CHILE

TORTURE: AN INTERNATIONAL CRIME
Even one torture victim is one too many

On 24 March 1999, the United Kingdom (UK) House of Lords ruled that former General Augusto Pinochet can be extradited only for the crimes of torture and conspiracy to torture alleged to have been committed after 8 December 1988, the date on which the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UN Convention against Torture) became binding on the UK, Spain and Chile.

Although the House of Lords judgment clearly stated that during the government of General Augusto Pinochet (1973-1990) "appalling acts of barbarism were committed in Chile and elsewhere in the world: torture, murder and the unexplained disappearance of individuals all on a large scale", the majority of the charges were eliminated. The House of Lords held that crimes other than torture and conspiracy to torture, included in the Spanish extradition request were either not extraditable offences, that the description of the conduct did not satisfy the requirements of English law or the crimes were not crimes under international law.

The panel of seven Law Lords ruled, by a majority of six to one, that Augusto Pinochet was not entitled to state immunity on torture charges. Three Lords placed the loss of his immunity at the date of the UK ratification of the UN Convention against Torture, 8 December 1988, one at 29 September 1988, when internal UK legislation came into force and two Law Lords held that the former general was "never at any stage entitled to immunity".

The Law Lords confirmed that a former head of state cannot show that to commit an international crime is to perform a function which international law protects by giving immunity. The six Law Lords agreed on the principle that torture is an international crime over which international law and the parties to the UN Convention against Torture have given universal jurisdiction to all courts wherever the torture occurs. Indeed, even one case of torture would be sufficient to permit extradition to a state able and willing to try the person accused.

In their ruling, the Law Lords indicated that the UK Home Secretary, Jack Straw, can therefore, if he thinks fit, permit the extradition proceedings against Augusto Pinochet to continue on the reduced number of charges. On 29 March 1999, the Home Secretary invited all interested parties to make representations by 7 April 1999 concerning whether he should renew his authority to the UK courts to proceed to consider the extradition request by Spain in the light of the ruling by the Law Lords. He said that he would reach a decision by 15 April 1999.

Eight cases of victims of torture after 29 September 1988 are included in the current extradition request filed by the Spanish judge, Baltasar Garzón. The eight cases are recorded in the reports of the Chilean official bodies, the National Commission on Truth and Reconciliation (*Comisión*

Nacional de Verdad y Reconciliación) and the National Corporation for Reparation and Reconciliation (*Corporación Nacional de Reparación y Reconciliación*)[1]. In each case the relevant body has concluded that the person had been a victim of human rights violations.

The cases include:
Marcos Quezada Yañez, a 17-year-old student who was active in the Pro-Democracy Party (*Partido por la Democracia*). He was arrested on 24 June 1989 in the town of Curacautín, IX Region, by members of *Carabineros*, uniformed police, and taken to a police checkpoint. A few hours later he died. According to the autopsy report he died as a result of "shock, probably from an electric current". In rejecting the official report that he had committed suicide, the National Commission on Truth and Reconciliation, taking into account the evidence gathered, was convinced that Marcos Quezada Yañez had died as a result of torture applied by government agents in violation of his human rights.

On 21 October 1988, **Cecilia Magni Camino** and **Raúl Pellegrin Friedmann** led an attack by a group of the armed opposition group "Manuel Rodríguez Patriotic Front" (*Frente Patriótico Manuel Rodríguez*) in the village of Los Queñes in southern Chile. As a result, a police corporal was killed. The bodies of Cecilia Magni Camino and Raúl Pellegrin Friedmann were found on 28 and 31 October 1988 respectively. According to the autopsy reports both bodies had injuries from blunt instruments and showed marks of electric shocks. The cause of death of Raúl Pellegrini was given as asphyxiation by being under water. The National Commission reached the conclusion that they were caught while fleeing and were tortured and executed by government agents.

According to a witness, **Wilson Fernando Valdebenito Juica** was arrested in the town of Cabildo, V Region, on 15 December 1988 by members of *Investigaciones*, civilian police. Witnesses indicated that he belonged to a left-wing group which was trying to reorganize miners. His body was found hours later near the locality of Molinas. His right hand was tied with an electric cable which was tied around his waist. According to the autopsy report, he died as a result of extensive burns to his body. The conclusion was that his death was due to contact with high electric current. The Corporation for Reparation and Reconciliation concluded that he died

[1]Following the return to civilian rule in 1990, two bodies were created in succession to gather information that would help clarify the truth about "disappearances", extrajudicial executions and deaths resulting from torture by Chilean state agents. The National Truth and Reconciliation Commission (*Comisión Nacional de Verdad y Reconciliación*) was created by Supreme Decree No. 355, signed on 25 April 1990. As recommended by the National Truth and Reconciliation Commission, legislation was submitted to Congress creating a successor body. The Corporation for Reparation and Reconciliation (*Corporación de Reparación y Reconciliación*) was established under Law 19.123 on February 1992. The combined findings of the two bodies recorded a total of 3,197 cases of human rights violations that were officially recognized by the state.

as a direct result of torture committed by government agents. It therefore concluded that he had been a victim of human rights violations by government agents.

On 26 March 1999, the Spanish Judge, Baltasar Garzón, supplemented the extradition request by adding 42 additional cases of victims of torture or conspiracy to torture after 29 September 1988. The additional information includes at least 29 victims allegedly tortured after 8 December 1988.

A State Policy to Torture

In Chile the repressive policy of the state, initiated by the military coup d'état of 11 September 1973, continued until 1990. This is clearly established in the Addendum submitted in November 1990 by Chile to the initial report to the UN Committee against Torture[2] : "This policy was characterized by very serious forms of human rights violations: executions without trial; executions following trials in which due process was not guaranteed; mass arrests of persons who were taken to concentration camps where they were subjected to very degrading conditions of detention and many of whom "disappeared"; widespread torture and ill-treatment[...]. This is the context in which the use of torture and other cruel, inhuman or degrading treatment or punishment was situated during the previous regime."

Torture was a policy used during the entire period of military government to instill widespread fear in the population and to eliminate real or alleged opposition. The Addendum states that although torture was used throughout "the entire term of office of the previous government" the practice of torture underwent a number of phases. By 1983, in reaction to national protest, this practice was directed towards public intimidation and extracting information as a matter of priority.

During this phase, the Addendum establishes, "torture normally continued to be carried out by the *Central Nacional de Informaciones* (CNI), National Information Agency, in their secret places of detention, while cruel treatment was practised primarily by *Carabineros,* although CNI officials and to a lesser extent the Police Department and the Army also took part."

The consolidation of power in the hands of the military government facilitated the "systematic use of arbitrary detention and torture by the security forces". The continued practice of such repressive policy was extended until the end of the military government. This is also the

[2] U.N. Doc. CAT/C/7/Add.9, 16 November 1990. The Addendum contains additional information requested by the UN Committee against Torture at its third session at the end of the consideration of the initial report of Chile on 23 November 1989, U.N. Docs. CAT/C/SR.40 and 41.

conclusion reached by Judge Baltasar Garzón in his supplement on 26 March 1999 to the current extradition request.

Ratification of the Convention against Torture and reports of torture

Amnesty International had long been concerned that in spite of the Chile's ratification of the UN Convention against Torture in September 1988, testimonies received by the organization showed that torture continued in the last months of 1988. The information received at the time and published in an Amnesty International document[3] indicated that most of the detainees were held by *Carabineros* or members of *Investigaciones*, but that the CNI, which had been responsible for most cases of torture in previous years, could have been involved in the interrogation and torture. The cases reported showed that certain forms of torture, associated with the early years of the military government, were still being used, such as the practice of attacking victims with police dogs.

The 1988 cases highlighted in Amnesty International's document included:
José Luis Donoso Cáceres, who in his testimony described the torture to which he was subjected. He was arrested on 26 October 1988 together with another man, **Jose Antonio Ugarte González**, in the area known as Las Peñas by members of the Special Operations Group, of the *Carabineros (Grupo de Operaciones Especiales de Carabineros)*. José Luis Donoso Cáceres said they were beaten, handcuffed, thrown to the ground and kicked. He said that when he did not provide the information asked for by his interrogators, they set specially trained dogs to bite him, inflicting multiple wounds to his arms, legs and upper part of the body. The two men were ordered into a vehicle where the interrogation continued. José Luis Donoso Cáceres was subsequently ordered out of the vehicle and made to take his shoes off. He was made to walk the rest of the way up a hill barefoot, while being punched, hit with the butts of guns and bitten by a dog. His head was repeatedly submerged in a stream until he nearly suffocated. His eyes were poked and his head stuck into a beehive.

The two men were accused of carrying out an attack on a police post in the village of Los Queñes and charged under the Arms Control Law. They were held 35 days incommunicado after which time they were given access to their lawyers and relatives.

In another testimony, **Luis Carlos Godoy Cortes**, who was arrested in the town of Talca, VII Region, on 3 October 1998 and charged under the Arms Control Law, provides details of the treatment to which he was subjected. He said that he was beaten, handcuffed and had his head covered with a hood. He was pushed into a vehicle and taken to a place he could not identify.

[3]See: Chile: Reports of torture continue (AI Index: AMR 22/07/89), February 1989.

He was warned not to shout, otherwise he would be killed. He was put on to a metal frame (*parrilla*) with his hands and feet tied to it. Electric current was applied all over his body, particularly to his genitals and head.

Continuing torture: more than 1,000 cases of "disappearance"

In his supplement to the extradition request, Judge Baltasar Garzón included the record of 1,198 victims of torture which has been continuing since 8 December 1988: the 1,198 people who remain "disappeared" without any resolution of their fate.

It is now settled law, not only that forced disappearances on a widespread or systematic basis are crimes against humanity, as the United Kingdom recently recognized when it signed the Rome Statute for an International Criminal Court, Article 7 of which gives the Court jurisdiction over forced disappearances as crimes against humanity, but also that forced disappearances constitute severe pain or suffering amounting to torture, both for the families of the "disappeared" person and the victim, as long as the "disappearance" remains unresolved. This emerging consensus has been recognized by the United Nations Special Rapporteur on torture, Sir Nigel Rodley (*The Treatment of Prisoners under International Law* (Oxford: Clarendon Press 2d ed. 1999), p. 261).

Each of the 1,198 still unresolved cases of "disappearance" in the current extradition request continue to inflict such severe pain or suffering until the fate of the "disappeared" is resolved by the "reappearance" of the person, those responsible acknowledge the facts, an independent and impartial body resolves the fate of the victim or the body of the person is found. Article 17 (1) of the United Nations Declaration on the Protection of All Persons from Enforced Disappearance (United Nations Declaration), adopted by the United Nations General Assembly in Resolution 47/133 of 18 December 1992, states: "Acts constituting enforced disappearance shall be considered a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified". Similarly, Article III of the Inter-American Convention on the Forced Disappearance of Persons, ratified by Chile, states that the offence of forced disappearance "shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined".

An enforced disappearance constitutes torture for the families of the "disappeared". Article 1 (2) of the United Nations Declaration states:

> "Any act of enforced disappearance . . . inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, *inter alia*, . . . the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment". The Human Rights Committee concluded with regard to the

mother of a woman who was "disappeared" in Uruguay and whose fate was unresolved:

> "The Committee understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has the right to know what has happened to her daughter. In these respects, she too is a victim of the violations of the Covenant suffered by her daughter in particular, of article 7." (*Elena Quinteros Almeida v. Uruguay*, Communication No. 107/1981, views of the Human Rights Committee adopted on 21 July 1983, para. 14, *reprinted in* 2 Selected Decisions of the Human Rights Committee under the Optional Protocol 138, 142 (1990).

Last year in reviewing the periodic report of Algeria, the Human Rights Committee concluded that disappearances constitute a violation of Article 7 of the ICCPR for the families of the "disappeared" ("les disparitions constituent une violation de l'article 7 pour ce qui est des families des disparus"). (U.N. Doc. CCPR/C/79/Add.95, 18 August 1998, para. 10).

Also last year, the European Court of Human Rights came to the same conclusion, finding that the extreme pain and suffering an enforced disappearance inflicted on the mother of the "disappeared" person violated Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (*Kurt v. Turkey*, Judgment, Eur. Ct. Hum. Rts, Case No. 15/1997/799/1002, 25 May 1998, para. 134).

An enforced disappearance also constitutes torture for the person who has been "disappeared". Article 1 (2) of the United Nations Declaration states: "Any act of enforced disappearance . . . inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, *inter alia*, . . . the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment".

The Human Rights Committee, a body of experts established under the International Covenant on Civil and Political Rights (ICCPR), to which the United Kingdom and Chile are parties, has found that an enforced disappearance violates the rights of the "disappeared" person under Article 7 of the ICCPR. In the case of Mohammed Bashir El-Megreisi, who was "disappeared" by Libyan security police in January 1989 for more than three years, the Human Rights Committee found that the victim, "by being subjected to prolonged incommunicado detention in an unknown location, is the victim of torture and cruel and inhuman treatment", in violation of Articles 7 and 10 (1) of the ICCPR. (*El-Megreisi v. Libya*, Report of the Human Rights Committee, vol. 2, 49 U.N. G.A.O.R., Supp. (No, 40), (1994), Annex IX T, paras. 2.1-2.5).

In a "disappearance" case involving Peru, the Human Rights Committee, held: "In the circumstances, the Committee concludes that the abduction and disappearance of the victim and

the prevention of contact with his family and with the outside world constitute cruel and inhuman treatment in violation of article 7, *juncto* article 2, paragraph 1 of the Covenant." (*Celis Laureano v. Peru*, Communication No. 540/1993, 25 March 1996, para. 8.5).

Similarly, in another case of "disappearance", the Human Rights Committee declared: "In the circumstances, the Committee concludes that the removal of the victim and the prevention of contact with his family and with the outside world constitute cruel and inhuman treatment in violation of article 7 of the Covenant." (*Katombe L. Tshishimbi v. Zaire*, Communication No. 542/1993, 26 March 1996, para. 5.5).

The United Nations Working Group on Enforced or Involuntary Disappearances has approached the question in much the same way. It has stated that "[t]he very fact of being detained as a disappeared person, isolated from one's family for a long period is certainly a violation of the right to humane conditions of detention and has been represented to the Group as torture." (Report of the Working Group on Enforced or Involuntary Disappearances, U.N. Doc. No. E/CN.4/1983/14, para. 131).

Similarly, the Inter-American Court of Human Rights has concluded that a forced disappearance violates Article 5 of the American Convention on Human Rights:

> "155. The forced disappearance of human beings is a multiple and continuos violation of many rights .. .
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> 156. Moreover, prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being. Such treatment therefore, violate Article 5 of the Convention, which recognizes the rights to the integrity of the person by providing that:
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> 1. Every person has the right to have his physical, mental, and moral integrity respected.
> 2. No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment." (*Velasquez Rodriguez* Case, 29 July 1988, paras. 155-156).

The Inter-American Court of Human Rights has reiterated this conclusion in the *Godinez Cruz* case (*Godinez Cruz v. Honduras*, Judgment, 20 January 1989, Series C, No. 5, para. 197) and, most recently, in the *Blake* Case on 24 January 1998 concerning "disappearances" in Guatemala (paragraph 97) (so far unreported), Case Blake (Guatemala).

<u>The court should decide whether other cases amount to hostage-taking</u>

Lord Hope of Craigshead concluded, and other Law Lords agreed, that "[a]n offence under the Taking of Hostages Act 1982 is one of those offences, wherever the act takes place, which is deemed by section 22 (6) of the Extradition Act 1989 to be an offence committed within the territory of any other state against whose law it is an offence." However, he also concluded that Charge 3 of the sample draft charges, as worded, did not seem to him "to amount to a conspiracy to take hostages within the meaning of section 1 of the Act of 1982". Thus, the House of Lords agreed that if any of the allegations in the current extradition request or any supplemental extradition request indicated that a person threatened to kill, injure or continue to detain a person in order to compel another person to do or to abstain from doing any act, then the request would demonstrate the existence of an extradition crime. Amnesty International believes that the Magistrate's court appointed to the case should be permitted to proceed to consider the current and any subsequent extradition request to determine whether an extradition crime has been committed.

Principles of superior responsibility apply to all crimes in the extradition request

In addition to rules of international criminal law on determining whether a former president or commander in chief of the armed forces of a country is criminally responsible for crimes under international law such as torture or conspiracy to torture, under long-settled principles of international criminal law, it is not necessary to prove beyond a reasonable doubt that in any individual case the superior *ordered* the person concerned to be tortured. Indeed, it is not even necessary to prove that the president or commander in chief of the armed forces *knew* that the particular victim was tortured. What the prosecution must prove beyond a reasonable doubt is that the superior had a duty to exercise authority over subordinates, that the superior either knew the unlawful conduct was planned or carried out by the subordinate or had sufficient information to enable the superior to conclude that such conduct was planned or had occurred, the superior failed to take necessary and feasible steps to prevent or punish the subordinate. It will be up to the courts to determine how to apply the rule of criminal responsibility to the facts of this case.

This long-settled rule of international criminal law is incorporated in virtually identical terms in provisions of a number of important international instruments, including Article 7 (3) of the Statute of the International Criminal Tribunal for the former Yugoslavia, Article 6 (3) of the Statute of the Rwanda Tribunal, Article 86 (2) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Article 6 of the United Nations Draft Code of Crimes against the Peace and Security of Mankind and Article 28 of the Rome Statute for an International Criminal Court. Article 28 of the Rome Statute spells out in detail the rules applicable to a military superior, such as a commander in chief of the armed forces or civilian effectively acting as a military commander, and to a civilian superior, such as a president who is not effectively acting as a military commander:

> "In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:
> a. A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
> (i) That military commander or person either knew, or owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
> (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
> b. With respect to superior and subordinate relationships not described in paragraph a, a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where;
> (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
> (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
> (iii)The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

These principles have particular force when the allegations of torture, conspiracy to torture or other crimes were alleged to have been committed as part of a systematic or widespread practice resulting in thousands of victims of torture, murder and "disappearance" over nearly two decades.

In addition, international criminal law is well developed concerning concepts of ancillary criminal responsibility, such as conspiracy, complicity, aiding and abetting and accomplice responsibility, particularly in the case of torture, most recently in the judgment by the International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Furundñija*, Case No. IT-95-17/1-T, 10 December 1998, paras. 187-257. As with the rule of law on the criminal responsibility of superiors for crimes under international law, the application in a particular case is up to the courts.

On 7 April 1999, Amnesty International made a submission to the UK Home Secretary, Jack Straw, together with the other third-party intervenors in the House of Lords, the Medical

Foundation for the Care of the Victims of Torture, the Redress Trust, Mary Ann and Juana Francisca Beausire, Dr Sheila Cassidy and the Association of Relatives of Disappeared Prisoners. In their submission, the intervenors urged the Home Secretary not to modify the authority he signed on 9 December 1998 to proceed in the extradition process of former general Augusto Pinochet with respect to any conduct amounting to torture after 8 December 1988 or conspiracy to commit torture after that date, which is in the Spanish Judge Baltasar Garzón request for extradition or in any supplemental request for extradition. The intervenors stressed in particular that each of the 1,198 still unresolved cases of "disappearances" continue to inflict severe pain or suffering amounting to torture until the fate of the "disappeared" is clearly established. This can only happen if the victim "reappears", those responsible acknowledge the facts, or an independent and impartial body clarifies what happened to the victim. The perpetrators should be brought to justice.