiago requested the First Criminal Court of Rancagua to decline jurisdiction over the case, on the grounds that the accused Castro-Osorio and Neveu-Cortesi "on the date of the events were on active duty under military jurisdiction." Furthermore, the Military Court sustained that at the time of the events, "Decree Law No. 5 of [S]eptember 12, 1973, which declared [...] the state of siege [,] on the grounds of civil commotion, was in force [, and] that in view of the circumstances in which the country was enmeshed, said situation should be construed as a state or time of war." [FN74] On October 7, 1996, the First Criminal Court of Rancagua denied the motion for dismissal for lack of jurisdiction filed by the Second Military Court since "there were no grounds to assume that the accused were on active duty at the time of the events." [FN75] Thus, the motion for dismissal for lack of jurisdiction was formally brought before the Supreme Court.

[FN74] Cf. Motion for dismissal for lack of jurisdiction filed by the Second Military Court of Santiago against the First Criminal Court of Rancagua on September 27, 1996, (record of appendixes to the State's final written arguments, Appendix 1, folios 1886 and 1887).
[FN75] Cf. Resolution of the First Criminal Court of Rancagua of October 7, 1996, (record of appendixes to the State's final written arguments, Appendix 1, folio 1916).

82(17) On December 5, 1996, the Supreme Court decided on the motion for dismissal for lack of jurisdiction (supra para. 82(16)) and found that "jurisdiction over the case lies on the Second Military Court of Santiago, to which the case should be submitted." [FN76]

[FN76] Cf. Resolution of the Supreme Court of Justice of December 5, 1996, (record of appendixes to the State's final written arguments, Appendix 1, folio 1931).

82(18) On December 16, 1996, the Second Military Court of Santiago initiated the investigation through the Second Military and Police Prosecutor's Office of Santiago. [FN77] On January 13, 1997, said Military Court took over and joined case No. 40.184, until then under the charge of the First Criminal Court of Rancagua, with case No. 876-96, under its charge. [FN78]

[FN77] Cf. Resolution of the Second Military Court of Santiago of December 16, 1996, (record of appendixes to the State's final written arguments, Appendix 1, folio 1933).
[FN78] Cf. Resolution of the Second Military Court of Santiago of January 13, 1997, (record of appendixes to the State's final written arguments, Appendix 1, folio 1970).

82(19) On January 14, 1997, the Second Military and Police Prosecutor's Office of Santiago requested the Second Military Court of Santiago to "order the full and final dismissal of the proceedings [based] on the statute of limitations regarding the criminal liability" of Castro-Osorio and Neveu-Cortesi, pursuant to Decree Law No. 2.191. [FN79]

[FN79] Cf. Communication of January 14, 1997 of the Second Military and Police Prosecutor's Office of Santiago, (record of appendixes to the State's final written arguments, Appendix 1, folios 1934 and 1935).

82(20) On January 28, 1997, the Second Military Court of Santiago, without analyzing the evidence or deciding on the conclusion of the investigation, ordered the final dismissal of the case, pursuant to Decree Law No. 2.191. In the whereas clauses of its resolution, the Military Court pointed out that:

the foundations of law rest on two values which are inherent to it, justice and legal certainty.
As long as legal rules are based on these values, the law may fulfill its ultimate goal; i.e. social peace.
Amnesty is a concept founded on legal certainty which, to a certain extent, can do without justice in order to achieve social peace, which is the essential and ultimate goal of law that justifies its very existence.
[…]
[A] Constitutional State such as Chile is reflected, among other basic conducts, in the rule of law; therefore, the legal amnesty rule cannot be disregarded without affecting legality and the constitutional order inherent to it.
[T]he effects of amnesty go back to the date on which the offense was committed; therefore, once an amnesty law is passed and after establishing that the event occurred within the period covered by said law, all pending proceedings shall be definitely discontinued."
[…]

[A]mnesty has the effect of invalidating the criminal nature of the event; therefore, it is absolutely useless to complete an investigation in a case regarding an event that was proven to have occurred within the period covered by the amnesty law.
In any event, it should be noted that the investigation stage in the instant case has been fully completed. [FN80]

[FN80] Cf. Dismissal No. 28 ordered by the Second Military Court of Santiago on January 28, 1997, (record of appendixes to the State's final written arguments, Appendix 1, folios 1936 to 1938 and 1974 to 1976).

82(21) On February 26, 1997, Mrs. Gómez-Olivares, through her representative, filed a motion for appeal against the final dismissal ordered in the case. The motion was founded, among other things, on the fact that the dismissal ordered does not "precisely guarantee social peace or the stability of the Rule of Law" and the "copious international legislation approved by Chile […] renders the enforcement of the amnesty law inadmissible." [FN81] The case file was forwarded to the Court-Martial, which on March 25, 1998, confirmed the judgment of the Second Military Court of Santiago (supra para. 82(20)). In the whereas clauses of the judgment, the Court-Martial resorted to the case law of the Supreme Court of Justice, as follows:

amnesty [is] an objective ground for termination of criminal liability [and] it becomes effective ipso facto as from the date set in the law. Said effects cannot be challenged by its beneficiaries [...], since they relate to public law rules aimed at safeguarding the general interests of society. The foregoing means that, once the applicability of the amnesty law is verified, said applicability must be declared by the courts […]. That does not entail the application of the provisions of Section 413 [of the Code of Criminal Procedure], which provide that final dismissal of the case cannot be ordered unless the investigation aimed at verifying the corpus delicti and identifying the criminal has been completed. [FN82]

The Court-Martial also found that:

the occurrence of the illegal act (murder) [of Mr. Almonacid-Arellano] within the period covered by the amnesty law has been irrefutably verified; moreover, a writ of indictment has been issued against the alleged perpetrators. Therefore, the amnesty decree law is fully effective and, consequently, it should be applied by the courts and the proceedings should be definitely dismissed, since criminal liability has expired and, therefore, the criminal proceedings are futile. [FN83]

As regards the enforcement of international agreements on human rights, the Court-Martial found that:

this Court cannot uphold the idea that said international instruments have the effect of invalidating [Decree Law No. 2.191 … I]ndeed, the Pact of San Jose, Costa Rica, was ratified on August 21, 1990[,] while the International Covenant on Civil and Political Rights was incorporated to the Chilean legislation on April 29, 1989. Therefore, it cannot be applied

retroactively disregarding provisions on the non-retroactivity of criminal law, since that would amount to sustaining that amnesty has the effect of reinforcing criminal liability even after final expiration thereof. The foregoing considerations are inconsistent with the essence of amnesty; i.e. the enforcement of the most favorable criminal law for those who shall benefit thereunder. [FN84]

One of the members of the Court-Martial dissented in the reasoning of the majority of the Court since she found that the "murder" of Mr. Almonacid-Arellano had been perpetrated in "times when the country was enmeshed in a domestic war" and that said act, "given the prevailing circumstances and modus operandi, [...] falls within one of the actions prohibited under Article 4 [common] of the Geneva Conventions." Moreover, she stated that Article 52 of the Geneva Conventions "sets forth that war crimes are non-extinguishable and are not susceptible of amnesty." [FN85]

[FN81] Cf. Motion for appeal filed by the representative of Mrs. Gómez-Olivares on February 26, 1997, (record of appendixes to the State's final written arguments, Appendix 1, folio 1949).
[FN82] Cf. Judgment of the Court-Martial of March 25, 1998, whereas clause 5 (record of appendixes to the application, Appendix 3, folio 41).
[FN83] Cf. Judgment of the Court-Martial of March 25, 1998, whereas clause 6 (record of appendixes to the application, Appendix 3, folio 42).
[FN84] Cf. Judgment of the Court-Martial of March 25, 1998, whereas clause 9 (record of appendixes to the application, Appendix 3, folios 43 and 44).
[FN85] Cf. Dissenting opinion of Judge Morales to the Judgment of the Court-Martial of March 25, 1998 (record of appendixes to the application, Appendix 3, folios 44 and 45).

82(22) On April, 9, 1998, Mrs. Gómez-Olivares, through her representative, filed a motion for review regarding the judgment of the Court-Martial (supra para. 82(21)), on the following grounds, among others:

pursuant to the Code of Criminal Procedure [...] judges may not order the final dismissal of proceedings unless the investigation stage has been concluded [...]. In the instant case, the investigation stage had not been completed, significant proceedings had not been performed, including the identification of the members of the Police patrol and, eventually, the finding of new events that allowed identifying other individuals responsible for the murder [of Mr. Almonacid-Arellano];
[…]
the amnesty decree law may continue in force only regarding those matters that have not been regulated or prohibited by international legislation. [However], given that the case involves murders committed by State agents, they are international illegal acts in relation to which 'national sovereignty' [...] is necessarily restricted and the possibility to grant an indiscriminate pardon or amnesty is thus also limited;
[…]

the right to the truth and justice to which the next of kin of the victims are entitled is an inherent right that is superior to the right claimed to the benefit of criminals upon imposing criminal liability for the events, which thus becomes an accessory right; and
[…]
from the Geneva Conventions and the amnesty law […] it may be inferred that amnesty may be enforced regarding any matters other than the 'gross violations specified in the Geneva Conventions.' [FN86]

[FN86] Cf. Motion for appeal filed by the representative of Mrs. Gómez-Olivares, (record of appendixes to the State's final written arguments, Appendix 1, folios 2000 to 2016).

82(23) The Supreme Court ruled on this motion on April 16, 1998, and "overruled it on the grounds that it was time-barred." [FN87] On November 11, 1998, the Court ordered to close the case file. [FN88]

[FN87] Cf. Resolution of the Supreme Court of April 16, 1998, (record of appendixes to the State's final written arguments, Appendix 1, folio 2019).
[FN88] Cf. Order to close proceedings of November 11, 1998, (record of appendixes to the State's final written arguments, Appendix 1, folio 2039).
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ii) Measures adopted by the State regarding Decree Law No. 2.191

82(24) To the date of this judgment, six bills of law aimed at amending Decree Law No. 2.191 were submitted. Two of these bills [FN89] proposed an interpretation of the aforementioned decree law through another law, and set forth that the decree should not be enforced regarding crimes against humanity given the impossibility to declare them extinguished and susceptible of amnesty. The third bill [FN90] was aimed at extending the period covered by the Decree Law until March 11, 1990. The fourth bill [FN91] sought to prevent the commencement of proceedings to impose liability upon those individuals mentioned as perpetrators, accomplices or accessories after the fact, "rendering any criminal or civil action related thereto extinguished" and suggested that any pending lawsuits should be definitely dismissed "without further proceedings." The fifth bill [FN92] was intended to regulate the application of the Decree Law and to establish that, in the case of detained-disappeared persons, the judge should continue investigating "with the sole aim of discovering the location of the victims or their remains." None of the five bills was passed. The sixth bill [FN93] was recently submitted and its purpose is to declare Decree Law No. 2.191 invalid under public law. The Court ignores the current status of the legislative processing of this bill.

[FN89] Cf. Bulletin No. 654-07, submitted on April 7, 1992 by senators Rolando Calderón-Aránguiz, Jaime Gazmuri-Mujica, Ricardo Núñez-Muñoz and Hernán Vodanovic-Schnake (record of appendixes to the State's final written arguments, Appendix 10, folios 4269 to 4274);

Bulletin No. 1718-07, submitted on October 11, 1995 by senators Ruiz de Giorgio and Mariano Ruiz-Esquide (record of appendixes to the State's final written arguments, Appendix 11, folios 4276 to 4285).
[FN90] Cf. Bulletin No. 1.622-07, submitted on June 6, 1995 by Senator Sebastián Piñera-Echenique (record of appendixes to the State's final written arguments, Appendix 12, folios 4365 to 4371).
[FN91] Cf. Bulletin No. 1632-07, submitted on June 14, 1995 by Senator Francisco Javier Errazuriz (record of appendixes to the State's final written arguments, Appendix 13, folios 4373 to 4377).
[FN92] Cf. Bulletin No. 1657-07, submitted on July 19, 1995, by Senators Diez, Larraín, Otero, and Piñera (record of appendixes to the State's final written arguments, Appendix 14, folios 4379 to 4389).
[FN93] Cf. Bulletin No. 4162-07, submitted on April 21, 2006, by Senators Girardi, Letelier, Navarro, and Ruiz-Esquide (Appendix 9, State's final written arguments, folios 4249 to 4267).

82(25) In the last few years, the Judiciary of Chile has not applied Decree Law No. 2.191 in several cases. [FN94]

[FN94] Cf. Appeals Court of Santiago, Motion for Appeal No. 38683-94 of September 30, 1994 (record of documents submitted at the Public Hearing, folios 483 to 495); Supreme Court, Motion for Review No. 3831-97 of June 8, 1998 (record of documents submitted at the Public Hearing, folios 186 to 196); Supreme Court, Motion for Review No. 469-98 of September 9, 1998 (record of documents submitted at the Public Hearing, folios 364 to 380); Supreme Court, Motion for Review No. 2097-1998 of December 29, 1998 (record of documents submitted at the Public Hearing, folios 299 to 305); Supreme Court, Motion for Review No. 247-98 of January 7, 1999 (record of documents submitted at the Public Hearing, folios 197 to 206); Supreme Court, Motion for Review No. 1359-2001 of August 26, 2002 (record of documents submitted at the Public Hearing, folios 220 to 234); Supreme Court, Motion for Review No. 4135-2001 of November 29, 2002 (record of documents submitted at the Public Hearing, folios 207 to 219); Supreme Court, Motion for Review No. 4054-2001 of January 31, 2003 (record of documents submitted at the Public Hearing, folios 272 to 283); Supreme Court, Motion for Review No. 4053-2001 of January 31, 2003 (record of documents submitted at the Public Hearing, folios 253 to 271); Supreme Court, Motion for Review No. 4209-01 of March 3, 2003 (record of documents submitted at the Public Hearing, folios 284 to 298); Supreme Court, Motion for Review No. 2231-01 of August 28, 2003 (record of documents submitted at the Public Hearing, folios 235 to 252); Supreme Court, Motion for Review No. 1134-2002 of November 04, 2003 (record of documents submitted at the Public Hearing, folios 306 to 316); Supreme Court, Motion for Review No. 2505-2002 of November 11, 2003 (record of documents submitted at the Public Hearing, folios 317 to 324); Supreme Court, Motion for Review No. 11821-2003 of January 05, 2004 (record of documents submitted at the Public Hearing, folios 443 to 475); Supreme Court, Motion for Review No. 457-2005 of February 09, 2005 (record of documents submitted at the Public Hearing, folios 424 to 437); Supreme Court, Motion for Review No. 4622-2002 of March 29, 2005 (record of documents submitted at the Public Hearing, folios 325 to 339); Supreme Court, Motion for Review No. 15765-2004 of July 06, 2005 (record of documents submitted at

the Public Hearing, folios 438 to 442); Supreme Court, Motion for Review No. 3925-2005 of September 05, 2005 (record of documents submitted at the Public Hearing, folios 390 to 423); Appeals Court of Santiago, Motion for Review No. 37483–2004, resolution 8472, issued by the Criminal Secretariat, of January 18, 2006 (record of appendixes to the State's final written arguments, Appendix 4, Volume II, folios 4170 to 4179); Appeals Court of Santiago, Motion for Appeal No. 24471-2005, Resolution 43710, issued by the Criminal Secretariat, of April 20, 2006 (record on the merits, Volume IV, folios 1089 to 1093). 396-2006, Resolution 9334, issued by the Secretaría Única (Single Secretariat), of May 8, 2006 (record on the merits, Volume IV, folios 1094 and 1095); Supreme Court, Motion for Review No. 3215-2005, Resolution 11745, issued by the Single Secretariat, of May 30, 2006 (record on the merits, Volume IV, folios 1157 to 1059); Appeals Court of Santiago, No. 14567-2004, Resolution 64656, issued by the Criminal Secretariat, of June 02, 2006 (record on the merits, Volume IV, folios 1160 and 1061); Appeals Court of Santiago, No. 14058-2004, Resolution 74986, issued by the Criminal Secretariat, of June 27, 2006 (record on the merits, Volume IV, folios 1263 to 1270); Appeals Court of Santiago, No. 32365-2005, Resolution 76786, issued by the Criminal Secretariat, of June 29, 2006, (record on the merits, Volume IV, folios 1260 to 1262).

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d) Reparation measures adopted in view of the gross human right violations committed during the de facto Government

82(26) On April 25, 1990, immediately after the end of the de facto Military Government, President Patricio Aylwin-Azocar, considering, among other things, "[t]hat the moral conscience of the Nation demands that the truth for the grave violations of human rights committed in our country between September 11, 1973 and March 11, 1990 be brought to light," [FN95] passed Supreme Decree No. 355, whereby the Comisión Nacional de Verdad y Reconciliación (National Truth and Reconciliation Commission) was established (hereinafter "the Truth Commission"). The duties of this Commission involved:

a) Setting a complete description of the gross events referred to herein, their background and circumstances;
b) Gathering background information to identify the victims and establish their current location;
c) Recommending the reparation and restoration measures deemed legally appropriate; and
d) Recommending such legal and administrative measures as, at the discretion of the Commission, should be adopted to prevent or hinder the commission of the acts referred to herein.

Supreme Decree No. 355 considered the following to be gross violations:

disappearance after arrest, execution and torture leading to death committed by government agents or people in their service, as well as kidnappings and attempts on the life of persons carried out by private citizens for political reasons. [FN96]

[FN95] Cf. Whereas clause one of Supreme Decree No. 355 of April 25, 1990, Report of the Comisión Nacional de Verdad y Reconciliación (National Truth and Reconciliation Commission), Volume I, pages XI to XIV (record of appendixes to the State's final written arguments, Appendix 2, folios 2077 to 2079).
[FN96] Cf. Article one of Supreme Decree No. 355 of April 25, 1990, Report of the Comisión Nacional de Verdad y Reconciliación (National Truth and Reconciliation Commission), Volume I, pages XI to XIV (record of appendixes to the State's final written arguments, Appendix 2, folios 2077 to 2079).

82(27) After performing the duties assigned thereto, the Truth Commission issued its report, unanimously agreed upon by its members, and submitted it to President Aylwin on February 8, 1991. [FN97] For his part, President Aylwin disclosed the report to the public on March 4, 1991. [FN98] At that opportunity, the President asked for forgiveness to the next of kin of the victims as follows:

When those who caused so much suffering were State officials and the relevant government authorities could not or did not know how to prevent or punish them, nor was there the necessary social reaction to avert it, both the State and society as a whole are responsible, whether by act or by omission. It is the Chilean society who is in debt to the victims of human rights violations.
[…]
(...) Therefore, in my capacity as President of the Republic, I dare to speak for the entire nation and, in its name, apologize to the families of the victims. [FN99]

[FN97] Cf. Address to the Nation delivered by President Patricio Aylwin upon disclosing the Report of the Comisión Nacional de Verdad y Reconciliación (National Truth and Reconciliation Commission) on March 4, 1991, Report of the Comisión Nacional de Verdad y Reconciliación (National Truth and Reconciliation Commission), Volume II, pages 887 to 894, (record of appendixes to the State's final written arguments, Appendix 2, folios 2529 to 2533).
[FN98] Cf. Address to the Nation delivered by President Patricio Aylwin, supra note 97.
[FN99] Cf. Address to the Nation delivered by President Patricio Aylwin, supra note 97.

82(28) The report of the Comisión Nacional de Verdad y Reconciliación (Truth Commission) individually names the victims, including Mr. Almonacid-Arellano. [FN100] Moreover, the Truth Commission made recommendations for symbolic reparation and restoration measures, [FN101] both legal and administrative [FN102] as well as related to social welfare. [FN103]

[FN100] Cf. Report of the Comisión Nacional de la Verdad y Reconciliación (National Truth and Reconciliation Commission), Volume II, page 904 and Volume III, page 18, (record of appendixes to the State's final written arguments, Appendix 2, folios 2233 and 2572).
[FN101] Cf. Report of the Comisión Nacional de la Verdad y Reconciliación (National Truth and Reconciliation Commission), Volume II, pages 824 and 825, (record of appendixes to the State's final written arguments, Appendix 2, folio 2498).

[FN102] Cf. Report of the Comisión Nacional de la Verdad y Reconciliación (National Truth and Reconciliation Commission), Volume II, pages 826 and 827, (record of appendixes to the State's final written arguments, Appendix 2, folio 2499).
[FN103] Cf. Report of the Comisión Nacional de la Verdad y Reconciliación (National Truth and Reconciliation Commission), Volume II, pages 827 to 836, (record of appendixes to the State's final written arguments, Appendix 2, folios 2499 to 2504).

82(29) On February 8, 1992, Law No. 19.123 was published in the Official Gazette, whereby the Corporación Nacional de Reparación y Reconciliación (National Reparation and Reconciliation Corporation) was established. [FN104] The purpose of this Corporation was "to coordinate, perform, and promote any actions necessary to comply with the recommendations contained in the Report of the Comisión Nacional de Verdad y Reconciliación (National Truth and Reconciliation Commission)." [FN105] To that effect, a monthly pension was granted to the next of kin of the victims of human rights violations or political violence, [FN106] they were granted the right to receive certain free medical [FN107] and educational benefits, [FN108] and the children of the victims were exempted from military service, if summoned to do it. [FN109]

[FN104] Cf. Law No. 19.123, published in the Official Gazette on February 8, 1993, (record of appendixes to the State's final written arguments, Appendix 3, folios 3383 to 3395).
[FN105] Cf. Article 1 of Law No. 19.123, published in the Official Gazette on February 8, 1993, (record of appendixes to the State's final written arguments, Appendix 3, folio 3383).
[FN106] Cf. Articles 17 to 27 of Law No. 19.123, published in the Official Gazette on February 8, 1993, (record of appendixes to the State's final written arguments, Appendix 3, folios 3389 to 3392).
[FN107] Cf. Article 28 of Law No. 19.123, published in the Official Gazette on February 8, 1993, (record of appendixes to the State's final written arguments, Appendix 3, folio 3393).
[FN108] Cf. Articles 29 to 31 of Law No. 19.123, published in the Official Gazette on February 8, 1993, (record of appendixes to the State's final written arguments, Appendix 3, folios 3393 to 3394).
[FN109] Cf. Article 32 of Law No. 19.123, published in the Official Gazette on February 8, 1993, (record of appendixes to the State's final written arguments, Appendix 3, folio 3394).

82(30) On November 11, 2003, Supreme Decree No. 1.040 was published in the Official Gazette, whereby the Comisión Nacional sobre Prisión Política y Tortura (National Commission on Political Imprisonment and Torture) was created to find the truth regarding the individuals who were deprived of freedom and tortured for political reasons within the period of the de facto military Government. [FN110] Moreover, in its final report the Commission proposed symbolic collective and individual reparation measures (embodied in Law No. 19.992).

[FN110] Cf. Report of the Comisión Nacional sobre Prisión Política y Tortura (National Commission on Political Imprisonment and Torture), (record of appendixes to the State's final written arguments, Appendix 4, folio 3430).

82(31) On October 29, 2004, Law No. 19.980 was passed. Said Law amended Law No. 19.123 (supra para. 82(29)) by broadening and adding new benefits for the next of kin of the victims, including a 50 percent increase in the amount of the monthly reparation pension; the empowerment of the President of the Republic to grant a maximum of 200 non-contributory pensions and the broadening of the scope of health benefits. [FN111]

[FN111] Cf. Law No. 19.980, published in the Official Gazette on October 29, 2004, (record of appendixes to the answer to the application, folios 376 to 379).

82(32) In addition to the foregoing, the State adopted the following reparation measures: i) Programa de Apoyo a los Presos Políticos (Political Prisoners Support Program) for individuals kept in custody as of March 11, 1990; ii) Programa de Reparación y Atención Integral de Salud (PRAIS) (Comprehensive Health Service and Reparation Program) for those affected by human rights violations; iii) Programa de Derechos Humanos del Ministerio del Interior (Human Rights Program of the Department of the Interior); iv) technological improvements for the Legal Medical Service; v) Oficina Nacional del Retorno (National Return Office); vi) Programa para Exonerados Políticos (Political Exoneration Program); vii) restitution of or compensation for property seized and acquired by the State; viii) the setting of the Mesa de Diálogo sobre Derechos Humanos (Human Rights Conversation Table), and ix) the presidential initiative "No hay mañana sin ayer" ("Yesterday for Tomorrow") of President Ricardo Lagos. [FN112]

[FN112] Cf. Statement of Cristián Correa-Montt, witness proposed by the State (record on the merits, Volume II, folios 421 to 440).

82(33) Lastly, the State has set up several memorials in honor of the victims of human rights violations. [FN113]

[FN113] Cf. Document entitled "Memoriales construidos con Aportes del Programa de Derechos Humanos del Ministerio del Interior", appendix 1 to the statement of Cristián Correa-Montt (record on the merits, Volume II, folios 441 to 450); book "Políticas de Reparación. Chile 1990-2004" by Elizabeth Lira and Brian Loveman, appendix 2 to the statement of Cristián Correa-Montt (record on the merits, Volume II, folios 451 to 463).

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e) Reparation measures granted to Mrs. Gómez-Olivares and her family

82(34) Mrs. Gómez-Olivares received a bonus in 1992, and was granted a monthly life pension. She is also the beneficiary of health benefits. Similarly, the children of Mrs. Gómez-Olivares and Mr. Almonacid-Arellano have received educational and economic reparations, including higher

education grants. Furthermore, they also enjoy health benefits. All in all, Mrs. Gómez-Olivares and her children have received direct transfers in the amount of approximately US$ 98,000.00 (ninety-eight thousand United States Dollars), and scholarships in the amount of approximately US$ 12,180.00 (twelve thousand one hundred and eighty United States Dollars). [FN114]

[FN114] Cf. Statement of Mrs. Elvira Gómez-Olivares at the public hearing of March 29, 2006; statement of Cristián Correa-Montt (record on the merits, Volume II, folio 439); receipts from the Benefit Payment Division of the Operations Department of the Instituto de Normalización Provisional (Provisional Normalization Institute) of February 2006 (record of appendixes to the State's final written arguments, Appendix 4, volume II, folios 4392 to 4394).

82(35) The State named a street "Luis Almonacid" and a residential area "Villa Professor Luis Almonacid," both in the city of Rancagua, and included the name of Mr. Almonacid-Arellano in the Memorial of Santiago's General Cemetery. [FN115]

[FN115] Cf. Statement of Mrs. Elvira Gómez-Olivares (public hearing held on March 29, 2006); list of works in Rancagua http://www.ddhh.gov.cl/DDHH/obras/info_VIR/VIR_rancagua.html (record of appendixes to the answer to the application, folio 381).

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f) Regarding the damage inflicted on Mrs. Gómez-Olivares and her family, and costs and expenses

82(36) Mrs. Gómez-Olivares and her children endured pain and suffering as a result of the fact that those responsible for the death of Mr. Almonacid-Arellano had not been punished.

82(37) Mrs. Gómez-Olivares acted through representatives in the domestic proceedings of the instant case and the proceedings before the bodies of the Inter-American System of Human Rights, which resulted in costs and expenses.

VIII. FAILURE TO COMPLY WITH THE GENERAL DUTIES CONTAINED IN ARTICLES 1(1) AND 2 OF THE AMERICAN CONVENTION (OBLIGATION TO RESPECT RIGHTS AND OBLIGATION TO ADOPT DOMESTIC LEGAL REMEDIES) AND VIOLATIONS OF ARTICLES 8 AND 25 THEREOF (RIGHT TO A FAIR TRIAL AND RIGHT TO JUDICIAL PROTECTION)

83. Arguments of the Commission

a) denial of justice in detriment of the next of kin of Mr. Almonacid-Arellano derives from the enforcement of the self-amnesty Decree Law issued during the military dictatorship as self-pardon for the benefit of its members. The State has held this law in force after the ratification of the American Convention; in turn, the Chilean courts have declared it to be constitutional and have continued enforcing it;

b) in the instant case, it is clear that the enforcement of said Decree Law affects the right of the victims to an investigation, as well as the identification and prosecution of those individuals responsible for the deaths of the victims and the injuries caused to their next of kin. Indeed, this law affects the rights of the victims to get justice;
c) the enforcement of the self-amnesty Decree Law adversely and permanently affected the judicial proceeding aimed at the investigation, prosecution, arrest, trial and conviction of those responsible for the arbitrary detention and extra-legal execution of Mr. Almonacid-Arellano. In that sense, the State has violated Articles 8, 25 and 1(1) of the Convention in detriment of his next of kin;
d) another consequence of the enforcement of Decree Law No. 2.191 and the subsequent closing of the investigation was the denial of the right to be heard by a competent court to the next of kin of Mr. Almonacid-Arellano, and
e) on the other hand, the fact that an investigation involving police members has been entrusted to the military courts gives rise to serious doubts regarding their independence and impartiality.

84. Arguments of the Representative

a) the crime under investigation in the instant case is not a common crime, but an international one which, overcoming amnesties, statutes of limitations or other mechanisms aimed at extinguishing criminal responsibility, gives right to criminal prosecution, including the trial and conviction of the offenders.
b) the final dismissal of the proceeding by application of the Amnesty Decree Law shows an absolute lack of knowledge regarding the scope of the laws governing the international community, which Chile, as a sovereign state, accepted and incorporated to its domestic legislation;
c) where murder is committed by State agents, an international crime arises, in respect of which national sovereignty, expressed in the adherence to international treaties, is necessarily restricted, and the possibility to grant an indiscriminate pardon or amnesty is thus also limited;
d) a State may freely establish its domestic legislation, pursuant to its national sovereign laws. The State, however, does not have the authority to modify unilaterally any situations or circumstances for which there is an international juridical classification. If international law considers or classifies a specific fact as a crime, binding the State to punish such fact, the State cannot alter or modify such status for domestic convenience;
e) the referral of the case to the military courts is a violation of Article 8 of the American Convention, since the court hearing the instant case was not competent, independent or impartial; and
f) in this regard, a system of justice such as the military courts cannot be impartial from the moment it places all its means of defense at the disposal of the person it shall subject to prosecution and trial.

85. Arguments of the State

a) to begin with, amnesty or self-amnesty laws are contrary to international human rights law;

b) the case law of the higher courts of justice of Chile, traceable from 1998, has established several mechanisms to avoid the application of the Amnesty Decree Law, and so avoid its negative effects regarding the respect for human rights, and
c) it endorses the opinion of the Inter-American Court, which establishes that as a matter of principle, it is desirable that no amnesty laws exist, but in case they do, they must not be an obstacle for the respect of human rights, as established by the Court in the Case of Barrios Altos.

Considerations of the Court

86. Article 1(1) of the Convention establishes the following:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

87. Likewise, Article 2 of the Convention establishes the following:

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

88. Article 8(1) of the Convention establishes the following:

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, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

89. And furthermore, Article 25(1) of the Convention establishes that:

Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

90. In the instant case, the Court has been requested to determine whether the State has complied with the general duties established in the aforementioned Articles 1(1) and 2 of the Convention upon keeping in force Decree Law No. 2.191 after the Chilean State ratified the Convention. On the other hand, the Court must determine whether the application of said decree law constitutes a violation of the rights embodied in Articles 8(1) and 25 of the Convention as regards Article 1(1) thereof, in detriment of the alleged victims in the instant case. For that purpose, the Court deems it appropriate to undertake the analysis of these questions as follows: a) first, it should be determined whether the murder of Mr. Almonacid-Arellano is a crime

against humanity, b) second, if it is determined that such murder is a crime against humanity, the Court shall consider whether such crime may be susceptible of amnesty, c) third, in case it is determined that such crime may not be susceptible of amnesty, the Court shall analyze whether Decree Law No. 2.191 contemplates an amnesty for this crime and whether the State has violated the Convention in keeping such law in force, and d) finally, the Court shall analyze whether the enforcement of such law by the judicial authorities in the instant case implies a violation of the rights embodied in Articles 8(1) and 25 of the Convention. All the aforesaid shall be analyzed in paragraph A) of this Chapter.

91. Once the aforesaid has been determined, the Court shall address, in paragraph B) of this chapter, the allegations made by the Inter-American Commission and the representative of the alleged victims as regards the fact that the military court did not have jurisdiction to hear the instant case, which fact they consider as a violation of Article 8(1) of the American Convention.

92. It should be pointed out that the State has merely objected to the admissibility of the case –issue which has already been determined by this Court in previous paragraphs (supra paras. 38 to 65)- and has pointed out that the Chilean courts of justice no longer enforce Decree Law No. 2.191. The Court points out that the State has not affirmed at any time that the said decree law does not violate the American Convention. Indeed, the Agent for the State at the public hearing pointed out the following:

I want to make it clear, and I will repeat here that the Chilean State is not defending the Decree Law of Amnesty. On the contrary, we do not consider that the Decree Law of Amnesty has any ethical or juridical value. [FN116]

[FN116] Cf. oral arguments of the State (public hearing held on March 29, 2006).

A) Validity and enforcement of Decree Law No. 2.191

a) Extra-legal execution of Mr. Almonacid-Arellano

93. In this section, the Court shall analyze whether the crime committed against Mr. Almonacid-Arellano may be considered as a crime against humanity. In this sense, the Court must analyze whether on September 17, 1973, date on which Mr. Almonacid-Arellano died, the murder constituted a crime against humanity, and it must also determine the circumstances surrounding such death.

94. The development of the concept of “crime against humanity” started at the beginning of the last century. In the preamble to The Hague Convention on Laws and Customs of War on Land, 1907 (Convention IV) the High Contracting Parties established that “the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.” [FN117] Likewise, the term “crimes against humanity and

civilization" was used by the governments of France, the United Kingdom, and Russia on May 28, 1915 to denounce the massacre of Armenians in Turkey. [FN118]

[FN117] Cf. The Hague Convention of October 18, 1907 on Laws and Customs of War on Land (Hague IV.)
[FN118] Egon Schwelb, Crimes Against Humanity, British Yearbook of International Law. Vol 23, (1946), 178, page 181. "[C]rimes against humanity and civilization for which the members of the Turkish Government as well as the agents involved in the massacres are responsible."
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95. Murder as a crime against humanity was included for the first time in Article 6(c) of the Charter of the International Military Tribunal of Nuremberg which was appendixed to the Agreement to establish an International Military Tribunal for the trial and punishment of the main war criminals of the European Axis countries, signed in London on August 8, 1945 (the "London Charter"). Shortly afterwards, on December 20, 1945, the Control Council Law No.10 also considered murder as a crime against humanity in its Article II(c). Similarly, the crime of murder was included in Article 5(c) of the Charter of the International Military Tribunal for the trial of the main war criminals of the Far East (Tokyo Charter), adopted on January 19, 1946.

96. Furthermore, the Court acknowledges that the Nuremberg Charter played an important role in establishing the elements that characterize a crime as a "crime against humanity." This Charter provided the first articulation of the elements for such a crime. [FN119] The original conception of such elements remained basically unaltered as of the date of the death of Mr. Almonacid-Arellano, with the exception that crimes against humanity may be committed during both peaceful and war times. [FN120]

On that basis, the Court acknowledges that crimes against humanity include the commission of inhuman acts, such as murder, committed in a context of generalized or systematic attacks against civilians. A single illegal act as those mentioned above, committed within the described background, would suffice for a crime against humanity to arise. In the same sense, the International Tribunal for the Former Yugoslavia rendered judgment in the Case of Prosecutor v. Dusko Tadic, when considering that "a single act committed by a perpetrator within a context of a generalized or systematic attack against the civil population brings about individual criminal liability, and it is not necessary for the perpetrator to commit numerous offenses in order to be considered responsible." [FN121] All these elements were already legally defined when Mr. Almonacid-Arellano was executed.

[FN119] Article 6 - The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes:
[…]
(c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during

the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.
[FN120] Cf. United States Nuremberg Military Tribunal, United States v. Ohlendort, 15 I.L.R. 656 (1948); United States v. Alstotter (1948 Justice Case), in Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 Vol. III 956 (U.S. Gov. Printing Office 1951); History of the UN War Crimes Commission and the Development of the Laws of War complied by the War Crimes Commission (1948); Cf. UN, Principles of International Law recognized in the Charter of the Nuremberg Tribunal. Adopted by the International Law Commission of the United Nations in 1950, UN Doc. A/1316 (1950), part III, para. 123; Article I(b) of the Convention on the non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted by the General Assembly of the United Nations in Resolution 2391 (XXIII) of November 25, 1968.
[FN121] Cf. International Criminal Tribunal for the Former Yugoslavia, Case of Prosecutor v. Dusko Tadic, IT-94-1-T, Opinion and Judgment, May 7, 1997, at para. 649. This was subsequently confirmed by the same court in the Case of Prosecutor v. Kupreskic, et al, IT-95-16-T, Judgment, January 14, 2000, at para. 550, and Case of Prosecutor v. Kordic and Cerkez, IT-95-14/2-T, Judgment, February 26, 2001, at para. 178.
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97. On the other hand, the International Military Tribunal for the trial of the Major War Criminals (hereinafter the "Nuremberg Tribunal"), which had jurisdiction to hear the cases of crimes included in the London Charter, stated that the Nuremberg Charter "is the expression of International Law existing at the moment of its creation, and to such extent, is in itself a contribution to International Law." [FN122] In this way, it provided recognition to the existence of an international custom, as an expression of international law, which prohibited such crimes.

[FN122] Cf. Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, Germany, (1947) at 218.
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98. The prohibition of crimes against humanity, including murder, was further corroborated by the United Nations. On December 11, 1946, the General Assembly confirmed "the principles of International Law recognized by the Charter of the Nuremberg Tribunal and the judgments of said Tribunal." [FN123] Furthermore, in 1947, the General Assembly entrusted the International Law Commission with "formulating the international law principles recognized by the Charter and by the judgments of the Nuremberg Tribunal." [FN124] These principles were adopted in 1950. [FN125] Among them, Principle VI(c) classifies murder as a crime against humanity. Likewise, the Court points out that Article 3 common to the Geneva Conventions of 1949, to which Chile has been a party since 1950, also prohibits "homicide in all its forms" of persons that do not directly take part in the hostilities.

[FN123] Cf. UN, Confirmation of the Principles of International Law recognized by the Charter of the Nuremberg Court adopted by the General Assembly of the United Nations in its Resolution 95(I), at its 55th plenary session on December 11, 1946.
[FN124] Cf. UN, Formulation of the Principles of International law recognized by the Charter and by the Judgments of the Nuremberg Tribunal, adopted by the General Assembly of the United Nations in Resolution 177 (II), at its 123rd plenary session on November 21, 1947.
[FN125] Cf. UN, Principles of International law recognized by the Charter of the Nuremberg Tribunal, adopted by the International Law Commission of the United Nations in 1950 (A/CN.4/34).
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99. Based on the preceding paragraphs, the Court finds that there is sufficient evidence to conclude that in 1973, year in which Mr. Almonacid-Arellano died, the commission of crimes against humanity, including murder committed in the course of a generalized or systematic attack against certain sectors of the civil population, was in violation of a binding rule of international law. Said prohibition to commit crimes against humanity is a ius cogens rule, and the punishment of such crimes is obligatory pursuant to the general principles of international law.

100. The European Court of Human Rights also rendered a judgment in that sense in the Case of Kolk and Kislyiy v. Estonia. In this case, Kolk and Kislyiy committed crimes against humanity in 1949 and were tried and convicted for such crimes by the Estonian courts in 2003. The European Court stated that even though the acts committed by those persons might have been legal pursuant to the domestic legislation then in force, the Estonian courts considered that they were crimes against humanity under international law at the moment of their commission, and that there was no reason to conclude otherwise. [FN126]

[FN126] Cf. ECHR, Case of Kolk and Kislyiy v. Estonia, Judgment of January 17, 2006. Applications No. 23052/04 and 24018/04.
[Kolk and Kislyiy] pointed out that the acts in respect of which they were convicted had taken place in 1949 in the territory of the Russian Soviet Federative Socialist Republic of Estonia. At the time the events occurred the Criminal Code of 1946 of the Russian Federative Socialist Republic was applicable in the territory of Estonia. The said code did not contemplate crimes against humanity. The responsibility for crimes against humanity was not established in Estonia until November 9, 1944 [...]
The Court notices, first, that Estonia lost its independence as a consequence of the non-aggression Pact between Germany and the Union of Soviet Socialist Republics (also known as "Molotov-Ribbentrop Pact",) adopted on August 23, 1939, and its additional secret protocols. [...] The totalitarian Communist Regime of the Soviet Union conducted systematic actions on a large scale against the Estonian population, including, for example, the deportation of approximately 10,000 people on June 14, 1941 and over 20,000 people on March 25, 1949.
[…]
The Court notices that the deportation of the civilian population was expressly recognized by the Charter of the Nuremberg Tribunal of 1945 as a crime against humanity (article 6 (c)). Even when the Nuremberg Tribunal was established to prosecute the principal war criminals of the European Axis countries for the crimes committed before or during the Second World War, the

Court points out that the universal validity of the principles regarding crimes against humanity was subsequently confirmed by, inter alia, Resolution No. 95 of the General Assembly of the United Nations (December 11, 1946) and afterwards, by the International Law Commission. Therefore, the responsibility for crimes against humanity cannot be restricted to nationals of some countries and only to those acts that were committed during the Second World War. […]
[…]
The Court points out that even though the acts committed by Kolk and Kislyiy might have been considered crimes under the Soviet laws then in force, the Estonian courts considered them as crimes against humanity under international law at the time of their commission. The Court considers that there is no reason to conclude otherwise. […] Therefore, the Court considers that the allegations of the appellants do not have sufficient grounds to state that their acts did not constitute crimes against humanity at the moment of their commission. […]
Furthermore, there is no statutory limitation that may be applicable to the crimes against humanity, irrespective of the date on which they were committed. […] The Court does not find any reason whatsoever to challenge the interpretation and application of the domestic law that the Estonian courts made in the light of the applicable international law provisions. To conclude, the allegations of the petitioners are held to be groundless and must be dismissed.
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101. On the other hand, the Court points out that in 1998, when the application of Decree Law No. 2.191 was confirmed in the instant case (supra para. 82(21)), the Charters of the International Criminal Tribunals for the Former Yugoslavia (May 25, 1993) and Rwanda (November 9, 1994) had already been adopted, and articles 5 and 3 thereof reaffirm that murder is a serious international law crime. This criterion was confirmed by Article 7 of the Rome Statute (July 17, 1998) which created the International Criminal Court.

102. Now the Court must analyze whether the circumstances surrounding the death of Mr. Almonacid-Arellano could constitute a crime against humanity, as defined in the year 1973 (supra para. 99).

103. As it is evident from the chapter of Proven Facts (supra paras. 82(3) to 82(7)), between September 11, 1973 and March 10, 1990 Chile was ruled by a military dictatorship which, by developing a state policy intended to create fear, attacked massively and systematically the sectors of the civilian population that were considered as opponents to the regime. This was achieved by a series of gross violations of human rights and of international law, among which there are at least 3,197 victims of summary executions and forced disappearances, and 33,221 detainees, most of whom were tortured (supra para. 82(5)). Likewise, the Court considered proven that the most violent time of that repressive period was that of the first months of the de facto government. Approximately 57 percent of all deaths and disappearances occurred during the first months of the dictatorship. The execution of Mr. Almonacid-Arellano took place precisely during that time.

104. Considering the aforesaid, the Court determines that there is sufficient evidence to reasonably state that the extra-legal execution committed by State agents in detriment of Mr. Almonacid-Arellano, who was a member of the Communist Party and a candidate to preside the said party, as well as the Provincial Secretary of the Central Unitaria de Trabajadores (Labor

Central Union) and Magisterio (SUTE) Union Leader -all of which was considered a threat to the dictatorship doctrine- was committed following a systematic and generalized pattern against the civilian population, and thus, it is a crime against humanity.

b) Impossibility to grant an amnesty for crimes against humanity

105. According to the International Law corpus iuris, a crime against humanity is in itself a serious violation of human rights and affects mankind as a whole. In the Case of Prosecutor v. Erdemovic, the International Tribunal for the Former Yugoslavia stated that:

Crimes against humanity are serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health, and or dignity. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterises crimes against humanity. [FN127]

[FN127] Cf. International Criminal Tribunal for the Former Yugoslavia, Prosecutor v. Erdemovic, Case No. IT-96-22-T, Sentencing Judgment, November 29, 1996, at para. 28.

Crimes against humanity are serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health, and or dignity. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterises crimes against humanity.

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106. Since the individual and the whole mankind are the victims of all crimes against humanity, the General Assembly of the United Nations has held since 1946 [FN128] that those responsible for the commission of such crimes must be punished. In that respect, they point out Resolutions 2583 (XXIV) of 1969 and 3074 (XXVIII) of 1973. In the former, the General Assembly held that the “thorough investigation” of war crimes and crimes against humanity, as well as the punishment of those responsible for them “constitute an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms, the encouragement of confidence, the furtherance of cooperation among peoples and the promotion of international peace and security.” [FN129] In the latter, the General Assembly stated the following:

War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.
[...]

States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity. [FN130]

[FN128] Cf. UN, Extradition and punishment of war criminals, adopted by the General Assembly of the United Nations in Resolution 3 (I) of February 13, 1946; Confirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal, adopted by the General Assembly of the United Nations in Resolution 95 (I) of December 11, 1946; Extradition of war criminals and traitors, adopted by the General Assembly of the United Nations in Resolution 170 (II) of October 31, 1947; Question of the punishment of war criminals and of persons who have committed crimes against humanity, adopted by the General Assembly of the United Nations in Resolution 2338 (XXII) of December 18, 1967; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted by the General Assembly of the United Nations in Resolution 2391 (XXIII) of November 25, 1968; Question of the punishment of war criminals and of persons who have committed crimes against humanity adopted by the General Assembly of the United Nations in Resolution 2712 (XXV) of December 14, 1970; Question of the punishment of war criminals and of persons who have committed crimes against humanity adopted by the General Assembly of the United Nations in Resolution 2840 (XXVI) of December 18, 1971, and Crime Prevention and Control, adopted by the General Assembly of the United Nations in Resolution 3021 (XXVII) of December 18, 1972.
[FN129] Cf. UN, Question of the punishment of war criminals and of persons who have committed crimes against humanity, adopted by the General Assembly of the United Nations in Resolution 2583 (XXIV) of December 15, 1969.
[FN130] Cf. UN, Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, adopted by the General Assembly of the United Nations in Resolution 3074 (XXVIII) December 3, 1973.
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107. Likewise, Resolutions 827 and 955 of the Security Council of the United Nations, [FN131] together with the Charters of the Tribunals for the Former Yugoslavia (Article 29) and Rwanda (Article 28), impose on all Member States of the United Nations the obligation to fully cooperate with the Tribunals for the investigation and punishment of those persons accused of having committed serious International Law violations, including crimes against humanity. Likewise, the Secretary General of the United Nations has pointed out that in view of the rules and principles of the United Nations, all peace agreements approved by the United Nations can never promise amnesty for crimes against humanity. [FN132]

[FN131] Cf. UN Resolution of the Security Council S/RES/827 for the establishment of the International Criminal Tribunal for the Former Yugoslavia of March 25, 1993; and Resolution of the Security Council S/RES/955 for the establishment of an International Criminal Case for Rwanda of November 8, 1994.
[FN132] Cf. UN Report of the Secretary General S/2004/616 on the Rule of Law and Transitional Justice in conflict and post-conflict societies of August 3, 2004, para. 10.
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108. The adoption and enforcement of laws that grant amnesty for crimes against humanity prevents the compliance of the obligations stated above. The Secretary General of the United Nations, in his report about the establishment of the Special Tribunal for Sierra Leona stated the following:

While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the UN has consistently maintained the position that amnesty cannot be granted in respect of international crimes such as genocide, crimes against humanity, or violations of international humanitarian law. [FN133]

[FN133] Cf. UN Report of the Secretary General S/2000/915 on the establishment of a Tribunal for Sierra Leona, of October 4, 2000, para. 22.
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109. The Secretary General also informed that the legal effects of the amnesty granted in Sierra Leona had not been taken into account "given their illegality pursuant to international law." [FN134] Indeed, the Charter for the Special Tribunal for Sierra Leona stated that the amnesty granted to persons accused of crimes against humanity, which are violations of Article 3 of the Geneva Conventions and Additional Protocol II, [FN135] as well as of other serious violations of international humanitarian law, "shall not be an impediment to subject [them] to trial."

[FN134] Cf. UN Report of the Secretary General S/2000/915 on the establishment of a Tribunal for Sierra Leona, of October 4, 2000, para. 24.
[FN135] Cf. UN Additional Protocol to the Geneva Conventions of August 12, 1949 regarding the protection of victims of non-international armed conflicts (Protocol II).
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110. The obligation that arises pursuant to international law to try, and, if found guilty, to punish the perpetrators of certain international crimes, among which are crimes against humanity, is derived from the duty of protection embodied in Article 1(1) of the American Convention. This obligation implies the duty of the States Parties to organize the entire government system, and in general, all agencies through which the public power is exercised, in such manner as to legally protect the free and full exercise of human rights. As a consequence of this obligation, the States must prevent, investigate, and punish all violations of the rights recognized by the Convention and, at the same time, guarantee the reinstatement, if possible, of the violated rights, and as the case may be, the reparation of the damage caused due to the violation of human rights. If the State agencies act in a manner that such violation goes unpunished, and prevents the reinstatement, as soon as possible, of such rights to the victim of such violation, it can be concluded that such State has not complied with its duty to guarantee the free and full exercise of those rights to the individuals who are subject to its jurisdiction. [FN136]

[FN136] Cf. Case of Velásquez-Rodríguez. Judgment of July 29, 1988. Series C No. 4, para. 166, and Case of Godínez-Cruz. Judgment of January 20, 1989. Series C No. 5, para. 175.

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111. Crimes against humanity give rise to the violation of a series of undeniable rights that are recognized by the American Convention, which violation cannot remain unpunished. The Court has stated on several occasions that the State has the duty to prevent and combat impunity, which the Court has defined as "the lack of investigation, prosecution, arrest, trial, and conviction of those responsible for the violation of the rights protected by the American Convention." [FN137] Likewise, the Court has determined that the investigation must be conducted resorting to all legal means available and must be focused on the determination of the truth and the investigation, prosecution, arrest, trial, and conviction of those persons that are responsible for the facts, both as perpetrators and instigators, especially when State agents are or may be involved in such events. [FN138] In that respect, the Court has pointed out that those resources which, in view of the general conditions of the country or due to the circumstances of the case, turn to be deceptive, cannot be taken into account. [FN139]

[FN137] Cf. Case of the Ituango Massacres, supra note 14, para. 299; Case of the "Mapiripán Massacre," Judgment of September 15, 2005. Series C No. 134, para. 237; Case of the Moiwana Community, Judgment of September 15, 2005. Series C No. 134, para. 203.
[FN138] Cf. Case of Ximenes-Lopes, supra note 14, para. 148; Case of Baldeón-García, supra note 14, para. 94; and Case of the Pueblo Bello Massacre, Judgment of January 31, 2006. Series C No. 140, para. 143.
[FN139] Cf. Case of Baldeón-García, supra note 14, para. 144; Case of the 19 Merchants, Judgment of July 5, 2004. Series C No. 109, para. 192; and Case of Baena Ricardo et al. Jurisdiction. Judgment of November 28, 2003. Series C No. 104, para. 77.

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112. In the Case of Barrios Altos the Court has already stated that:

all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extra-legal, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law. [FN140]

[FN140] Cf. Case of Barrios Altos. Judgment of March 14, 2001. Series C No. 75, para. 41.

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113. It is worth mentioning that the State itself recognized in the instant case that "amnesty or self-amnesty laws are, in principle, contrary to the rules of international human rights law." [FN141]

[FN141] Cf. Final written arguments of the State (record on the Merits of the Case, Volume III, folio 723.)

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114. In view of the above considerations, the Court determines that the States cannot neglect their duty to investigate, identify, and punish those persons responsible for crimes against humanity by enforcing amnesty laws or any other similar domestic provisions. Consequently, crimes against humanity are crimes which cannot be susceptible of amnesty.

c) Enforcement of Decree Law No. 2.191 from August 21, 1990

115. Since it has already been established that the crime against Mr. Almonacid-Arellano is a crime against humanity, and that crimes against humanity cannot be susceptible of amnesty, the Court must now determine if under Decree Law No. 2.191 amnesty is granted for such crime, and if such were the case, the Court must further determine whether the State has breached its obligation arising from Article 2 of the Convention upon keeping such law in force.

116. Article 1 of Decree Law No. 2.191 (supra para. 82(10)) grants a general amnesty to all those responsible for "criminal acts" that were committed from September 11, 1973 to March 10, 1978. Furthermore, Article 3 of such Decree Law excludes a series of crimes from such amnesty. [FN142] The Court notes that murder, being a crime against humanity, is not included on the list provided in Article 3 of the said Decree Law. This was also the determination made by the Chilean courts that heard the instant case upon its application (supra paras. 82(20) and 82(21)). Likewise, this Court, though not requested to decide on other crimes against humanity in the instant case, draws the attention to the fact that other crimes against humanity such as forced disappearance, torture, and genocide, among others, are not excluded from such amnesty.

[FN142] Pursuant to Article 3 of Decree Law No. 2.191 amnesty shall not be granted to "those persons against whom criminal actions are pending for the crimes of parricide, infanticide, robbery aggravated by violence or intimidation, drug production or dealing, abduction of minors, corruption of minors, arson and other damage to property; rape, statutory rape, incest, driving under the influence of alcohol, embezzlement, swindling and illegal exaction, fraudulent practices and deceit, indecent assault, crimes included in Decree Law No. 280 of 1974 as amended; bribery, fraud, smuggling and crimes included in the Tax Code."

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117. The Court has confirmed on several occasions that:

Under the law of nations, a customary law prescribes that a State that has signed an international agreement must introduce into its domestic laws whatever changes are needed to ensure execution of the obligations it has undertaken. This principle is universally valid and has been characterized in case law as an evident principle ("principe allant de soi"; Exchange of Greek and Turkish populations, avis consultatif, 1925, C.P.J.I., Series B, No. 10, p. 20). Accordingly, the

American Convention stipulates that every State Party is to adapt its domestic laws to the provisions of that Convention, so as to guarantee the rights embodied therein. [FN143]

[FN143] Cf. Case of Garrido and Baigorria. Reparations (art. 63(1) of the American Convention on Human Rights). Judgment of August 27, 1998. Series C No. 39, para. 68; Case of Baena Ricardo et al. Judgment of February 2, 2001. Series C No. 72, para. 179.

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118. Pursuant to Article 2 of the Convention, such adaptation implies the adoption of measures following two main guidelines, to wit: i) the annulment of laws and practices of any kind whatsoever that may imply the violation of the rights protected by the Convention, and ii) the passing of laws and the development of practices tending to achieve an effective observance of such guarantees. [FN144] It is necessary to reaffirm that the duty stated in i) is only complied when such reform is effectively made. [FN145]

[FN144] Cf. Case of Ximenes-Lopes, supra note 14, para. 83; Case of Gómez-Palomino. Judgment of November 22, 2005. Series C No. 136, para. 91; and Case of the "Mapiripán Massacre", supra note 137, para. 109.
[FN145] Cf. Case of Raxcacó-Reyes. Judgment of September 15, 2005. Series C No. 133. para. 87; Case of the IndigenousYakye Axa Community, supra note 5, para. 100; and Case of Caesar. Judgment of March 11, 2005. Series C No. 123, paras. 91 and 93.

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119. Amnesty laws with the characteristics as those described above (supra para. 116) leave victims defenseless and perpetuate impunity for crimes against humanity. Therefore, they are overtly incompatible with the wording and the spirit of the American Convention, and undoubtedly affect rights embodied in such Convention. This constitutes in and of itself a violation of the Convention and generates international liability for the State. [FN146] Consequently, given its nature, Decree Law No. 2.191 does not have any legal effects and cannot remain as an obstacle for the investigation of the facts inherent to the instant case, or for the identification and punishment of those responsible therefor. Neither can it have a like or similar impact regarding other cases of violations of rights protected by the American Convention which occurred in Chile. [FN147]

[FN146] Cf. Case of Barrios Altos. Interpretation of the Judgment on the Merits. (art. 67 of the American Convention on Human Rights). Judgment of September 3, 2001. Series C No. 83, para. 18.
[FN147] Cf. Case of Barrios Altos, supra note 140, para. 44.

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120. On the other hand, even though the Court notes that Decree Law No. 2.191 basically grants a self-amnesty, since it was issued by the military regime to avoid judicial prosecution of its own crimes, it points out that a State violates the American Convention when issuing

provisions which do not conform to the obligations contemplated in said Convention. The fact that such provisions have been adopted pursuant to the domestic legislation or against it, "is irrelevant for this purpose." [FN148] To conclude, the Court, rather than the process of adoption and the authority issuing Decree Law No. 2.191, addresses the ratio legis: granting an amnesty for the serious criminal acts contrary to international law that were committed by the military regime.

[FN148] Cf. Certain Powers of the Inter-American Commission of Human Rights (arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights.). Advisory Opinion OC-13/93 of July 16, 1993. Series A No. 13, para. 26.

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121. Since it ratified the American Convention on August 21, 1990, the State has kept Decree Law No. 2.191 in force for sixteen years, overtly violating the obligations set forth in said Convention. The fact that such Decree Law has not been applied by the Chilean courts in several cases since 1998 is a significant advance, and the Court appreciates it, but it does not suffice to meet the requirements of Article 2 of the Convention in the instant case. Firstly because, as it has been stated in the preceding paragraphs, Article 2 imposes the legislative obligation to annul all legislation which is in violation of the Convention, and secondly, because the criterion of the domestic courts may change, and they may decide to reinstate the application of a provision which remains in force under the domestic legislation.

122. For such reasons, the Court determines that by formally keeping within its legislative corpus a Decree Law which is contrary to the wording and the spirit of the Convention, the State has not complied with the obligations imposed by Article 2 thereof.

d) Enforcement of Decree Law No. 2.191

123. The above mentioned legislative obligation established by Article 2 of the Convention is also aimed at facilitating the work of the Judiciary so that the law enforcement authority may have a clear option in order to solve a particular case. However, when the Legislative Power fails to set aside and / or adopts laws which are contrary to the American Convention, the Judiciary is bound to honor the obligation to respect rights as stated in Article 1(1) of the said Convention, and consequently, it must refrain from enforcing any laws contrary to such Convention. The observance by State agents or officials of a law which violates the Convention gives rise to the international liability of such State, as contemplated in International Human Rights Law, in the sense that every State is internationally responsible for the acts or omissions of any of its powers or bodies for the violation of internationally protected rights, pursuant to Article 1(1) of the American Convention. [FN149]

[FN149] Cf. Case of Ximenes-Lopes, supra note 14, para. 172; and Case of Baldeón-García, supra note 14, para. 140.

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124. The Court is aware that domestic judges and courts are bound to respect the rule of law, and therefore, they are bound to apply the provisions in force within the legal system. But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception. In other words, the Judiciary must exercise a sort of "conventionality control" between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.

125. By the same token, the Court has established that "according to international law, the obligations that it imposes must be honored in good faith and domestic laws cannot be invoked to justify their violation." [FN150] This provision is embodied in Article 27 of the Vienna Convention on the Law of Treaties, 1969.

[FN150] Cf. International Responsibility for the Issuance and Application of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights), Advisory Opinion OC-14/94 of December 9, 1994, Series A No. 14, para. 35.

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126. In the instant case, the Judiciary applied Decree Law No. 2.191 (supra paras. 82(20) and 82(21)), which had the immediate effect to discontinue the investigation and close the case file, thus granting impunity to those responsible for the death of Mr. Almonacid-Arellano. Pursuant to the aforesaid, his next of kin were prevented from exercising their right to a hearing by a competent, independent, and impartial court, and likewise, they were prevented from resorting to an effective and adequate remedy to redress the violations committed in detriment of their relative and to know the truth.

127. Pursuant to the case law of this Court:

in the light of the general obligations established in Articles 1(1) and 2 of the American Convention, the States Parties are obliged to take all measures to ensure that no one is deprived of judicial protection and the exercise of the right to a simple and effective recourse, in the terms of Articles 8 and 25 of the Convention. Consequently, States Parties to the Convention which adopt laws that have the opposite effect, such as self-amnesty laws, violate Articles 8 and 25 in relation to Articles 1(1) and 2 of the Convention. Self-amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention. This type of law precludes the identification of the individuals who are responsible for human rights violations, because it obstructs the investigation and access to justice and prevents the victims and their next of kin from knowing the truth and receiving the corresponding reparation. [FN151]

[FN151] Cf. Case of Barrios Altos, supra note 140, para. 43.

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128. Therefore, the Court considers that the application of Decree Law No. 2.191 was contrary to the obligations embodied in Article 1(1) of the American Convention in violation of the rights of Elvira del Rosario Gómez-Olivares and of Alfredo, Alexis, and José Luis Almonacid-Gómez, embodied in Articles 8(1) and 25 of the Convention, for all of which the Chilean State is internationally responsible.

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129. As a conclusion of all questions addressed in this section the Court A), considers that the murder of Mr. Almonacid-Arellano was part of a State policy to repress certain sectors of the civilian population, and that it constitutes an example of a number of other similar illegal acts that took place during that period. The crime committed against Mr. Almonacid-Arellano cannot be susceptible of amnesty pursuant to the basic rules of international law since it constitutes a crime against humanity. The State has violated its obligation to modify its domestic legislation in order to guarantee the rights embodied in the American Convention because it has enforced and still keeps in force Decree Law No. 2.191, which does not exclude crimes against humanity from the general amnesty it grants. Finally, the State has violated the right to a fair trial and the right to judicial protection and has not complied with its obligation to respect guarantees in detriment of the next of kin of Mr. Almonacid-Arellano, given the fact that it applied Decree Law No. 2.191 to the instant case.

B) Regarding the military jurisdiction

130. The American Convention in its Article 8(1) establishes that every person has the right to a hearing by a competent, independent, and impartial court. Thus, the Court has pointed out that "all persons subject to trial of any kind before a State body must have the guarantee that such body is impartial and acts in accordance with the procedure established by law to hear and decide the case submitted to it." [FN152]

[FN152] Cf. Case of Herrera-Ulloa, supra note 13. para. 169; and Case of the Constitutional Court. Judgment of January 31, 2001. Series C No. 71, para. 77.

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131. The Court has established that in a democratic State, the military criminal jurisdiction must have a restrictive scope and must be exceptional and aimed at the protection of special legal interests related to the functions that the law assigns to the Military. Therefore, it must only try military men for the commission of crimes or offenses that due to their nature may affect military interests. [FN153] In that respect, the Court has held that "when the military courts assume jurisdiction over a matter that should be heard by the regular courts, the right to the competent judge is violated, as is, a fortiori, due process of law, which, in turn, is closely linked to the right of access to justice." [FN154]

[FN153] Cf. Case of Palamara-Iribarne. Judgment of November 22, 2005. Series C No. 135, para. 124; Case of the "Mapiripán Massacre," supra note 137, para. 202; and Case of 19 Tradesmen, supra note 139, para. 165.
[FN154] Cf. Case of Palamara-Iribarne, supra note 153, para. 143; Case of 19 Tradesmen, supra note 139, para. 167; and Case of Las Palmeras. Judgment of December 6, 2001. Series C No. 90, para. 52.

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132. In the instant case, the Court has considered proven that on September 27, 1996 the Second Military Court of Santiago requested the First Criminal Court of Rancagua to decline jurisdiction to continue hearing the case on the grounds that on the date the events occurred the accused were under military jurisdiction (supra para. 82(16)). As a consequence of the aforesaid, the Supreme Court of Justice of Chile decided the issue of jurisdiction in favor of the Military Jurisdiction (supra para. 82(17)) and closed the investigation in the instant case by the application of self-amnesty Decree Law (supra paras. 82(20) and 82(21)).

133. Considering the aforesaid, the Court determines that the State has violated Article 8(1) of the American Convention, together with Article 1(1) thereof on the grounds that it granted jurisdiction to the military courts to hear the instant case, while said courts do not comply with the standards of competence, independence and impartiality mentioned above.

IX. REPARATIONS (APPLICATION OF ARTICLE 63(1) OF THE AMERICAN CONVENTION)

Duty to Make Reparations

134. In accordance with the analysis presented in the previous chapter, the Court has found that the Chilean State is responsible for violating the rights enshrined in Articles 8(1) and 25 of the American Convention, and for failing to comply with the duties arising from Articles 1(1) and 2 of said international instrument. The Court has established, on several occasions, that any violation of an international duty which has caused damage entails the duty to make proper reparations for said damage. [FN155] To this end, Article 63(1) of the American Convention provides that:

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

[FN155] Cf. Case of Montero-Aranguren et al. Judgment of July 5, 2006. Series C No. 150, para. 115; Case of Ximenes-Lopes, supra note 14, para. 207; and Case of the Ituango Massacres, supra note 14, para. 345.

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135. As the Court has held, Article 63(1) of the American Convention reflects a rule of customary law which constitutes one of the fundamental principles of contemporary International Law regarding the responsibility of the States. Thus, when a wrongful act imputable to a State occurs, pursuant to the international law that State becomes immediately responsible for the violation of an international norm, with the consequent duty to make reparations and cause the consequences of the violation to cease. [FN156]

[FN156] Cf. Case of Montero-Aranguren et al., supra note 155, para. 116; Case of Ximenes-Lopes, supra note 14, para. 208; and Case of the Ituango Massacres, supra note 14, para. 346.
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136. Redressing the damage caused by the breach of an international duty requires, as far as possible, restitutio in integrum, which means restoring the situation to that prior to the violation. Should this be impossible, it is for the international court to establish a series of measures aimed not only at ensuring respect for the violated rights, but also at redressing the consequences of the breach and ordering the payment of compensation for the damage suffered. It is also necessary to add the positive measures a State must undertake to guarantee that injurious acts like the ones of the instant case do not occur again. The duty to make reparations, governed by International Law in all of its aspects (scope, nature, modality, and the determination of beneficiaries) may not be altered or breached by the respondent State by invoking domestic legal provisions. [FN157]

[FN157] Cf. Case of Montero-Aranguren et al., supra note 155, para. 117; Case of Ximenes-Lopes, supra note 14, para. 209; and Case of the Ituango Massacres, supra note 14, para. 347.
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137. Reparations, as the term itself suggests, are the measures intended to cause the effects of the violations committed to disappear. Their nature and amount depend on the damage caused, both from the pecuniary and non-pecuniary point of view. Reparations should not make the victims or their successors neither wealthier nor poorer. [FN158]

[FN158] Cf. Case of Montero-Aranguren et al., supra note 155, para. 118; Case of Ximenes-Lopes, supra note 14, para. 210; and Case of the Ituango Massacres, supra note 14, para. 348.
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138. In the chapter on Proven Facts, this Court held it proven that, since the return to democracy, the Chilean State has pursued a policy of reparations for the violations perpetrated during the military dictatorship. This policy has benefited surviving victims and the next of kin of deceased or disappeared victims, and has sought national reconciliation. The Court celebrates the steps taken by the State and highlights the work of the Comisión Nacional de Verdad y Reconciliación (National Truth and Reconciliation Commission), the Corporación Nacional de Reparación y Reconciliación (National Reparation and Reconciliation Corporation) and the Comisión Nacional sobre Prisión Política y Tortura (National Commission on Political

Imprisonment and Torture) (supra paras. 82(26) to 82(30)). Additionally, it is a non-disputed fact that Mr. Almonacid-Arellano's next of kin benefited from this state reparation policy (supra paras. 82(34) and 82(35)).

139. Nevertheless, the instant case refers to the denial of justice suffered by Mrs. Gómez-Olivares and her children as a result of the facts analyzed in the previous chapter. Hence, the Court, in accordance with the evidence collected during the proceedings and in the light of the foregoing criteria, now proceeds to analyze the claims filed by the Commission and the representative and the considerations of the State, so that it may order the reparations it deems relevant.

140. Arguments of the Commission

a) in order to make reparations for the violations committed in the instant case, the Court should instruct the State to:

i) conduct a complete, impartial, and effective investigation of the facts aimed at establishing the truth and punishing those persons responsible for the murder of Mr. Almonacid-Arellano, whether as perpetrators or instigators;

ii) adopt legislative and other measures, in accordance with its constitutional processes and the provisions of the American Convention, with a view to finally suspending the effects of Decree Law No. 2.191 in all instances and taking all judicial proceedings in which it was applied back to the moment when said Decree Law had not been applied;

iii) guarantee the victims of human rights violations committed during the military dictatorship that ruled the country between September 1973 and March 1990, that they shall be entitled to judicial protection and to a simple and prompt recourse, pursuant to Articles 8 and 25 of the Convention;

iv) adopt the necessary measures to guarantee that the cases concerning human rights violations shall not be investigated or tried by military courts, under no circumstances whatsoever; and

v) make full and adequate reparation to Mr. Almonacid-Arellano's next of kin, including any compensation additional to those already obtained by the family, which may be deemed relevant, for pecuniary and moral damage; as well as the legal costs and expenses incurred by the victims in processing the case at the domestic level and those incurred in processing the instant case before the Inter-American system.

b) besides the satisfaction consisting in the investigation and punishment of those responsible for the death of Mr. Almonacid-Arellano, the Court should instruct the State to:

i) acknowledge the impunity that has prevailed in the instant case and the obstacles that hindered the realization of justice for many years, including a public, worthy, and significant apology, all of it in consultation with the victim's next of kin;

ii) publicly announce the outcome of the internal investigation and punishment proceedings, in order to endorse the right to know the truth of Mr. Almonacid-Arellano's next of kin and of the Chilean society as a whole, and

iii) adopt the necessary measures to have the decision of the Court published for didactic purposes.

141. Arguments of the representative

a) “it is not in the interest of Mr. Almonacid-Arellano’s next of kin to obtain pecuniary benefits.” Their interest lies in achieving justice. “Reparations should be preventive, and prevention entails not only punishing those who are guilty and knowing the truth, but also awarding pecuniary compensation for the damage caused to the victims. To [the victims’ next of kin] that is the least important issue [,] indeed, […] if the Chilean State accepts and acquiesces to the application filed by the Inter-American Commission on Human Rights, they waive any compensation, because what they are interested in is truth and justice, and, of course, the punishment of those who are guilty;”
b) he acknowledges that Mrs. Gómez-Olivares, since March 1992 has been receiving a pension, which initially neared $56,000.00 (fifty-six thousand Chilean pesos) and currently amounts to $347,321.00 (three hundred forty- seven thousand three hundred and twenty-one Chilean pesos) per month. He further acknowledges that, at the beginning of 2005, Mr. Almonacid-Arellano’s children, Alfredo, Alexis, and José Luis Almonacid-Gómez received a single payment of $10,000,000 (ten million Chilean pesos) each. It is also true that the youngest of them, José Luis, pursued his studies with a State scholarship;
c) the foregoing amounts and the scholarship received result from the murder of Mr. Almonacid-Arellano, but they do not constitute the reparation that arises from this international action, that is to say, the one derived from the denial of justice, inasmuch as it entails moral damage for the “unquantifiable” effort made during 23 years to seek justice;
d) regarding lost earnings, Mr. Almonacid-Arellano’s current approximate salary as a professor would be $450,000.00 (four hundred fifty thousand Chilean pesos) per month. He died at the age of 42 and could have retired at 65, so that at the time of his death he had 33 years of active life ahead; and
e) we should not forget that when she witnessed her husband's murder, Mrs. Gómez-Olivares was eight months and a half pregnant and, as a result of the experience, she suffered a placental abruption which caused the immediate death of the fetus.

142. Arguments of the State

a) the case law originating from Chilean courts of justice is evolving towards declaring the inapplicability of the Amnesty Decree Law in cases of egregious human rights violations. Furthermore, by the time of the hearing in the instant case, five bills to amend Decree Law No. 2.191 had been submitted;
b) the Rettig report names each victim, including Mr. Almonacid-Arellano, and after this report was disclosed, all the next of kin of the acknowledged victims obtained reparations in the form of a reparation voucher and a life pension, as well as reparation vouchers, educational scholarships, and free health care services through the Programa de Reparación y Atención Integral de Salud (Comprehensive Health Service and Reparation Program of the Health Ministry) (PRAIS) for the victims’ children;
c) Mrs. Gómez-Olivares has pointed out that the reparation she has received and shall receive is enough and that what she is seeking is justice; therefore, the petition for additional reparation should be dismissed as irrelevant.

Considerations of the Court

A) Beneficiaries

143. Pursuant to Article 63(1) of the American Convention, the Court considers Elvira del Rosario Gómez-Olivares and Alfredo, Alexis, and José Luis Almonacid-Gómez as "injured party," for being victims of the violations described in the previous chapter of this Judgment.

144. The Court shall now proceed to determine the reparation measures it deems appropriate for the instant case. In doing so, it shall first refer to those measures standing closer to restitutio in integrum among the violations stated in this Judgment, namely: the adaptation of domestic law to conform to the American Convention and the duty of the State to continue investigating this case, identify, prosecute, and punish those responsible, such measures being also part of the guarantees to prevent the repetition of acts in violation of human rights. Secondly, the Court shall refer to the financial compensation for pecuniary and non-pecuniary damage which the Commission and the representatives allege the beneficiaries have suffered as a consequence of the facts set forth in the instant case. Finally, the Court shall order that this Judgment be published as reparation for non-pecuniary damage.

B) Adaptation of domestic law to conform to the American Convention and duty of the State to continue investigating this case, identify, prosecute and, as appropriate, punish those responsible

145. As explained in paragraph 119 of this Judgment, the Court finds that, inasmuch as it seeks to grant amnesty to persons responsible for crimes against humanity, Decree Law No. 2.191 is inconsistent with the American Convention and, therefore, has no legal effects; consequently, the State must: i) ensure that it does not continue to hinder the investigation of Mr. Almonacid-Arellano's extra-legal execution and the identification and, as appropriate, punishment of those responsible, and ii) ensure that Decree Law No. 2.191 does not continue to hinder the investigation, prosecution and, as appropriate, punishment of those responsible for similar violations perpetrated in Chile.

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146. The Court has found that the State has violated the rights established in Articles 8 and 25 of the American Convention in relation to Article 1(1) thereof, to the detriment of Elvira del Rosario Gómez-Olivares and Alfredo, Alexis, and José Luis Almonacid-Gómez. This violation occurred for two reasons: i) the granting of jurisdiction to the military courts to hear the case of Mr. Almonacid-Arellano's death, and ii) the application of Decree Law No. 2.191. The first violation resulted from Order of the Supreme Court of December 5, 1996 (supra para. 82(17)), whilst the second one was a consequence of the judgments of January 28, 1997 of the Second Military Court of Santiago (supra para. 82(20)) and of March 25, 1998 of the Court-Martial (supra para. 82(21)).

147. In view of the foregoing, the Court hereby orders that the State set aside the above mentioned domestic decisions and judgments, and refer the case file to a regular court, so that, by way of criminal proceedings, all those responsible for Mr. Almonacid-Arellano's death are identified and punished.

148. The Court has previously ruled that the right to know the truth is included in the right of victims or their next of kin to have the harmful acts and the corresponding responsibilities elucidated by competent State bodies, through the investigation and prosecution provided for in Articles 8 and 25 of the Convention. [FN159]

[FN159] Cf. Case of Barrios Altos, supra note 140, para. 48. Case of Bámaca-Vélasquez. Judgment of November 25, 2000. Series C No. 70, para. 201.

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149. Once more, the Court wishes to highlight the important role played by the different Chilean Commissions (supra paras. 82(26) to 82(30)) in trying to collectively build the truth of the events which occurred between 1973 and 1990. Likewise, the Court appreciates that the Report of the Comisión Nacional de Verdad y Reconciliación (National Truth and Reconciliation Commission) includes Mr. Almonacid-Arellano's name and a brief summary of the circumstances of his execution.

150. Notwithstanding the foregoing, the Court considers it relevant to remark that the "historical truth" included in the reports of the above mentioned Commissions is no substitute for the duty of the State to reach the truth through judicial proceedings. In this sense, Articles 1(1), 8 and 25 of the Convention protect truth as a whole, and hence, the Chilean State must carry out a judicial investigation of the facts related to Mr. Almonacid-Arellano's death, attribute responsibilities, and punish all those who turn out to be participants. Indeed, the Report of the Comisión Nacional de Verdad y Reconciliación (National Truth and Reconciliation Commission) concludes that:

From the standpoint of prevention alone, this Commission believes that for the sake of achieving national reconciliation and preventing the recurrence of such events it is absolutely necessary that the government fully exercise its power to mete out punishment. Full protection of human rights is conceivable only within a state that is truly subject to the rule of law. The rule of law means that all citizens are subject to the law and to the courts, and hence that the sanctions contemplated in criminal law, which should be applied to all alike, should thereby be applied to those who infringe the laws which safeguard human rights. [FN160]

[FN160] Cf. Report of the Comisión Nacional de Verdad y Reconciliación (National Truth and Reconciliation Commission) (record of appendixes to the final written arguments of the State, Appendix 2, p. 2520).

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151. The State may not invoke any domestic law or provision to exonerate itself from the Court's order to have a criminal court investigate and punish those responsible for Mr. Almonacid-Arellano's death. The Chilean State may not apply Decree Law No. 2.191 again, on account of all the considerations presented in this Judgment, especially those included in paragraph 145. Additionally, the State may not invoke the statute of limitations, the non-

retroactivity of criminal law or the ne bis in idem principle to decline its duty to investigate and punish those responsible.

152. Indeed, as a crime against humanity, the offense committed against Mr. Almonacid-Arellano is neither susceptible of amnesty nor extinguishable. As explained in paragraphs 105 and 106 of this Judgment, crimes against humanity are intolerable in the eyes of the international community and offend humanity as a whole. The damage caused by these crimes still prevails in the national society and the international community, both of which demand that those responsible be investigated and punished. In this sense, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity [FN161] clearly states that "no statutory limitation shall apply to [said internationally wrongful acts], irrespective of the date of their commission."

[FN161] Adopted by the General Assembly of the United Nations through Resolution 2391 (XXIII) of November 26, 1968, entered into force on November 11, 1970.

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153. Even though the Chilean State has not ratified said Convention, the Court believes that the non-applicability of statutes of limitations to crimes against humanity is a norm of General International Law (ius cogens), which is not created by said Convention, but it is acknowledged by it. Hence, the Chilean State must comply with this imperative rule.

154. With regard to the ne bis in idem principle, although it is acknowledged as a human right in Article 8(4) of the American Convention, it is not an absolute right, and therefore, is not applicable where: i) the intervention of the court that heard the case and decided to dismiss it or to acquit a person responsible for violating human rights or international law, was intended to shield the accused party from criminal responsibility; ii) the proceedings were not conducted independently or impartially in accordance with due procedural guarantees, or iii) there was no real intent to bring those responsible to justice. [FN162] A judgment rendered in the foregoing circumstances produces an "apparent" or "fraudulent" res judicata case. [FN163] On the other hand, the Court believes that if there appear new facts or evidence that make it possible to ascertain the identity of those responsible for human rights violations or for crimes against humanity, investigations can be reopened, even if the case ended in an acquittal with the authority of a final judgment, since the dictates of justice, the rights of the victims, and the spirit and the wording of the American Convention supersedes the protection of the ne bis in idem principle.

[FN162] Cf. UN, Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/9, July 17, 1998, Art. 20; Statute of the International Criminal Tribunal for the former Yugoslavia, S/Res/827, 1993, Art. 10, and Statute of the International Criminal Tribunal for Rwanda, S/Res/955, November 8, 1994, Art. 9.

[FN163] Cf. Case of Carpio-Nicolle et al. Judgment of November 22, 2004. Series C No. 117, para. 131.

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155. In the instant case, two of the foregoing conditions are met. Firstly, the case was heard by courts which did not uphold the guarantees of jurisdiction, independence and impartiality. Secondly, the application of Decree Law No. 2.191 did actually prevent those allegedly responsible from being brought before the courts and favored impunity for the crime committed against Mr. Almonacid-Arellano. The State cannot, therefore, rely on the ne bis in idem principle to avoid complying with the order of the Court (supra para. 147).

156. On the other hand, the State, in order to fulfill its duty to investigate, must guarantee that the necessary facilities shall be provided by all public institutions to the regular court trying Mr. Almonacid-Arellano's case (supra para. 147). Hence, the former shall forward to said court any information or documents it may request, bring before it the persons it may subpoena, and perform the actions it may order.

157. Finally, the State must guarantee that Elvira del Rosario Gómez-Olivares and Alfredo, Alexis, and José Luis Almonacid-Gómez have full access to and capacity to act at all stages and instances of said investigation, pursuant to the domestic law and the provisions of the American Convention. [FN164] The results of the investigation shall be publicly disclosed by the State, so that the Chilean society may know the truth about the events of the instant case. [FN165]

[FN164] Cf. Case of Montero-Aranguren et al., supra note 155, para. 139; Case of Baldeón-García, supra note 14, para. 199; and Case of Blanco-Romero et al. Judgment of November 28, 2005. Series C No. 138, para. 97.
[FN165] Cf. Case of Montero-Aranguren et al., supra note 155, para. 139; Case of Baldeón-García, supra note 14, para. 199; and Case of the Pueblo Bello Massacre, supra note 138, para. 267.

C) Pecuniary and non-pecuniary damage

158. Pecuniary damage entails income loss or detriment, expenses incurred as a result of the events and pecuniary consequences causally linked to the violations. [FN166] Non-pecuniary damage may encompass both the suffering and distress caused to the victims of human rights violations and their next of kin and the impairment of highly significant values in connection with the individuals or their living conditions. [FN167]

[FN166] Cf. Case of Ximenes-Lopes, supra note 14, para. 220; Case of Baldeón-García, supra note 14, para. 183; and Case of the Sawhoyamaxa Indigenous Community. Judgment of March 29, 2006. Series C No. 146, para. 216.
[FN167] Cf. Case of Montero-Aranguren et al., supra note 155, para. 130; Case of the Ituango Massacres, supra note 14, para. 383; and Case of Baldeón-García, supra note 14, para. 188.

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159. In the instant case, the representative bases his request for compensation for pecuniary and non-pecuniary damage on Mr. Almonacid-Arellano's death. Thus, for example, he refers to the allowances received by Mr. Almonacid-Arellano's next of kin as compensation since 1992, Mr. Almonacid-Arellano's life expectancy and lost earnings, and the pain suffered by his relatives for losing a next of kin in the violent circumstances of the instant case. Additionally, the Commission requests that "compensation for pecuniary and moral damage, additional to those already obtained by the family, be granted as may be deemed relevant;" that is to say, that the Court increase the amount received by Mr. Almonacid-Arellano's next of kin as compensation for his death.

160. The violations described in this Judgment refer to the denial of justice suffered by Mr. Almonacid-Arellano's next of kin and the failure of the State to comply with its general duties as set forth in Articles 1(1) and 2 of the American Convention. Therefore, the reparations ordered in this instance must refer solely to these aspects and not to those ones on which the Court has issued no ruling for lack of ratione temporis jurisdiction. Neither the representative nor the Commission have filed arguments or evidence to prove that the violations described in this Judgment caused pecuniary damage. Accordingly, the Court shall not award any compensation in this regard.

161. Regarding to non-pecuniary damage, the Court acknowledges that the victims of the instant case suffered as a result of the denial of justice arising from the facts analyzed in the foregoing chapters. Likewise, it takes cognizance of the representative's remark that the main interest of the victims of this case lies in achieving justice. On the other hand, the Court makes a positive assessment of the policy of reparation of human rights violations advanced by the State (supra paras. 82(26) to 82(33)), pursuant to which Mrs. Gómez-Olivares and her children received an approximate amount of US$ 98,000.00 (ninety-eight thousand United States Dollars), plus educational benefits in an approximate amount of US$ 12,180.00 (twelve thousand, a hundred and eighty United States Dollars). In the light of the foregoing, the Court decides not to order the payment of economic compensation for non-pecuniary damage, for it believes, as in other cases, that this judgment is in and of itself a form of reparation, [FN168] and that the measures described in paragraphs 145 to 157 of this Judgment constitute due reparation under Article 63(1) of the American Convention.

[FN168] Cf. Case of Montero-Aranguren et al., supra note 155, para. 131; Case of Ximenes-Lopes, supra note 14, para. 236; and Case of the Ituango Massacres, supra note 14, para. 387.

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162. As it has ruled in other cases [FN169], the Court decides that, as satisfaction, the State shall publish the chapter on proven facts and the operative part of this Judgment, for a single time and without footnotes, in the Official Gazette and in another newspaper of wide national circulation. These publications shall be made within six months from the date of notification of this Judgment.

[FN169] Cf.. Case of Montero-Aranguren et al., supra note 155, para. 151; Case of Ximenes-Lopes, supra note 14, para. 249; and Case of the Ituango Massacres, supra note 14, para. 410.

E) Costs and Expenses

163. Costs and expenses are included in the concept of reparation set forth in Article 63(1) of the American Convention, inasmuch as the steps taken by the victims in order to achieve justice, both at the domestic and international level, imply expenditures that must be compensated when the State is found to be internationally responsible by a condemnatory judgment. As regards reimbursement, it is for the Court to sensibly appraise its scope. Bearing in mind the nature of international jurisdiction for human rights protection, this appraisal may be made on the basis of the principle of equity and taking into account the expenses indicated by the parties, provided the quantum is reasonable. [FN170]

[FN170] Cf.. Case of Montero-Aranguren et al., supra note 155, para. 152; Case of the Ituango Massacres, supra note 14, para. 414; and Case of Baldeón-García, supra note 14, para. 208.

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164. In the instant case, the Court notes that the representative has not verified or proved any specific amount for costs and expenses, whereby it shall proceed to fix it on the grounds of equity. To this end, the Court considers that the costs and expenses arising from the domestic proceedings must be calculated as from December 5, 1996, the date on which the Supreme Court decided that the military courts had jurisdiction to continue hearing the case (supra para. 82(17)), since that date marked the beginning of the denial of justice analyzed in the instant case. Costs and expenses at the international level shall be calculated as from the filing of the application before the Inter-American Commission. Hence, the Court deems it fair to instruct the State to reimburse the amount of US$ 10,000.00 (ten thousand United States Dollars) or an equivalent amount in Chilean currency, to Mrs. Elvira del Rosario Gómez-Olivares, who shall give her representative the amount due to him for costs and expenses.

X. METHOD OF COMPLIANCE

165. In order to comply with this judgment, the State shall reimburse costs and expenses within a year from the date notice of the judgment is served upon it. Regarding the publication of this judgment (supra para. 162), the State shall comply with such measure within six months from the date notice of the judgment is served upon it. The remaining reparation measures ordered by the Court shall be complied with by the State within a reasonable time (supra paras. 145 to 157).

166. If the beneficiary of the reimbursement of costs and expenses were not able to receive the payment within the term specified above due to causes attributable thereto, the State shall deposit said amount into an account or certificate of deposit in favor of the beneficiary with a reputable Chilean financial institution, in United States dollars, and under the most favorable financial

terms permitted by law and banking practice. If after ten years compensation has not been claimed, these amounts shall be returned to the State together with accrued interest.

167. The State may discharge its obligations by tendering United States dollars or an equivalent amount in Chilean currency, at the New York, USA, exchange rate as quoted on the day prior to the day payment is made.

168. The amounts allocated in this Judgment as reimbursement of costs and expenses shall not be affected, reduced, or conditioned by current taxes or any taxes that may be levied in the future. Consequently, said amount shall be paid in full to the beneficiary in accordance with the provisions set forth in this judgment.

169. Should the State fall into arrears with its payments, interest shall be paid on any amount due at the current bank default interest rate in Chile.

170. In accordance with its constant practice, the Court retains the authority which derives from its jurisdiction and the provisions of Article 65 of the American Convention, to monitor full compliance with this judgment. The instant case shall be closed once the State has fully complied with the provisions herein set forth. Within one year from the date of notice of this judgment, the Chilean State shall submit to the Court a report on the measures adopted in compliance herewith.

XI. OPERATIVE PARAGRAPHS

171. Therefore,

THE COURT,

DECIDES:

Unanimously,

1. To dismiss the preliminary objections raised by the State.

DECLARES:

Unanimously, that:

2. The State did not comply with its obligations derived from Articles 1(1) and 2 of the American Convention on Human Rights and violated the rights enshrined in Articles 8(1) and 25 thereof, to the detriment of Elvira del Rosario Gómez-Olivares and Alfredo, Alexis, and José Luis Almonacid-Gómez, as set forth in paragraphs 86 to 133 herein.
3. Insofar as it was intended to grant amnesty to those responsible for crimes against humanity, Decree Law No. 2.191 is incompatible with the American Convention and, therefore, it has no legal effects.
4. This judgment is, in and of itself, a form of reparation.

AND RULES:

Unanimously, that:

5. The State must ensure that Decree Law No. 2.191 does not continue to hinder further investigation into the extra-legal execution of Mr. Almonacid-Arellano as well as the identification and, if applicable, punishment of those responsible, as set forth in paragraphs 145 to 157 herein.
6. The State must ensure that Decree Law No. 2.191 does not continue to hinder the investigation, prosecution, and, if applicable, punishment of those responsible for similar violations in Chile, in accordance with paragraph 145 herein.
7. The State shall reimburse costs and expenses within one year from the date notice of this Judgment is served upon it, as set forth in paragraph 164 herein.
8. The State shall cause this Judgment to be published as required in paragraph 162 herein within six months from the date notice of this judgment is served upon it.
9. The State shall monitor full compliance with this Judgment and the instant case shall be closed once the State has fully complied with the provisions set forth herein. Within one year from the date of notice of this Judgment, the State shall submit to the Court a report on the measures adopted in compliance herewith.

Judge Antônio A. Cançado-Trindade informed the Court of the contents of his Concurring Opinion, which is appendixed hereto.

Done in Spanish and English, the Spanish version being the official, in San José, Costa Rica, on September 26, 2006.

Sergio García-Ramírez
President

Alirio Abreu-Burelli
Antônio A. Cançado Trindade
Manuel E. Ventura-Robles
Diego García-Sayán

Pablo Saavedra-Alessandri
Secretary

So ordered,

Sergio García-Ramírez
President

Pablo Saavedra-Alessandri
Secretary

CONCURRING OPINION OF JUDGE A.A. CANÇADO-TRINDADE

1. I have voted in favor of the adoption of the Judgment rendered in the Case of Almonacid-Arellano et al. v. Chile by the Inter-American Court of Human Rights. Given the importance of the issues considered in this Judgment by the Court, I feel obliged to append this Opinion, containing my personal reflections, as the basis of my position on the matters addressed by the Court. I shall focus on three main points, as follows: a) the lack of legal validity of self-amnesties; b) self-amnesties and the obstruction and denial of justice: extension of the material scope of jus cogens prohibitions; and c) the conceptualization of crimes against humanity at the confluence of International Human Rights Law and International Criminal Law.

I. Lack of legal validity of Self-amnesties

2. This Judgment rendered by the Inter-American Court in the Case of Almonacid-Arellano et al. v. Chile follows the line of reasoning first introduced in its historic Judgment (of March 14, 2001) in the Case of Barrios Altos v. Peru, in which the Court stated that:

"This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extra-legal, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by International Human Rights Law" (para. 41).

The Judgment rendered by the Court in the Case of Barrios Altos, -in which there was acquiescence on the part of the Peruvian State-, has become well-known and renowned within international legal circles throughout the world as it was the first time an international court held that a self-amnesty law had no legal effects. In its Judgment in the Case of Barrios Altos, the Court found, for the first time in history and categorically, that:

"Owing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, the said laws lack legal effect and may not continue to obstruct the investigation of the grounds (…) or the identification and punishment of those responsible (…)" (para. 44).

3. Even though in the Case of Almonacid-Arellano et al. v. Chile the State did not acquiesce to the claim, it has adopted a positive and constructive approach to the proceedings before the Court (as evidenced by this Judgment) insofar as it has not disputed that (self-amnesty) Decree Law No. 2.191 of April 18, 1978 violates the American Convention (para. 90) and, moreover, the State itself has admitted that "in principle, amnesty or self-amnesty laws are contrary to the rules of International Human Rights Law" (para. 112). In this Judgment, the Court has rightly characterized Decree Law No. 2.191 as a self-amnesty law, enacted by the "military regime in order to shield its own crimes," perpetrated during the curfew imposed between September 11, 1973 and March 10, 1978, "from the hands of justice" (paras. 119 and 81(10)).

4. It is common knowledge that there are different types of amnesty, [FN171] "granted" under the pretext of achieving "national reconciliation" through the revelation of the "truth" (under the terms of the amnesty in question) and forgiveness; these pretexts, in practice have

been individually or collectively used by some States. [FN172] However, forgiveness cannot be imposed by a decree law or otherwise; instead, it can only be granted spontaneously by the victims themselves. And, in order to do so, they have sought justice. In this regard, the Court recalls in this Judgment that, when releasing to the public, on March 4, 1993, the final Report of the Comisión Nacional de Verdad y Reconciliación (National Truth and Reconciliation Commission) (of February 8, 1991), the President of Chile then incumbent, Mr. Patricio Aylwin, apologized to the victims' next of kin, on behalf of the State (and the nation) as follows:

"When those who caused so much suffering were officials of the State and the relevant government authorities could not or did not know how to prevent or punish them, nor was there the necessary social reaction to avert it, both the State and society as a whole are responsible, whether by act or by omission. It is the Chilean society who is in debt to the victims of human rights violations. (...) Therefore, in my capacity as President of the Republic, I dare to speak for the entire nation and, in its name, apologize to the next of kin of the victims." [FN173]

[FN171] Cf. e.g. L. Joinet (rapporteur), "Study on Amnesty Laws," document No. E/CN.4/Sub.2/1985/16/Rev.1, Geneva, UN Subcommission on the Prevention of Discrimination and Protection of Minorities, 1985, pp. 1-22; J. Gavron, "Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court," 51 International and Comparative Law Quarterly (2002) pp. 91-117.

[FN172] A. O'Shea, Amnesty for Crime in International Law and Practice, The Hague, Kluwer, 2004, p. 23, and cf. pp. 25-33.

[FN173] Cit. in para. 81(26) of this Judgment. P. Aylwin-Azocar, "La Comisión de la Verdad y Reconciliación de Chile" (National Truth and Reconciliation Commission of Chile), in Estudios Básicos de Derechos Humanos - II (eds. A.A. Cançado-Trindade and L. González-Volio), San José de Costa Rica, IIDH, 1995, pp. 105-119.

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5. Over the past years, research has been conducted on the different types of amnesty; however, there is no need to discuss this aspect further here. Notwithstanding, given the circumstances surrounding the cas d'espèce, it is relevant to focus on a specific type of amnesty: the so-called "self-amnesty," which seeks to shelter those responsible for gross human rights violation from justice, thus promoting impunity. To start with, it is important to remember that true laws may not be arbitrary; they do not bear the name of those who hold themselves above them. They have some level of abstraction, essential to the operation of law. They embody principles, which form and inform them, and are apprehended by human reason, i.e. the recta ratio, and give them a life of their own. They give expression to everlasting values. As pointed out in a famous study of statutory construction,

"Laws remain identical to themselves, while the ever-changing course of history and life flows beneath them." [FN174]

[FN174] S. Soler, La Interpretación de la Ley, Barcelona, Publ. Ariel, 1962, p. 108, and cf. pp. 15, 115, 117, and 143.

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6. The Court, in its Advisory Opinion No. 6 (of May 9, 1986), held that:

"the word laws in Article 30 of the [American] Convention means a general legal norm tied to the general welfare, passed by democratically elected legislative bodies established by the Constitution, and formulated according to the procedures set forth by the Constitutions of the States Parties for that purpose." (para. 38)

7. Self-amnesties are far from satisfying all these requirements. They are not true laws insofar as they are devoid of their intrinsic generic nature, [FN175] of the idea of Law that inspires them (essential even to legal certainty), [FN176] and of the search for the common good. They do not even seek the organization or regulation of social relations in furtherance of the common good. They are only designed to keep certain facts from justice, cover gross rights violations and ensure impunity for some individuals. They do not satisfy the minimum requirements of laws; on the contrary, they are illegal aberrations.

[FN175] G. Radbruch, Introdução à Ciência do Direito [original title: Einführung in die Rechtswissenschaft], São Paulo, Publ. Livr. Martins Fontes, 1999, p. 8.
[FN176] G. Radbruch, Filosofia do Direito, volume I, Coimbra, Publ. A. Amado, 1961, pp. 185-186.

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8. In my opinion, the person who most eloquently wrote about the purposes of law and the injustices committed based on so-called "laws" is Gustav Radbruch. In his famous Fünf Minuten Rechtsphilosophie, first published as a circular addressed to the students of the University of Heidelberg in 1945, shortly after -and certainly under the impact- of the atrocities of World War II, the great legal philosopher asserted that "the three values that Law must serve" are justice, the common good, and legal certainty. However, there are "laws" that have shown to be so detrimental to the common good and so unfair, that they appear to be devoid of "legality."

9. In his fierce criticism of positivism, G. Radbruch added that "There are also fundamental principles of law that are above any and all positive precepts, so that any law that violates such principles cannot but be set aside." [FN177] Furthermore, the great legal philosopher asserted that positivism

"was what left people and jurists defenseless against the most arbitrary, cruel, and criminal laws. In the final analysis, it equates law and force, leading to believe that where the latter is present, the former will be as well." [FN178]

[FN177] G. Radbruch, Filosofia do Direito, volume I, Coimbra, Publ. A. Amado, 1961, pp. 213-214.
[FN178] Ibid., pp. 211-214.

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10. In evoking G. Radbruch's philosophy toward the end of his life, I shall allow myself to add that self-amnesties are, in my view, the very negation of Law. They overtly violate general principles of law, such as the right of access to justice (which, in my opinion, falls within the scope of jus cogens), the principle of equality before the law, and the right to be tried by a competent court (juez natural), among others. In some cases, they have even covered up crimes against humanity and genocide. [FN179] To the extent that they obstruct the administration of justice for such heinous crimes, self-amnesties are contrary to jus cogens (cf. infra).

[FN179] For example, the Treaty of Sèvres (1920) provided for the incrimination of the Turks responsible for the massacre of Armenians, but it was superseded by the Treaty of Lausanne (1923), which "granted" amnesty to the perpetrators of what came to be known as the first genocide of the 20th century; cit. in A. O'Shea, op. cit. supra n. (2), p. 15; and cf. B. Bruneteau, Le siècle des génocides - Violences, massacres et processus génocidaires de l'Arménie au Rwanda, Paris, A. Colin, 2004, pp. 48-72.

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11. In this Judgment in the Case of Almonacid-Arellano et al., the Inter-American Court, following the precedent introduced in the Case of Barrios Altos, pointed out that self-amnesties such as Decree Law No. 2.191 of 1978

"leave victims defenseless and perpetuate impunity for crimes against humanity. Therefore, they are overtly incompatible with the wording and the spirit of the American Convention, and undoubtedly affect rights embodied in such Convention. This constitutes in and of itself a violation of the Convention and generates international liability for the State. Consequently, given its nature, Decree Law No. 2.191 does not have any legal effects and cannot remain as an obstacle for the investigation of the facts inherent to the instant case or for the identification and punishment of those responsible therefor. Neither can it have a like or similar impact regarding other cases of violations of rights protected by the American Convention which have occurred in Chile" (para. 119).

12. It is hardly surprising that Decree Law No. 2191 has been the target of severe criticism in specialized legal publications. [FN180] After all, it was precisely during the period covered by the aforesaid self-amnesty that most State crimes were perpetrated by the Pinochet regime. The Inter-American Court has established in this Judgment that, precisely during the period between September 11, 1973 and March 10, 1978, the "military dictatorship" in Chile,

"by developing a state policy intended to create fear, attacked massively and systematically sectors of the civilian population that were considered as opponents to the regime. This was achieved by a series of serious violations of human rights and of international law, among which there are at least 3,197 victims of summary executions and forced disappearances, and 33,221 detainees, of whom the great majority were tortured." (para. 103)

Mr. Almonacid-Arellano, extra-legally executed by State officials within a "systematic and generalized pattern" of crimes against the civilian population (para. 103), was among these many victims.

[FN180] Cf., inter alia, B. Chigara, Amnesty in International Law - The Legality under International Law of National Amnesty Laws, Harlow/London, Longman, 2002, pp. 11 and 114; A. O'Shea, Amnesty for Crime in International Law..., op. cit. supra n. (2), pp. 68, 285-286 and 313.

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13. Stories and testimonies published in recent years agree that the dictatorship which seized power in Chile on September 11, 1973 opted for the "immediate elimination" through "collective executions." Out of at least 3,197 dead and disappeared "1,823 were killed or disappeared during the first four months of the coup d'état." [FN181] Thus, on September 11, 1973, the "war [sic] against terrorism" began, just like on September 11, 2001: on each occasion the choice was to violate human rights and International Law by erroneously combating terrorism through State terrorism.

[FN181] N.C. Mariano, Operación Cóndor - Terrorismo de Estado en el Cono Sur (Operation Condor, State Terrorism in the Southern Cone), Buenos Aires, Publ. Lohlé-Lumen, 1998, p. 87; and cf. A. Boccia Paz, M.H. López, A.V. Pecci, and G. Giménez Guanes, En los Sótanos de los Generales - Los Documentos Ocultos del Operativo Cóndor (In the Generals' basements- The Hidden Documents of Operation Condor), Asunción, Expolibro/Servilibro, 2002, p. 187.

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14. During the "total war" which began on September 11, 1973, suspects and political prisoners

"were crammed into improvised concentration camps, such as the Estadio Nacional de Santiago (National Stadium of Santiago). Over 1,000 people were summarily executed (…). The Chilean military introduced a new tactic for Latin America: they would bury the prisoners' bodies in secret mass graves or "common pits," and would tell prisoners' families that their relatives had never been kept in their custody.
(…) Since the enemy had international reach, Pinochet masterminded an international scheme to defeat it. To this end, he forged a secret alliance with the military governments of Uruguay, Paraguay, Brazil, and Argentina. (…) The initiative was named "Operation Condor" (...). Almost invariably, the victims of Operation Condor disappeared." [FN182]

[FN182] J. Dinges, Operación Cóndor - Una Década de Terrorismo Internacional en el Cono Sur (Operation Condor - A Decade of International Terrorism in the Southern Cone), Santiago, Publ. B Chile, 2004, pp. 22-23.

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15. Seeking to grant amnesty to those responsible for the aforesaid State crimes is an affront to the Rule of Law in a democratic society. As I stated in my Concurring Opinion in the Case of Barrios Altos,

"The so-called self-amnesties are, in sum, an inadmissible affront to the right to truth and the right to justice (starting with the very access to justice). They are manifestly incompatible with the general -indissociable- obligations of the States Parties to the American Convention to respect and to ensure respect for the human rights protected by it, securing their free and full exercise (pursuant to the provisions of Article 1(1) of the Convention), as well as to harmonize their domestic law with the international norms of protection (pursuant to the provisions of Article 2 of the Convention). Moreover, they affect the rights protected by the Convention, in particular the rights to judicial guarantees (Article 8) and to judicial protection (Article 25). (...)
There is another point which seems to me even graver in relation to the distorted figure -an offense against the Rule of Law itself- of the so-called laws of self-amnesty. As the facts of this Case of Barrios Altos disclose -in leading the Court to declare, in accordance with the recognition of international liability made by the respondent State, the violations of the rights to life [FN183] and to personal integrity, [FN184]- such laws do affect non-derogable rights -the minimum universally recognized- which fall within the scope of jus cogens." (paras. 5 and 10).

[FN183] Article 4 of the American Convention.
[FN184] Article 5 of the American Convention.

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16. And I concluded my Concurring Opinion by stating that:

"No State can be considered to rest above the Law, whose norms have as ultimate addressees the human beings. (…) It should be stated and restated firmly, whenever necessary that in the domain of the International Law of Human Rights, the so-called 'laws' of self-amnesty are not truly laws: they are nothing but an aberration, an inadmissible affront to the juridical conscience of humanity." (para. 26)

II. Self-amnesties and the Obstruction and Denial of Justice: Extension of the Material Scope of Jus Cogens Prohibitions

17. Self-amnesties, although based on "legal" instruments such as statutes, decree laws and similar, are the very negation of Law and a truly legal aberration. The adoption and enactment of self-amnesties constitute, in my opinion, an additional violation of the American Convention on Human Rights. The tempus commisi delicti is that of the enactment of the self-amnesty in question, an additional violation of the Convention that adds to the original violations thereof in this case. Self-amnesty, in and of itself, violates, by its very existence, Articles 1(1) and 2 of the American Convention, hinders access to justice by the victims or their next of kin (Articles 25 and 8 of the Convention), obstructs the investigation of the facts (required by Article 1(1) of the Convention), prevents the administration of justice and the granting of appropriate reparations. They entail, in sum, the most flagrant obstruction and denial of justice, leaving the victims and their next of kin utterly and completely defenseless.

18. Such denial of justice is accompanied by aggravating circumstances, with their ensuing legal consequences, insofar as it implies a deliberate cover-up of violations of fundamental rights through a systematic pattern of illegal or arbitrary detention, kidnapping, torture, and forced disappearance of persons, which are absolutely prohibited under jus cogens. [FN185] Consequently, the aforesaid self-amnesties bring upon the State aggravated international liability.

[FN185] A. O'Shea, op. cit. supra n. (2), p. 186, and cf. pp. 198-199, 219 and 222-223.

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19. Said aggravated international liability is the result of violating jus cogens, -giving rise to an objective illegality, [FN186]- which entails other consequences in relation to reparations. No State may resort to contrivances in order to violate jus cogens norms; [FN187] its prohibitions are not dependent on the State's acquiescence. [FN188] In its most recent Judgment rendered four days ago, in the Case of Goiburú et al. v. Paraguay (on September 22, 2006), the Inter-American Court extended the material scope of jus cogens to include the right of access to justice at the domestic and international level, in the sense I have been advocating in this Court for a long time now, as I pointed out in my Separate Opinion (paras. 62-68) in the aforesaid case.

[FN186] Cf. A. Orakhelashvili, "Peremptory Norms and Reparation for Internationally Wrongful Acts," 3 Baltic Yearbook of International Law (2003) p. 26.

[FN187] Cf. B. Chigara, op. cit. supra n. (9), pp. 151 and 164, and cf. pp. 26, 35-36, 60 and 91.

[FN188] Precisely to avoid that the State resorts to subterfuge in order to cover up crimes, in recent years, the erosion of the traditional connection between territoriality and nationality has been promoted for the purpose of "denationalizing" the administration of criminal justice in certain circumstances and protecting the legitimate interests of the international community in this area; cf. L. Reydams, Universal Jurisdiction - International and Municipal Legal Perspectives, Oxford, University Press, 2004, pp. 27 and 220-221. And cf. also Beigbeder, Judging Criminal Leaders - The Slow Erosion of Impunity, The Hague, Nijhoff, 2002, pp. 14 and 207-214.

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20. Furthermore, said denial of justice constitutes a gross violation of Articles 1(1), 2, 25 and 8 of the American Convention. The State that commits such a violation by way of a "self-amnesty" fails to "respect" and "ensure respect for" the rights enshrined in the American Convention (in accordance with the general obligation contained in Article 1(1) thereof); fails to harmonize its domestic law with the American Convention (in accordance with the general obligation contained in Article 2 thereof), and hinders access to justice, not only formally but also materially [FN189] (Articles 25 and 8 of the Convention). That is to say, access to justice and due process of law as a whole are affected, denied by "self-amnesty." The inextricable interrelationship between the provisions of Articles 25 and 8 of the American Convention, violated in this case, is emphatically recognized by the most lucid contemporary legal authors, even in relation to "self-amnesties," as noted as follows:

“The right of access to justice is expressed in human rights treaties in the interrelated provisions for the right to a hearing and the right to an effective remedy.” [FN190]

[FN189] Cf. A. O'Shea, op. cit. supra n. (2), pp. 270-272, and cf. p. 273.
[FN190] i.e. the rights enshrined in Articles 8 and 25 of the American Convention; cf. ibid., p. 282 (emphasis added), and cf. pp. 284 and 288-289.

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21. Ultimately, self-amnesties violate the right to know the truth and the right to justice. They callously disregard the terrible suffering of the victims and hinder the right to appropriate reparations. Their vicious effects, in my view, permeate the whole social body, with the ensuing loss of faith in human justice and true values and a perverse distortion of the purpose of the State. Originally created to serve the common good, the State becomes an entity that exterminates members of certain sectors of the population (the most precious constituent element of the State itself, its human substratum) with total impunity. From an entity designed to serve the common good, it becomes an entity responsible for truly criminal practices, undeniable State crimes.

22. It is clear from this Judgment rendered by the Court (para. 152) in the Case of Almonacid-Arellano that jus cogens transcends the law of treaties to include general International Law. And it could not be otherwise because of its conceptualization as peremptory law. The Inter-American Court significantly finds, in the cas d'espèce, that

“The State may not invoke any domestic law or provision to exonerate itself from the Court's order to have a criminal court investigate and punish those responsible for Mr. Almonacid-Arellano’s death. The Chilean State may not apply Decree Law No. 2.191 again, on account of all the considerations presented in this Judgment, insofar as the State is under an obligation to set aside said Decree Law (supra para. 144). Additionally, the State may not invoke the statute of limitations, the non-retroactivity of criminal law or the principle of ne bis in idem to decline its duty to investigate and punish those responsible” (para. 151).

23. Hence operative paragraph No. 3 of this Judgment, which states that “insofar as it was intended to grant amnesty to those responsible for crimes against humanity, Decree Law No. 2191 is incompatible with the American Convention and, therefore, it has no legal effects.” Inasmuch as the aforesaid Decree Law has no legal effects in the light of the American Convention, and in order to put an end to the violation of Articles 1(1) and 2, as well as of Articles 25 and 8 as established by the Court (operative paragraph No. 2), the respondent State may not formally maintain said decree law in force as part of its domestic law.

24. As a member of this Court, I have always emphasized the interrelation, at the ontological and hermeneutical level, between Articles 25 and 8 of the American Convention (as in, inter alia, my Separate Opinion -paras. 28 to 65- in the Case of the Pueblo Bello Massacre v. Colombia, Judgment of January 31, 2006) in the conceptual construction of the right of access to justice (right to effective jurisdictional protection, the right to Law) as a jus cogens imperative. In addition, since my early years in this Court, I have consistently emphasized the interrelation of

the general obligations contained in Articles 1(1) and 2 of the American Convention, for example, in my Dissenting Opinion (paras. 2-11) in the Case of El Amparo v. Venezuela, Judgment on Reparations of September 14, 1996. In another Dissenting Opinion in the same Case of El Amparo (Order of April 16, 1997 on Interpretation of the Judgment), I also asserted the objective or "strict" liability of the State for failure to comply with its legislative obligations under the American Convention in order to harmonize its domestic law with the obligations undertaken under said treaty (paras. 12-14 and 21-26).

25. Moreover, in my Dissenting Opinion in the Case of Caballero-Delgado and Santana v. Colombia (Judgment on Reparations of January 29, 1997), regarding the interrelation between the general duties to respect and to ensure respect for the protected rights and to harmonize the domestic legal order with the international norms of protection of the American Convention (para. 6), I stated that:

"In fact, those two general obligations, -which are added to the other specific conventional obligations concerning each of the protected rights,- are incumbent upon the States Parties by the application of International Law itself, of a general principle (pacta sunt servanda) whose source is metajuridical, in seeking to be based, beyond the individual consent of each State, on considerations concerning the binding character of the duties derived from international treaties. In the present domain of protection, the States Parties have the general obligation, arising from a general principle of International Law, to take all measures of domestic law to guarantee the effective protection (effet utile) of the recognized rights.
The two general obligations enshrined in the American Convention -that of respecting and guaranteeing the protected rights (Article 1(1)) and that of harmonizing domestic law with the international norms of protection (Article 2)- appear to me to be ineluctably intertwined. (…) As those conventional norms bind the States Parties -and not only their governments,- in addition to the Executive, the Legislative and the Judicial Powers are also under the obligation to take the necessary measures to give effectiveness to the American Convention at domestic law level. Non-compliance with the conventional obligations, as known, engages the international responsibility of the State, for acts or omissions, either of the Executive Power, or of Legislative, or of the Judiciary. In sum, the international obligations of protection, which in their wide scope are incumbent upon all the powers of the State (…)" (paras. 8 and 10).

III. The Conceptualization of Crimes against Humanity at the Confluence of International Human Rights Law and International Criminal Law

26. In my recent Separate Opinion four days ago (always under relentless time pressure, further intensified by the current fast working "methods" of the Inter-American Court, which I do not share), in the Judgment in the Case of Goiburú et al. v. Paraguay, I placed the conceptualization of crimes against humanity at the confluence of International Human Rights Law and International Criminal Law. In the aforesaid Separate Opinion, I pointed out that crimes against humanity

"are perpetrated by individuals who, however, follow State policies, with the institutions, human and other resources of the State at their disposal, and who are favored by the impotence or tolerance or connivance or indifference of the social body that does nothing to stop them. Either

explicitly or implicitly, the State policy is present in crimes against humanity. [FN191] They are not limited to mere isolated acts by deranged individuals. They are carefully calculated, planned and executed.

The classification of crimes against humanity is a great contemporary victory, which encompasses, in my view, not only International Human Rights Law, but also International Criminal Law insofar as it reflects the universal condemnation of gross and systematic violations of fundamental and irrevocable rights, i.e. jus cogens violations; hence the non-applicability, in the event of their occurrence, of the so-called statutes of limitations in national or domestic legal systems. [FN192] The category of crimes against humanity, in my opinion, is yet another expression of the universal juridical conscience, of its immediate reaction against crimes that affect humanity as a whole.

Crimes against humanity stand at the confluence of International Criminal Law and International Human Rights Law. Crimes against humanity of exceptional gravity were, in their origins, connected with armed conflicts, but nowadays, from a humanistic perspective, it is recognized that crimes against humanity have an impact on International Human Rights Law (e.g. in cases of systematic torture and humiliation of victims) insofar as, in seeking to dehumanize their victims, they negate humanity in general. [FN193] Crimes against humanity are massive and systematic in nature; they are organized and planned as a matter of State criminal policy, -as conceptualized in their precedents by the ad hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda, [FN194]- they are clearly State crimes. [FN195]

Organized and orchestrated by the State, in the upper echelons of government, State crime is carried out by several individuals in furtherance of the criminal policy of a given State, thus constituting actual crimes of the State, resulting in international liability of such State (under International Human Rights Law) and of the individuals that perpetrated the crimes. [FN196] Hence, the importance of prevention, given the severity of these crimes, as well as the guarantee of non-repetition" (paras. 40-43).

[FN191] Cf., in this regard, e.g., M.Ch. Bassiouni, Crimes against Humanity in International Criminal Law, 2nd. rev. ed., The Hague, Kluwer, 1999, pp. 252, 254-257. This is the concept underlying the United Nations Convention against Torture, which criminalizes, under International Law, the acts of public officials; ibid., p. 263 and cf. p. 277.

[FN192] M.Ch. Bassiouni, op. cit. supra n. (21), pp. 227 and 289.

[FN193] Y. Jurovics, Réflexions sur la spécificité du crime contre l'humanité, Paris, LGDJ, 2002, pp. 21-23, 40, 52-53 and 66-67 and cf. E. Staub, The Roots of Evil – The Origins of Genocide and Other Group Violence, Cambridge, University Press, 2005 [reprint], pp. 119, 121 and 264.

[FN194] On contemporary international case law regarding crimes against humanity, cf. J.R.W.D. Jones, The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, 2nd. ed., Ardsley/N.Y., Transnational Publs., 2000, pp. 103-120 and 490-494; L.J. van den Herik, The Contribution of the Rwanda Tribunal to the Development of International Law, Leiden, Nijhoff, 2005, pp. 151-198.

[FN195] Ibid., pp. 93, 183, 192, 199, 228, 278-279, 310, 329-331, 335, 360 and 375.

[FN196] Cf. ibid., pp. 375-377, 403, 405-407, 441 and 447-448.

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27. The Inter-American Court addressed this issue as part of its reasoning in the Judgment rendered in this Case of Almonacid-Arellano et al. v. Chile. As an indication of jurisprudential cross-fertilization, the Court evokes the case law of the ad hoc International Criminal Tribunal for the Former Yugoslavia (ICTY, Trial Chamber) in the sense that a single act in gross violation of human rights by a perpetrator may constitute a crime against humanity, taken within the context of a systematic practice, if it is the product of "a political system based on terror and persecution" (Case of Tadic, May 7, 1997, para. 649). What is at stake is the conduct of the State, the existence of a "policy element" (Case of Kupres[ki], January 14, 2000, paras. 550-551). Isolated acts by a perpetrator, if planned by the State, as part of a "systematic" practice in furtherance of a "State policy," constitute crimes against humanity (Case of Kordic, February 26, 2001, paras. 176-179).

28. In my recent General Course on Public International Law delivered at The Hague Academy of International Law (2005), I pointed out that, in fact, at the dawn of International Law, basic principles of humanity were applied to govern the conduct of the States. What in time became known as "crimes against humanity" derived, originally, from Customary International Law, [FN197] and was later conceptually developed under International Humanitarian Law, [FN198] and, more recently, under International Criminal Law. [FN199] Here, we are in the realm of jus cogens, of peremptory law. When human beings fall victim to such crimes, humanity as a whole is likewise victimized. This has been expressly recognized by the ICTY (in the Case of Tadic, 1997); such crimes affect the human conscience (ICTY, Case of Erdemovic, 1996), [FN200] -the universal juridical conscience,- and the aggrieved persons as well as humanity itself fall victim to them. [FN201] This line of analysis developed by International Humanitarian Law and contemporary International Criminal Law must, in my view, be incorporated into the conceptual universe of International Human Rights Law. This Judgment of the Inter-American Court in the Case of Almonacid-Arellano et al. constitutes a first step in this direction.

[FN197] S.R. Ratner and J.S. Abrams, Accountability for Human Rights Atrocities in International Law, Oxford, Clarendon Press, 1997, pp. 45-48.

[FN198] Cf. J. Pictet, Développement et principes du Droit international humanitaire, Genève/Paris, Inst. H.-Dunant/Pédone, 1983, pp. 107 and 77; C. Swinarski, Principales Nociones e Institutos del Derecho Internacional Humanitario como Sistema Internacional de Protección de la Persona Humana (Basic Concepts and Principles of International Humanitarian Law as an International System for the Protection of Human Rights), San José de Costa Rica, IIDH, 1990, p. 20.

[FN199] Cf. D. Robinson, "Defining 'Crimes against Humanity' at the Rome Conference," 93 American Journal of International Law (1999) pp. 43-57; and, on the historical background, cf., e.g. H. Fujita, "Le crime contre l'humanité dans les procès de Nuremberg et de Tokyo," 34 Kobe University Law Review (2000) pp. 1-15. - Crimes against humanity are currently defined in The Rome Statute of the International Criminal Court (Article 7).

[FN200] J.R.W.D. Jones, The Practice of the International Criminal Tribunals..., op. cit. supra n. (24), pp. 111-112.

[FN201] A.A. Cançado-Trindade, “International Law for Humankind: Towards a New Jus Gentium - General Course on Public International Law,” Recueil des Cours de l'Académie de Droit International de la Haye (2005) Chapter XI (in print).

Antônio Augusto Cançado Trindade
Judge

Pablo Saavedra-Alessandri
Secretary