CHILE

THE INESCAPABLE OBLIGATION OF THE INTERNATIONAL COMMUNITY TO BRING TO JUSTICE THOSE RESPONSIBLE FOR CRIMES AGAINST HUMANITY COMMITTED DURING THE MILITARY GOVERNMENT IN CHILE

"The principle of international law, which under certain circumstances, protects the representative of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings".

Judgment of the International Military Tribunal of Nüremberg, recognized as international law principles by the Resolution 95 (I) of 11 December 1946 of the United Nations General Assembly.

Introduction – Violent overthrow of democratic government and human rights violations as a means to gain and maintain power

- a brief summary of the human rights violations situation in Chile followi 1973 military coup
- an outline of key international law regarding crimes against humanity
- key points regarding the responsibility of the state in this case.

The 11 September 1973 Chilean military coup, which overthrew the democratically elected government of Salvador Allende, heralded the implementation of a policy of systematic human rights violations under the direct command of General Augusto Pinochet. To overthrow the constitutionally elected government of President

Allende, the military commanders of the coup implemented a policy of violence and in order to hold onto political power implemented a planned systematic, widespread policy of violation of fundamental human rights. Thousands were detained, tortured, executed and disappeared. The international community was aware of the systematic policy of human rights violations implemented in the aftermath of the coup. In 1975 the General Assembly of the United Nations (Resolution N° 3448 (XXX) of the General Assembly of the United Nations of 9 December 1975) issued a statement which acknowledged the institutionalized practice of torture, ill-treatment, and arbitrary arrest. The UN Ad-Hoc Working Group on Chile established by the United Nations in 1975, together with the Inter-American Commission on Human Rights of the Organization of American States, extensively documented these systematic and widespread violations. The UN Ad-Hoc Working Group on Chile concluded that cases of torture, as crimes against humanity, committed by the military government should be prosecuted by the international community (UN doc A/31/253, 8 October 1976, paragraph 511).

The systematic and widespread nature of these human rights violations has been officially recognized by the civilian government of Chile in its report to the UN Committee against Torture in 1990. In 1996 the Reparation and Reconciliation Corporation, which had been set up under the administration of President Patricio Aylwin in 1992, presented its final report. The Corporation officially recognized a further 123 "disappearances" and 776 extrajudicial executions or death under torture during the military period. Combined with the findings of the Truth and Reconciliation Commission this brought the number of "disappearances" to 1,102 and extrajudicial executions and death under torture to 2,095, making a total of 3,197 cases that were officially recognized by the Chilean state. Those victim to human rights violations included *those considered to be real, potential or suspected ideological opponents of the military government. The Truth and Reconciliation Commission together with the Chilean Government's report to the Committee against Torture concluded that the intelligence service, DINA (Directorate of National Intelligence), under the direct command of Augusto Pinochet, played a central role in the policy of systematic and widespread*

human rights violations in Chile. Similarly they concluded that the DINA developed a variety of criminal tactics including killings and disappearances of individuals of Chileans and other nationalities, considered to be "enemies" of the military regime, in other countries. This required intelligence coordination and planning at the highest levels of the State.

General Pinochet was the supreme Head of State, and the DINA reported directly to him. He was very much in command and fully aware of what was being done by the Intelligence services. In February 1998 the former head of DINA told the Chilean Supreme Court that Augusto Pinochet was in overall command of its operation. General Pinochet was also head of the armed forces which also played a role in carrying out the policy of human rights violations.

Failure to tackle impunity in Chile

For quarter of a century relatives of the victims of human rights violations have campaigned for justice, as well as truth, with the support of human rights lawyers, organizations and judges. The simple elements of truth and justice are essential for true reconciliation. As senior members of the Chilean Government and politicians have stated the issue of human rights violations committed during the military government is an unresolved one. Several mechanisms guaranteeing impunity have blocked effective judicial investigations in Chile.

The Amnesty Law of 1978 passed during the government of General Pinochet has made it impossible for the relatives to find the answers on the whereabouts of those "disappeared" and to obtain justice. Those responsible for committing human rights violations played a major role in dictating the terms of transition to civilian rule to ensure immunity from prosecution for human rights violators and this has not allowed for true reconciliation. Those seeking truth and justice have been sidelined, often violently, as a means to silence them. The constitution which Pinochet was instrumental in drafting built in a system of senators for life who as parliamentarians have complete immunity under national law. Augusto Pinochet was assured his position as senator on retiring from the armed forces. Impunity has

also been guaranteed by threats and intimidation against those who demand justice. Impunity is not accidental.

The Inter-American Commission on Human Rights in 1996 and 1998 concluded that the self- amnesty is incompatible with international human rights law and its legal impact formed part of a general policy of human rights violations (IACHR Reports No.36/96 and No.25/98).

The responsibility of the international community in responding to systematic human rights violations

The scale, number and seriousness of human rights violations which were committed under the September 1973 and March 1990 military government, together with their systematic nature, constitute crimes against humanity under international law.

a) Any state may exercise universal jurisdiction over crimes against humanity

Crimes against humanity recognized by international law include the practice of systematic or widespread killings, torture, forced disappearances, and arbitrary detention. A number of these crimes against humanity have been the subject of international conventions and are recognized by international customary law.

These crimes against humanity are subject to universal jurisdiction. This principle has been established since the International Military Tribunal of Nüremberg and its Judgment. The principles articulated in the Judgement were recognized as international law principles by the United Nations General Assembly in 1946 (Resolution 95 (I)). Crimes against humanity and the norms which regulate them form part of *jus cogens* (fundamental norms) and as such are peremptory norms of

general international law which as recognized in the Vienna Convention of the Law of Treaties (1969)cannot be modified or revoked by treaty or national law.

Indeed, as the International Court of Justice recognized in Barcelona, Traction, Light and Power Company Ltd. Judgment (ICJ, 1972 Report, page 32) the prohibition in international law of the acts alleged in this case is an obligation *erga omnes* which all states have a legal interest in ensuring is maintained.

Therefore, all states are under an inescapable obligation to prosecute and punish crimes against humanity and to cooperate in the detection, arrest and punishment of persons implicated in these crimes.

States have an obligation to pursue judicial investigations against those responsible for crimes against humanity regardless of where or when such crimes were committed, this is an international law principle recognized similarly by the United Nations Principles of international co-operation in the detection, arrest extradition and punishment of persons guilty of war crimes and crimes against humanity, adopted by the General Assembly in Resolution 3074 (XXVIII) of 3 December 1973.

b) The rules regulating crimes against humanity – no immunity under international law

Those responsible for crimes against humanity cannot invoke immunity or special privileges as a means of avoiding legal proceedings a principle established within the Statute of Nüremberg International Military Tribunal (Article 7). The Judgment of the Nüremberg Tribunal went further by ruling that the international law principles which protect State representatives in some cases are not applicable in acts which constitute crimes under international law. The Nüremberg Tribunal ruled that any person regardless of governmental hierarchy who has contributed to a crime against humanity is criminally liable. The United Nations General Assembly reaffirmed the principles articulated in the Nüremberg Charter and Judgment in its Resolution 95 (I) of 11 December 1946. This fundamental rule of law has also been reaffirmed by the International Law Commission in Principle III of the Principles of Law Recognized in the Charter of the Nüremberg Tribunal and the Judgment of the Tribunal (1950), in Article 6 of the Charter of the International Military Tribunal for the Far East in

1946, Article 7 (2) of the 1993 Statutes of the International Tribunal for the former Yugoslavia and Article 6 (2) of the 1994 Statute of the International Criminal Tribunal for Rwanda and Article 7 of the United Nations Draft Code of Crimes against the Peace and Security of Mankind adopted in 1996, as well as in Article 27 of the Statute for the International Criminal Court, adopted in Rome on 17 July 1998. The UN International Law Commission has stated:

> "As further recognized by the Nürnberg Tribunal in its judgment, the author of crime under international law cannot invoke his official position to escape punishment in appropriate proceedings. The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence" (Report of the International Law Commission on the work of its forty-eighth session, 6 May - 26 July 1996, UN Doc. A/51/10, Page 41).

Whether or not crimes against humanity have been codified in the internal laws of a state does not exempt a state from conducting judicial investigations into crimes against humanity since these are already codified under international law. The UN International Covenant on Civil and Political Rights (Article 15.(2)) and the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (Article 7.(2)) establish that a person accused of committing crimes against humanity can be prosecuted according to the principles established and recognized by international law. Failure to codify international law on crimes against humanity within the internal law statutes of a state does not excuse a state which fails to pursue judicial investigations. The UN International Law Commission reaffirmed the principles established by the Nüremberg Tribunal by which "international law may impose duties on individuals directly without any interposition of internal law"(Report of the International Law Commission on the work of its forty-eighth session, 6 May - 26 July 1996, UN Document A/51/10, Page 16).

Crimes against humanity are unaffected by statutes of limitation as recognized in the Convention on Imprescriptibility of Crimes of War and Against Humanity, adopted by the General Assembly of the United Nations, Resolution 2391 (XXII) of 1968, and in the Council of Europe's treaty: Non-applicability of Statutory Limitations to Crimes against Humanity and War Crimes, E.T.S. No.82, adopted on 25 January 1974. This fundamental rule of law was reaffirmed in Article 29 of the Statute of the International Criminal Court.

Furthermore, those responsible for crimes against humanity cannot benefit from asylum or refuge in another country. (UN General Assembly Resolution

30/74(XXVIII) 1973, Convention relating to the Status of Refugees (Article 1.f) and UN Declaration on territorial Asylum (Article 1.2)).

The Nüremberg Tribunal recognized the principle that: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced", (Nazi Conspiracy and Aggression: Opinion and Judgment, U.S.A. Government Printing Office, 1947, Page 223).

These principles were acknowledged by the United Kingdom as a party to the Nüremberg Charter which set up the Tribunal, on which United Kingdom judges then served.

Amnesty International is concerned by the failure to acknowledge the responsibility of the state under international law in the investigation, prosecution and punishment of crimes against humanity committed during the Chilean military regime (1973 to 1990):

* The UK should ensure that legal proceedings initiated in Spain and other countries on crimes against humanity committed during the military regime are not frustrated by an incorrect interpretation of the UK's obligations under international law. It should implement the well-established rule of international law providing that the immunity of heads of state cannot be invoked in cases of crimes against humanity to avoid prosecution;

* The recognition of a supposed right of immunity to a former head of state implicated in crimes against humanity is a direct violation of a fundamental rule of international law;

* The UK cannot refuse to implement the rule of international law. All states are under an inescapable obligation to prosecute and punish crimes against humanity and to cooperate in the detection, arrest and punishment of persons implicated in these kinds of crime;

* The UK should recognize that failure to abide by this obligation risks sending a clear message to violators and would be violators that the international community is turning a blind eye to continued and future impunity;

* Ignores the calls made by families of victims of human rights violations under the military government of Augusto Pinochet, who for over a quarter of a century have campaigned for justice as well as truth, on the international community to proceed with international judicial investigations. Their calls have been made in the light of the fact that the Chilean state has set up mechanisms to ensure the impunity of human rights violators. Impunity is not accidental.

Finally, Amnesty International asks:

How can states argue that they respect international law and human rights, when they have not ensured that international law is fully incorporated into their internal laws and that their judiciary fully respects the fundamental rules of international law?

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