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LEGAL BRIEF ON THE INCOMPATIBILITY

OF CHILEAN DECREE LAW N° 2191 OF 1978

WITH INTERNATIONAL LAW

Amnesty International and the International Commission of Jurists submit for consideration the present legal brief on the incompatibility with international law of Decree Law N° 2191 of 1978. The legal brief addresses the international obligations of the State with regard to human rights (Point I), the obligation to judge and punish the perpetrators of human rights violations (Point II), the incompatibility with international law of amnesties for violators of human rights (Point III), the principle of *pacta sunt servanda* (Point IV) and the non-application of the amnesty by national tribunals (Point V).

Prior to entering into the subject, it need not be recalled that the Republic of Chile ratified the International Covenant on Civil and Political Rights[1] in 1972 and in 1990 the American Convention on Human Rights[2]. Additionally, in 1988 the Republic of Chile ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment as well as the Inter-American Convention to Prevent and Punish Torture.

I. The State's Duty to Guarantee

International human rights law imposes two major classes of obligation on the State: one, the duty to abstain from infringing upon human rights, and the other a duty to guarantee respect of these rights. The former is composed of a set of specific obligations related directly to the duty of the State to abstain from violating human rights –whether through action or omission – which in itself implies ensuring the active enjoyment of such rights. The second refers to obligations incumbent on the State to prevent violations, to investigate them when they occur, to process and punish the perpetrators and to provide reparation for damages caused. Within this framework, the State is placed in the legal position of serving as guarantor of human rights, from which emerge essential obligations related to the protection and ensuring of such rights. It is on this basis that jurisprudence and legal doctrine has elaborated the concept of the Duty to Guarantee as a fundamental notion of the legal position of the State in the matter of human rights. In this juridical relation between the individual and the State, characteristic of international human rights law, the legal position of the State is basically that of a guarantor. The Duty to Guarantee can be summarized as a set of "obligations to guarantee and protect human rights…[and] consists of the duty to prevent conduct contravening legal norms and, if these occur, to investigate them, judge and punish the perpetrators and indemnify the victims"[3].

[1] The Covenant took effect for Chile on 23 March 1976. See United Nations document E/CN.4/2000/89.
[2] See Documentos Básicos en materia de Derechos Humanos en el Sistema Interamericano, Organization of American States, San José, Costa Rica, 1997, pages 49 and following.
[3] United Nations Observer Mission in El Salvador, Report of 19 February 1992, United Nations document A/46/876 S/23580, paragraph 28 (document used in Spanish, free translation).

This duty to guarantee is based juridically both in international common law as well as in international conventional law. The Duty to Guarantee is an element confirmed expressly in various human rights agreements: the American Convention on Human Rights (article 1,1); the Inter-American Convention on the Forced Disappearance of Persons (article 1); the Inter-American Convention for the Prevention and Punishment of Torture (article 1); the International Covenant on Civil and Political Rights (article 2); and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, among others. Likewise, various declaratory texts reiterate this duty, such as the Declaration on the Protection of All Persons from Enforced Disappearance and the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary or Summary Executions[4].

In analyzing article 1(1) of the American Convention on Human Rights, the Inter-American Court of Human Rights recalled that State Parties had contracted the general obligation to protect, respect and guarantee all of the rights covered by the Convention, and as a result:

> "States must prevent, investigate and punish any violation of the rights recognized by the Convention and, in addition, must secure wherever possible recovery of the violated right and, where appropriate, reparation of the damages produced by the violation of human rights…[and] The State is under the legal obligation to prevent, by reasonable measures, violations of human rights, and to investigate seriously with all the means at its disposal violations which have been committed within the scope of its jurisdiction, in order to identify those responsible, impose appropriate sanctions upon them and ensure the victim an adequate reparation"[5].

The jurisprudence of international human rights tribunals as well as of quasi-jurisdictional human rights bodies, such as the Human Rights Committee of the United Nations and the Inter-American Commission on Human Rights, coincide in affirming that this duty to guarantee is composed of four main international obligations which it is the responsibility of the State to fulfill: the obligation to investigate; the obligation to prosecute and punish those responsible; the obligation to provide fair and adequate reparation to the victims and their families; and the obligation to establish the truth of the facts.

These obligations, which constitute the Duty to Guarantee, are by nature complementary and are not alternatives or substitutes. Thus, for example, the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions has explained:

> “Governments are obliged under international law to carry out exhaustive and impartial investigations into allegations of violations of the right to life, to identify, bring to justice and punish their perpetrators, to grant compensation to the victims or their families, and to take effective measures to avoid future recurrence of such violations. The first two components of this fourfold obligation constitute in themselves the most effective deterrent for the prevention of human rights violations [...] the recognition of the right of victims or their families to receive adequate compensation is both a recognition of the State's responsibility for the acts of its organs and an expression of respect for the human being. Granting compensation presupposes compliance with the obligation to carry out an investigation into allegations of human rights abuses with a view to identifying and prosecuting their perpetrators. Financial or other compensation provided to the victims or their families before such investigations are initiated or concluded, however, does not

[4] General Assembly of the United Nations, Resolution 44/162 of 15 December 1989.
[5] Inter-American Court of Human Rights, Judgement of July 29, 1988, *Velázquez Rodríguez Case*, in Series C: Decisions and Judgments, Nº 4, paragraphs 166 and 174 (Spanish version used, free translation).

exempt Governments from this obligation."[6].

The obligations that make up the Duty to Guarantee are certainly interdependent. Thus the obligation to prosecute and punish those responsible for human rights violations is closely related to that of investigating the facts. Nevertheless, "it is not possible for the State to choose which of these obligations it is required to fulfill"[7]. Even if they can be fulfilled separately one by one, this does not free the State from the duty of fulfilling each and every one of these obligations. The Inter-American Commission on Human Rights has repeatedly affirmed that the measures of providing reparation to victims and their family members and establishing "Truth Commissions" in no way exonerates the State from its obligation to bring to justice those responsible for violations of human rights and to impose sanctions on such persons[8]. In the case of Chile, the Inter-American Commission on Human Rights expressly considered that:

> "The Government's recognition of responsibility, its partial investigation of the facts and its subsequent payment of compensation are not enough, in themselves, to fulfill its obligations under the Convention. According to the provisions of Article 1.1, the State has the obligation to investigate all violations that have been committed within its jurisdiction, for the purpose of identifying the persons responsible, imposing appropriate punishment on them, and ensuring adequate reparations for the victims"[9]

In the case of El Salvador, the Inter-American Commission on Human Rights recalled that despite the importance the Truth Commission had for establishing the facts related to the most serious violations and for promoting national reconciliation, this type of Commission:

> "[cannot] be accepted as a substitute for the State's obligation, which cannot be delegated, to investigate violations committed within its jurisdiction, and to identify those responsible, punish them, and ensure adequate compensation for the victim (Article 1.1 of the American Convention), all within the overriding need to combat impunity."[10]

II. Obligation to prosecute and punish

The obligation to prosecute and punish the perpetrators of human rights violations, as an expression of the Duty to Guarantee, has its juridical basis in article 2 of the International Covenant on Civil and Political Rights as well as in article 1 of the American Convention on Human Rights.

The Inter-American Court of Human Rights has recalled that, in the light of its obligations under the American Convention on Human Rights:

> "The State is under the legal obligation to prevent, by all reasonable measures, violations of human rights, and to seriously investigate with all the means at its disposal any such

[6] United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, Report to the Comission on Human Rights, doc. E/CN.4/1994/7, paragraphs 688 and 711.
[7] Méndez, Juan, "Derecho a la Verdad frente a las graves violaciones a los derechos humanos" in La aplicación de los tratados de derechos humanos por los tribunales locales, CELS, Editores del Puerto, Buenos Aires, 1997, p. 526.
[8] Inter-American Commission on Human Rights, Report N° 28/92, Cases 10.147, 10.181, 10.240, 10.262, 10.309, and 10.311 (Argentina), 2 October 1992, paragraph 52.
[9] Inter-American Commission on Human Rights, Report N° 36/96, Case 10.843 (Chile), 15 October 1996, paragraph 77. See also Inter-American Commission on Human Rights, Report N° 34/96, Cases 11.228, 11.229, 11.231 and 11282 (Chile), 15 October 1996, paragraph 76; and Report N° 25/98, Cases 11.505, 11.532, 11.541, 11.546, 11.549, 11.569, 11.572, 11.573, 11.583, 11.585, 11.595, 11.652, 11.657, 11.675 and 11.705 (Chile), 7 April 1998, paragraph 50.
[10] Inter-American Commission on Human Rights, Report N° 136/99, Case 10.488 Ignacio Ellacuría S.J. and others (El Salvador), 22 December 1999, paragraph 230.

violations which have been committed within the scope of its jurisdiction, in order to identify those responsible, impose appropriate sanctions on them and ensure the victim an adequate reparation."[11]

In various judgments the Inter-American Court of Human Rights has recalled that State parties to the American Convention on Human Rights have the international obligation to prosecute and punish those responsible for violations of human rights[12]. This obligation is directly related to the right of every person to be heard by a competent, independent and impartial tribunal, for the determination of his rights, as well as the right to an effective recourse, as confirmed in articles 8 and 25 of the American Convention on Human Rights. As the Inter-American Court of Human Rights has recalled:

> "The American Convention guarantees every person access to justice to assert his rights, it being the duty of the State parties to prevent and investigate human rights violations, and to identify and punish the intellectual perpetrators and abettors of such violations.[…] Article 8.1 of the American Convention bears a direct relation to article 25 in relation to article 1.1 of the same Convention, which guarantees every person a rapid recourse for securing, among other results, that those responsible for human rights violations be judged."[13]

The non-fulfillment of this obligation amounts in practice to a denial of justice and thus to impunity, the latter being understood as "the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights" [14]. For this reason, the Inter-American Court of Human Rights has recalled that:

> "[…] the State has the obligation to use all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human rights violations, and total defenselessness of victims and their relatives."[15] And that
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> "The State has the duty to avoid and combat impunity."[16]

The International Covenant on Civil and Political Rights also points to this obligation to prosecute and punish those responsible for human rights violations. Thus the Human Rights Committee has recalled that:

> "…the State party is under a duty to investigate thoroughly alleged violations of human rights, and in particular forced disappearances of persons and violations of the right to life, and to prosecute criminally, try and punish those held responsible for such violations. This

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[11] Inter-American Court of Human Rights, *Velásquez Rodríguez Case*, Judgement of July 1988, Series C No. 4, par. 174 and Godínez Cruz Case, Judgement of January 20, 1989, Series C, No. 5, par. 184 (Spanish version used, free translation.

[12] Inter-American Court of Human Rights, Series C: Decisions and Judgments: *Velásquez Rodríguez Case*, *Compensatory Damages*, Judgement of July 21, 1989, (Art. 63.1 American Convention on Human Rights), Series C, No. 7, pars. 32 and 34; *Godínez Cruz Case, Compensatory Damages* (Art. 63.1 American Convention on Human Rights), Judgement of July 21, 1989, Series C, No. 8, pars. 30 and 3; *Caballero Delgado y Santana Case*, Judgement of December 8, 1995, Series C, No. 22, par. 69 and decision point 5; *El Amparo Case, Reparations* (Artículo 63.1 Convención Americana sobre Derechos Humanos), Judgement of September 14, 1996, Series C, No. 28, par. 61 and decision point 4; *Castillo Páez Case*, Judgement of November 3, 1997, Series C, No. 34, par. 90; *Suárez Rosero Case*, Judgement of November 12, 1997, Series C, No. 35, par. 107 and decision point 6; and *Nicholas Blake Case*, Judgement of January 24, 1998, Series C, No. 36, par. 97.

[13] Inter-American Court of Human Rights, Series C: Decisions and Judgments, No. 48, *Caso Blake*, *Reparaciones,* Judgement of January 22, 1999, pars. 61and 63 (free translation).

[14] Inter-American Court of Human Rights, Series C: Decisions and Judgments, No. 37, *Paniagua Moralesa et al. Case*, Judgemernt of March 8, 1998, par. 173.

[15] Inter-American Court of Human Rights, Series C: Decisions and Judgments, No. 37, *Paniagua Moralesa et al. Case*, Judgemernt of March 8, 1998, par. 173.

[16] Inter-American Court of Human Rights, Series C: Decisions and Judgments, No. 48, *Caso Blake*, *Reparaciones,* Judgement of January 22, 1999, par. 64 (free translation).

> duty applies a fortiori in cases in which the perpetrators of such violations have been identified."[17]

There undoubtedly exists an obligation to legally prosecute and punish the perpetrators of human rights violations. This obligation is regulated not only by the International Covenant on Civil and Political Rights and the American Convention on Human Rights, but also by other international instruments, including most importantly the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Inter-American Convention for the Prevention and Punishment of Torture and the Inter-American Convention on the Forced Disappearance of Persons.

This obligation is not solely of a conventional character. The Committee against Torture recognized this fact, in considering cases of torture that had occurred prior to the entry into force of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Committee against Torture recalled that the obligation to punish those responsible for acts of torture was already requirable in view of the fact that "there existed a general rule of international law which should oblige all States to take effective measures […] to punish acts of torture"[18]. The Committee against Torture based its consideration in the "principles of the judgement by the Nuremberg International Tribunal" and the right not to be tortured contained in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

The natural connection between the right to justice and the obligation to impart justice is evident. The duty to impart justice, incumbent on the State, has its basis in conventional norms but also in the character of human rights as being a subject of judicial action. A right, the transgression of which is liable not to be recognized by the judicial system, is an imperfect right. On the contrary, human rights are basic rights, and therefore it is not possible for a legal system, which is based precisely on such rights, not to provide for the possibility of asserting such rights judicially. As the United Nations Expert on the right to restitution, indemnization and rehabilitation has expressed it:

> "it is difficult to imagine a judicial system which protects the rights of the victims while at the same time remaining indifferent and inactive with regard to the flagrant offences of those who have violated such rights."[19].

The responsibility of the State is compromised not only when it encroaches upon the rights of an individual through the active or omissive conduct of its agents, but also when the State neglects to exercise appropriate actions with regard to investigating the facts, prosecuting and punishing those responsible and providing reparation, or when it obstructs the workings of justice. Thus the transgression or non-observance by the State of this Duty to Guarantee compromises its international responsibility. This principle was established early in international law, and one of the first jurisprudential precedents for this involved the arbitration decision pronounced on May 1, 1925 by Prof. Max Huber in the case of the British claims for damages caused to British subjects in the Spanish zone of Morocco [20]. In this arbitration decision, Prof. Huber recalled that according to international law:

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[17] Decision in the case of Nydia Erika Bautista, Comunication Nº 563/1993 (Colombia), of November 13, 1995, United Nations document CCPR/C/55/D/563/1993, par. 8,6. See also the decision in the case of José Vicente and Amado Villafañe Chaparro, Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres, Comunication Nº 612/1995 (Colombia), United Nations document CCPR/C/60/D/612/1995, par. 8,8.

[18] United Nations Comittee against Torture, Decision relative to comunications 1/1988, 2/1988 and 3/1988, of November 23, 1989, paragraph 7.2.

[19] Expert on the right to restitution, indemnization and rehabilitation, United Nations document E/CN.4/Sub.2/1992/8, paragraph 5.5 (document in Spanish, free translation).

[20] See United Nations document, Nations Unies, Recueil de sentences arbitrales, vol. II, pages 640 a 742.

> "The responsibility of the State can be compromised […] by a lack of vigilance in the prevention of the damageable acts, but also through lack of diligence in the criminal prosecution of the offenders […] It is recognized that in general, repression of the offenses is not only a legal obligation of the competent authorities but also […] an international duty of the State" [21]

Non-observance of this Duty to Guarantee is not limited then to aspects of prevention, as was noted by the United Nations Observer Mission in El Salvador (ONUSAL):

> "the responsibility of the State can result not only from a lack of vigilance in prevention of the injurious acts, but also from a lack of diligence in the criminal prosecution of those responsible and in the application of the required civil sanctions"[22].

In maintaining the impunity of human rights violations, the State violates its international obligations and compromises its international responsibilities. In this context the Inter-American Court of Human Rights has recalled that:

> " If the apparatus of the State acts in such away that the violation remains unpunished and does not restore the victim, as far as possible, to the full enjoyment of his rights, it may be affirmed that the State has not fulfilled its duty to guarantee the free and full exercise of such rights by the persons subject to its jurisdiction."[23]

III. The incompatibility of amnesties and the obligation to judge and punish

Amnesties and other similar measures which impede the perpetrators of human rights violations from being brought to trial, judged and punished are incompatible with the obligations which international human rights law imposes on States. On one hand, such amnesties are incompatible with the obligation to investigate, judge and punish those responsible for human rights violations. At the same time, these amnesties are incompatible with the obligation of the State to guarantee every person an effective recourse and the right to be heard by an independent and impartial tribunal for the determination of his rights. International jurisprudence has been coherent and consistent in this matter.

The Human Rights Committee of the United Nations in its General Commentary No. 20 (concerning article 7 of the International Covenant on Civil and Political Rights) concluded that:

> "Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible."[24]

The Human Rights Committee has repeatedly reaffirmed this jurisprudence in examining amnesties adopted by State parties to the International Covenant on Civil and Political Rights. In its 1999 "Concluding Observations" on Chile, the Human Rights Committee considered that:

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[21] Ibid, pp. 645 and 646 (original in French, free translation).
[22] ONUSAL, doc. cit., par. 29 (original in Spanish, free translation).
[23] Inter-American Court of Human Rights, Series C: Decisions and Judgments, No.4, *Caso Velázquez Rodríguez,* Judgement of July 29, 1988*,* par. 176 (Spanish version, free translation).
[24] General Comment No.20 (44) on article 7, 44th session period of the Human Rights Committee (1992), in Official Documents of the General Assembly, fourty-seventh session period, Supplement No. 40 (A/47/40), annex VI.A.

> "The Amnesty Decree Law, under which persons who committed offences between 11 September 1973 and 10 March 1978 are granted amnesty, prevents the State party from complying with its obligation under article 2, paragraph 3, to ensure an effective remedy to anyone whose rights and freedoms under the Covenant have been violated. The Committee reiterates the view expressed in its General Comment 20, that amnesty laws covering human rights violations are generally incompatible with the duty of the State party to investigate human rights violations, to guarantee freedom from such violations within its jurisdiction and to ensure that similar violations do not occur in the future."[25]

In 1995, in its "Concluding Observations" on Argentina, the Human Rights Committee concluded that by denying the right to an effective recourse to persons who were victims of human rights violations during the period of authoritarian government, Law No. 23521 (Law of Due Obedience) and Law No 23492 (Law of Punto Final) violated paragraphs 2 and 3 of article 2 and paragraph 5 of article 9 of the Covenant, whereby:

> "the compromises made by the State party with respect to its authoritarian past, especially the Law of Due Obedience and Law of Punto Final and the presidential pardon of top military personnel, are inconsistent with the requirements of the Covenant."[26]

The Human Rights Committee, in its "Concluding Observations" of November 2000, reminded the Argentine State that:

> "Gross violations of civil and political rights during military rule should be prosecutable for as long as necessary, with applicability as far back in time as necessary, to bring to justice their perpetrators."[27]

In the case of the 1995 amnesty declared in Peru, the Human Rights Committee concluded that by impeding the investigation and appropriate punishment of the perpetrators of human rights violations committed in the past, the law constitutes a violation of the obligation contained in article 2 of the International Covenant on Civil and Political Rights.[28]

In the case of the amnesty granted to civil and military personnel for any violations of the human rights of civilians that may have been committed during the course of the civil war in Lebanon, the Committee of Human Rights recalled that:

> "Such a sweeping amnesty may prevent the appropriate investigation and punishment of the perpetrators of past human rights violations, undermine efforts to establish respect for human rights, and constitute an impediment to efforts undertaken to consolidate democracy."[29]

In its "Concluding Observations" to France, in May 1997, the Human Rights Committee concluded that:

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[25] Concluding Observations of the Human Rights Committee: Chile 30/03/99. United Nations document CCPR/C/79/Add.104, par. 7.
[26] Concluding Observations of the Human Rights Committee: Argentina. 05/04/95. United Nations document CCPR/C/79/Add.46; A/50/40, par. 144.
[27] Concluding Observations of the Human Rights Committee: Argentina. 03/11/2000. United Nations document CCPR/CO/70/ARG, par. 9.
[28] United Nations document CCPR/C/79/Add.67, par 9. See also Concluding Observations of the Human Rights Committee: Peru, in United Nations document CCPR/CO/70/PER, par. 9.
[29] United Nations document CCPR/C/79/Add.78, par. 12.

> "the Amnesty Acts of November 1988 and January 1990 for New Caledonia are incompatible with the obligation of France to investigate alleged violations of human rights."[30]

The Human Rights Committee has issued similar pronouncements with respect to amnesty laws in El Salvador[31], Haití[32] and Uruguay[33]. The Committee has emphasized that these types of amnesties contribute to creating an atmosphere of impunity for the perpetrators of human rights violations and undermine efforts designed to reestablish respect for human rights and the rule of law, a state of affairs contrary to the obligations of States under the International Covenant on Civil and Political Rights.

Concerning the incompatibility of such amnesties with the American Convention on Human Rights, the Inter-American Commission on Human Rights has repeatedly concluded that:

> "the application of amnesties renders ineffective and worthless the obligations that States Parties have assumed under Article 1.1 of the Convention, and thus constitutes a violation of that article and eliminates the most effective means for protecting such rights, which is to ensure the trial and punishment of the offenders."[34]

The Commission has likewise stated that:

> "such laws remove the most effective measure for enforcing human rights, i.e., the prosecution and punishment of the violators."[35]

In the case of Chilean Decree Law 2191 of 1978, the Inter-American Commission on Human Rights considered that the amnesty violates the right to justice pertaining to the families of the victims in seeking to identify the authors of those acts, to establish the corresponding responsibilities and penalties, and to obtain legal satisfaction from them. In addition, the Commission considered that the amnesty issued by the military regime constituted a violation of articles 1.1 and 2 of the American Convention on Human Rights, and that its application generates a denial of the right to justice, which violates articles 8 and 25 of the American Convention on Human Rights. The Inter-American Commission on Human Rights concluded in its Reports Nos. 34/96, 36/96 and 25/98 that:

> "The action by which the military regime that had seized power in Chile issued the 1978 Decree-Law No. 2191 declaring amnesty for itself is incompatible with the provisions of the American Convention on Human Rights, which was ratified by Chile on 21 August 1990."[36]

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[30] United Nations document CCPR/C/79/Add.80, par. 13.
[31] United Nations document CCPR/C/79/Add.34, par. 7.
[32] United Nations document A/50/40, paras. 224-241.
[33] United Nations documents CCPR/C/79/Add.19 pars. 7 and 11; CCPR/C/79/Add.90, Part C. "Principal subjects of concern and recommendations"; and Opinion of 09/08/94, Hugo Rodríguez Case (Uruguay), Comunication No. 322/1988, CCPR/C/51/D/322/1988, par. 12,4.
[34] Inter-American Commission on Human Rights, Report N° 36/96, Case 10.843 (Chile), October 15, 1996, par. 50. See also: Report N° 34/96, Cases 11.228, 11.229, 11.231 and 11282 (Chile), October 15, 1996, par. 50; Report N° 25/98, Cases 11.505, 11.532, 11.541, 11.546, 11.549, 11.569, 11.572, 11.573, 11.583, 11.585, 11.595, 11.652, 11.657, 11.675 and 11.705 (Chile), April 7, 1998, par. 42; Report N° 136/99, Case 10.488 Ignacio Ellacuría S.J. et al. (El Salvador), December 22, 1999, par. 200; Report Nº 1/99, Case10.480 lucio Parada Cea et al. (El Salvador), January 27 1999, par. 107; Report Nº 26/92, case 10.287 Las Hojas massacre (El Salvador), September 24, 1992, par. 6; Report Nº 28/92, Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311 (Argentina), October 2, 1992; and Report N° 29 (Uruguay), 1992.
[35] Inter-American Commission on Human Rights, Report N° 136/99, Case 10.488 Ignacio Ellacuría S.J. et al. (El Salvador), December 22, 1999, par. 200.
[36] Inter-American Commission on Human Rights, Report N° 36/96, Case 10.843 (Chile), October 15, 1996, par. 105; Report N° 34/96, Cases 11.228, 11.229, 11.231 and 11282 (Chile), October 15, 1996, par. 104; Report N° 25/98, Cases 11.505, 11.532, 11.541, 11.546, 11.549, 11.569, 11.572, 11.573, 11.583, 11.585, 11.595, 11.652, 11.657, 11.675 and 11.705 (Chile), April 7, 1998, par. 101.

In the case of the amnesty in El Salvador, the Inter-American Commission on Human Rights has repeatedly concluded that this law is incompatible with the obligations of the State under the American Convention on Human Rights [37]. In one of its opinions, the Commission concluded that

> "These amnesty laws have deprived large segments of the population of the "right to justice in their just claims against those who committed excesses and acts of barbarity against them"."[38]

With regard to the case of the amnesty laws in Argentina and Uruguay, the Inter-American Commission on Human Rights concluded that these provisions were incompatible with article XVIII (Right to a fair trial) of the American Declaration of the Rights and Duties of Man and articles 1, 8 and 25 of the American Convention on Human Rights."[39]

The incompatibility of such amnesty laws was recognized implicitly by the World Conference on Human Rights, convened under the auspices of the United Nations in June 1993 in Vienna. The Vienna Declaration and Program of Action adopted by the World Conference on Human Rights contains a clause according to which:

> "States should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law"[40].

IV. ***Pacta sunt servanda***

It is a general principle of international law, and universally recognized, that states must execute in good faith the treaties they adhere to and the international obligations arising from them. This general principle of international law has as a corollary that the authorities of a country cannot increase obstacles posed by internal law in order to avoid meeting their international engagements or to modify the terms of their fulfillment. This is a longstanding general principle of international law recognized by international jurisprudence [41]. Likewise, international jurisprudence has repeatedly affirmed that in accordance with this principle, the judgments issued by national tribunals cannot be used as an impediment to fulfillment of international obligations[42].

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[37] Inter-American Commission on Human Rights, Report N° 136/99, Case 10.488 Ignacio Ellacuría S.J. et al. (El Salvador), December 22, 1999; Report N° 37/00, Case 11.481, Monseñor Oscar Arnulfo Romero y Galdámez (El Salvador),April 13, 2000; Report Nº 1/99, Case10.480 lucio Parada Cea et al. (El Salvador), January 27,1999; Report Nº 26/92, case 10.287 Las Hojas massacre (El Salvador) September 24,1992, among others.

[38] Inter-American Commission on Human Rights, Report Nº 1/99, Case10.480, Lucio Parada Cea y otros (El Salvador), January 27, 1999, par. 107.

[39] Inter-American Commission on Human Rights, Report Nº 28/92 , Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311 (Argentina), October 2, 1992; and Report N° 29/92 (Uruguay).

[40] World Conference on Human Rights, doc. cit., par. 60.

[41] Permanent Court of International Court of Justice, Advisory Opinion of 4 February 1932, *Traitement des nationaux polonais et autres persones d'origine ou de langue polonaise dans le territoire de Dantzig*, Series A/B, n° 44; Advisory Opinion of 31 June 1930, *Question des communautés greco-bulgares*, Series n° 17. International Court of Justice, Advisory Opinion of 26 April 1988, *Obligation to Arbitrate;* Judgement of 28 November 1958, *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands/Sweden);* Judgement of 16 April 1955, *Notteböhm (2nd Phase) (Lichtenstein/Guatemala)*. Arbitration settlement S.A Bunch, *Montijo (Colombia/United States of America)*, 26 July 1875.

[42] Permanent Court of International Justice, Judgement N° 7, of 25 May 1923, *Haute Silésie polonaise*, in Recueil des arrêts et ordonnances, série A, N° 7; and Judgement N° 13, *Usine de Chorzow (Allemange / Pologne)*, of 13 September 1928, in Recueil des arrêts et ordonnances, série A, N° 17.

This principle and its corollary have been clarified in articles 26 and 27 of the Vienna Convention on the Law of Treaties, ratified by the Republic of Chile.[43] It is unnecessary to emphasize that Chilean jurisprudence has expressly recognized the imperative character of the *pacta sunt servanda* principle. In its ruling of 26 October 1995, the Supreme Court of Justice of Chile affirmed that:

> "it is a universally recognized principle that civilized Nations can not invoke their internal law to elude international obligations and engagements under such treaties, which, if this happened, would certainly weaken the rule of law."[44]

International human rights law is not inconsistent with this principle. The Inter-American Court of Human Rights has repeatedly affirmed this. In its Advisory Opinion concerning "International Responsibility for the Promulgation and Enforcement of Laws in violation of the Convention", the Inter-American Court of Human Rights recalled that:

> "Pursuant to international law, all obligations imposed by it must be fulfilled in good faith; domestic law may not be invoked to justify nonfulfillment. These rules may be deemed to be general principles of law and have been applied by the Permanent Court of International Justice and the International Court of Justice even in cases involving constitutional provisions…"[45]

Similarly, the Inter-American Court of Human Rights has indicated that:

> "A State may violate an international treaty and, specifically, the Convention, in many ways. It may do so in the latter case, for example, by failing to establish the norms required by Article 2 [of the American Convention on Human Rights]. Likewise, it may adopt provisions which do not conform to its obligations under the Convention. Whether those norms have been adopted in conformity with the internal juridical order makes no difference for these purposes."[46]

If a law of a country violates rights protected by an international treaty and/or obligations arising from it, the State compromises its international responsibility. The Inter-American Court of Human Rights has reiterated this principle on various occasions, and in particular in its Advisory Opinion No. 14:

> "the promulgation of a law that manifestly violates the obligations assumed by a state upon ratifying or acceding to the Convention constitutes a violation of that treaty and, if such violation affects the guaranteed rights and liberties of specific individuals, gives rise to international responsibility for the state in question."[47]

Addressing the issue of amnesty laws incompatible with the international obligations of States under the American Convention on Human Rights, the Inter-American Court of Human Rights has recalled that an amnesty law cannot serve as justification for not fulfilling the duty to investigate and to grant access to justice. The Court has stated:

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[43] Chile signed the Convention on 23 May 1969 and ratified it on 9 April 1981.

[44] Judgement of 26 October 1995, Bárbara Uribe and Edwin vanYurick Case (original in Spanish, free translation).

[45] Inter-American Court of Human Rights, International Responsibility for the Promulgation and Enforcement of Laws in violation of the Convention (arts. 1 and 2, American Convention on Human Rights), Advisory Opinion OC-14/94 of December 1994, Series A No. 14, par. 35.

[46] Inter-American Court of Human Rights, Advisory Opinion OC-13/93, of July 16, 1993, "*Certain Attributes of the Inter-American Commision On Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights)*, in Series A: Judgments and Opinions, No. 13, par.. 26.

[47] Advisory Opinion OC-14/94, doc. cit., par. 50.

> "The States cannot, in order to not carry out their international obligations, invoke provisions of their internal law, as is, in this case, the Amnesty Law ... which in the view of this Court hinders the investigation and access to justice. For these reasons, the argument [...] that it is impossible for it to carry out that duty to investigate the events that led to this case must be rejected. "[48]

The Human Rights Committee made the same point in its concluding observations to Peru in 1996. In concluding that the amnesty law and the law interpreting the amnesty law adopted by the administration of President Fujimori were incompatible with Peru's obligations under the International Covenant on Civil and Political Rights, the Committee underlined that:

> "national legislation cannot modify the international obligations contracted by a State party by virtue of the Covenant."[49]

Similarly, the Inter-American Commission on Human Rights has reiterated this principle in concluding that the amnesty Decree Law No. 2191 is incompatible with the obligations of Chile under the American Convention on Human Rights:

> "The Chilean State cannot under international law justify its failure to comply with the Convention by alleging that the self-amnesty was decreed by a previous government, or that the abstention and failure of the Legislative Power to revoke that Decree-Law, or the acts of the Judicial Power confirming its application, have nothing to do with the position and responsibility of the democratic Government, since the Vienna Convention on the Law of Treaties provides in Article 27 that a State Party cannot invoke the provisions of its domestic law as a justification for non-compliance with a treaty."[50]

V . The non-application of the amnesty by national tribunals

The responsibility of the State is compromised from the moment that any one of its organs violates an internal obligation, whether by action or omission. This is a principle of international common law[51], recognized extensively by international jurisprudence. This principle is reflected in the Draft Articles on State Responsibility, which the International Law Commission of the United Nations has been elaborating since 1955 in fulfillment of the mandate conferred on it by the UN General Assembly to codify the principles of international law governing the responsibility of States[52]. Article 6 of this draft text reads as follows:

> "The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinate position in the organization of the State."[53]

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[48] Loyaza Tamayo Case, Reparations judgement, 27 November 1998, par. 168, cited in Inter-American Commission on Human Rights, Report N° 37/00, Case 11.481, Monseñor Oscar Arnulfo Romero y Galdámez (El Salvador),13 April 2000.

[49] United Nations document CCPR/C/79/Add.67, par. 10 (Spanish version used, free translation).

[50] Inter-American Commission on Human Rights, Report N° 34/96, Cases 11.228, 11.229, 11.231 and 11282 (Chile), October 1996, par. 85.

[51] Roberto Ago, *Tercer informe sobre la responsabilidad de los Estados*, in Anuario de la Comisión de Derecho Internacional, 1971, Vol. II, 1st. Parte, pp. 253-254 (document used in Spanish, free translation).

[52] Resolution 799 (VIIIof the United Nations General Assembly, of 7 December 1953,

[53] Report of the International Law Commission on the work of its forty-eighth session, 6 May to 26 July 1996, United Nations document, Supplement N° 10 (A/51/10), p. 6.

International human rights law is not inconsistent with this principle, which has been reaffirmed by the Inter-American Court of Human Rights[54], the European Court of Human Rights[55] and the European Commission on Human Rights[56]. The Inter-American Commission on Human Rights, in one of its judgments concerning the incompatibility with the American Convention on Human Rights of Decree Law No. 2191 of 1978, recalled that:

> "While the Executive, Legislative and Judicial powers may indeed be distinct and independent internally, the three powers of the State represent a single and indivisible unit which is the State of Chile and which, at the international level, cannot be treated separately, and thus Chile must assume the international responsibility for the acts of its public authorities that violate its international commitments deriving from international treaties."[57]

In this juridical context, the courts must fulfill the international obligations of the State within the framework of the competence incumbent upon them. These include, with regard to the subject of the present legal brief: to administer justice in an independent and impartial manner, including observation of judicial guarantees; to investigate, prosecute and punish the perpetrators of human rights violations; and to guarantee the right to a fair trial and an effective recourse to the victims of human rights violations and their family members. Action by a court running contrary to these obligations, whether by act or omission, would constitute a denial of justice and a violation of the international obligations of the State, thus compromising the international responsibility of the latter.

The application by a national tribunal of an amnesty law incompatible with the international obligations of the State and violating internationally protected human rights constitutes a violation of the international obligations of the State. In the case of application of Decree Law No. 2191 of 1978 by national tribunals in legal cases, the Inter-American Commission of Human Rights has concluded that:

> "The judgment of the Supreme Court of Chile, rendered on 28 August 1990, and its confirmation on 28 September of that year, declaring that Decree-Law 2191 was constitutional and that its enforcement by the Judiciary was mandatory although the American Convention on Human Rights had already entered into force in Chile, violates the provisions of Articles 1.1 and 2 of that Convention."[58]

> "The judicial rulings of definitive dismissal issued in the criminal charges brought in connection with the detention and disappearance of the 70 persons in whose name the present case was initiated, not only aggravated the situation of impunity, but were also in clear violation of the right to justice pertaining to the families of the victims in seeking to identify the authors of those acts, to establish the corresponding responsibilities and penalties, and to obtain legal satisfaction from them."[59]

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[54] See among others, Inter-American Court of Human Rights, Series C: Decisions and Judgments, Nº 4 , *Velázquez Rodríguez Case,* Judgement of July 29, 1988, par. 151.
[55] See for example the judgments *Tomasi vs. France*, of 27 August 1992; and *Fr. Lombardo vs. Italy*, of 26 November 1992
[56] See for example, European Commission of Human Rights, Case *Ireland vs. United Kingdom*, in Annuaire de la Convention européenne des droits de l'homme, Vol. 11, 1st. Part, p. 11.
[57] Inter-American Commission on Human Rights, Report N° 36/96, Case 10.843 (Chile), 15 October 1996, par. 84.
[58] Inter-American Commission on Human Rights, Report N° 36/96, Case 10.843 (Chile), 15 October 1996, par. 106; , Report N° 34/96, Cases 11.228, 11.229, 11.231 and 11282 (Chile), 15 October 1996, par. 105; and Report N° 25/98, Cases 11.505, 11.532, 11.541, 11.546, 11.549, 11.569, 11.572, 11.573, 11.583, 11.585, 11.595, 11.652, 11.657, 11.675 and 11.705 (Chile), 7 April 1998, par. 102.
[59] Inter-American Commission on Human Rights, Report N° 36/96, Case 10.843 (Chile), 15 October 1996, par. 107In this same sense, see Report N° 34/96, Cases 11.228, 11.229, 11.231 and 11282 (Chile), 15 October 1996, par. 106, and Report N° 25/98, Cases 11.505, 11.532, 11.541, 11.546, 11.549, 11.569, 11.572, 11.573, 11.583, 11.585, 11.595, 11.652, 11.657, 11.675 and 11.705 (Chile), 7 April 1998, par. 103.

The international obligation of the State to investigate, prosecute and punish the perpetrators of human rights violations is carried out through judicial activity. Thus the courts have the duty to execute this obligation; otherwise they compromise the responsibility of the State. In this juridical context, a court not only must abstain from applying an amnesty law that is incompatible with the international obligations of the state and that violates internationally protected human rights, but at the same time must proceed to investigate, prosecute and punish the perpetrators of human rights violations. In the case of the Chilean courts, this duty stems not only from international human rights law but also from the clear constitutional precept contained in article 5 of the Constitution of the Republic of Chile, which stipulates:

> "The exercise of sovereignty is acknowledged to be limited by respect for the fundamental rights that have their origin in human nature. It is the duty of the organs of State to respect and promote the rights guaranteed by this Constitution and by the international conventions ratified by Chile and currently in force."[60]

In light of the above considerations, Amnesty International and the International Commission of Jurists consider that a court of justice of the Republic of Chile can not apply amnesty law No. 2191 of 1978, which violates internationally protected human rights, without violating the international obligations of the State and its own Constitution.

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[60] Original in Spanish, translation as cited in UN document CCPR/C/95/Add.11, par. 15.