

Inter-American Court of Human Rights

Case of Almonacid-Arellano *et al* v. Chile

Judgment of September 26, 2006 (Preliminary Objections, Merits, Reparations and Costs)

[...]

VII PROVEN FACTS

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

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

82(1) Luis Alfredo Almonacid-Arellano and Elvira del Rosario Gómez-Olivares got married² and had three children: Alfredo, Alexis, and José Luis Almonacid-Gómez.

82(2) Mr. Almonacid-Arellano "was an elementary education teacher and activist in the Chilean Communist Party, party director candidate, provincial secretary of

¹ As stated by the European Court, even if there is only *ratione temporis* jurisdiction regarding events occurred after the ratification of the European Convention, "it could have regard to the facts prior to ratification inasmuch as they [...] might be relevant for the understanding of facts occurring after that date." *ECHR, Case of Broniowski v Poland [GC]*. Judgment of 22 June 2004, Application No. 31433/96, para. 122.

² *Cf.* Certificate of marriage issued by the Registrar of Life Statistics of Rancagua, (record of appendixes to the State's final written arguments, Appendix 1, folio 1675).

Central Unitaria de Trabajadores - CUT (Central Labor Union) and union leader of Sindicato Unido de Trabajadores de Educación – SUTE (Education Labor Union).³

b) *Background: events occurred before August 21, 1990*

i) *Context*

82(3) On September 11, 1973 a military coup d'état overthrew the Government of President Salvador Allende in Chile. "The armed forces, through the Military Junta, took over the executive power first (Decree Law No. 1) and then the constituent and legislative power (Decree Law No. 128)."⁴ The new President of the Republic/Commander in Chief enjoyed "a number of powers without precedents in Chile. Not only did the leader rule and administer the country, but he was also a member and the president of the Military Junta –therefore, legislation could only be passed and the Constitution could only be amended upon his participation. He was also the Commander in Chief of the Army."⁵ Decree Law No. 5 of September 22, 1973, "established that the state of siege for the civil commotion in which the country was enmeshed should be construed as a 'state or time of war'.⁶

82(4) Widespread repression against alleged opponents to the regime (*infra* para. 82(6)) was a standard State policy from that date until the end of the military rule on March 10, 1990, "though subject to changing intensity and various selectivity levels⁷ for choosing victims."⁸ Said repression was characterized by systematic and massive⁹ arbitrary and summary executions, torture (including rape, mainly of women), and arbitrary detention at facilities not subject to legal control, forced

³ Cf. Report of the *Comisión Nacional de la Verdad y Reconciliación* (National Truth and Reconciliation Commission), Volume III, page 18, (record of appendixes to the State's final written arguments, Appendix 2, folio 2572).

⁴ Cf. Report of the *Comisión Nacional de la Verdad y Reconciliación* (National Truth and Reconciliation Commission), Volume I, page 42, (record of appendixes to the State's final written arguments, Appendix 2, folio 2101).

⁵ Cf. Report of the *Comisión Nacional de la Verdad y Reconciliación* (National Truth and Reconciliation Commission), Volume I, page 47, (record of appendixes to the State's final written arguments, Appendix 2, folio 2103).

⁶ Cf. Report of the *Comisión Nacional de la Verdad y Reconciliación* (National Truth and Reconciliation Commission), Volume I, page 60, (record of appendixes to the State's final written arguments, Appendix 2, folio 2110).

⁷ Cf. Report of the *Comisión Nacional de la Verdad y Reconciliación* (National Truth and Reconciliation Commission), Volume I, page 115, (record of appendixes to the State's final written arguments, Appendix 2, folio 2137).

⁸ Cf. Report of the *Comisión Nacional sobre prisión política y tortura* (National Commission on Political Imprisonment and Torture), page 177, (record of appendixes to the State's final written arguments, Appendix 4, folio 3583).

⁹ Cf. Report of the *Comisión Nacional de la Verdad y Reconciliación* (National Truth and Reconciliation Commission), Part One, chapter II and Part Two, pages 15 to 104 (record of appendixes to the State's final written arguments, Appendix 2); and Report on the classification of victims of human right violations and political violence of the *Corporación Nacional de Reparación y Reconciliación* (National Reparation and Reconciliation Corporation), page 37, (record of appendixes to the State's final written arguments, Appendix 3, folio 2822).

disappearances and other human right violations committed by State officials, sometimes with the aid of civilians. Repression was applied in almost all regions of the country.¹⁰

82(5) The first months of the *de facto* government were the most violent stage of the repressive period. Exactly 1,823 out of 3,197¹¹ total cases of identified victims of executions and forced disappearances during the military rule took place in 1973.¹² Moreover, "61 percent of the 33,221 arrests classified by the *Comisión Nacional sobre Prisión Política y Tortura* (National Commission on Political Imprisonment and Torture) refer to arrests made in 1973."¹³ Said Commission pointed out that "more than 94 percent of the victims of political imprisonment" alleged to have been tortured by State officials.¹⁴

82(6) The victims of all these violations were renowned officials of the overthrown government and important left-wing figures; ordinary and common militants; political, trade union, community, student (university and high school education) and indigenous leaders and heads; representatives of community-based organizations participating in social claim movements. "However, [that] such political relationships existed was often deduced from the fact that the victims had been involved in 'conflictive' behavior, such as strikes, stoppages, occupation of lands or buildings, street demonstrations, and the like."¹⁵ These killings are part of the climate prevailing immediately after September 11, 1973, namely the attempt to carry out a 'cleanup' operation aimed at those who were regarded as dangerous by reason of their ideas and activities and to instill fear into their colleagues who eventually might

¹⁰ Cf. Report of the *Comisión Nacional de Verdad y Reconciliación* (National Truth and Reconciliation Commission), page 19 (record of appendixes to the State's final written arguments, Appendix 2, folio 2089); Report on the classification of victims of human right violations and political violence of the *Corporación Nacional de Reparación y Reconciliación* (National Reparation and Reconciliation Corporation) (record of appendixes to the State's final written arguments, Appendix 3); and Report of the *Comisión Nacional sobre Prisión Política y Tortura* (National Commission on Political Imprisonment and Torture) (record of appendixes to the State's final written arguments, Appendix 4).

¹¹ Cf. Chart 16 "Victims recognized by the State, classified as disappeared or dead," Appendix 1 to the Report on the classification of victims of human right violations and political violence of the *Corporación Nacional de Reparación y Reconciliación* (National Reparation and Reconciliation Corporation), page 576, (record of appendixes to the State's final written arguments, Appendix 3, folio 3356).

¹² Cf. Chart 17 "Complaints researched and victims recognized by the State, according to the year in which the events occurred," Appendix 1 to the Report on the classification of victims of human right violations and political violence of the *Corporación Nacional de Reparación y Reconciliación* (National Reparation and Reconciliation Corporation), page 577, (record of appendixes to the State's final written arguments, Appendix 3, folio 3357).

¹³ Cf. Report of the *Comisión Nacional sobre Prisión Política y Tortura* (National Commission on Political Imprisonment and Torture), page 178, (record of appendixes to the State's final written arguments, Appendix 4, folio 3584).

¹⁴ Cf. Report of the *Comisión Nacional sobre Prisión Política y Tortura* (National Commission on Political Imprisonment and Torture), page 177, (record of appendixes to the State's final written arguments, Appendix 4, folio 3583).

¹⁵ Cf. Report of the *Comisión Nacional de Verdad y Reconciliación* (National Truth and Reconciliation Commission), Volume I, page 114, (record of appendixes to the State's final written arguments, Appendix 2, folio 2137).

be a 'threat'.¹⁶ Notwithstanding the foregoing, during the initial repression stage, the selection of victims was largely carried out arbitrarily.¹⁷

82(7) As regards extra-legal executions –the crime committed in the instant case–, “as a rule, those killed were already in custody, and the killing took place in isolated areas and at night. [...] Especially in the southern regions [of the country], in which people already taken into custody were executed in the presence of their families.”¹⁸

ii) *Execution of Mr. Almonacid-Arellano and commencement of criminal proceedings on the grounds of that event*

82(8) “He [Mr. Almonacid-Arellano, 42 years old] was arrested at his home in the city of Rancagua by the police on September 16, 1973. As he was leaving his house to get into the police truck, his captors shot him. Police took him to Rancagua hospital, where he died the following day.”¹⁹

82(9) On October 3, 1973, the First Criminal Court of Rancagua initiated an investigation under case No. 40.184 for the death of Mr. Almonacid-Arellano,²⁰ which was dismissed by the Court on November 7, 1973.²¹ The Appeals Court of Rancagua revoked said dismissal on December 7, 1973.²² After that date, the case was dismissed time and time again by the Criminal Court,²³ while the Appeals Court

¹⁶ Cf. Report of the *Comisión Nacional de Verdad y Reconciliación* (National Truth and Reconciliation Commission), Volume I, page 115, (record of appendixes to the State’s final written arguments, Appendix 2, folio 2137).

¹⁷ Cf. Report of the *Comisión Nacional de Verdad y Reconciliación* (National Truth and Reconciliation Commission), (record of appendixes to the State’s final written arguments, Appendix 2); Report on the classification of victims of human right violations and political violence of the *Corporación Nacional de Reparación y Reconciliación* (National Reparation and Reconciliation Corporation) (record of appendixes to the State’s final written arguments, Appendix 3); and Report of the *Comisión Nacional sobre prisión política y tortura* (National Commission on Political Imprisonment and Torture) (record of appendixes to the State’s final written arguments, Appendix 4).

¹⁸ Cf. Report of the *Comisión Nacional de Verdad y Reconciliación* (National Truth and Reconciliation Commission), Volume I, page 117, (record of appendixes to the State’s final written arguments, Appendix 2, folio 2138).

¹⁹ Cf. Report of the *Comisión Nacional de Verdad y Reconciliación* (National Truth and Reconciliation Commission), Volume III, page 18, (record of appendixes to the State’s final written arguments, Appendix 2, folio 2572).

²⁰ Cf. Order of the First Criminal Court of Rancagua of October 3, 1973, (record of appendixes to the State’s final written arguments, Appendix 1, folio 1628).

²¹ Cf. Resolution of the First Criminal Court of Rancagua of November 7, 1973, (record of appendixes to the State’s final written arguments, Appendix 1, folio 1631).

²² Cf. Resolution of the Appeals Court of Rancagua of December 7, 1973, (record of appendixes to the State’s final written arguments, Appendix 1, folio 1634).

²³ Cf. Resolutions of the First Criminal Court of Rancagua of April 8 (record of appendixes to the State’s final written arguments, Appendix 1, folio 1631), May 17 (record of appendixes to the State’s final written arguments, Appendix 1, folio 1658), and August 7, 1974 (record of appendixes to the State’s final written arguments, Appendix 1, folio 1666).

continued revoking the dismissals ordered²⁴ until the temporary dismissal of the case was confirmed on September 4, 1974.²⁵

iii) *Decree Law No. 2.191*

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

Whereas:

1°- The country is now enjoying general peace, order and quietness, and the civil commotion stage has been overcome, thus leading to the conclusion of the state of siege and curfew in the entire national territory;

2°- Ethics demand the best efforts to strengthen the relations that join Chile as one nation, overcoming hostilities that are meaningless today and promoting initiatives to consolidate the reunification of the Chilean people;

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

The Government has decided to issue the following Decree Law:

Section 1 - Amnesty shall be granted to all individuals who performed illegal acts, whether as perpetrators, accomplices or accessories after the fact, during the state of siege in force from September 11, 1973 to March 10, 1978, provided they are not currently subject to legal proceedings or have been already sentenced.

Section 2 - Amnesty shall be further granted to those individuals who, to the date of this Decree Law, have been sentenced by military courts, after September 11, 1973.

Section 3 - Amnesty, as specified in Section 1 above, shall not apply to any individuals against whom criminal actions are pending for parricide, infanticide, robbery aggravated by violence or intimidation, drug production or dealing, abduction of minors, corruption of minors, arson and other damage to property; rape, statutory rape, incest, driving under the influence of alcohol, embezzlement, swindling and illegal exaction, other fraudulent practices and deceit, indecent assault, crimes included in Decree Law No. 280 of 1974, as amended; bribery, fraud and smuggling, and crimes included in the Tax Code.

Section 4 - The provisions of Section 1 shall not apply to any individuals allegedly responsible, whether as perpetrators, accomplices or accessories after the facts, for the events investigated under proceedings No. 192-78 before the Military Court of Santiago, *Ad Hoc* Prosecutor's Office.

Section 5 - Any individual subject to this decree law who is not present in the territory of the Republic shall abide by the provisions of Section 3 of Decree Law No. 81 of 1973, to enter the country.

c) *Events subsequent to August 21, 1990*

i) *Domestic judicial proceedings*

82(11) On November 4, 1992 Mrs. Gómez-Olivares, through her representative, brought criminal charges before the First Criminal Court of Rancagua and requested

²⁴ Cf. Resolutions of the Appeals Court of Rancagua of April 30 and June 18, 1974, (record of appendixes to the State's final written arguments, Appendix 1, folios 1655 and 1661).

²⁵ Cf. Resolution of the Appeals Court of Rancagua of September 4, 1974, (record of appendixes to the State's final written arguments, Appendix 1, folio 1669).

the reopening of case No. 40.184.²⁶ Based on the foregoing, the Court set aside the temporary dismissal of the case²⁷ (*supra* para. 82(9)), and received the testimony of Manuel Segundo Castro-Osorio²⁸ and Raúl Hernán Neveu-Cortesi,²⁹ allegedly responsible for the death of Mr. Almonacid.

82(12) Through the resolutions of February 3³⁰ and June 3, 1993,³¹ and April 5, 1994,³² the First Criminal Court of Rancagua found it had no jurisdiction to decide on the case and ordered that the proceedings be transferred to the Military and Police Prosecutor's Office of San Fernando. In view of these resolutions, Mrs. Gómez-Olivares, through her representative, filed motions for reconsideration and appeal on February 9³³ and June 5, 1993,³⁴ and April 8, 1994,³⁵ respectively. The First Criminal Court of Rancagua overruled the motion for reconsideration through the resolutions of February 25,³⁶ and June 7, 1993,³⁷ and April 9, 1994,³⁸ respectively, and forwarded the case to the Appeals Court to decide on the motions for appeal. The Appeals Court revoked the resolutions whereby the First Criminal Court of Rancagua

²⁶ Cf. Criminal charges brought by Elvira del Rosario Gómez-Olivares on November 4, 1992, (record of appendixes to the State's final written arguments, Appendix 1, folios 1694 to 1696).

²⁷ Cf. Resolution of the First Criminal Court of Rancagua of November 5, 1992, (record of appendixes to the State's final written arguments, Appendix 1, folio 1697).

²⁸ Cf. Testimony of Castro-Osorio of November 18, 1992 before the First Criminal Court of Rancagua, (record of appendixes to the State's final written arguments, Appendix 1, folios 1698 to 1700).

²⁹ Cf. Testimony of Neveu-Cortesi of January 12, 1993 before the First Criminal Court of Rancagua, (record of appendixes to the State's final written arguments, Appendix 1, folio 1707).

³⁰ Cf. Resolution of the First Criminal Court of Rancagua of February 3, 1993, (record of appendixes to the State's final written arguments, Appendix 1, folio 1711).

³¹ Cf. Resolution of the First Criminal Court of Rancagua of June 3, 1993, (record of appendixes to the State's final written arguments, Appendix 1, folio 1740).

³² Cf. Resolution of the First Criminal Court of Rancagua of April 5, 1994, (record of appendixes to the State's final written arguments, Appendix 1, folio 1774).

³³ Cf. Motions for reconsideration and appeal filed by the representative of Mrs. Gómez-Olivares on February 9, 1993, (record of appendixes to the State's final written arguments, Appendix 1, folios 1718 and 1719).

³⁴ Cf. Motions for reconsideration and appeal filed by the representative of Mrs. Gómez-Olivares on June 5, 1993, (record of appendixes to the State's final written arguments, Appendix 1, folios 1741 and 1742).

³⁵ Cf. Motions for reconsideration and appeal filed by the representative of Mrs. Gómez-Olivares on April 8, 1994, (record of appendixes to the State's final written arguments, Appendix 1, folios 1777 and 1778).

³⁶ Cf. Resolution of the First Criminal Court of Rancagua of February 25, 1993, (record of appendixes to the State's final written arguments, Appendix 1, folio 1721).

³⁷ Cf. Resolution of the First Criminal Court of Rancagua of June 7, 1993, (record of appendixes to the State's final written arguments, Appendix 1, folio 1742).

³⁸ Cf. Resolution of the First Criminal Court of Rancagua of April 9, 1994, (record of appendixes to the State's final written arguments, Appendix 1, folio 1779).

had found it had no jurisdiction through the resolutions of April 5,³⁹ and November 9, 1993,⁴⁰ and October 11, 1994,⁴¹ respectively, on the grounds that the investigation stage had not been concluded and that there was no sufficient certainty to establish the civil or military status of the individuals involved in the events. Therefore, the investigation stage was not closed.

82(13) On December 23, 1994, the First Criminal Court of Rancagua declared the preliminary investigation stage concluded,⁴² and on December 28 that year Mrs. Gómez-Olivares, through her representative, requested the Court to “annul” said resolution.⁴³ On January 2, 1995, the Court set aside its prior resolution.⁴⁴ However, on February 8, 1995, the Court declared the conclusion of the investigation stage again.⁴⁵ Later, on February 15, 1995, the Court ordered the final dismissal of the proceedings, pursuant to Decree Law No. 2.191⁴⁶ (*supra* para. 82(10)). On November 3, 1995, the Appeals Court decided to revoke said dismissal and to reopen the investigation proceedings “since the investigation had not been concluded.”⁴⁷ On June 5, 1996, the First Criminal Court of Rancagua declared the investigation proceedings closed once again.⁴⁸ The Appeals Court decided to revoke said resolution and, additionally, ordered the Court “to impose penalties for criminal liability” upon the alleged offender Neveu-Cortesi.⁴⁹

82(14) On August 31, 1996, the First Criminal Court of Rancagua passed a resolution whereby “legal proceedings were brought against [Manuel Segundo Castro-Osorio], as accomplice[,] and [Raúl Hernán Neveu-Cortesi], as perpetrator of the murder of

³⁹ Cf. Resolution of the Appeals Court of Rancagua of April 5, 1993, (record of appendixes to the State’s final written arguments, Appendix 1, folio 1730).

⁴⁰ Cf. Resolution of the Appeals Court of Rancagua of November 9, 1993, (record of appendixes to the State’s final written arguments, Appendix 1, folio 1747).

⁴¹ Cf. Resolution of the Appeals Court of Rancagua of October 11, 1994, (record of appendixes to the State’s final written arguments, Appendix 1, folio 1788).

⁴² Cf. Resolution of the First Criminal Court of Rancagua of December 23, 1994, (record of appendixes to the State’s final written arguments, Appendix 1, folio 1796).

⁴³ Cf. Brief of December 28, 1994 filed by the representative of Mrs. Gómez-Olivares, (record of appendixes to the State’s final written arguments, Appendix 1, folios 1797 and 1798).

⁴⁴ Cf. Resolution of the First Criminal Court of Rancagua of January 2, 1995, (record of appendixes to the State’s final written arguments, Appendix 1, folio 1798).

⁴⁵ Cf. Resolution of the First Criminal Court of Rancagua of February 8, 1995, (record of appendixes to the State’s final written arguments, Appendix 1, folio 1802).

⁴⁶ Cf. Resolution of the First Criminal Court of Rancagua of February 15, 1995, (record of appendixes to the State’s final written arguments, Appendix 1, folio 1803).

⁴⁷ Cf. Resolution of the Appeals Court of Rancagua of November 3, 1995, (record of appendixes to the State’s final written arguments, Appendix 1, folio 1817).

⁴⁸ Cf. Resolution of the First Criminal Court of Rancagua of June 5, 1996, (record of appendixes to the State’s final written arguments, Appendix 1, folio 1854).

⁴⁹ Cf. Resolution of the Appeals Court of Rancagua of August 28, 1996, (record of appendixes to the State’s final written arguments, Appendix 1, folios 1873 and 1874).

Luis Alfredo Almonacid-Arellano." Furthermore, the Court ordered the arrest of Castro-Osorio and instructed the *Prefectura de Carabineros* (Police Department) of Curicó to bring Neveu-Cortesi before the Court.⁵⁰

82(15) On October 3, 1996, the First Criminal Court of Rancagua decided to release Mr. Castro-Osorio⁵¹ on bail, a decision that was confirmed by the Appeals Court on October 4, 1996.⁵² Immediately afterwards, on October 5, 1996, Castro-Osorio filed a motion for appeal against the decision of the First Criminal Court of Rancagua that initiated proceedings against him⁵³ (*supra* para. 82(14)). The Appeals Court decided to revoke the resolution appealed and declared Mr. Castro-Osorio as non-indicted.⁵⁴

82(16) On September 27, 1996, the Second Military Court of Santiago requested the First Criminal Court of Rancagua to decline jurisdiction over the case, on the grounds that the accused Castro-Osorio and Neveu-Cortesi "on the date of the events were on active duty under military jurisdiction." Furthermore, the Military Court sustained that at the time of the events, "Decree Law No. 5 of [S]eptember 12, 1973, which declared [...] the state of siege [,] on the grounds of civil commotion, was in force [, and] that in view of the circumstances in which the country was enmeshed, said situation should be construed as a state or time of war."⁵⁵ On October 7, 1996, the First Criminal Court of Rancagua denied the motion for dismissal for lack of jurisdiction filed by the Second Military Court since "there were no grounds to assume that the accused were on active duty at the time of the events."⁵⁶ Thus, the motion for dismissal for lack of jurisdiction was formally brought before the Supreme Court.

82(17) On December 5, 1996, the Supreme Court decided on the motion for dismissal for lack of jurisdiction (*supra* para. 82(16)) and found that "jurisdiction over the case lies on the Second Military Court of Santiago, to which the case should be submitted."⁵⁷

⁵⁰ Cf. Resolution of the First Criminal Court of Rancagua of August 31, 1996, (record of appendixes to the State's final written arguments, Appendix 1, folios 1877 and 1878).

⁵¹ Cf. Resolution of the First Criminal Court of Rancagua of October 3, 1996, (record of appendixes to the State's final written arguments, Appendix 1, folio 1902).

⁵² Cf. Resolution of the Appeals Court of Rancagua of October 4, 1996, (record of appendixes to the State's final written arguments, Appendix 1, folio 1907).

⁵³ Cf. Motion for appeal filed by the representative of Mrs. Gómez-Olivares on October 5, 1996, (record of appendixes to the State's final written arguments, Appendix 1, folios 1917 and 1918).

⁵⁴ Cf. Resolution of the Appeals Court of Rancagua of October 30, 1996, (record of appendixes to the State's final written arguments, Appendix 1, folio 2044).

⁵⁵ Cf. Motion for dismissal for lack of jurisdiction filed by the Second Military Court of Santiago against the First Criminal Court of Rancagua on September 27, 1996, (record of appendixes to the State's final written arguments, Appendix 1, folios 1886 and 1887).

⁵⁶ Cf. Resolution of the First Criminal Court of Rancagua of October 7, 1996, (record of appendixes to the State's final written arguments, Appendix 1, folio 1916).

⁵⁷ Cf. Resolution of the Supreme Court of Justice of December 5, 1996, (record of appendixes to the State's final written arguments, Appendix 1, folio 1931).

82(18) On December 16, 1996, the Second Military Court of Santiago initiated the investigation through the Second Military and Police Prosecutor's Office of Santiago.⁵⁸ On January 13, 1997, said Military Court took over and joined case No. 40.184, until then under the charge of the First Criminal Court of Rancagua, with case No. 876-96, under its charge.⁵⁹

82(19) On January 14, 1997, the Second Military and Police Prosecutor's Office of Santiago requested the Second Military Court of Santiago to "order the full and final dismissal of the proceedings [based] on the statute of limitations regarding the criminal liability" of Castro-Osorio and Neveu-Cortesi, pursuant to Decree Law No. 2.191.⁶⁰

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

the foundations of law rest on two values which are inherent to it, justice and legal certainty.

As long as legal rules are based on these values, the law may fulfill its ultimate goal; i.e. social peace.

Amnesty is a concept founded on legal certainty which, to a certain extent, can do without justice in order to achieve social peace, which is the essential and ultimate goal of law that justifies its very existence.

[...]

[A] Constitutional State such as Chile is reflected, among other basic conducts, in the rule of law; therefore, the legal amnesty rule cannot be disregarded without affecting legality and the constitutional order inherent to it.

[T]he effects of amnesty go back to the date on which the offense was committed; therefore, once an amnesty law is passed and after establishing that the event occurred within the period covered by said law, all pending proceedings shall be definitely discontinued."

[...]

[A]mnesty has the effect of invalidating the criminal nature of the event; therefore, it is absolutely useless to complete an investigation in a case regarding an event that was proven to have occurred within the period covered by the amnesty law.

In any event, it should be noted that the investigation stage in the instant case has been fully completed.⁶¹

82(21) On February 26, 1997, Mrs. Gómez-Olivares, through her representative, filed a motion for appeal against the final dismissal ordered in the case. The motion was founded, among other things, on the fact that the dismissal ordered does not "precisely guarantee social peace or the stability of the Rule of Law" and the "copious international legislation approved by Chile [...] renders the enforcement of the

⁵⁸ Cf. Resolution of the Second Military Court of Santiago of December 16, 1996, (record of appendixes to the State's final written arguments, Appendix 1, folio 1933).

⁵⁹ Cf. Resolution of the Second Military Court of Santiago of January 13, 1997, (record of appendixes to the State's final written arguments, Appendix 1, folio 1970).

⁶⁰ Cf. Communication of January 14, 1997 of the Second Military and Police Prosecutor's Office of Santiago, (record of appendixes to the State's final written arguments, Appendix 1, folios 1934 and 1935).

⁶¹ Cf. Dismissal No. 28 ordered by the Second Military Court of Santiago on January 28, 1997, (record of appendixes to the State's final written arguments, Appendix 1, folios 1936 to 1938 and 1974 to 1976).

amnesty law inadmissible.⁶² The case file was forwarded to the Court-Martial, which on March 25, 1998, confirmed the judgment of the Second Military Court of Santiago (*supra* para. 82(20)). In the whereas clauses of the judgment, the Court-Martial resorted to the case law of the Supreme Court of Justice, as follows:

amnesty [is] an objective ground for termination of criminal liability [and] it becomes effective *ipso facto* as from the date set in the law. Said effects cannot be challenged by its beneficiaries [...], since they relate to public law rules aimed at safeguarding the general interests of society. The foregoing means that, once the applicability of the amnesty law is verified, said applicability must be declared by the courts [...]. That does not entail the application of the provisions of Section 413 [of the Code of Criminal Procedure], which provide that final dismissal of the case cannot be ordered unless the investigation aimed at verifying the *corpus delicti* and identifying the criminal has been completed.⁶³

The Court-Martial also found that:

the occurrence of the illegal act (murder) [of Mr. Almonacid-Arellano] within the period covered by the amnesty law has been irrefutably verified; moreover, a writ of indictment has been issued against the alleged perpetrators. Therefore, the amnesty decree law is fully effective and, consequently, it should be applied by the courts and the proceedings should be definitely dismissed, since criminal liability has expired and, therefore, the criminal proceedings are futile.⁶⁴

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

this Court cannot uphold the idea that said international instruments have the effect of invalidating [Decree Law No. 2.191 ...]Indeed, the Pact of San Jose, Costa Rica, was ratified on August 21, 1990[,] while the International Covenant on Civil and Political Rights was incorporated to the Chilean legislation on April 29, 1989. Therefore, it cannot be applied retroactively disregarding provisions on the non-retroactivity of criminal law, since that would amount to sustaining that amnesty has the effect of reinforcing criminal liability even after final expiration thereof. The foregoing considerations are inconsistent with the essence of amnesty; i.e. the enforcement of the most favorable criminal law for those who shall benefit thereunder.⁶⁵

One of the members of the Court-Martial dissented in the reasoning of the majority of the Court since she found that the "murder" of Mr. Almonacid-Arellano had been perpetrated in "times when the country was enmeshed in a domestic war" and that said act, "given the prevailing circumstances and *modus operandi*, [...] falls within one of the actions prohibited under Article 4 [common] of the Geneva Conventions." Moreover, she stated that Article 52 of the Geneva Conventions "sets forth that war crimes are non-extinguishable and are not susceptible of amnesty."⁶⁶

⁶² Cf. Motion for appeal filed by the representative of Mrs. Gómez-Olivares on February 26, 1997, (record of appendixes to the State's final written arguments, Appendix 1, folio 1949).

⁶³ Cf. Judgment of the Court-Martial of March 25, 1998, whereas clause 5 (record of appendixes to the application, Appendix 3, folio 41).

⁶⁴ Cf. Judgment of the Court-Martial of March 25, 1998, whereas clause 6 (record of appendixes to the application, Appendix 3, folio 42).

⁶⁵ Cf. Judgment of the Court-Martial of March 25, 1998, whereas clause 9 (record of appendixes to the application, Appendix 3, folios 43 and 44).

⁶⁶ Cf. Dissenting opinion of Judge Morales to the Judgment of the Court-Martial of March 25, 1998 (record of appendixes to the application, Appendix 3, folios 44 and 45).

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

pursuant to the Code of Criminal Procedure [...] judges may not order the final dismissal of proceedings unless the investigation stage has been concluded [...]. In the instant case, the investigation stage had not been completed, significant proceedings had not been performed, including the identification of the members of the Police patrol and, eventually, the finding of new events that allowed identifying other individuals responsible for the murder [of Mr. Almonacid-Arellano];

[...]

the amnesty decree law may continue in force only regarding those matters that have not been regulated or prohibited by international legislation. [However], given that the case involves murders committed by State agents, they are international illegal acts in relation to which 'national sovereignty' [...] is necessarily restricted and the possibility to grant an indiscriminate pardon or amnesty is thus also limited;

[...]

the right to the truth and justice to which the next of kin of the victims are entitled is an inherent right that is superior to the right claimed to the benefit of criminals upon imposing criminal liability for the events, which thus becomes an accessory right; and

[...]

from the Geneva Conventions and the amnesty law [...] it may be inferred that amnesty may be enforced regarding any matters other than the 'gross violations specified in the Geneva Conventions.'⁶⁷

82(23) The Supreme Court ruled on this motion on April 16, 1998, and "overruled it on the grounds that it was time-barred."⁶⁸ On November 11, 1998, the Court ordered to close the case file.⁶⁹

ii) *Measures adopted by the State regarding Decree Law No. 2.191*

82(24) To the date of this judgment, six bills of law aimed at amending Decree Law No. 2.191 were submitted. Two of these bills⁷⁰ proposed an interpretation of the aforementioned decree law through another law, and set forth that the decree should not be enforced regarding crimes against humanity given the impossibility to declare them extinguished and susceptible of amnesty. The third bill⁷¹ was aimed at

⁶⁷ Cf. Motion for appeal filed by the representative of Mrs. Gómez-Olivares, (record of appendixes to the State's final written arguments, Appendix 1, folios 2000 to 2016).

⁶⁸ Cf. Resolution of the Supreme Court of April 16, 1998, (record of appendixes to the State's final written arguments, Appendix 1, folio 2019).

⁶⁹ Cf. Order to close proceedings of November 11, 1998, (record of appendixes to the State's final written arguments, Appendix 1, folio 2039).

⁷⁰ Cf. Bulletin No. 654-07, submitted on April 7, 1992 by senators Rolando Calderón-Aránguiz, Jaime Gazmuri-Mujica, Ricardo Núñez-Muñoz and Hernán Vodanovic-Schnake (record of appendixes to the State's final written arguments, Appendix 10, folios 4269 to 4274); Bulletin No. 1718-07, submitted on October 11, 1995 by senators Ruiz de Giorgio and Mariano Ruiz-Esquide (record of appendixes to the State's final written arguments, Appendix 11, folios 4276 to 4285).

⁷¹ Cf. Bulletin No. 1.622-07, submitted on June 6, 1995 by Senator Sebastián Piñera-Echenique (record of appendixes to the State's final written arguments, Appendix 12, folios 4365 to 4371).

extending the period covered by the Decree Law until March 11, 1990. The fourth bill⁷² sought to prevent the commencement of proceedings to impose liability upon those individuals mentioned as perpetrators, accomplices or accessories after the fact, "rendering any criminal or civil action related thereto extinguished" and suggested that any pending lawsuits should be definitely dismissed "without further proceedings." The fifth bill⁷³ was intended to regulate the application of the Decree Law and to establish that, in the case of detained-disappeared persons, the judge should continue investigating "with the sole aim of discovering the location of the victims or their remains." None of the five bills was passed. The sixth bill⁷⁴ was recently submitted and its purpose is to declare Decree Law No. 2.191 invalid under public law. The Court ignores the current status of the legislative processing of this bill.

82(25) In the last few years, the Judiciary of Chile has not applied Decree Law No. 2.191 in several cases.⁷⁵

⁷² Cf. Bulletin No. 1632-07, submitted on June 14, 1995 by Senator Francisco Javier Errazuriz (record of appendixes to the State's final written arguments, Appendix 13, folios 4373 to 4377).

⁷³ Cf. Bulletin No. 1657-07, submitted on July 19, 1995, by Senators Diez, Larrain, Otero, and Piñera (record of appendixes to the State's final written arguments, Appendix 14, folios 4379 to 4389).

⁷⁴ Cf. Bulletin No. 4162-07, submitted on April 21, 2006, by Senators Girardi, Letelier, Navarro, and Ruiz-Esquide (Appendix 9, State's final written arguments, folios 4249 to 4267).

⁷⁵ Cf. Appeals Court of Santiago, Motion for Appeal No. 38683-94 of September 30, 1994 (record of documents submitted at the Public Hearing, folios 483 to 495); Supreme Court, Motion for Review No. 3831-97 of June 8, 1998 (record of documents submitted at the Public Hearing, folios 186 to 196); Supreme Court, Motion for Review No. 469-98 of September 9, 1998 (record of documents submitted at the Public Hearing, folios 364 to 380); Supreme Court, Motion for Review No. 2097-1998 of December 29, 1998 (record of documents submitted at the Public Hearing, folios 299 to 305); Supreme Court, Motion for Review No. 247-98 of January 7, 1999 (record of documents submitted at the Public Hearing, folios 197 to 206); Supreme Court, Motion for Review No. 1359-2001 of August 26, 2002 (record of documents submitted at the Public Hearing, folios 220 to 234); Supreme Court, Motion for Review No. 4135-2001 of November 29, 2002 (record of documents submitted at the Public Hearing, folios 207 to 219); Supreme Court, Motion for Review No. 4054-2001 of January 31, 2003 (record of documents submitted at the Public Hearing, folios 272 to 283); Supreme Court, Motion for Review No. 4053-2001 of January 31, 2003 (record of documents submitted at the Public Hearing, folios 253 to 271); Supreme Court, Motion for Review No. 4209-01 of March 3, 2003 (record of documents submitted at the Public Hearing, folios 284 to 298); Supreme Court, Motion for Review No. 2231-01 of August 28, 2003 (record of documents submitted at the Public Hearing, folios 235 to 252); Supreme Court, Motion for Review No. 1134-2002 of November 04, 2003 (record of documents submitted at the Public Hearing, folios 306 to 316); Supreme Court, Motion for Review No. 2505-2002 of November 11, 2003 (record of documents submitted at the Public Hearing, folios 317 to 324); Supreme Court, Motion for Review No. 11821-2003 of January 05, 2004 (record of documents submitted at the Public Hearing, folios 443 to 475); Supreme Court, Motion for Review No. 457-2005 of February 09, 2005 (record of documents submitted at the Public Hearing, folios 424 to 437); Supreme Court, Motion for Review No. 4622-2002 of March 29, 2005 (record of documents submitted at the Public Hearing, folios 325 to 339); Supreme Court, Motion for Review No. 15765-2004 of July 06, 2005 (record of documents submitted at the Public Hearing, folios 438 to 442); Supreme Court, Motion for Review No. 3925-2005 of September 05, 2005 (record of documents submitted at the Public Hearing, folios 390 to 423); Appeals Court of Santiago, Motion for Review No. 37483-2004, resolution 8472, issued by the Criminal Secretariat, of January 18, 2006 (record of appendixes to the State's final written arguments, Appendix 4, Volume II, folios 4170 to 4179); Appeals Court of Santiago, Motion for Appeal No. 24471-2005, Resolution 43710, issued by the Criminal Secretariat, of April 20, 2006 (record on the merits, Volume IV, folios 1089 to 1093). 396-2006, Resolution 9334, issued by the *Secretaría Única* (Single Secretariat), of May 8, 2006 (record on the merits, Volume IV, folios 1094 and 1095); Supreme Court, Motion for Review No. 3215-2005, Resolution 11745, issued by the Single Secretariat, of May 30, 2006 (record on the merits, Volume IV, folios 1157 to 1059); Appeals Court of Santiago, No. 14567-2004, Resolution 64656, issued by the Criminal Secretariat, of June 02, 2006 (record on the merits, Volume IV, folios 1160 and 1061); Appeals Court of Santiago, No. 14058-2004, Resolution 74986,

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

82(26) On April 25, 1990, immediately after the end of the *de facto* Military Government, President Patricio Aylwin-Azocar, considering, among other things, “[t]hat the moral conscience of the Nation demands that the truth for the grave violations of human rights committed in our country between September 11, 1973 and March 11, 1990 be brought to light,”⁷⁶ passed Supreme Decree No. 355, whereby the *Comisión Nacional de Verdad y Reconciliación* (National Truth and Reconciliation Commission) was established (hereinafter “the Truth Commission”). The duties of this Commission involved:

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

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

disappearance after arrest, execution and torture leading to death committed by government agents or people in their service, as well as kidnappings and attempts on the life of persons carried out by private citizens for political reasons.⁷⁷

82(27) After performing the duties assigned thereto, the Truth Commission issued its report, unanimously agreed upon by its members, and submitted it to President Aylwin on February 8, 1991.⁷⁸ For his part, President Aylwin disclosed the report to the public on March 4, 1991.⁷⁹ At that opportunity, the President asked for forgiveness to the next of kin of the victims as follows:

issued by the Criminal Secretariat, of June 27, 2006 (record on the merits, Volume IV, folios 1263 to 1270); Appeals Court of Santiago, No. 32365-2005, Resolution 76786, issued by the Criminal Secretariat, of June 29, 2006, (record on the merits, Volume IV, folios 1260 to 1262).

⁷⁶ Cf. Whereas clause one of Supreme Decree No. 355 of April 25, 1990, Report of the *Comisión Nacional de Verdad y Reconciliación* (National Truth and Reconciliation Commission), Volume I, pages XI to XIV (record of appendixes to the State’s final written arguments, Appendix 2, folios 2077 to 2079).

⁷⁷ Cf. Article one of Supreme Decree No. 355 of April 25, 1990, Report of the *Comisión Nacional de Verdad y Reconciliación* (National Truth and Reconciliation Commission), Volume I, pages XI to XIV (record of appendixes to the State’s final written arguments, Appendix 2, folios 2077 to 2079).

⁷⁸ Cf. Address to the Nation delivered by President Patricio Aylwin upon disclosing the Report of the *Comisión Nacional de Verdad y Reconciliación* (National Truth and Reconciliation Commission) on March 4, 1991, Report of the *Comisión Nacional de Verdad y Reconciliación* (National Truth and Reconciliation Commission), Volume II, pages 887 to 894, (record of appendixes to the State’s final written arguments, Appendix 2, folios 2529 to 2533).

⁷⁹ Cf. Address to the Nation delivered by President Patricio Aylwin, *supra* note 97.

When those who caused so much suffering were State officials and the relevant government authorities could not or did not know how to prevent or punish them, nor was there the necessary social reaction to avert it, both the State and society as a whole are responsible, whether by act or by omission. It is the Chilean society who is in debt to the victims of human rights violations.

[...]

(...) Therefore, in my capacity as President of the Republic, I dare to speak for the entire nation and, in its name, apologize to the families of the victims.⁸⁰

82(28) The report of the *Comisión Nacional de Verdad y Reconciliación* (Truth Commission) individually names the victims, including Mr. Almonacid-Arellano.⁸¹ Moreover, the Truth Commission made recommendations for symbolic reparation and restoration measures,⁸² both legal and administrative⁸³ as well as related to social welfare.⁸⁴

82(29) On February 8, 1992, Law No. 19.123 was published in the Official Gazette, whereby the *Corporación Nacional de Reparación y Reconciliación* (National Reparation and Reconciliation Corporation) was established.⁸⁵ The purpose of this Corporation was "to coordinate, perform, and promote any actions necessary to comply with the recommendations contained in the Report of the *Comisión Nacional de Verdad y Reconciliación* (National Truth and Reconciliation Commission)."⁸⁶ To that effect, a monthly pension was granted to the next of kin of the victims of human rights violations or political violence,⁸⁷ they were granted the right to receive certain free medical⁸⁸ and educational benefits,⁸⁹ and the children of the victims were exempted from military service, if summoned to do it.⁹⁰

⁸⁰ Cf. Address to the Nation delivered by President Patricio Aylwin, *supra* note 97.

⁸¹ Cf. Report of the *Comisión Nacional de la Verdad y Reconciliación* (National Truth and Reconciliation Commission), Volume II, page 904 and Volume III, page 18, (record of appendixes to the State's final written arguments, Appendix 2, folios 2233 and 2572).

⁸² Cf. Report of the *Comisión Nacional de la Verdad y Reconciliación* (National Truth and Reconciliation Commission), Volume II, pages 824 and 825, (record of appendixes to the State's final written arguments, Appendix 2, folio 2498).

⁸³ Cf. Report of the *Comisión Nacional de la Verdad y Reconciliación* (National Truth and Reconciliation Commission), Volume II, pages 826 and 827, (record of appendixes to the State's final written arguments, Appendix 2, folio 2499).

⁸⁴ Cf. Report of the *Comisión Nacional de la Verdad y Reconciliación* (National Truth and Reconciliation Commission), Volume II, pages 827 to 836, (record of appendixes to the State's final written arguments, Appendix 2, folios 2499 to 2504).

⁸⁵ Cf. Law No. 19.123, published in the Official Gazette on February 8, 1993, (record of appendixes to the State's final written arguments, Appendix 3, folios 3383 to 3395).

⁸⁶ Cf. Article 1 of Law No. 19.123, published in the Official Gazette on February 8, 1993, (record of appendixes to the State's final written arguments, Appendix 3, folio 3383).

⁸⁷ Cf. Articles 17 to 27 of Law No. 19.123, published in the Official Gazette on February 8, 1993, (record of appendixes to the State's final written arguments, Appendix 3, folios 3389 to 3392).

⁸⁸ Cf. Article 28 of Law No. 19.123, published in the Official Gazette on February 8, 1993, (record of appendixes to the State's final written arguments, Appendix 3, folio 3393).

82(30) On November 11, 2003, Supreme Decree No. 1.040 was published in the Official Gazette, whereby the *Comisión Nacional sobre Prisión Política y Tortura* (National Commission on Political Imprisonment and Torture) was created to find the truth regarding the individuals who were deprived of freedom and tortured for political reasons within the period of the *de facto* military Government.⁹¹ Moreover, in its final report the Commission proposed symbolic collective and individual reparation measures (embodied in Law No. 19.992).

82(31) On October 29, 2004, Law No. 19.980 was passed. Said Law amended Law No. 19.123 (*supra* para. 82(29)) by broadening and adding new benefits for the next of kin of the victims, including a 50 percent increase in the amount of the monthly reparation pension; the empowerment of the President of the Republic to grant a maximum of 200 non-contributory pensions and the broadening of the scope of health benefits.⁹²

82(32) In addition to the foregoing, the State adopted the following reparation measures: i) *Programa de Apoyo a los Presos Políticos* (Political Prisoners Support Program) for individuals kept in custody as of March 11, 1990; ii) *Programa de Reparación y Atención Integral de Salud (PRAIS)* (Comprehensive Health Service and Reparation Program) for those affected by human rights violations; iii) *Programa de Derechos Humanos del Ministerio del Interior* (Human Rights Program of the Department of the Interior); iv) technological improvements for the Legal Medical Service; v) *Oficina Nacional del Retorno* (National Return Office); vi) *Programa para Exonerados Políticos* (Political Exoneration Program); vii) restitution of or compensation for property seized and acquired by the State; viii) the setting of the *Mesa de Diálogo sobre Derechos Humanos* (Human Rights Conversation Table), and ix) the presidential initiative "*No hay mañana sin ayer*" ("Yesterday for Tomorrow") of President Ricardo Lagos.⁹³

82(33) Lastly, the State has set up several memorials in honor of the victims of human rights violations.⁹⁴

⁸⁹ Cf. Articles 29 to 31 of Law No. 19.123, published in the Official Gazette on February 8, 1993, (record of appendixes to the State's final written arguments, Appendix 3, folios 3393 to 3394).

⁹⁰ Cf. Article 32 of Law No. 19.123, published in the Official Gazette on February 8, 1993, (record of appendixes to the State's final written arguments, Appendix 3, folio 3394).

⁹¹ Cf. Report of the *Comisión Nacional sobre Prisión Política y Tortura* (National Commission on Political Imprisonment and Torture), (record of appendixes to the State's final written arguments, Appendix 4, folio 3430).

⁹² Cf. Law No. 19.980, published in the Official Gazette on October 29, 2004, (record of appendixes to the answer to the application, folios 376 to 379).

⁹³ Cf. Statement of Cristián Correa-Montt, witness proposed by the State (record on the merits, Volume II, folios 421 to 440).

⁹⁴ Cf. Document entitled "*Memoriales construidos con Aportes del Programa de Derechos Humanos del Ministerio del Interior*", appendix 1 to the statement of Cristián Correa-Montt (record on the merits, Volume II, folios 441 to 450); book "*Políticas de Reparación. Chile 1990-2004*" by Elizabeth Lira and Brian Loveman, appendix 2 to the statement of Cristián Correa-Montt (record on the merits, Volume II, folios 451 to 463).

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

82(34) Mrs. Gómez-Olivares received a bonus in 1992, and was granted a monthly life pension. She is also the beneficiary of health benefits. Similarly, the children of Mrs. Gómez-Olivares and Mr. Almonacid-Arellano have received educational and economic reparations, including higher education grants. Furthermore, they also enjoy health benefits. All in all, Mrs. Gómez-Olivares and her children have received direct transfers in the amount of approximately US\$ 98,000.00 (ninety-eight thousand United States Dollars), and scholarships in the amount of approximately US\$ 12,180.00 (twelve thousand one hundred and eighty United States Dollars).⁹⁵

82(35) The State named a street "Luis Almonacid" and a residential area "Villa Professor Luis Almonacid," both in the city of Rancagua, and included the name of Mr. Almonacid-Arellano in the Memorial of Santiago's General Cemetery.⁹⁶

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

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

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

VIII

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

[...]

A) Validity and enforcement of Decree Law No. 2.191

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

93. In this section, the Court shall analyze whether the crime committed against Mr. Almonacid-Arellano may be considered as a crime against humanity. In this

⁹⁵ Cf. Statement of Mrs. Elvira Gómez-Olivares at the public hearing of March 29, 2006; statement of Cristián Correa-Montt (record on the merits, Volume II, folio 439); receipts from the Benefit Payment Division of the Operations Department of the *Instituto de Normalización Provisional* (Provisional Normalization Institute) of February 2006 (record of appendixes to the State's final written arguments, Appendix 4, volume II, folios 4392 to 4394).

⁹⁶ Cf. Statement of Mrs. Elvira Gómez-Olivares (public hearing held on March 29, 2006); list of works in Rancagua http://www.ddhh.gov.cl/DDHH/obras/info_VIR/VIR_rancagua.html (record of appendixes to the answer to the application, folio 381).

sense, the Court must analyze whether on September 17, 1973, date on which Mr. Almonacid-Arellano died, the murder constituted a crime against humanity, and it must also determine the circumstances surrounding such death.

94. The development of the concept of "crime against humanity" started at the beginning of the last century. In the preamble to The Hague Convention on Laws and Customs of War on Land, 1907 (Convention IV) the High Contracting Parties established that "the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."⁹⁷ Likewise, the term "crimes against humanity and civilization" was used by the governments of France, the United Kingdom, and Russia on May 28, 1915 to denounce the massacre of Armenians in Turkey.⁹⁸

95. Murder as a crime against humanity was included for the first time in Article 6(c) of the Charter of the International Military Tribunal of Nuremberg which was appended to the Agreement to establish an International Military Tribunal for the trial and punishment of the main war criminals of the European Axis countries, signed in London on August 8, 1945 (the "London Charter"). Shortly afterwards, on December 20, 1945, the Control Council Law No.10 also considered murder as a crime against humanity in its Article II(c). Similarly, the crime of murder was included in Article 5(c) of the Charter of the International Military Tribunal for the trial of the main war criminals of the Far East (Tokyo Charter), adopted on January 19, 1946.

96. Furthermore, the Court acknowledges that the Nuremberg Charter played an important role in establishing the elements that characterize a crime as a "crime against humanity." This Charter provided the first articulation of the elements for such a crime.⁹⁹ The original conception of such elements remained basically unaltered as of the date of the death of Mr. Almonacid-Arellano, with the exception that crimes against humanity may be committed during both peaceful and war times.¹⁰⁰

⁹⁷ Cf. The Hague Convention of October 18, 1907 on Laws and Customs of War on Land (Hague IV.)

⁹⁸ Egon Schwelb, *Crimes Against Humanity*, British Yearbook of International Law. Vol 23, (1946), 178, page 181. "[C]rimes against humanity and civilization for which the members of the Turkish Government as well as the agents involved in the massacres are responsible."

⁹⁹ Article 6 - The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes:
[...]

(c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

¹⁰⁰ Cf. United States Nuremberg Military Tribunal, *United States v. Ohlendorf*, 15 I.L.R. 656 (1948); *United States v. Alstotter* (1948 Justice Case), in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* Vol. III 956 (U.S. Gov. Printing Office 1951); *History of the UN War Crimes Commission and the Development of the Laws of War* compiled by the War Crimes Commission (1948); Cf. UN, *Principles of International Law recognized in the Charter of the Nuremberg Tribunal*. Adopted by the International Law Commission of the United Nations in 1950, UN Doc. A/1316 (1950), part III, para. 123; Article I(b) of the Convention on the non-Applicability of Statutory Limitations

On that basis, the Court acknowledges that crimes against humanity include the commission of inhuman acts, such as murder, committed in a context of generalized or systematic attacks against civilians. A single illegal act as those mentioned above, committed within the described background, would suffice for a crime against humanity to arise. In the same sense, the International Tribunal for the Former Yugoslavia rendered judgment in the *Case of Prosecutor v. Dusko Tadic*, when considering that "a single act committed by a perpetrator within a context of a generalized or systematic attack against the civil population brings about individual criminal liability, and it is not necessary for the perpetrator to commit numerous offenses in order to be considered responsible."¹⁰¹ All these elements were already legally defined when Mr. Almonacid-Arellano was executed.

97. On the other hand, the International Military Tribunal for the trial of the Major War Criminals (hereinafter the "Nuremberg Tribunal"), which had jurisdiction to hear the cases of crimes included in the London Charter, stated that the Nuremberg Charter "is the expression of International Law existing at the moment of its creation, and to such extent, is in itself a contribution to International Law."¹⁰² In this way, it provided recognition to the existence of an international custom, as an expression of international law, which prohibited such crimes.

98. The prohibition of crimes against humanity, including murder, was further corroborated by the United Nations. On December 11, 1946, the General Assembly confirmed "the principles of International Law recognized by the Charter of the Nuremberg Tribunal and the judgments of said Tribunal."¹⁰³ Furthermore, in 1947, the General Assembly entrusted the International Law Commission with "formulating the international law principles recognized by the Charter and by the judgments of the Nuremberg Tribunal."¹⁰⁴ These principles were adopted in 1950.¹⁰⁵ Among them, Principle VI(c) classifies murder as a crime against humanity. Likewise, the Court points out that Article 3 common to the Geneva Conventions of 1949, to which Chile has been a party since 1950, also prohibits "homicide in all its forms" of persons that do not directly take part in the hostilities.

to War Crimes and Crimes against Humanity, adopted by the General Assembly of the United Nations in Resolution 2391 (XXIII) of November 25, 1968.

¹⁰¹ Cf. International Criminal Tribunal for the Former Yugoslavia, *Case of Prosecutor v. Dusko Tadic*, IT-94-1-T, Opinion and Judgment, May 7, 1997, at para. 649. This was subsequently confirmed by the same court in the *Case of Prosecutor v. Kupreskic, et al*, IT-95-16-T, Judgment, January 14, 2000, at para. 550, and *Case of Prosecutor v. Kordic and Cerkez*, IT-95-14/2-T, Judgment, February 26, 2001, at para. 178.

¹⁰² Cf. Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, Germany, (1947) at 218.

¹⁰³ Cf. UN, Confirmation of the Principles of International Law recognized by the Charter of the Nuremberg Court adopted by the General Assembly of the United Nations in its Resolution 95(I), at its 55th plenary session on December 11, 1946.

¹⁰⁴ Cf. UN, Formulation of the Principles of International law recognized by the Charter and by the Judgments of the Nuremberg Tribunal, adopted by the General Assembly of the United Nations in Resolution 177 (II), at its 123rd plenary session on November 21, 1947.

¹⁰⁵ Cf. UN, Principles of International law recognized by the Charter of the Nuremberg Tribunal, adopted by the International Law Commission of the United Nations in 1950 (A/CN.4/34).

99. Based on the preceding paragraphs, the Court finds that there is sufficient evidence to conclude that in 1973, year in which Mr. Almonacid-Arellano died, the commission of crimes against humanity, including murder committed in the course of a generalized or systematic attack against certain sectors of the civil population, was in violation of a binding rule of international law. Said prohibition to commit crimes against humanity is a *ius cogens* rule, and the punishment of such crimes is obligatory pursuant to the general principles of international law.

100. The European Court of Human Rights also rendered a judgment in that sense in the *Case of Kolk and Kislyiy v. Estonia*. In this case, Kolk and Kislyiy committed crimes against humanity in 1949 and were tried and convicted for such crimes by the Estonian courts in 2003. The European Court stated that even though the acts committed by those persons might have been legal pursuant to the domestic legislation then in force, the Estonian courts considered that they were crimes against humanity under international law at the moment of their commission, and that there was no reason to conclude otherwise.¹⁰⁶

¹⁰⁶ Cf. ECHR, *Case of Kolk and Kislyiy v. Estonia*, Judgment of January 17, 2006. Applications No. 23052/04 and 24018/04.

[Kolk and Kislyiy] pointed out that the acts in respect of which they were convicted had taken place in 1949 in the territory of the Russian Soviet Federative Socialist Republic of Estonia. At the time the events occurred the Criminal Code of 1946 of the Russian Federative Socialist Republic was applicable in the territory of Estonia. The said code did not contemplate crimes against humanity. The responsibility for crimes against humanity was not established in Estonia until November 9, 1944 [...]

The Court notices, first, that Estonia lost its independence as a consequence of the non-aggression Pact between Germany and the Union of Soviet Socialist Republics (also known as "Molotov-Ribbentrop Pact",) adopted on August 23, 1939, and its additional secret protocols. [...] The totalitarian Communist Regime of the Soviet Union conducted systematic actions on a large scale against the Estonian population, including, for example, the deportation of approximately 10,000 people on June 14, 1941 and over 20,000 people on March 25, 1949.

[...]

The Court notices that the deportation of the civilian population was expressly recognized by the Charter of the Nuremberg Tribunal of 1945 as a crime against humanity (article 6 (c)). Even when the Nuremberg Tribunal was established to prosecute the principal war criminals of the European Axis countries for the crimes committed before or during the Second World War, the Court points out that the universal validity of the principles regarding crimes against humanity was subsequently confirmed by, *inter alia*, Resolution No. 95 of the General Assembly of the United Nations (December 11, 1946) and afterwards, by the International Law Commission. Therefore, the responsibility for crimes against humanity cannot be restricted to nationals of some countries and only to those acts that were committed during the Second World War. [...]

[...]

The Court points out that even though the acts committed by Kolk and Kislyiy might have been considered crimes under the Soviet laws then in force, the Estonian courts considered them as crimes against humanity under international law at the time of their commission. The Court considers that there is no reason to conclude otherwise. [...] Therefore, the Court considers that the allegations of the appellants do not have sufficient grounds to state that their acts did not constitute crimes against humanity at the moment of their commission.

[...]

Furthermore, there is no statutory limitation that may be applicable to the crimes against humanity, irrespective of the date on which they were committed. [...] The Court does not find any reason whatsoever to challenge the interpretation and application of the domestic law that the Estonian courts made in the light of the applicable international law provisions. To conclude, the allegations of the petitioners are held to be groundless and must be dismissed.

101. On the other hand, the Court points out that in 1998, when the application of Decree Law No. 2.191 was confirmed in the instant case (*supra* para. 82(21)), the Charters of the International Criminal Tribunals for the Former Yugoslavia (May 25, 1993) and Rwanda (November 9, 1994) had already been adopted, and articles 5 and 3 thereof reaffirm that murder is a serious international law crime. This criterion was confirmed by Article 7 of the Rome Statute (July 17, 1998) which created the International Criminal Court.

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

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

104. Considering the aforesaid, the Court determines that there is sufficient evidence to reasonably state that the extra-legal execution committed by State agents in detriment of Mr. Almonacid-Arellano, who was a member of the Communist Party and a candidate to preside the said party, as well as the Provincial Secretary of the *Central Unitaria de Trabajadores* (Labor Central Union) and *Magisterio* (SUTE) Union Leader -all of which was considered a threat to the dictatorship doctrine- was committed following a systematic and generalized pattern against the civilian population, and thus, it is a crime against humanity.

b) *Impossibility to grant an amnesty for crimes against humanity*

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

Crimes against humanity are serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health, and or dignity. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterises crimes against humanity.¹⁰⁷

¹⁰⁷ Cf. International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Erdemovic*, Case No. IT-96-22-T, Sentencing Judgment, November 29, 1996, at para. 28.

Crimes against humanity are serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health, and or dignity. They are inhumane acts that by their extent and gravity go beyond the limits

106. Since the individual and the whole mankind are the victims of all crimes against humanity, the General Assembly of the United Nations has held since 1946¹⁰⁸ that those responsible for the commission of such crimes must be punished. In that respect, they point out Resolutions 2583 (XXIV) of 1969 and 3074 (XXVIII) of 1973. In the former, the General Assembly held that the "thorough investigation" of war crimes and crimes against humanity, as well as the punishment of those responsible for them "constitute an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms, the encouragement of confidence, the furtherance of cooperation among peoples and the promotion of international peace and security."¹⁰⁹ In the latter, the General Assembly stated the following:

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

States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.¹¹⁰

107. Likewise, Resolutions 827 and 955 of the Security Council of the United Nations,¹¹¹ together with the Charters of the Tribunals for the Former Yugoslavia

tolerable to the international community, which must perforce demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterises crimes against humanity.

¹⁰⁸ Cf. UN, Extradition and punishment of war criminals, adopted by the General Assembly of the United Nations in Resolution 3 (I) of February 13, 1946; Confirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal, adopted by the General Assembly of the United Nations in Resolution 95 (I) of December 11, 1946; Extradition of war criminals and traitors, adopted by the General Assembly of the United Nations in Resolution 170 (II) of October 31, 1947; Question of the punishment of war criminals and of persons who have committed crimes against humanity, adopted by the General Assembly of the United Nations in Resolution 2338 (XXII) of December 18, 1967; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted by the General Assembly of the United Nations in Resolution 2391 (XXIII) of November 25, 1968; Question of the punishment of war criminals and of persons who have committed crimes against humanity adopted by the General Assembly of the United Nations in Resolution 2712 (XXV) of December 14, 1970; Question of the punishment of war criminals and of persons who have committed crimes against humanity adopted by the General Assembly of the United Nations in Resolution 2840 (XXVI) of December 18, 1971, and Crime Prevention and Control, adopted by the General Assembly of the United Nations in Resolution 3021 (XXVII) of December 18, 1972.

¹⁰⁹ Cf. UN, Question of the punishment of war criminals and of persons who have committed crimes against humanity, adopted by the General Assembly of the United Nations in Resolution 2583 (XXIV) of December 15, 1969.

¹¹⁰ Cf. UN, Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, adopted by the General Assembly of the United Nations in Resolution 3074 (XXVIII) December 3, 1973.

¹¹¹ Cf. UN Resolution of the Security Council S/RES/827 for the establishment of the International Criminal Tribunal for the Former Yugoslavia of March 25, 1993; and Resolution of the Security Council S/RES/955 for the establishment of an International Criminal Case for Rwanda of November 8, 1994.

(Article 29) and Rwanda (Article 28), impose on all Member States of the United Nations the obligation to fully cooperate with the Tribunals for the investigation and punishment of those persons accused of having committed serious International Law violations, including crimes against humanity. Likewise, the Secretary General of the United Nations has pointed out that in view of the rules and principles of the United Nations, all peace agreements approved by the United Nations can never promise amnesty for crimes against humanity.¹¹²

108. The adoption and enforcement of laws that grant amnesty for crimes against humanity prevents the compliance of the obligations stated above. The Secretary General of the United Nations, in his report about the establishment of the Special Tribunal for Sierra Leona stated the following:

While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the UN has consistently maintained the position that amnesty cannot be granted in respect of international crimes such as genocide, crimes against humanity, or violations of international humanitarian law.¹¹³

109. The Secretary General also informed that the legal effects of the amnesty granted in Sierra Leona had not been taken into account "given their illegality pursuant to international law."¹¹⁴ Indeed, the Charter for the Special Tribunal for Sierra Leona stated that the amnesty granted to persons accused of crimes against humanity, which are violations of Article 3 of the Geneva Conventions and Additional Protocol II,¹¹⁵ as well as of other serious violations of international humanitarian law, "shall not be an impediment to subject [them] to trial."

110. The obligation that arises pursuant to international law to try, and, if found guilty, to punish the perpetrators of certain international crimes, among which are crimes against humanity, is derived from the duty of protection embodied in Article 1(1) of the American Convention. This obligation implies the duty of the States Parties to organize the entire government system, and in general, all agencies through which the public power is exercised, in such manner as to legally protect the free and full exercise of human rights. As a consequence of this obligation, the States must prevent, investigate, and punish all violations of the rights recognized by the Convention and, at the same time, guarantee the reinstatement, if possible, of the violated rights, and as the case may be, the reparation of the damage caused due to the violation of human rights. If the State agencies act in a manner that such violation goes unpunished, and prevents the reinstatement, as soon as possible, of such rights to the victim of such violation, it can be concluded that such State has

¹¹² Cf. UN Report of the Secretary General S/2004/616 on the Rule of Law and Transitional Justice in conflict and post-conflict societies of August 3, 2004, para. 10.

¹¹³ Cf. UN Report of the Secretary General S/2000/915 on the establishment of a Tribunal for Sierra Leona, of October 4, 2000, para. 22.

¹¹⁴ Cf. UN Report of the Secretary General S/2000/915 on the establishment of a Tribunal for Sierra Leona, of October 4, 2000, para. 24.

¹¹⁵ Cf. UN Additional Protocol to the Geneva Conventions of August 12, 1949 regarding the protection of victims of non-international armed conflicts (Protocol II).

not complied with its duty to guarantee the free and full exercise of those rights to the individuals who are subject to its jurisdiction.¹¹⁶

111. Crimes against humanity give rise to the violation of a series of undeniable rights that are recognized by the American Convention, which violation cannot remain unpunished. The Court has stated on several occasions that the State has the duty to prevent and combat impunity, which the Court has defined as "the lack of investigation, prosecution, arrest, trial, and conviction of those responsible for the violation of the rights protected by the American Convention."¹¹⁷ Likewise, the Court has determined that the investigation must be conducted resorting to all legal means available and must be focused on the determination of the truth and the investigation, prosecution, arrest, trial, and conviction of those persons that are responsible for the facts, both as perpetrators and instigators, especially when State agents are or may be involved in such events.¹¹⁸ In that respect, the Court has pointed out that those resources which, in view of the general conditions of the country or due to the circumstances of the case, turn to be deceptive, cannot be taken into account.¹¹⁹

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

all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extra-legal, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.¹²⁰

113. It is worth mentioning that the State itself recognized in the instant case that "amnesty or self-amnesty laws are, in principle, contrary to the rules of international human rights law."¹²¹

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

¹¹⁶ Cf. *Case of Velásquez-Rodríguez*. Judgment of July 29, 1988. Series C No. 4, para. 166, and *Case of Godínez-Cruz*. Judgment of January 20, 1989. Series C No. 5, para. 175.

¹¹⁷ Cf. *Case of the Ituango Massacres*, *supra* note 14, para. 299; *Case of the "Mapiripán Massacre,"* Judgment of September 15, 2005. Series C No. 134, para. 237; *Case of the Moiwana Community*, Judgment of September 15, 2005. Series C No. 134, para. 203.

¹¹⁸ Cf. *Case of Ximenes-Lopes*, *supra* note 14, para. 148; *Case of Baldeón-García*, *supra* note 14, para. 94; and *Case of the Pueblo Bello Massacre*, Judgment of January 31, 2006. Series C No. 140, para. 143.

¹¹⁹ Cf. *Case of Baldeón-García*, *supra* note 14, para. 144; *Case of the 19 Merchants*, Judgment of July 5, 2004. Series C No. 109, para. 192; and *Case of Baena Ricardo et al. Jurisdiction*. Judgment of November 28, 2003. Series C No. 104, para. 77.

¹²⁰ Cf. *Case of Barrios Altos*. Judgment of March 14, 2001. Series C No. 75, para. 41.

¹²¹ Cf. Final written arguments of the State (record on the Merits of the Case, Volume III, folio 723.)

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

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

116. Article 1 of Decree Law No. 2.191 (*supra* para. 82(10)) grants a general amnesty to all those responsible for "criminal acts" that were committed from September 11, 1973 to March 10, 1978. Furthermore, Article 3 of such Decree Law excludes a series of crimes from such amnesty.¹²² The Court notes that murder, being a crime against humanity, is not included on the list provided in Article 3 of the said Decree Law. This was also the determination made by the Chilean courts that heard the instant case upon its application (*supra* paras. 82(20) and 82(21)). Likewise, this Court, though not requested to decide on other crimes against humanity in the instant case, draws the attention to the fact that other crimes against humanity such as forced disappearance, torture, and genocide, among others, are not excluded from such amnesty.

117. The Court has confirmed on several occasions that:

Under the law of nations, a customary law prescribes that a State that has signed an international agreement must introduce into its domestic laws whatever changes are needed to ensure execution of the obligations it has undertaken. This principle is universally valid and has been characterized in case law as an evident principle ("*principe allant de soi*"; *Exchange of Greek and Turkish populations*, avis consultatif, 1925, C.P.J.I., Series B, No. 10, p. 20). Accordingly, the American Convention stipulates that every State Party is to adapt its domestic laws to the provisions of that Convention, so as to guarantee the rights embodied therein.¹²³

118. Pursuant to Article 2 of the Convention, such adaptation implies the adoption of measures following two main guidelines, to wit: i) the annulment of laws and practices of any kind whatsoever that may imply the violation of the rights protected by the Convention, and ii) the passing of laws and the development of practices tending to achieve an effective observance of such guarantees.¹²⁴ It is necessary to

¹²² Pursuant to Article 3 of Decree Law No. 2.191 amnesty shall not be granted to "those persons against whom criminal actions are pending for the crimes of parricide, infanticide, robbery aggravated by violence or intimidation, drug production or dealing, abduction of minors, corruption of minors, arson and other damage to property; rape, statutory rape, incest, driving under the influence of alcohol, embezzlement, swindling and illegal exaction, fraudulent practices and deceit, indecent assault, crimes included in Decree Law No. 280 of 1974 as amended; bribery, fraud, smuggling and crimes included in the Tax Code."

¹²³ Cf. *Case of Garrido and Baigorria. Reparations* (art. 63(1) of the American Convention on Human Rights). Judgment of August 27, 1998. Series C No. 39, para. 68; *Case of Baena Ricardo et al.* Judgment of February 2, 2001. Series C No. 72, para. 179.

¹²⁴ Cf. *Case of Ximenes-Lopes*, *supra* note 14, para. 83; *Case of Gómez-Palomino*. Judgment of November 22, 2005. Series C No. 136, para. 91; and *Case of the "Mapiripán Massacre"*, *supra* note 137, para. 109.

reaffirm that the duty stated in i) is only complied when such reform is effectively made.¹²⁵

119. Amnesty laws with the characteristics as those described above (*supra* para. 116) leave victims defenseless and perpetuate impunity for crimes against humanity. Therefore, they are overtly incompatible with the wording and the spirit of the American Convention, and undoubtedly affect rights embodied in such Convention. This constitutes in and of itself a violation of the Convention and generates international liability for the State.¹²⁶ Consequently, given its nature, Decree Law No. 2.191 does not have any legal effects and cannot remain as an obstacle for the investigation of the facts inherent to the instant case, or for the identification and punishment of those responsible therefor. Neither can it have a like or similar impact regarding other cases of violations of rights protected by the American Convention which occurred in Chile.¹²⁷

120. On the other hand, even though the Court notes that Decree Law No. 2.191 basically grants a self-amnesty, since it was issued by the military regime to avoid judicial prosecution of its own crimes, it points out that a State violates the American Convention when issuing provisions which do not conform to the obligations contemplated in said Convention. The fact that such provisions have been adopted pursuant to the domestic legislation or against it, "is irrelevant for this purpose."¹²⁸ To conclude, the Court, rather than the process of adoption and the authority issuing Decree Law No. 2.191, addresses the *ratio legis*: granting an amnesty for the serious criminal acts contrary to international law that were committed by the military regime.

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

122. For such reasons, the Court determines that by formally keeping within its legislative *corpus* a Decree Law which is contrary to the wording and the spirit of the

¹²⁵ Cf. *Case of Raxcacó-Reyes*. Judgment of September 15, 2005. Series C No. 133. para. 87; *Case of the Indigenous Yakyé Axa Community*, *supra* note 5, para. 100; and *Case of Caesar*. Judgment of March 11, 2005. Series C No. 123, paras. 91 and 93.

¹²⁶ Cf. *Case of Barrios Altos. Interpretation of the Judgment on the Merits*. (art. 67 of the American Convention on Human Rights). Judgment of September 3, 2001. Series C No. 83, para. 18.

¹²⁷ Cf. *Case of Barrios Altos*, *supra* note 140, para. 44.

¹²⁸ Cf. *Certain Powers of the Inter-American Commission of Human Rights* (arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights.). Advisory Opinion OC-13/93 of July 16, 1993. Series A No. 13, para. 26.

Convention, the State has not complied with the obligations imposed by Article 2 thereof.

d) Enforcement of Decree Law No. 2.191

123. The above mentioned legislative obligation established by Article 2 of the Convention is also aimed at facilitating the work of the Judiciary so that the law enforcement authority may have a clear option in order to solve a particular case. However, when the Legislative Power fails to set aside and / or adopts laws which are contrary to the American Convention, the Judiciary is bound to honor the obligation to respect rights as stated in Article 1(1) of the said Convention, and consequently, it must refrain from enforcing any laws contrary to such Convention. The observance by State agents or officials of a law which violates the Convention gives rise to the international liability of such State, as contemplated in International Human Rights Law, in the sense that every State is internationally responsible for the acts or omissions of any of its powers or bodies for the violation of internationally protected rights, pursuant to Article 1(1) of the American Convention.¹²⁹

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

125. By the same token, the Court has established that "according to international law, the obligations that it imposes must be honored in good faith and domestic laws cannot be invoked to justify their violation."¹³⁰ This provision is embodied in Article 27 of the Vienna Convention on the Law of Treaties, 1969.

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

127. Pursuant to the case law of this Court:

¹²⁹ Cf. *Case of Ximenes-Lopes*, *supra* note 14, para. 172; and *Case of Baldeón-García*, *supra* note 14, para. 140.

¹³⁰ Cf. *International Responsibility for the Issuance and Application of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*, Advisory Opinion OC-14/94 of December 9, 1994, Series A No. 14, para. 35.

in the light of the general obligations established in Articles 1(1) and 2 of the American Convention, the States Parties are obliged to take all measures to ensure that no one is deprived of judicial protection and the exercise of the right to a simple and effective recourse, in the terms of Articles 8 and 25 of the Convention. Consequently, States Parties to the Convention which adopt laws that have the opposite effect, such as self-amnesty laws, violate Articles 8 and 25 in relation to Articles 1(1) and 2 of the Convention. Self-amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention. This type of law precludes the identification of the individuals who are responsible for human rights violations, because it obstructs the investigation and access to justice and prevents the victims and their next of kin from knowing the truth and receiving the corresponding reparation.¹³¹

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

*
* * *

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

[...]

XI OPERATIVE PARAGRAPHS

171. Therefore,

THE COURT,

[...]

DECLARES:

Unanimously, that:

¹³¹ Cf. *Case of Barrios Altos*, *supra* note 140, para. 43.

2. The State did not comply with its obligations derived from Articles 1(1) and 2 of the American Convention on Human Rights and violated the rights enshrined in Articles 8(1) and 25 thereof, to the detriment of Elvira del Rosario Gómez-Olivares and Alfredo, Alexis, and José Luis Almonacid-Gómez, as set forth in paragraphs 86 to 133 herein.

3. Insofar as it was intended to grant amnesty to those responsible for crimes against humanity, Decree Law No. 2.191 is incompatible with the American Convention and, therefore, it has no legal effects.

4. This judgment is, in and of itself, a form of reparation.

AND RULES:

Unanimously, that:

5. The State must ensure that Decree Law No. 2.191 does not continue to hinder further investigation into the extra-legal execution of Mr. Almonacid-Arellano as well as the identification and, if applicable, punishment of those responsible, as set forth in paragraphs 145 to 157 herein.

6. The State must ensure that Decree Law No. 2.191 does not continue to hinder the investigation, prosecution, and, if applicable, punishment of those responsible for similar violations in Chile, in accordance with paragraph 145 herein.

[...]