

# CHILE

## I. INTRODUCTION

### 1. The Legal Framework

#### 1.1. The Constitution

Chile has a population of approximately 15.5 million people made up of several ethnic groups, including considerable indigenous communities.<sup>1</sup>

The Republic of Chile is a unitary state, the territory of which is divided into 12 regions and a metropolitan area in which Santiago, the country's capital, is situated. Each region is divided into provinces and each province into communes.<sup>2</sup>

The 1925 Constitution was last amended in 1971 and in force until 1980 when it was finally replaced by the current Constitution through Decree Law 3.464 and 1.150, as subsequently amended. The Constitution guarantees a range of civil and political rights, such as the right to life and physical integrity, as well as social and economic rights.<sup>3</sup>

The judicial system is divided in regular and special courts, the former being District Courts *Juzgado de Distrito*, *Juzgados de Subdelegación*, *Juzgados de Letras de Menor Cuantía*, *Juzgados de Letras de Mayor Cuantía*, having jurisdiction over civil and criminal matters in the first instance, the Courts of Appeals and the Supreme Court.<sup>4</sup> The Supreme Court of Justice, consisting of 21 judges, is charged with powers of management, control and supervision of all the courts of the nation, with the exception of the Constitutional Court, the Electoral Qualifying Court, the regional electoral courts and the military courts in time of war.<sup>5</sup> Articles 81 and 82 of the Constitution established a Constitutional Tribunal of seven judges.<sup>6</sup> Both the Constitutional Court and the Supreme Court have powers of judicial review. Military courts and the courts martial are 'special courts,' with jurisdiction over offences committed by members of the army.

#### 1.2. Incorporation and status of international law in domestic law

Chile has become party to the following relevant international treaties:

- The two 1949 Geneva Conventions, 1949 (12 October 1950)
- Convention on the Prevention and Punishment of the Crime of Genocide (3 June 1953)
- International Convention on the Elimination of All Forms of Racial Discrimination (20 October 1971)
- Convention on the Status of Refugees (28 January 1972)
- International Covenant on Civil and Political Rights (10 February 1972)

---

<sup>1</sup> Core Documents Forming Part of the Reports of States Parties: Chile, UN Doc. HRI/CORE/1/Add.103, 17 March 1999, para.1.

<sup>2</sup> Ibid., para. 27

<sup>3</sup> See Article 19 of Chapter III of the Constitution.

<sup>4</sup> See Código Organico De Tribunales (Organic Code of the Courts), Law No.7.421 of 15 June 1943, as amended.

<sup>5</sup> Ibid., para. 48-9.

<sup>6</sup> See for the Tribunal's functions and organization Law 17.977 of the Law on the Constitutional Tribunal (Ley Orgánica Constitucional del Tribunal Constitucional) from 19 May 1981 and amendment, 18.930 of 17 February 1990.

- International Covenant on Social, Economic and Cultural Rights (10 February 1972)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Ratification (30 September 1988)#
- Inter-American Convention to Prevent and Punish Torture (30 September 1988)
- Convention on the Elimination of All Forms of Discrimination against Women (7 December 1989)
- Convention on the Rights of the Child (13 August 1990)
- American Convention on Human Rights ("Pact of San José, Costa Rica") (21 August 1990)
- The two 1977 Additional Protocols to the Geneva Conventions (24 April 1991)
- Optional Protocol to the International Convention on Civil and Political Rights (28 May 1992)
- Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belém do Pará") (15 November 1996)

No express norms govern the incorporation of either international treaties or customary international law. As held in jurisprudence, an international treaty is incorporated in the internal legal order by way of approval by the National Congress, followed by its promulgation by the President of the Republic, and finally the publication in the *Diario Oficial* (Official Gazette) of the text of the treaty and of the decree of promulgation.<sup>7</sup> Once an international treaty has been approved according to the procedure just outlined, the courts and the administration may apply its provisions as valid Chilean law. The treaty has the same status as statutory legislation.<sup>8</sup>

International human rights treaties binding Chile have been accorded a special status in Article 5 (2) of the Constitution: "It is the duty of the organs of the State to respect and promote these rights as guaranteed by this Constitution, and by the international treaties which have been ratified by Chile and are in force." Accordingly, such treaties are viewed as adding to and complementing the rights laid down in Article 19 of the Constitution and share their constitutional status.<sup>9</sup> Customary international law has been attributed legal validity in jurisprudence and may therefore be, or even has to where so provided, directly applied.<sup>10</sup>

Chile has not adopted any specific laws implementing the Convention against Torture but the Convention can and has been invoked through the courts and the administration.

## 2. Practice of torture: Context, Occurrences, Responses

### 2.1. The practice

On 11 September 1973, the constitutional government of President Salvador Allende Gossens was overthrown by a military regime - headed by General Augusto Pinochet Ugarte - which

---

<sup>7</sup> See Core Document, supra, para. 68, which states that: "the basis of this interpretation of the courts is to be found in Article 50, paragraph 1, of the Constitution, which gives the National Congress exclusive power to: "approve or reject international treaties submitted by the President of the Republic prior to ratification thereof. Approval of a treaty shall be subject to the same procedures as those prescribed for a law."

<sup>8</sup> See Core Documents supra, para. 70.

<sup>9</sup> As stated by the Chilean Government, in its 2002 Report to CAT, supra, para. 3: "There is, however, no provision within the Chilean legal system which expressly stipulates that, in the event of a conflict of provisions, those of the human rights treaty shall prevail. The continuing debate in Chile about the violation of human rights during the military regime has made it difficult to reach a firm consensus on doctrine and jurisprudence relating to the constitutional standing of these conventions. It should nevertheless be emphasized that the rulings of the Supreme Court during recent years have recognized the importance of the international treaties relating to human rights and humanitarian law, giving effect to their provisions and drawing attention to their value in a number of cases." (The reasoning of the Supreme Court in a 1998 ruling can be found in footnote 1 of the document).

<sup>10</sup> According to the Chilean Government, Core Document, supra, para. 67.

lasted until 11 March 1990. During the Pinochet regime, state agents systematically used torture to eliminate political opposition. Torture took place in both official and clandestine detention centres. It is estimated that between 300,000 and 500,000 people were systematically tortured in Chile between 1973 and 1990<sup>11</sup> and more than 3,000 were “disappeared” by the security forces of the military regime: the DINA (*Dirección de Inteligencia Nacional*) and its successor, the C.N.I. (*Corporación Nacional de Informaciones*), the *Carabineros*,<sup>12</sup> the Army, the *Comando Conjunto* (Command formed by civilians and military officers) and *Operación Cóndor*, an intelligence unit formed by agents of the five dictatorships of the Southern Cone (Chile, Argentina, Paraguay, Uruguay and Brazil).

With the arrival of democracy, torture became less common and was no longer used as a matter of state policy. However, illegal methods and excessive violence are sometimes used by the *Carabineros* when dispersing demonstrations and while the protesters are arrested and detained in police stations. Sporadic use of torture and ill-treatment by the police during interrogation as a means to obtain information continues to be reported. The main victims of torture are peasants, the *mapuche* (one of Chile’s indigenous groups), common criminals, youth from poor sectors of society and, in some cases, conscripts undergoing compulsory military service. Some instances have also been reported where women were subjected to sexual violence.<sup>13</sup>

Prisons are overcrowded.<sup>14</sup> Prisoners have complained to NGOs about beatings from prison guards, and the courts have received numerous complaints of mistreatment of prisoners. Prison guards have been accused of using excessive force to stop attempted prison breaks.<sup>15</sup> Moreover, prisoners in maximum-security prisons and prisoners with HIV/AIDS and mental deficiencies often do not receive adequate medical attention.<sup>16</sup>

## 2.2. Domestic Responses

Chile has over the last few years carried out a broad reform of the criminal justice system which resulted in a new Criminal Code of Procedures coming into force on 12 October 2000.<sup>17</sup> According to the Presidential Message introducing the relevant bill, “the basic parameters used in the design of the bill have been the Constitution and the international human rights instruments binding on the country, special account having been taken, among the latter, of the American Convention on Human Rights and the International Covenant on Civil and Political Rights.”<sup>18</sup>

<sup>11</sup> See CECT, SERPAJ, CODEPU, et. al., *Pacto Social y Moral Contra la Tortura* (unpublished, on file with REDRESS).

<sup>12</sup> The *Carabineros* (uniformed police) and the Police Department are in charge of public security. *Carabineros* fall under the auspices of the Ministry of Defence, and the Police Department reports to the Ministry of the Interior according to Decree Law N° 444, 1974. See on this Chile’s 2002 Report to CAT, *supra*, paras. 38 et seq.

<sup>13</sup> See, *Corporación de Promoción y Defensa de los Derechos del Pueblo (CODEPU)*, “Informe de Derechos Humanos 1990-2000”, Serie Retrospectiva y Reflexión, <http://www.derechos.org/nizkor/chile/doc/codepu00/>

<sup>14</sup> The Ministry of Justice stated that in October 2001 there were 34,335 prisoners in prisons designed to lodge 23,025 inmates. US DOS, *Country Reports on Human Rights Practices 2001: Chile*, March 4, 2002.

<sup>15</sup> HRW, *World Report 2003*, Chile.

<sup>16</sup> See CODEPU report, *supra*.

<sup>17</sup> The entry into force in all regions will be achieved in 2005. See overview in Chile’s 2002 Report to CAT, *supra*, paras.19 and 20. See for the rationale for the law reform, Fourth periodic reports of States parties due in 1994: Chile, UN Doc. CPR/C/95/Add.11, 3 December 1998, para. 106: “It is hoped that the separation of investigatory functions, on the one hand, from the prosecution on the other, will make for more diligent, thorough and technical police investigations based on a variety of types of evidence, thereby preventing the possibility of ill-treating an accused person to secure a confession as a basis for proceedings. If the court does not have to investigate cases it can focus on trying them by the rules of law and guaranteeing the rights of the persons involved. The new procedural system gives the Public Prosecutor’s Office broad powers during the investigation of the case, limited only by individual human rights, which can be upheld by the courts if they are violated.”

<sup>18</sup> As quoted in Chile’s 2002 Report to CAT, *supra*, para. 20.

Two years before, Act No. 19.567 of 1 July 1998 had been passed which introduced the offence of torture, abolished arrest on suspicion and established rights of detainees.<sup>19</sup> These developments have gone hand in hand with institutional reforms, such as the establishment of the Public Prosecutor's Office and the Office of the Public Criminal Defender in 1997 and 2001 respectively.<sup>20</sup> Moreover, training courses on international human rights standards are being carried out for *Gendameria*, *Carabinerios*, *Investigaciones* Police and Doctors.<sup>21</sup>

### 2.3. International Responses

Chile has recently submitted its third periodic report to the United Nations Committee against Torture which is due to be considered.<sup>22</sup> Chile has yet to submit its fifth report to the Human Rights Committee, which was due in April 2002,<sup>23</sup> however in evaluating the fourth report submitted in 1999, the committee was particularly concerned about the Amnesty Decree Law. This is due to the fact that "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."<sup>24</sup> In addition to this the Human Rights Committee was "deeply concerned by persistent complaints of torture and excessive use of force by police and other security personnel, (some of which were confirmed in the State party's report), as well as by the lack of independent mechanisms to investigate such complaints. The sole possibility of resort to court action cannot serve as a substitute for such mechanisms."<sup>25</sup>

The Special Rapporteur on Torture visited Chile in 1996 and found that while torture did not appear to be systematic, torture and ill-treatment of suspects of crime and witnesses at the hands of the police "seems to be an extensive problem."<sup>26</sup> He also made recommendations for the adoption of measures of reparation for torture survivors.<sup>27</sup>

The laws and practices of torture in Chile, especially its amnesty laws, have also been held to violate the guarantees provided in the American Convention of Human Rights in several cases before the Inter-American Commission of Human Rights.<sup>28</sup>

## II. PROHIBITION OF TORTURE UNDER DOMESTIC LAW

---

<sup>19</sup> See *ibid.*, para.21.

<sup>20</sup> *Ibid.*, para.19.

<sup>21</sup> *Ibid.*, paras.75 et seq.

<sup>22</sup> Third periodic reports due in 1997, Addendum, Chile, UN Doc. CAT/C.39/Add.14, 28 October 2002. See in regard of Chile's second periodic report, Concluding observations of the Committee against Torture: Chile, UN Doc. A/50/44, paras.52-61, 26 July 1995.

<sup>23</sup> Concluding observations of the Human Rights Committee: Chile. 30/03/99. UN Doc. CCPR/C/79/Add.104, 30 March 1999, para. 26.

<sup>24</sup> *Ibid.*, para. 7

<sup>25</sup> *Ibid.*, para. 10

<sup>26</sup> See Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 95/37, Addendum, Visit by the Special Rapporteur to Chile, UN Doc. E/CN.4/96/35/Add.2, 4 December 1996, paras. 72-74.

<sup>27</sup> *Ibid.*, para.76: "p) Measures should be taken in order to ensure that victims of torture obtain adequate compensation. (q) The Programme of Compensation and Full Health Care for Victims of Human Rights Violations (PRAIS) should be reinforced so that it can assist victims of torture that occurred under either the military or the civilian Governments in all aspects of their rehabilitation, including their professional rehabilitation. (r) National non-governmental organizations also play, and have played in the past, an important role in the rehabilitation of torture victims. Whenever they require it, they should receive official support to carry out their activities in this respect. At the same time, the Government is urged to consider increasing its contribution to the United Nations Voluntary Fund for Victims of Torture which, over the years, has financed the programmes of several NGOs in Chile."

<sup>28</sup> See e.g. Garay Hermosilla et al., case No.10.8431, 1996; Irma Reyes et al., cases 11.228, 1996; Carmelo Soria Espinoza, case no.11,725, 1999 and Samuel Alfonso Catalan Lincoleo, case no.11.771, 2001.

Article 19 (1) of Chapter III of the Constitution contains no express prohibition of torture but: "guarantees to all persons the right to life and physical and psychological integrity of the individual." Moreover, it provides that "use of all illegal pressure is prohibited."

There are no exceptional circumstances allowing for the derogation of the prohibition of torture/ill-treatment.<sup>29</sup>

Chilean criminal law contains no specific offence of torture in line with Article 1 of the Convention against Torture.<sup>30</sup> However, under the new Code of Criminal Procedure, detainees have the right not to be subjected to torture or cruel, inhuman or degrading treatment and several orders have been issued to the respective security forces spelling out the prohibition of torture.<sup>31</sup>

Title IV, article 19, of Decree Law No. 2.460 (Chilean Police Department Organization Act) reads: "Chilean Police Department officials shall be prohibited from committing any act of violence designed to obtain statements from a detainee." Moreover, Supreme Decree No. 1.771 dated 30 December 1992 provided that prison policy should be based on respect for the fundamental rights of detainees and should impose penalties on *Gendarmería* officials (in charge of prisoners) for any use of torture, cruel, inhuman or degrading treatment, either in word or in deed, and for unnecessary harshness against detainees.

### **III. CRIMINAL ACCOUNTABILITY OF PERPETRATORS OF TORTURE**

#### **1. The Substantive Law: Criminal offences and punishment**

Neither the Criminal Code nor the Code of Military Justice contains a specific offence of torture corresponding with the definition set out in Article 1 of the Convention against Torture.

Article 150 of the Criminal Code was used to punish torture before Act No. 19.567 of 1 July 1998 introduced. Article 150 (a) and (b) provides that: "The following shall incur penalties...: 1. Whoever orders or prolongs unduly the incommunicado detention of a person deprived of their liberty or treats that person with unnecessary harshness, and 2. Whoever orders an arrest or detention arbitrarily in places other than those established by law."<sup>32</sup>

Article 150 (A) of the Criminal Code provides that: "Any public employee who inflicts on a person deprived of their liberty unlawful physical or mental ill-treatment or pressure, or orders or acquiesces in its infliction, shall incur ... (penalties)."<sup>33</sup> "The same penalties, although with minimum to medium terms, shall be applied to any public employee who, knowing of the occurrence of the acts listed in the preceding paragraph, fails to prevent or stop them, having

---

<sup>29</sup> "Article 19, paragraph 26, of the Constitution expressly guarantees that the norms regulating or complementing the fundamental rights that it recognizes cannot affect them in their essence or impose conditions, taxes or requirements impeding their free exercise. For the purpose of strengthening this principle, the constitutional reform of August 1989 repealed the second subparagraph, whereby "the norms relating to states of constitutional exception and others which the Constitution itself contemplates" were excepted from the guarantee." See Core Document, supra, para. 66.

<sup>30</sup> See on Article 150A and B of the Criminal Code, infra, III.

<sup>31</sup> See Chile's 2002 Report to CAT, supra, paras. 32 et seq.

<sup>32</sup> According to Act No. 19.567, penalties range from 61 days to 5 years of rigorous or ordinary imprisonment for persons who order or unduly prolong the incommunicado detention of a person deprived of liberty, treat him with unnecessary severity or cause him to be detained arbitrarily in places other than those established by law.

<sup>33</sup> Punishment ranges from 541 days to 5 years of rigorous or ordinary imprisonment.

the power or authority to do so.” “If, by means of any of the acts referred to in the first paragraph, a public employee compels the victim or a third party to make a confession, to make any kind of statement or to give any information, the penalty shall range from the maximum term of shorter imprisonment or confinement to the minimum term of longer imprisonment or confinement, with the corresponding penalty attaching.”<sup>34</sup> If the acts described in this article should result in any of the injuries referred to in Article 397 or in the death of the person deprived of their liberty, where the result is attributable to the public employee's negligence or recklessness, the penalty shall range from the minimum to the medium term of longer imprisonment or confinement and absolute permanent disqualification.”<sup>35</sup>

Article 150 (B) of the Penal Code “imposes penalties ranging from 61 days to 3 years of rigorous or ordinary imprisonment on persons who, not having the status of public employee, commit the offences punishable under articles 150 and 150 A (first subparagraph); penalties ranging from 541 days to 5 years of rigorous or ordinary imprisonment on persons who, not having the status of public employee, commit the offence punishable under 150 A (second subparagraph); penalties ranging from 3 years and 1 day to 10 years of rigorous or ordinary imprisonment on persons who, not having the status of public employee, commit the offence punishable under the final subparagraph of article 150 A.”<sup>36</sup> Neither Article 150 (A) or (B) of the Criminal Code uses the word *torture* to indicate the prohibited conduct nor are the concepts of cruel, inhuman or degrading treatment or punishment used. The term that is used - “*Tormentos o Apremios Ilegítimos*,” translates as torments or illegitimate punishments.

The Acts proscribed in Articles 150, 150 (A) and 150 (B) of the Criminal Code, as well as participation in, complicity in, incitement to or the attempt to commit them are punishable under criminal law.<sup>37</sup>

Other criminal offences that can be invoked in specific instances of torture are offences related to inflicting bodily harm,<sup>38</sup> rape<sup>39</sup> and homicide.<sup>40</sup>

There are no specific defences against charges of torture but generally applicable defences might be invoked.<sup>41</sup>

Article 330 of the Code of Military Justice, which is applicable to members of the army, the navy, *Carabineros* and the air force (Article 6), provides that members of these institutions who use unnecessary violence or order it to be used are liable to penalties ranging from 60 days to 15 years.<sup>42</sup> Officers who know about the abuse and have the “necessary power and authority” to prevent or stop it also would be considered accessories to the crime if they fail to do so.<sup>43</sup>

---

<sup>34</sup> Aggravated penalties range from 3 to 10 years of rigorous or ordinary imprisonment.

<sup>35</sup> Aggravated penalties ranging from 5 to 15 years of rigorous imprisonment.

<sup>36</sup> See Chile's 2002 Report to CAT, para. 55, supra, (c).

<sup>37</sup> Articles 50-54 Criminal Code.

<sup>38</sup> Articles 396-399 Criminal Code.

<sup>39</sup> See Articles 361 and 362 as well as Articles 363 et seq. Criminal Code for other sexual offences.

<sup>40</sup> See Articles 390-393 Criminal Code.

<sup>41</sup> Such as acting in the line of duty, or legitimate exercise of a right, authority, position or employment. See Article 10 Criminal Code.

<sup>42</sup> Who “in executing an order from a superior or in the exercise of his military functions employ, or causes to be employed, without due reason, unnecessary violence in the execution of the acts which he is required to perform”, as quoted in Chile's 2002 report to CAT, supra, para.57.

<sup>43</sup> See Article 330 Code of Military Justice.

The penalties for violations of Title IV, article 19, of Decree Law No. 2.460 (Chilean Police Department Organization Act)<sup>44</sup> vary in the same way as those referred to in the above-mentioned article of the Code of Military Justice.

Disciplinary sanctions may be imposed in the form of a corresponding penalty attaching to the main penalty (*accessoria*), and may be an absolute and permanent ban on occupying public office or running for a position, or an absolute ban on exercising his or her profession for the duration of the sentence. Art. 255 of the Penal Code provides: "Any civil servant who, while carrying out their duties, shall commit an unjust act against people or use illegitimate or unnecessary pressures for the purposes of this act, shall be punished by suspension from work, at all levels and fined between eleven and twenty salaries"

Military officers can be transferred to another unit, arrested within the military or police institution, permanent or temporary suspended (article 21 of the Penal Code).<sup>45</sup> The Commanders-in-Chief of the Armed Forces (Army, Navy and Air Force) and the Director General of the *Carabineros* cannot be removed from office by the President of the Republic.<sup>46</sup>

## 2. The procedural law

### 2.1. Immunities

Decree Law No. 2.191 was enacted by the Military *Junta* and published in the Official Gazette on 19 April 1978. It granted a general amnesty to anyone who might have committed offences during the period from 11 September 1973 to 10 March 1978 while the state of siege was in effect. The Amnesty Law continues to be in force, in spite of the fact that the Inter-American Commission has repeatedly stated that the amnesty decree (a blanket amnesty) is completely illegal under international law and that the atrocities committed during the military regime should be investigated and perpetrators should be punished.<sup>47</sup> Patricio Aylwin, first elected president, announced in 1991 that the legislation in force does not prevent investigations by the courts from continuing until the offences under investigation have been sufficiently clarified and the identity of the offender determined.<sup>48</sup> Since 1998, several rulings by the Supreme Court and the opinion of the majority of the Supreme Court in its August 2000 ruling lifting Pinochet's immunity in the Caravan of Death case (see below), supported this position.<sup>49</sup> However, several judges of the Supreme Court subsequently indicated that the Court may leave the question of how to apply the Amnesty Law to the discretion of individual judges when they decide on the sentence. In the light of conflicting rulings, the question of the applicability of the Amnesty Law remains unresolved at the moment of the condemnation.<sup>50</sup>

### 2.2. Statute of Limitations

<sup>44</sup> See supra II.

<sup>45</sup> Article 21 Criminal Code.

<sup>46</sup> See Core Document, supra, para. 32.

<sup>47</sup> See e.g. Garay Hermsilla et al., case No.10.8431, 1996; Irma Reyes et al., cases 11.228, 1996; Carmelo Soria Espinoza, case no.11.725, 1999 and in particular Samuel Alfonso Catalan Lincoleo, case no.11.771, 2001.

<sup>48</sup> Fourth periodic reports of States parties due in 1994, UN Doc. CPR/C/95/Add.11, 3 December 1998, para. 102.

<sup>49</sup> See overview of jurisprudence in Amnesty International, Chile: Testament to suffering and courage: the long quest for justice and truth, December 2001, AI Index: AMR 22/014/2001, pp.13 et seq.

<sup>50</sup> See Amnesty International, Chile, Legal Brief on the Incompatibility of Chilean Decree Law No 2191 of 1978 with International Law, January 2001, AI Index: AMR 22/002/2001, pp.2 et seq.

The statute of limitations is 5 to 15 years depending on the category of crime as classified in the Criminal Code.<sup>51</sup> Accordingly, the statute of limitations for the crime of torture is 5 years, unless the accused is charged with another "more serious" offence subject to a different statute of limitation (i.e. causing serious bodily harm, death, 10 years limitation). However, the majority of judges of the Supreme Court, in its August 2000 ruling on lifting Pinochet's immunity in the Caravan of Death case, also held that the statute of limitation should be applied only after the circumstances of the crime have been established and the guilty party has been identified.<sup>52</sup>

### 2. 3. Criminal Investigations

A torture victim or his/her relatives, may either themselves or through another authorised person, lodge a complaint about alleged acts of torture before a competent judge, or before the police, army, public ministry, *Carabineros*, *Gendarmería* and "heads of public offices" which must report complaints about acts constituting criminal offences to a judge within 24 hours or face fines, criminal and/or disciplinary sanctions.<sup>53</sup>

While the Public Prosecutor is responsible for prosecutions and supervising investigations, the latter are carried out by the investigations police.<sup>54</sup> There are no special official bodies responsible for examining and investigating alleged violations of human rights. The opening of an investigation is obligatory.<sup>55</sup> A person making the complaint has a right of access to a doctor and/or to have a medical report drawn up<sup>56</sup>, but a report drawn up by a doctor belonging to the *Servicio Medico Legal* (Forensic Service) has stronger evidentiary value. Moreover, a medical report may also be available following a medical examination of a detainee as required by law.<sup>57</sup> An examining magistrate may order an autopsy in cases of deaths under suspicious circumstances.<sup>58</sup> An alleged torturer may be taken into custody, be released on bail or placed under house arrest.<sup>59</sup> If he/she is a public official, s/he can be suspended from that position pending outcome of the investigation.<sup>60</sup> The usual basis for a decision not to proceed with an investigation, made by a judge, is lack of evidence, amnesty law or statute of limitations. The judge's decisions can be reviewed on appeal by the court of appeal and the Supreme Court.<sup>61</sup> If the evidence allows charges to be laid, the suspect is indicted pursuant to Article 424 of the P.P.C.

There is no specific law providing for protection of victims of crimes, including torture. However, an alleged perpetrator of torture may be refused bail on the grounds that his/her release would endanger the security of the victim. Moreover, a judge may order necessary measures to be

---

<sup>51</sup> Article 94 et seq. Criminal Code. See Articles 3 and 21 Criminal Code for the categories of offences (crimenes, simples deltos and faltas), which are classified according to the punishment, prescribed for the offence.

<sup>52</sup> *Supra*, III, 2.1.

<sup>53</sup> See Articles 81 et seq. in particular Articles 84 and 94 P.P.C.

<sup>54</sup> Article 110 P.P.C.

<sup>55</sup> Articles 10 and 11, 105 and 106 of the P.P.C. There are also special procedures for internal investigations for *Gendarmería* and *Carabineros* respectively. See Chile's 2002 report to CAT, paras.97 et seq.

<sup>56</sup> Article 224 P.P.C.

<sup>57</sup> See Article 272 *bis*, P.P.C.

<sup>58</sup> Articles 121 P.P.C. et seq.

<sup>59</sup> See Articles 251 et seq. P.P.C. on detention.

<sup>60</sup> Article 274 P.P.C.

<sup>61</sup> Article 414 P.P.C.



taken to ensure the protection of victims and witnesses. The latter may have their identity concealed and be provided special protection during pre-trial proceedings.<sup>62</sup>

## 2.4. Trial stage

*Carabineros* and members of the army are subject to military justice while members of the Police Department, like any civilians, may be tried in ordinary courts of justice.<sup>63</sup> The nature of proceedings is inquisitorial and the burden of proof is on the prosecution.<sup>64</sup> Sentences cannot be suspended but convicted persons may benefit from pardon or commutation of sentences.<sup>65</sup>

## 3. The Practice

### 3.1. Torture committed during military dictatorship

Most proceedings arising from the Pinochet years are related to torture followed by death or occurring in the context of "disappearances." Allegations made by torture survivors are mostly related to the proceedings against Pinochet and others, which are being investigated by Judge Juan Guzmán Tapia (case No. 2182-98).<sup>66</sup> In 1998 the United Kingdom detained former President Pinochet pending resolution of a Spanish extradition request for the crimes of genocide, terrorism and torture and for conspiracy to commit these crime. Subsequently, Spain's extradition request was granted, albeit qualified, by the House of Lords in its second ruling.<sup>67</sup> In March 2000, the then British Home Secretary Jack Straw denied Spain's extradition request on the basis of medical exams indicating that Pinochet was unfit mentally and physically to defend himself against the charges.<sup>68</sup> When he returned to Chile, Pinochet was accused of being the perpetrator, and on appeal the accomplice, of "kidnapping and/or aggravated homicide" committed in 1973 against 75 victims of a military operation known as the "Caravan of Death".<sup>69</sup> In July 2001, the Sixth Chamber of the Santiago Appeals Court "suspended temporarily", on health grounds<sup>70</sup>, the legal proceedings affecting Augusto Pinochet in this case. In July 2002, the Supreme Court ruled that these proceedings were "suspended definitively" for health reasons.<sup>71</sup> The Supreme Court's decision has been used by other first instance judges to suspend other pending proceedings against Augusto Pinochet.

<sup>62</sup> See on this Chile's 2002 report to CAT, para.112.

<sup>63</sup> *Ibid.*, para.105.

<sup>64</sup> Types of evidence are confessions, witnesses, trial discovery, expert witnesses, documents, and presumptions (regularly used by torture survivors). See Articles 424 et seq. P.P.C.

<sup>65</sup> Articles 501 and 93 of the P.P.C. respectively.

<sup>66</sup> According to Amnesty International, "since January 1998, over 260 criminal complaints (*querellas*) have been submitted to investigative Judge Juan Guzmán Tapia against Augusto Pinochet and others regarding gross human rights violations committed under military rule, between 1973 and 1990. See AI, Chile: Testament to suffering and courage, *supra*, p.2.

<sup>67</sup> See overview in International Commission of Jurists, Crimes Against Humanity, Pinochet faces justice, July 1999.

<sup>68</sup> See AI, Chile: Testament to suffering and courage, *supra*, pp.5 and 6.

<sup>69</sup> A helicopter-borne military squad that toured the country in October 1973, removing political prisoners from their cells and secretly executing them. HRW, World Report 2002: Chile.

<sup>70</sup> "The appellate court ruled that if the terms "madness" or "dementia" (grounds for exemption from trial under the code of penal procedures in force) were interpreted in the light of modern medical science (as the court believed they should be) Pinochet's condition should bar his trial. Moreover, the court held, to try Pinochet in his condition would violate the due process guarantees of the Chilean constitution and its new code of penal procedures. The decision gave norms of due process precedence over written laws for the first time in Chilean legal history. It also relied in part on a code of penal procedures that had not yet entered into force in Santiago, where Pinochet's trial was to be held". HRW, World Report 2002: Chile.

<sup>71</sup> See AI, Chile: Pinochet Case, Supreme Court ruling should not exert influence upon other trials, July 2002, AI-Index: AMR 22/006/2002 (Public) and Human Rights Watch, Chile: Pinochet escapes justice, but his prosecution changed history, 1 July 2002.

Many of the complaints lodged during the military regime never proceeded, as courts regularly rejected habeas corpus on behalf of prisoners and the Forensic Services seldom certified the existence of injuries. During the military dictatorship, the government regularly interfered with the work of the tribunals to prevent investigations regarding human rights violations. The main instrument, however, was the transferring of jurisdiction to military tribunals which did neither investigate complaints or charged and convicted suspected members of the security forces.<sup>72</sup> Civil courts refused to intervene in the proceedings of the military courts and proclaimed their more or less covert adherence to the military regime. "The Supreme Court consistently declared that it was not authorized to hear decisions of the military courts in time of war, although article 86 of the Constitution expressly gave it the supervision of all the courts in Chile."<sup>73</sup> More than 300 judges were dismissed during the dictatorship. One well-known case is the dismissal of Judge García Villegas when he investigated and publicly denounced the conditions to which prisoners were subject during that time.<sup>74</sup>

Further obstacles in relation to investigations concerning crimes committed by officials under the military regime are the fact that torture was not made a criminal offence before 1998, the amnesty law and the difficulty of proving torture, particularly in the light of the fact that prisoners were generally blindfolded while in detention and were therefore unable to identify the perpetrators. Moreover, victims and witnesses may face adverse repercussions.<sup>75</sup> Investigations of allegations of torture suffer from delays and take years. Investigations in connection with offence committed during the military regime are only being investigated in recent years. While investigations into cases of torture and "disappearances" have been launched, many are still pending or have been either closed or temporarily suspended.<sup>76</sup>

To date, there are only few cases in which perpetrators were convicted and punished for human rights violations committed. In the cases relating to torture resulting in death, the accused were tried for "excessive force" and homicide. In the case of Carlos Godoy Echevoyen, a member of the Carabineros were sentenced to three years and one day imprisonment and in the case of Mario Fernández two members of the army were sentenced to 6 years and 10 years and one day imprisonment respectively, and began to serve their sentence in 1996.<sup>77</sup> However, in what is seen as an important development, in February 2003 five secret agents suspected of being responsible for the assassination of former army commander Gen. Carlos Prats in 1974 were

---

<sup>72</sup> See Amnesty International, *Torture in the Eighties*, 1984, pp.150 et seq.

<sup>73</sup> Friedler, Edith Z., *Judicial Review in Chile*, 7 SouthWest J.L. & T. Am., 321 (2000), 331.

<sup>74</sup> See on the role of the judiciary during the military dictatorship, *Comisión Nacional de Verdad y Reconciliación*, Volume I, Second Part, Chapter IV, "*Actuación de los tribunals de justicia ante las graves violaciones a los derechos humanos ocurridas entre el 11 de septiembre de 1973 y el 11 de marzo de 1990.*"

<sup>75</sup> At the beginning of 2001, witnesses denounced the acting chief of Chile's air force, Gen. Hernán Gabrielli Rojas for his participation in the torture of political detainees following the September 1973 military coup. General Gabrielli filed a lawsuit against the three witnesses under Article 6(b) of the Law of State Security. This law prohibits defamation of top government officials, including the commander-in-chief of the armed forces, and punishes offenders with up to five years' imprisonment. Targets of Article 6(b) State Security Law prosecutions can be convicted even if they can prove the truth of their accusations. The law has been condemned by the Organization of American States for violating Article 13 of the American Convention on Human Rights, which protects freedom of expression. In mid-1999 the Lagos government promised to repeal the law, but reform legislation has been blocked in Congress. See HRW, *Chilean Air Force Official Must Face Torture Charges*, 14 February 2001. However, following complaint made by the *La Nación* newspaper on 15 September 2002, in connection with the fact that information has been hidden concerning the destiny of those people disappeared by the Air Force, General Campos was dismissed and the Head of the Air Force, Patricio Ríos was forced to resign on 13 October 2002.

<sup>76</sup> See AI, *Chile: Testament to suffering and courage*, supra, pp.8 et seq.

<sup>77</sup> See Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1995/37 B, UN Doc. E/CN.4/1997/7, 10 January 1997, III, Chile.

indicted and charged with criminal conspiracy and aggravated homicide and arrested immediately.<sup>78</sup>

On 15 April 2003, five ex DINA (*Dirección de Inteligencia Nacional*) agents were held responsible for the disappearance of Miguel Angel Sandoval who had been detained in the torture centre Villa Grimaldi. Judge Solis sentenced the chief of DINA, Manuel Contreras to 15 years imprisonment, Marcelo Moren Brito, the former director of villa Grimaldi, to 15 years, Miguel Krassnoff to 10 years, Fernando Lauriani to 5 years and Gerardo Godoy to 5 years imprisonment respectively.

### 3.2. Recent Torture Cases

In its recent report to the Committee against Torture, the Chilean Government has not provided any data on the number of complaints relating to torture.<sup>79</sup> Whilst complaints about torture and ill-treatment have been lodged, people belonging to disadvantaged groups and suspects of ordinary crimes have apparently refrained from lodging complaints out of ignorance of their rights and fear of adverse repercussions. Torture survivors who have come forward have reportedly received threats, are subject to surveillance and may even lose their jobs when the accused belongs to the military. Some witnesses have been ordered protected by judges.<sup>80</sup>

Most of the judicial proceedings relating to torture or ill-treatment instituted against the *Gendameria*, *Carabineros* or the investigation police have not resulted in a trial, as most investigations were closed before ever reaching the courts. According to the figures released by the Government, 11 judicial proceedings were instituted against *Gendarmeria* officers for the offences of ill-treatment or causing bodily injury to detainees between 1995 and 2000 (situation as at October 2000). Out of these, three ended with a conviction but sentences imposed (imprisonment of 61 days in two cases for ill-treatment and of 541 days for causing bodily injury) were in all instances suspended. In two cases, the defendants were acquitted and in three cases proceedings were dismissed. The other cases are still under way.<sup>81</sup> The figures for judicial proceedings instituted against the investigation police for the offence of employing unnecessary violence against detainees in the period 1996 to 2000 are similar. Out of nine cases referred to, proceedings were dismissed, cases closed or officers not prosecuted in all but one case. The only exception has been the conviction of a police officer for ill-treatment. The sentence of 540 days of rigorous imprisonment was suspended and the case was under appeal.<sup>82</sup> The figures for judicial proceedings against Carabineros personnel initiated in the military prosecutors' offices in the Metropolitan region for the offence of employing unnecessary violence against detainees in the period 1998 to 2000 are even more striking. Out of a total of 233 cases, 26 led to prosecutions, and only 3 cases resulted in a conviction.<sup>83</sup>

In practice, the conduct constituting the crime of '*Apremios Ilegítimos*' (unlawful punishment) under the Criminal Code has been investigated, judged and sentenced in Military Courts under the crime of '*Violencias Innecesarias*' as the courts have assumed jurisdiction over criminal

---

<sup>78</sup> See HRW, Chile: Indictment in Prats Case, 25 February 2003.

<sup>79</sup> See Chile's 2002 report to CAT, *supra*.

<sup>80</sup> See CODEPU report, *supra*.

<sup>81</sup> *Ibid.*, paras. 106 and 107.

<sup>82</sup> *Ibid.*, para.109.

<sup>83</sup> *Ibid.*, para.108. The report provides no information on any penalties imposed in the three cases in which defendants were convicted.

offences involving members of the security forces under Articles 2 and 3 of the Code of Military Justice.<sup>84</sup>

Administrative proceedings against members of the respective forces have been carried out in several hundred cases, resulting in some cases of disciplinary sanctions imposed, ranging from reprimand, fines to dismissal.<sup>85</sup> This practice leaves the impression that, as a matter of general practice, complaints relating to torture and ill-treatment are mainly investigated in administrative proceedings. It is obvious that such proceedings can be no substitute to criminal proceedings which have only been instituted in few cases.

Another reason for the low rate of criminal proceedings against perpetrators of torture might be the role of the judiciary, which has not been pro-active in respect of the investigation, and prosecution of cases of torture.<sup>86</sup> Confessions elicited through torture are not admissible in court.<sup>87</sup> Courts have held that no procedural value should attach to an extra-judicial statement made by a defendant as evidence of his involvement in an offence, since it had probably been obtained by means of ill-treatment. That practice, it was pointed out, was prohibited in international treaties, such as the Pact of San José, Costa Rica, the International Covenant on Civil and Political Rights and others, which were valid under domestic law by virtue of article 5, paragraph 2, of the Constitution and were binding on the courts, as well as forming part of the law of rational and due criminal process.<sup>88</sup> Moreover, judges should take measures to ensure that a detainee has not been coerced into making a confession through torture or threats of torture.<sup>89</sup> However, in practice judges have hardly called for investigations into allegations of torture raised by defendants.<sup>90</sup>

## IV. CLAIMING REPARATION FOR TORTURE

### 1. Available Remedies

#### 1.1. Constitutional Law

Article 38 (2) of the Constitution provides that: "Any person whose rights are damaged by the State administration, its organs or those of the municipality, may make a claim before those

---

<sup>84</sup> Criminal judges and district attorneys have declared that the jurisdiction of the Military Courts is the appropriate jurisdiction under the Law to proceed with investigations into claims of torture based on article 150A/B [See DE BRITO, "Human Rights and Democratization in Latin America Uruguay and Chile"; 1998, Institute of Strategic and International Studies, Lisbon]. See on this point also AI, Chile: Testament to suffering and courage, *supra*, p.16. The statement of the Inter-American Commission, dating back to 1985, that the continuing expansion of the military court's jurisdiction over civilians in Chile was gradually eroding the jurisdiction of the ordinary courts and adversely affected the exercise of the right to a fair trial, has thus retained its validity. See Report on the situation of Human Rights in Chile, OEA/Ser. L./V/II.66, Doc. A, 1985, p. 183. In fact, the "Propuesta Programática de la Concertación" (Government Program) of 1989 established the necessity to reform the Military Code to restrict military jurisdiction to crimes committed by and against military and military institutions exclusively. However, 14 years have passed since the first "Concertation" government and this reform is still pending. See Concertación de Partidos por la Democracia. Programa de Gobierno, page 5, Editorial Jurídica Publibley Ltda., 1989, Santiago Chile.

<sup>85</sup> See Chile's 2002 report to CAT., paras. 98 et seq.

<sup>86</sup> See Report of the Special Rapporteur on Torture, *supra*, para.60.

<sup>87</sup> See Articles 284 P.P.C.

<sup>88</sup> Decision by the Santiago Court of Appeals on 11 April 1995 mentioned in Fourth periodic reports of States parties due in 1994: Chile, UN Doc. CPR/C/95/Add.11, 3 December 1998, para. 111.

<sup>89</sup> Article 323 P.P.C.

<sup>90</sup> See Report of the Special Rapporteur on Torture, *supra*. According to Codepu's report, *supra*, the courts limit themselves to declare a breach of the law but do not apply sanctions. In order to obtain the application of criminal sanctions, a criminal complaint must be filed.

tribunals determined by the law, with no prejudice vis-à-vis any civil servant who may have caused the damage.” This provision provides no basis for a constitutional remedy as individuals can petition neither the Constitutional Tribunal nor the Supreme Court with a demand for reparation for a violation of fundamental rights.

## 1.2. Civil Law

A victim of a tort (*delito o cuasidelito*) can obtain compensation for damages.<sup>91</sup> The individual perpetrator and the state are jointly liable.<sup>92</sup> The State is liable if the culprit cannot pay through the “subsidiary” principle and can subsequently reclaim the money paid out as compensation.

Damages can be awarded for pecuniary and non-pecuniary harm. Relatives of a person who has died as a result of torture are also entitled to damages.<sup>93</sup> A civil lawsuit for tort damages has to be brought within four years<sup>94</sup>, though cases involving torture from the military dictatorship have been accepted after the time limit.<sup>95</sup>

The civil claim must be lodged against a specific person in order to establish their responsibility for the acts, and determine the payment of compensation.<sup>96</sup> Article 254 (3) of the Code of Civil Procedure makes mandatory that a civil suit must contain the name, address and profession or office of the individual against whom the suit is brought.<sup>97</sup> The unanimous jurisprudence of the Chilean courts indicates that civil actions may only proceed once the *corpus delicti* has been produced and the guilty party against whom such action is to be taken has been determined.<sup>98</sup> Moreover, Article 40 of the Code of Criminal Procedure together with Article 254 (3) of the Code of Civil Procedure has been interpreted by the courts as limiting the scope of civil suits only against identifiable individuals, and therefore preventing claims against the State itself.<sup>99</sup>

The possibility of initiating a civil case does not necessarily depend on the results of criminal proceedings.<sup>100</sup> A guilty verdict in a criminal case has the effect that the commission of the offence and the culpability cannot be disputed by the defendant thus convicted<sup>101</sup> and need not be proven by the plaintiff. The court has discretion in awarding costs which include court fees and legal costs incurred by the other party. As a general rule, the losing party has to pay all costs unless the court decides that there was a plausible motive or there has been at least one

---

<sup>91</sup>Section XXXV, Book IV, in particular Article 2314 Civil Code.

<sup>92</sup> See Article 2314 Civil Code on general liability of tortfeasor and Article 4 of the State Administrative Act (Ley 18.575, Ley Orgánica Constitucional de Bases Generales de la Administración del Estado) which reads: “El Estado sera responsable por los danos que causen los órganos de la Administración en el ejercicio de sus funciones, sin perjuicio de las responsabilidades que pudieren afectar al funcionario que los hubiere ocasionado.”

<sup>93</sup> Article 2315 Civil Code.

<sup>94</sup> Article 2332 Civil Code.

<sup>95</sup> According to information provided by CINTRAS.

<sup>96</sup> Samuel Alfonso Catalan Lincoleo, case no. 11.771 (2001), para 64.

<sup>97</sup> This provision is not adequate for cases involving grave human rights violations (especially if systematic and widespread), but when the violations are acts of torture, these requirements are particularly unreasonable, given the difficulty of identifying the perpetrator(s) in the majority of the cases.

<sup>98</sup> Garay Hermosilla et al., case no. 10.8431996, para 9.

<sup>99</sup> Ibid.

<sup>100</sup> Article 5 Code of Civil Procedure.

<sup>101</sup> Article 13 P.P.C.

vote in favour of the losing party.<sup>102</sup> The *Corporación de Asistencia Judicial* which belongs to the Justice Ministry provides legal aid to more recent torture victims.<sup>103</sup>

When a judicial order cannot be enforced, a creditor must apply to the court and initiate proceedings for the execution of the judgment (*juicio ejecutivo*) via seizure of the assets.<sup>104</sup>

### 1.3. Criminal Law

Reparation, in particular damages, can be obtained through criminal proceedings (adhesion laws).<sup>105</sup> A victim of a crime or his/her relatives may initiate such action against those responsible for the criminal offence, third persons liable under civil law and against the heirs/successors of either.<sup>106</sup> The procedure differs depending on whether the offence will only be prosecuted upon complaint or *ex officio* which will in turn inform the applicable statute of limitations.<sup>107</sup> In the latter case, the victim may adhere to criminal proceedings in the course of the criminal trial.<sup>108</sup> The burden of proof is on the victim in accordance with the rules applying in civil cases whereas procedural matters, including producing the evidence and the weight attached to it are governed by the Code of Criminal Procedure.<sup>109</sup> Reparation to be awarded includes damages for pecuniary and non-pecuniary harm.<sup>110</sup> The Criminal Code lays down the following scope of reparations for offences against life, physical or psychic integrity or the health of persons are: administering food to the family; payment for treatment of one who is mentally damaged or made unable to work, as well as providing food for him and his family; payment for the treatment and cure of the person offended in all other cases of lesions, feeding his family and himself during the period that he is unable to work, due to said injuries. The food shall always be congruous, depending on the offended party, and the obligation to cease if he has sufficient means to attend to his comfortable subsistence and administer them to his family, as determined by the Civil Code.<sup>111</sup> The victim may have to cover the cost of the trial should unless the court decides that he/she had a plausible motive to bring a complaint.<sup>112</sup> The enforcement of the sentence concerning the compensation claim is governed by the Code of Civil Procedure.<sup>113</sup>

## 2. The Practice

There have only been few successful cases relating to torture and ill-treatment in which the survivor and the relatives of the victim received compensation for their suffering at the hands of

---

<sup>102</sup> See Articles 138 to 147 Code of Civil Procedure.

<sup>103</sup> The right to free legal defence is embodied in Article 19, No.3, 2<sup>nd</sup> subparas. of the Constitution.

<sup>104</sup> See Articles 434 to 529 Code of Civil Procedure.

<sup>105</sup> Articles 10 et seq. P.P.C.

<sup>106</sup> See Articles 10 and 40 P.P.C.

<sup>107</sup> See Article 41 P.P.C. which refers to Article 2332 of the Civil Code, Title V of Book 1 of the Criminal Code and Articles 103bis and 450bis of the P.P.C.

<sup>108</sup> Articles 428 et seq. P.P.C. whereby Article 428 P.P.C. refers to Article 254 of the Code of Civil Procedure with regard to filing the lawsuit.

<sup>109</sup> Article 488 bis P.P.C.

<sup>110</sup> Article 10 P.P.C.

<sup>111</sup> Art. 410 of the Penal Code.

<sup>112</sup> Article 680 P.P.C.

<sup>113</sup> Article 527 bis P.P.C.

the military and state agents in the 1980s.<sup>114</sup> Compensation has also been awarded for other offences which took place at the same time (kidnapping, homicide, unnecessary force, etc.) via judicial proceedings, all of which are pending appeal. The maximum amount obtained through such settlement has been 215 Million Pesos in the case of Carmen Gloria Quintana.<sup>115</sup> All reparation through settlement has taken the form of monetary compensation.<sup>116</sup>

At the time of writing, no case relating to recent instances of torture is known in which a final award for damages has been made.<sup>117</sup> The obstacles facing torture survivors or the relatives of torture victims in taking legal action to vindicate their right to reparation are generally lack of financial means and difficulty of obtaining evidence. Moreover, given the extremely low number of convictions, torture survivor can in most cases not avail themselves of the remedy envisaged under the Criminal Procedure Code. Furthermore, the overlapping of civil and military jurisdictions has made reparation provisions of the Civil Code both inadequate and ineffective. Article 330 of the Military Code restricts the scope of acts falling under the defined punishable conduct and excludes psychological harm as a possible element of the crime. Applying this provision directly limits the adequate determination of damages caused to the victims. Although civil suits for damages independent from criminal prosecution are possible under Chilean law the practical effect of the Military Courts taking jurisdiction over torture cases has significantly restricted victims' ability to pursue civil remedies. In practice, most of the cases under military jurisdiction were dismissed without determining criminal liability under statute of limitations or Decree Law 2191, therefore preventing the victims from enjoying their right to a fair trial to duly determine their civil rights.<sup>118</sup> In most cases the right to compensation in respect of human rights violations committed during the military regime is illusory if not legally impossible because Decree Law No. 2191 (Amnesty Law) prevents the judges from ordering investigations of those crimes covered by the Amnesty Law.<sup>119</sup>

## V. GOVERNMENT REPARATION MEASURES

On 25 April 1990, a Supreme Decree of the new democratic government established the National Commission for Truth and Reconciliation. The powers of the National Commission ("the Retting Commission") related to the investigation of serious violations of human rights perpetrated in Chile during the period of the military dictatorship between 11 September 1973 and 11 March 1990.<sup>120</sup> According to its mandate, serious violations of human rights denoted

<sup>114</sup> Two cases are referred to in Chile's 2002 CAT report, p.45, Fn.21:" (a) compensation in the amount of 215 million Chilean pesos which the Exchequer will have to pay, by court order, to Ms. Carmen Gloria Quintana for the burns she suffered at the hands of Army Captain Fernández Dittus on 2 July 1986; (b) compensation in the amount of 264 million pesos which, by court order, the Exchequer had to pay to the five children of Mr. Mario Gilberto Fernández López, who died as a result of torture by State agents on 18 October 1984."

<sup>115</sup> Ibid.

<sup>116</sup> Normally P\$50 millions per family member. This information was provided by the Chilean NGO Cintras.

<sup>117</sup> See "INFORME DE LA COMISION ETICA CONTRA LA TORTURA AL PRESIDENTE DE LA REPUBLICA, SR. RICARDO LAGOS" and other relevant documents in [www.CODEPU.cl](http://www.CODEPU.cl)

<sup>118</sup> CODEPU (Comité de Defensa de los Derechos del Pueblo) "Informe Sobre la Impunidad en Chile" Publicado por Equipo Nikzkor, Madrid, España, September 1996.

<sup>119</sup> "The Supreme Court, in both decisions, stated that the self amnesty decree law does not exclude the right of aggrieved parties to be duly compensated by the civil courts for any financial damages that the offences may have cause them. If the self-amnesty decree law, as interpreted by the Court, constitutes a rule that prevents the judge from ordering an investigation is already underway, requires that it be suspended immediately, then the right to compensation for damages is not only illusory but also juridically impossible..." See Garay Herмосilla, supra, para 9. See also Irma Reyes et al., cases 11.228 et al., 1996 Reyes and Catalan Lincoleo.

<sup>120</sup> The report submitted by the Commission after nine months' work concluded that there had been extremely serious human rights violations resulting in the death, between 1973 and 1990, of a total of 2,279 persons. Apart from the cases noted, 614 were unable to be cleared up as the Commission did not have enough information to reach a conclusion.

violations to the right to life, disappearances, summary and extra-judicial executions, and torture followed by death. It was expressly barred from deciding on the responsibility of the individuals for the acts being investigated.<sup>121</sup> Following the report of the Retting Commission, the government passed legislation creating the National Corporation for Reparation and Reconciliation and providing compensation and health and educational services to some family members of the “disappeared” and executed detainees identified by the Retting Commission and the National Corporation.<sup>122</sup> The National Corporation was charged with continuing to examine cases left unresolved by the Retting Commission and with providing compensation to victims’ families.<sup>123</sup> It carried out educational programs designed to give effect to a culture of human rights.<sup>124</sup> President Aylwin acknowledged the gross violations, apologised on behalf of the State and presented the results of the investigation. However, the reparations measures undertaken by the democratic Government to address human rights violations of the past did not include torture survivors (the only victims entitled to reparation are the families of disappeared or dead victims (many of whom were tortured). The Inter-American Commission on Human Rights established in its Report of the Catalan Lincoleo Case that: “The (Chilean) government’s recognition of responsibility, its partial investigation of the facts and its subsequent payment of compensation are not enough, in themselves, to fulfil its obligation under the article 1 (1) of the American Convention”.<sup>125</sup> While many criticisms have been made to the Chilean reparation model<sup>126</sup>, the most disturbing is the fact that the narrow mandate of the Retting Commission and consequently the scope of the National Corporation left thousands of cases of violations of non-derogable human rights from which the victims survived—specifically cases of torture—without examination resulting in the victims being deprived of any legal recourse and of any other type of reparation.<sup>127</sup>

In 1991 the Programme of Full Health Care (PRAIS) for victims of human rights violations during the military regime was established in response to recommendations from the National Commission for Truth and Reconciliation.<sup>128</sup> According to the Government, the “programme provides physical and psychological care to relatives of detainees who have disappeared or been executed, torture victims and exiles, within the context of the State Health Services.”<sup>129</sup> On 31 May 1999, the number of registered beneficiaries of the programmes stood at 31,102 (of which

---

<sup>121</sup> Report of the National Commission on Truth and Reconciliation 74 note j, Phillip E. Berryman, trans., 1993.

<sup>122</sup> See Law No. 19.123, published in *Diario Oficial* (Feb 8, 1992); reprinted in Ministry of Foreign Affairs, Republic of Chile, Law Nr. 19,123: Creating the National Corporation for Reparation and Reconciliation (1992).

<sup>123</sup> There has been other legislation providing reparations to victims of the military regime, like Ley 19.234 (sobre el Exonerado Político), Ley 18.994 (creating the Oficina nacional de retorno), exerta n°779 creating the PRAIS (Programa de Reparación Integral de Salud). See *infra*, V, 2.

<sup>124</sup> See Core Documents *supra*, para. 117-9.

<sup>125</sup> N° 61/01 Report of the Catalan Lincoleo Case.

<sup>126</sup> The Retting Commission’s extra-judicial nature and its refusal to publish names of wrongdoers failed to address the interest of the victims’ families and society. Additionally, the services and pensions provided by the National Corporation cannot be considered to be fair compensation, or justifiable alternatives to the civil remedies precluded by the Amnesty law and otherwise mandated by Chile’s treaty obligations. See Quinn, Robert “Will the rule of law end? 62 *Fordham L. Rev.* 905, February 1994, interview with Alejandro Gonzales, President of the National Corporation, in Santiago, Chile, 11 August 1992.

<sup>127</sup> The primary failing is that the Retting Commission’s Report, together with the amnesty decree, leaves survivors of torture without means to identify, and thus, bring actions against their torturers. Many of the reparative measures recommended by the Commission did not apply to victims of torture because their cases were not included in the official report. See Jorge Correa S., *Dealing With Past Human Rights Violations: The Chilean Case After Dictatorship*, 67 *Notre Dame L. Re.* 1455, 1458-60 (1992).

<sup>128</sup> Decree n°729, 16/12/1992.

<sup>129</sup> Chile’s 2002 report to CAT, *supra*, para.113, which contains a description of the programme.



12,630 were direct victims or direct relatives of victims of human rights violations), and rose to 44,732 registered and approved beneficiaries in the year 2000 and 54,506 in the year 2001.<sup>130</sup> However, the programme has been criticised for inadequate resources and a certain lack of understanding of the trauma and substantial assistance received by victims comes from human rights NGOs specializing in mental health.<sup>131</sup>

Recently, after intense lobbying of the survivors of Villa Grimaldi, who requested to turn the main torture centre of the DINA into a museum, the government bought the land where the centre operated and transformed it into a memorial park. In December 2001, the government declared the Centre Domingo Canas in Santiago a "national monument" after letting the owners destroy the building. The place might be given to the association of former political prisoners who want to build a museum and cultural centre on the premises.<sup>132</sup>

President Lagos has appointed the Deputy Minister Jorge Correa Sutil, who has been holding meetings with the CECT (Comision Etica contra la tortura) to create a Truth, Justice and Reparations Commission for Torture Survivors. The proposals brought forward by some NGOs include the creation of a Commission with powers to produce an official record of victims of torture and ill-treatment during the military regime. The record would then be used to rehabilitate and morally and materially compensate torture victims. Discussions on the proposals are still ongoing at the time of writing.

## **VI. LEGAL REMEDIES IN CASES OF TORTURE COMMITTED IN THIRD COUNTRIES**

### **1. Prosecution over acts of torture committed in a third country**

#### **1.1. The Law**

##### **1.1.1. Criminal Law**

Chilean law provides for the active<sup>133</sup> and passive personality principle<sup>134</sup> and allows for the exercise of universal jurisdiction. Article 5 of the Chilean Constitution recognizes as limits on sovereignty "the respect for the essential rights originating from human nature" and provides that "[i]t is the duty of State agencies to respect and promote rights guaranteed by this Constitution and by international treaties ratified by Chile and in force". The Supreme Court of Justice of Chile has recognized in the *Pedro Enrique Poblete Cordoba* case that the provisions of international treaties to which Chile is a party and which are in force can be applied under Article 5.<sup>135</sup> Article 6 of the Courts Organization Code requires courts to exercise jurisdiction

---

<sup>130</sup> Ibid. The number of specialised mental health consultations under the programme rose from 5,962 in the first quarter of 2000 to 7, 629 in the second quarter of 2001. See for earlier figures Fourth periodic reports of States parties due in 1994: Chile CPR/C/95/Add.11, 3 December 1998, para. 121.

<sup>131</sup> Information provided by Karine Bonneau. For instance, only 12 of the 20 required teams are effectively working, with 2 professional instead of the 5 required; in many of them is lacking the mental health service, the budget is constantly reducing but the ministry of health, allocating to other program like the one in favor of victims of domestic violence.

<sup>132</sup> Information provided by Ms. Karine Bonneau, author of a Phd thesis on the right to reparation for victims of grave violations of human right in international law: the case of Chile, Paris, 2003.

<sup>133</sup> Article 6 (6) of the Courts Organization Code (Código Orgánico de Tribunales) for cases in which a Chilean national has committed an offence against another Chilean national abroad and has not been tried by a court in the country where the offence was committed.

<sup>134</sup> Ibid.

<sup>135</sup> *Pedro Enrique Poblete Cordoba*, Judgment, Rol 469-98 (Sup. Ct. Chile 9 September 1998), para. 10 (English translation by Amnesty International; another English translation is in 2 Y.B. Int'l Hum. L. 485 (1999)).

over crimes and offences committed outside the national territory which are included in treaties signed by Chile. Likewise, criminal Code does not authorize Chilean tribunals to take jurisdiction over crimes committed outside of the national territory unless the crime is "incorporated in a treaty."<sup>136</sup> Article 1 of the Code of Criminal Procedure states that Chilean tribunals exercise jurisdiction through "special laws, treaties or international conventions to which Chile is a party or through the generally recognized rules of international law".

Finally, according to the Government, "in internal Chilean law, there are no special provisions relating to the exercise of criminal jurisdiction over the offences provided for in the Convention (against Torture). Consequently, in order to determine whether any of these offences is within the competence of the Chilean courts, the above-mentioned internal provisions, the Bustamante Code when appropriate and the relevant provisions of the Convention itself would have to be applied. There are no judicial precedents for the application of these provisions."<sup>137</sup>

Diplomatic personnel is granted immunity in accordance with the Vienna Convention on Diplomatic Relations, 1961, to which Chile became a party in 1968.<sup>138</sup>

There have been no cases in which perpetrators of acts of torture allegedly committed in a third countries were prosecuted.

### 1.1.2. Extradition Law

Extradition is carried out in accordance with the provisions of the Criminal Procedure Code on the basis of extradition treaties between Chile and the requesting state. All such treaties concluded by Chile with other states since 1994 "include a generic clause, providing that "offences included in multilateral conventions to which both countries are parties" are extraditable."<sup>139</sup> In general, the crime in question must be recognised as an offence in the requesting country and in Chile, and must carry a minimum sentence of one year imprisonment. Chilean nationals may be extradited on the basis of a treaty. However, extradition may not be granted for political offences and wanted persons must not have been tried for the offence for which the country requests extradition.<sup>140</sup> While the Supreme Court, who decides on extradition requests following transmission of the request by the Ministry of Foreign Affairs, has to take international treaties into consideration in doing so, there are no express provisions prohibiting extradition when there are substantial grounds for believing that the wanted person would be in danger of being subjected to torture following extradition.<sup>141</sup>

## 1.2. The Practice

---

<sup>136</sup> Article 6(4) of the Criminal Code.

<sup>137</sup> Chile's 2002 report to CAT, *supra*, para.64.

<sup>138</sup> The Convention was published in the Official Gazette (Diario Oficial) on 4 March 1968, No.666.

<sup>139</sup> *Ibid.*, paras. 69 and 70.

<sup>140</sup> See Articles 626 to 656 PPC. See for Chile's obligation under Article 7 CAT (i.e. to prosecute an alleged perpetrator who cannot or is not extradited), the elaborations by the Chilean Government in its 2002 report to CAT, para.66: "The internal legislation regulating passive extradition does not contain an obligation in the terms of article 7, paragraph 1, of the Convention. On the other hand, article 655 (2) of the Code of Criminal Procedure establishes that, if the Supreme Court refuses extradition, the court shall proceed to release the detainee. Consequently, in order to give effect to that provision of article 7, at the present time the Convention would have to be applied directly by the Chilean courts, without prejudice to the express incorporation of that obligation in the internal legal order."

<sup>141</sup> See Chile's 2002 Report to CAT, para.51.

In 2001, Argentine federal judge María Servini de Cubría requested the extradition of Pinochet, Manuel Contreras (former director of Pinochet's secret police, the DINA), and five former DINA agents. They were charged in Argentina for the 1974 assassination in Buenos Aires of former Army Chief Gen. Carlos Prats and his wife Sofia Cuthbert. The Chilean Supreme Court denied their extradition on procedural grounds in December 2002 but Contreras was indicted for the crime in Chile in February 2003.<sup>142</sup>

In April 2001, another international warrant for the arrest of Manuel Contreras was issued by the Argentine federal judge Rodolfo Canicoba seeking his extradition for organizing Operation Condor. A similar request by the Argentine judge for the arrest, pending extradition, of General Pinochet was denied by Chilean Supreme Court judge Domingo Kokisch. Chile has also refused to extradite Manuel Contreras for the homicide of Salvador Allende's former Minister Orlando Letelier, to the United States. Contreras was prosecuted and served a 7 years prison sentence in Chile.<sup>143</sup>

## 2. Claiming reparation for acts of torture committed in third countries

Chile's private international law is governed by the civil code and applicable international treaties, such as the Bustamante Code and the Montevideo Treaties. Courts can exercise jurisdiction over torts committed abroad when the defendant has his/her domicile in Chile in which case the *lex loci delicti*, i.e. the law of the place of the tort would be applied.

Torture survivors may also claim compensation in the course of criminal proceedings brought against perpetrators of torture committed abroad as envisaged by the applicable criminal law outlined above.

Diplomatic immunity is granted in accordance with the Vienna Convention on Diplomatic Relations.<sup>144</sup>

There is no specific law on state immunity and there are no known precedents in which Chilean courts have ruled on the scope of state immunity in respect of claims relating to torture.

No cases are known in which victims of torture committed in a country other than Chile have brought a case for reparation against the responsible perpetrators or foreign States before Chilean Courts.

---

<sup>142</sup> See HRW, Chile: Indictment in Prats Case, *supra*.

<sup>143</sup> HRW, Chile Report 2002 and USDOS, Report 2001, Chile.

<sup>144</sup> The Convention was published in the Official Gazette (Diario Oficial) on 4 March 1968, No.666.