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Cover Page Footnote

I thank the Fordham-MCI International Legal Fellowship for funding the research for this Note. I thank Carmen Rohland, Doris and Marcello Montealegre, Hernán Montealegre Klenner, and the many individuals in Chile and the United States who assisted me with interviews and guidance. I also thank Kenneth Anderson, Manuel DelValle, and José Miguel Vivanco for their advice on sections of the text.

NOTE

WILL THE RULE OF LAW END?* CHALLENGING GRANTS OF AMNESTY FOR THE HUMAN RIGHTS VIOLATIONS OF A PRIOR REGIME: CHILE'S NEW MODEL

ROBERT J. QUINN**

INTRODUCTION

From 1973 until now, we have lived always counting how many were dead and how many were detained. If a moment came when there were fewer dead and fewer detained, we always said, "Ah, the situation is better for human rights." But that was a deeply erroneous statement. The problem is not one of numbers. The problem is who decides who lives and who dies, who is in jail and who is free.¹

On September 11, 1973, a military junta led by General Augusto Pinochet Ugarte shattered Chile's long history of civilian rule by overthrowing the democratically elected government of Salvador Allende. In the subsequent years of military rule, the Junta systematically violated the fundamental human rights of thousands of Chilean citizens. In 1978, in order to shield its agents responsible for the worst of the violations, the Junta issued an amnesty decree. Chilean Decree Law No. 2191² is a blanket amnesty³ law covering acts committed during the first

* Responding to the possibility of prosecutions of military officers for their involvement in the human rights violations of the past, General Pinochet, former leader of the military Junta and still Commander-in-Chief, stated "No one is going to touch my people. The day they do, the rule of law will come to an end." Americas Watch, Human Rights and the "Politics of Agreements:" Chile During President Aylwin's First Year 48 (1991). This Note suggests that, rather than threaten it, the dismantling of the amnesty decree would strengthen the rule of law, both with regard to the crimes of the past, and as a deterrent to future violations.

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1. Claudia Drewifus, *Freedom is the Best Revenge: Interview with Chilean human rights activist Roberto Garretón Merino*, Nation, Aug. 13, 1990, at 162 (remarks of Roberto Garretón, former national legal director of the *Vicaría de Solidaridad*, one of Chile's leading human rights organizations, and current head of the Office of Human Rights in the Ministry of Foreign Affairs).

2. Decree Law No. 2191 (Apr. 18, 1978), published in *Diario Oficial*, No. 30,042 (Apr. 19, 1978). A decree law is a norm "dictated by a *de facto* government—one not constitutionally established which has assumed legislative branch powers." Report of the National Commission on Truth and Reconciliation 74 note j (Phillip E. Berryman, trans., 1993) [hereinafter Report] (translation of the official government report: *Informe de la Comisión Nacional de Verdad y Reconciliación* (also known as the *Informe Rettig* [Rettig Report])).

Diario Oficial is "Chile's journal in which all presidential decrees and laws must be

five years of military rule, from September 11, 1973, the date of the military coup, through March 10, 1978.⁴ During that period, agents of the Chilean government killed over 2115 civilians.⁵ Thousands more had property taken or destroyed, were detained, beaten and tortured, or forced into exile. The State has punished no one.⁶

published, and therefore made public, within five working days following processing. It is published daily." *Id.* at 13 note a. *But cf. infra* note 122 (asserting that publication is not necessary once a law has been properly ratified).

3. Amnesty is "the abolition and forgetfulness of the offense." Black's Law Dictionary 83 (6th ed. 1990). When amnesty is granted "both the crime and punishment are abrogated." *Id.*

Amnesty and pardon "are of a different character and have different purposes." *Id.* at 1113. Pardon is "[a]n executive action that mitigates or sets aside punishment for a crime." *Id.* Amnesty, therefore, "overlooks [the] offense; [pardon] remits punishment. [Amnesty] is usually addressed to crimes against the sovereignty of the state, to political offenses, forgiveness being deemed more expedient for the public welfare than prosecution and punishment. [Pardon] condones infractions of the peace of the state." *Id.*

This Note does not question the power of a state to grant amnesty for crimes against its sovereignty, such as treason, sedition, and rebellion. This Note suggests, however, that states may not properly grant amnesty for grave violations of individual human rights committed by the state or state agents. The state is restricted in this manner because the power to amnesty "those who have infringed its sovereignty by rebellion or otherwise flows from the role of the State as the *victim*." Robert K. Goldman, *Amnesty Laws, International Law and the American Convention on Human Rights*, 6 Law Group Docket (Int'l Hum. Rts. L. Group), Summer 1989, at 3. While the state may properly issue pardons after investigation and identification of offending parties, only the victims themselves may forgive or otherwise eliminate the wrongfulness of acts in violation of their individual rights. *See id.*

4. The vast majority of the human rights violations committed under the Junta occurred from September 1973 through 1978, the first five years of military rule. This Note, therefore, does not examine the violations that occurred during the 12 years of military rule following the passage of the March 1978 amnesty decree and ending with the election of a civilian government in March 1990. *See generally* Report, *supra* note 2, at 635-775 (discussing acts committed between August 1977 and March 1990).

5. *See* Report, *supra* note 2, at 899. A total of 3877 confirmed or unresolved cases of death or disappearance were officially recorded between September 1973 and March 1990. *See id.* This total represents roughly .04% of Chile's total population at the time. The same percentage in the United States today would equal roughly 108,000 lives lost.

6. In addition to the amnesty decree, the military regime ensured itself impunity by expanding the jurisdiction and use of military courts in cases involving civilians arising from events before and after the 1978 amnesty decree. *See generally* Watson W. Gal- leher, *State Repression's Facade of Legality: The Military Courts in Chile*, 2 Temp. Int'l & Comp. L.J. 183, 188-96 (1988) (describing expanded use of military courts in government repression); Thomas A. O'Keefe, *The Use of the Military Justice System to Try Civilians in Chile*, N.Y. St. B.J., Nov. 1989, at 43, 46-47. Proposals to restrict the jurisdiction of these courts are progressing in the Chilean legislature. *See* Robert G. Vaughn, *Proposals for Judicial Reform in Chile*, 16 Fordham Int'l L.J. 577, 579-87, 590-93 (1992-93).

Article 4 of the amnesty decree provides the only exception to this total impunity. Article 4 specifically exempts from protection those implicated in the 1976 assassination of former Chilean foreign minister Orlando Letelier and his American aide, Ronni Moffit. *See infra* note 47. On November 12, 1993, Chilean Supreme Court Judge Adolfo Banados convicted two high ranking military officers in the murders. *See* Don Podesta, *2 Generals Convicted In Killing of Letelier; Chileans to be Jailed for Washington Murder*, Wash. Post, Nov. 13, 1993, at A19. Judge Banados sentenced retired general Manuel Contreras, former head of the secret police for the military regime, to seven years in

The Junta ceded power in March of 1990. The victims of offenses covered by the Junta's amnesty decree are now challenging its validity under both domestic and international law. The outcome of these challenges is significant not only for Chile, but for the many nations with similar histories who look to Chile for an acceptable model for addressing the crimes of a prior regime.⁷

This Note asserts that the amnesty decree violates Chile's international treaty obligations to provide victims with effective remedies, access to hearings, and compensation.⁸ At the same time, however, this Note suggests that the international community should not altogether reject the Chilean model. The measured approach of President Aylwin's administration, seeking "the whole truth and justice as far as possible,"⁹ while not satisfying suggested standards of mitigation, has demonstrated practical merit, particularly in the areas of recognition of state involvement and compensation. This Note suggests that if the new administration of Eduardo Frei¹⁰ continues to address the problem of the past violations, advancing toward an eventual dismantling of the blanket am-

prison, and active-duty brigadier general Pedro Espinoza to six years. *See id.* They remain free pending appeals to the full Supreme Court. *See* Katherine Ellison, *Pinochet Henchman Vows He'll Avoid Jail*, Toronto Star, Jan. 2, 1994, at E8; Alan Tomlinson, *Chile's People and Their New Government Want Justice* (National Public Radio broadcast, Weekend Edition, Transcript #1050-13, Dec. 19, 1993).

A subsequent case, however, indicates the continued strength of the impunity crafted by the amnesty decree. After the Supreme Court reversed an earlier denial and appointed an investigating justice, that justice, denying the government's claim that the amnesty decree cannot apply in cases which affect Chile's foreign relations, ruled against prosecution and held that the amnesty decree applied in the case of Carmen Soria, a U.N. official and Spanish citizen abducted, tortured and killed in 1976 by state agents. *See Chile Court Agrees to Probe Diplomat's 1976 Death*, Reuter Library Rep., Dec. 9, 1993 (BC Cycle), available in LEXIS, Nexis Library, Currnt File; William R. Long, *Prosecution Barred in U.N. Official's Death; Chile: Military Intelligence Agents Will Not be Tried in Murder of Spaniard. Family's Lawyer Plans an Appeal, But Court is Unlikely to Act Further*, L.A. Times, Jan. 1, 1994, at A6. The impunity, therefore, has yet to be broken.

Nevertheless, recent events offer some hope. Chile's House of Deputies (*Cámara de Diputados*), for example, largely in response to the Soria case, called on the Army to form a commission to purge itself of officers involved in the abuses of the past. *See Chile: Purging the Military*, Latin Am. Wkly. Rep., Jan. 20, 1994, at 24, available in LEXIS, News Library, Papers File.

7. For a discussion of the problem of transition governments and human rights violations of a prior regime, see *infra* notes 13-21 and accompanying text.

8. *See infra* notes 145-59 and accompanying text.

9. David Pilling, *Military Whitewash?; Chileans Worry Army Will Be Cleared of 'Disappeared' Deaths*, Gazette (Montreal), Aug. 15, 1993, at B4 (quoting Aylwin).

10. On December 11, 1993, Christian-Democratic Party (DC) member Eduardo Frei, son of former-President Eduardo Frei (1964-70), was elected president with 58% of the national vote. He replaces fellow Christian-Democrat Patricio Aylwin, who will complete his four-year term in March 1994. *See Chile's President-Elect Eduardo Frei Names Cabinet*, Reuters: Money Rep., Dec. 26, 1993 (BC cycle), available in LEXIS, Nexis Library, Currnt File. Under the terms of the transfer from military to civilian rule, as the first president of the transition, Aylwin was ineligible to run for a second term.

nesty decree, it could demonstrate an acceptable model for other emerging democracies: a model of gradual compliance with international legal obligations that also satisfies concerns for domestic stability.

This Note proceeds in three parts. Part I begins with a brief comment on the problem of transition governments and past violations of human rights. It then sets out background information on events in Chile and the amnesty law. Part II examines Chile's treaty obligations, particularly those under the American Convention on Human Rights (the "American Convention"), and explores the present challenge to the amnesty law before the Inter-American Commission on Human Rights (the "Commission").¹¹ Part III concludes that although Chile cannot escape these treaty obligations, it may mitigate its non-compliance by continuing recent measures at investigation and compensation. Ultimately, however, to achieve minimal compliance with international obligations, Chile must remove the blanket of impunity¹² created by the amnesty law.

I. BACKGROUND

Arising out of nearly seventeen years of military rule, marked by systematic violations of human rights and the subsequent impunity of the amnesty decree, Chile may offer lessons for other nations struggling to address the problems created by prior repressive regimes.

A. *The Problem of Past Violations*

The Junta's policy of systematic violation of human rights was not an experience unique to Chile. Similar policies were employed throughout Latin America.¹³ In Argentina in the 1970s, successive military juntas

11. Part of the Organization of American States, the Inter-American Commission is charged with addressing complaints filed under the provisions of the American Convention. See *infra* note 132.

12. Impunity is defined as "exemption or protection from penalty or punishment." Black's Law Dictionary 758 (6th ed. 1990). In this Note, impunity refers to the security from identification, prosecution and punishment for grave violations of human rights currently enjoyed by state agents under grants of amnesty, generally, and Chile's Decree Law No. 2191, in particular. See Report, *supra* note 2, at 124 (listing four factors allowing perpetrators of human rights violations to act with impunity: difficulty "weighing proof against government agents," the courts' "acceptance of official versions of events," use of the amnesty law "to halt investigations of the events it covers," and "[f]ailure of the Supreme Court to exercise its oversight over war tribunals").

13. Neither the official state policy of violations nor the derivative problem of a subsequent government's handling of those crimes has been unique to Latin America. See International Comm'n of Jurists, *Military Regimes in Latin America*, 17 Review 13 (1976); Susan Benesch, *Salvadoran President: Amnesty Is Answer*, St. Petersburg Times, Mar. 19, 1993, at 1A (discussing settling accounts for past violations in, among others, Germany, Greece, the Philippines, Mali, and the Central African Republic).

Recent examples of states confronting the issue of amnesty for past violations include El Salvador, Panama, and Haiti. See Kim Bolan, *Torture Victim Decries Recent Amnesty on El Salvador War Crimes*, Vancouver Sun, Mar. 27, 1993, at B1; John Otis, *Amnesty Blankets Latin America*, Wash. Times, May 16, 1993, at A1 (discussing am-

engaged in a "dirty war" against alleged leftist terrorism, claiming anywhere from 7000 to 30,000 lives.¹⁴ At that time in Uruguay, the military regime used prolonged imprisonment of political opponents and widespread torture to maintain power for more than eleven years.¹⁵ In the 1980s, political violence claimed the lives of 100,000 people El Salvador and Nicaragua.¹⁶ Similar policies were also practiced in recent decades in Brazil, Guatemala, and Honduras. As many of these nations have recently returned to democracy after years of repressive military rule, they must be encouraged to develop measures to meet their obligations to the international community: obligations to investigate, to prosecute those responsible, and to compensate the victims of the past.¹⁷ Too often these governments instead are enacting amnesty laws expunging the liability of the violators.¹⁸ All of the countries above, for example, have passed some form of amnesty provision.¹⁹ These provisions may violate international law if, as in the case of Chile, they violate the nation's treaty obligations. An examination of Chile's amnesty decree, therefore, is useful for demonstrating both the nature of a state's obligations under treaties that protect human rights, and the standards that should guide a state as it formulates programs to address the violations committed by a prior regime.

Chile's amnesty law, in particular, merits attention for three reasons. Chile's amnesty law was the first in a series of provisions enacted in Latin America, presenting a model for other nations.²⁰ Also, Chile's historic respect for legal process and tradition²¹ makes the existence of its blanket amnesty law not only more offensive, but potentially more harmful. If Chile is permitted to retain the amnesty decree in good standing, other emerging democracies with less mature judicial histories

nesty in Panama); Robert G. Torricelli, *Amnesty—A Nasty Necessity for Peace; Haiti: A Settlement is Close, But Only a Pardon Will Get the Military to Accept Aristide*, L.A. Times, May 6, 1993, at B7.

14. See Irwin P. Stotzky, *The Fragile Bloom of Democracy*, 44 U. Miami L. Rev. 105, 109 (1989).

15. See José Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Applicable Principles and Political Constraints*, 13 Hamline L. Rev. 623, 655 (1990).

16. John J. Moore, Jr., Note, *Problems with Forgiveness: Granting Amnesty under the Arias Plan in Nicaragua and El Salvador*, 43 Stan. L. Rev. 733, 734 (1991).

17. See Goldman, *supra* note 3, at 1.

18. See *id.* at 3.

19. See *id.* at 1.

20. Argentina, for example, explicitly modelled its law after the Chilean decree. See Mr. Louis Joinet, Special Rapporteur, United Nations Economic and Social Council, *The Administration of Justice and the Human Rights of Detainees. Question of the Human Rights of Persons Subjected to Any Form Of Imprisonment. Study on Amnesty Laws and their Role in the Safeguard and Promotion of Human Rights*, at 9, U.N. Doc. E/CN.4/ Sub.2/ 1985/16 (1985).

21. See Americas Watch, *Human Rights and the "Politics of Agreements:" Chile During President Aylwin's First Year 13 (1991)* (Chile is a "profoundly legalistic country"); Vaughn, *supra* note 6, at 584 ("The respect of legal rules in Chilean society increased the importance of preserving the appearance of an independent judiciary.").

may be more likely to employ similar grants of impunity, thereby undermining fundamental human rights protections. Moreover, Chile's current economic prosperity, admired by neighbors and viewed in part as the result of the authoritarian measures of the Junta, threatens to validate the abuses of the past and thereby to encourage, rather than to discourage, repeated military interventions.²²

B. *Events in Chile*

The political, historical, and legal background to the events in Chile provides the necessary factual context in which to explore the nature and scope of Chile's international treaty obligations.

1. The Coup: Before and After

Prior to the 1950s, Chile generally enjoyed a long tradition of stable, democratic rule with a powerful but politically uninvolved military.²³ This changed with the global Cold War and increasing polarization of Chilean society and politics,²⁴ as seen in the dramatic ideological differences and narrow margins in the presidential elections of the era.²⁵

22. See Malcolm Coad, *Myths are Final Casualty of 1973 Coup*, Guardian (Manchester), Sept. 11, 1993 at 11 (citing signs of healthy economy as results of Pinochet-era "harsh neoliberalism," including 10% annual growth rate, 4.5% open unemployment, and investment at 27% of GDP); William R. Long, *For Chile, No Clean Break from Painful, Bloody Past*, L.A. Times, Sept. 12, 1993, at A1 (noting claims that Chile's economy is a "Latin American Tiger," comparing favorably to the "Asian Tigers:" Taiwan, South Korea, and Singapore); Pilling, *supra* note 9, at B4 (Chile is "enjoying spectacular economic growth and sees itself as the 'Dragon' of Latin America.").

23. See Americas Watch, *Chile: Human Rights and the Plebiscite 2 (1988)*; Margaret E. Crahan, *The Evolution of the Military in Brazil, Chile, Peru, Venezuela and Mexico: Implications for Human Rights*, in *Human Rights and Basic Needs* 46, 61 (1982).

24. See Crahan, *supra* note 23, at 60-61 (discussing domestic political polarization as contributor to military intervention); Long, *supra* note 22, at A1 ("Chile was a symbol of ideological struggle that divided the globe."); José Zalaquett, *From Dictatorship to Democracy*, New Republic, Dec. 16, 1985, at 17 (background on Cold War ideologies in the Southern Cone).

25. In 1958, rightist Jorge Alessandri defeated leftist Salvador Allende by only 33,500 out of 1,235,552 votes cast. In 1964, centrist Eduardo Frei aligned with the right to defeat Allende, 56.1% to 38.9%. In 1970, Allende narrowly defeated Alessandri, 36.2% to 34.9%, and thus assumed office with barely a third of the population's support. See Americas Watch, *supra* note 23, at 2 n.3.

At the same time, the Chilean military became increasingly enamored with the activist, anti-marxist national security doctrine that urged intervention against domestic subversive elements.

Essentially, the national security doctrine regards domestic political struggles as an expression of a basic East-West conflict and sees Marxist penetration and insurgency as an all-pervading presence of a new type of enemy fighting a new type of war. . . . Since the war on Marxism is an insidious one, unorthodox methods are called for, including torture and extermination of irredeemable political activists.

Zalaquett, *supra* note 15, at 647; see also Report, *supra* note 2, at 54-57.

The polarization became acute after 1970, when socialist Salvador Allende was elected²⁶ and launched the "great experiment"—an attempt to reform the capitalist system by introducing socialist components.²⁷ In response, rightist elements in Chile, with assistance from the United States, undertook a program of economic destabilization—restricting credit and causing shortages in materials, goods, and food.²⁸ As the conflict intensified, militant offshoots developed on both sides. On the left, groups such as the Revolutionary Left Movement ("MIR"),²⁹ the Socialist Party, the United Popular Action Movement ("MAPU")³⁰ and the Christian Left advocated the use of violence both to defend the government and to implement the new social order.³¹ On the right, groups such as Tacna and Fatherland & Freedom³² openly called for military intervention.³³ Indeed, by 1973 Chile was objectively experiencing a climate favorable to civil war.³⁴

In this climate, on September 11, 1973, a military junta led by General Pinochet staged a coup. Within days, if not hours, the entire nation was under military control.³⁵ The Junta then assumed the executive,

26. The United States had supported the campaign of rightist Alessandri, and the "victory of the Popular Unity and President Allende in 1970 was regarded as a triumph of one of the contending superpowers, the USSR, and as a defeat for, and threat to, the other, the United States." Report, *supra* note 2, at 51; Brian Loveman, *Chile: The Legacy of Hispanic Capitalism* 296-97 (2d ed. 1988).

27. See Loveman, *supra* note 26, at 297-98; Crahan, *supra* note 23, at 61-63. Allende had "promised to 'open the door to socialism' in Chile." Long, *supra* note 22, at A12. The program included the "Chileanization" of key industries, particularly copper mines, and the creation of a "social area" of public ownership within the larger economy. See Report, *supra* note 2, at 52.

Nationalizations actually began in the late 1960s, when Chile compensated mine owners after taking majority holdings in major mines. In 1971, a constitutional amendment provided for full nationalization of many copper mines with compensation to be negotiated later. The mines were largely owned by United States companies, and nationalization was a significant concern of United States policy-makers, foreign corporations, and wealthy Chileans who also resented government violation of property rights. See Loveman, *supra* note 26, at 297-300.

28. See Loveman, *supra* note 26, at 296, 308; Report, *supra* note 2, at 51; Long, *supra* note 22, at A12 (recalling "nightmare of economic and political chaos"). The program added to inflation and unemployment, and helped to discredit government reform measures and to generate massive public unrest. Ultimately, the program was intended to force the Allende regime to abandon its socialist agenda or, alternatively, to create such disorder that the populace and the international community would support military intervention. See Loveman, *supra* note 26, at 296-97.

29. *Movimiento de Izquierda Revolucionaria*.

30. *Movimiento de Acción Popular Unificada*.

31. See Report, *supra* note 2, at 50. Certain parties on the left, however, rejected violence as a tactic, including the Communist Party, the Worker and Peasant United Popular Action Movement (*MAPU Obrero Campesino*), the majority of the Radical Party and President Allende himself. See *id.*

32. *Patria y Libertad*.

33. See Report, *supra* note 2, at 50.

34. *Id.* at 53.

35. This Note neither examines nor draws conclusions about the merits of the military intervention. It is worth noting, however, that persons on different sides of the political debate welcomed the military intervention in the belief that it would stabilize

legislative, and constituent powers of the State, but left the judicial powers formally intact, largely because a majority of the Supreme Court justices were sympathetic to the military cause.³⁶

The powers of the State were quickly consolidated in General Pinochet, who held the offices of Commander in Chief of the Army (thus presiding over the governing Junta), Supreme Commander of the Nation, and later, President of the Republic.³⁷ Under his authority, a secret group of military officers specializing in "counterinsurgency"³⁸ undertook a comprehensive program to "eliminat[e] what it regarded as the ultraleft."³⁹ Their tactics included summary executions,⁴⁰ torture,⁴¹

the economy. Most believed that political control would be returned to civil authorities in short order. See, e.g., Tim Rosenberg, *Fall of the Patriarch: Pinochet Gives Way, Gracelessly*, New Republic, Dec. 18, 1989, at 20 (noting that even Aylwin, then president of the Christian Democrats, supported the coup). For a full history of the events leading up to the coup and the early years of the Junta, see Loveman, *supra* note 26, at 296-361.

This Note is concerned only with those violations of human rights which occurred after the period of "pacification" (lasting no more than a week after the September 11, 1973 coup), when the military Junta had governing control of the nation and command of all uniformed forces. See Report, *supra* note 2, at 129 ("Very soon after September 11, 1973 the armed forces and police . . . [brought] the country under their control and [eliminated] any pockets of armed resistance on the part of supporters of the deposed regime. Such resistance actions can truly be said to have been minimal; . . . they were uncoordinated and had not the slightest chance of success, even locally."); see *id.* at 130 ("Within forty-eight hours . . . all armed activity in Santiago and its region had come to a halt . . .").

36. See Report, *supra* note 2, at 57. In general terms, the Report states that "[d]uring the period in question the judicial branch did not respond vigorously enough to human rights violations." *Id.* at 117. For a full treatment of the failures of the judiciary under the military government see *id.* at 117-26; see also Vaughn, *supra* note 6, at 583-88 (discussing how the judiciary, particularly the Supreme Court, "failed to protect adequately persons seeking redress . . . [and] appeared to condone the abuses of the military"); William D. Zabel et al., *Human Rights and the Administration of Justice in Chile: Report of a Delegation of the Association of the Bar of the City of New York and of the International Bar Association*, 42 Rec. Ass'n B. City N.Y. 431, 436 (1987) ("[T]he judiciary as a whole has shielded the government from accountability for the pervasive rights violations inflicted by agents of the state."); *id.* at 438 ("Although it lays claim to judicial independence and neutrality, the Supreme Court more typically has acted as a political ally of the military government.").

37. See Inter-American Comm'n on Hum. Rts., *Report on the Situation of Human Rights in Chile*, OAS/ser. L./V./II.66, doc. 17, at 10 (1985). The adoption of the 1980 constitution formalizes this extraordinary concentration of power in one person. See *id.* at 19-20; Americas Watch, *supra* note 23, at 42-43 & n.52; see generally *Constitución Política de La República de Chile*, ch. IV, arts. 24-32 (1980) (President of the Republic).

38. These officers learned their philosophy of counter-insurgency and related tactics from the United States government. See Report, *supra* note 2, at 48, 60-61.

39. *Id.* at 62.

40. See *id.* at 36-37, 63.

41. See *id.* at 38-39, 44, 63. This Note uses the definition of torture employed by the Chilean National Commission on Truth and Reconciliation, taken from Article 1 of the Convention Against Torture, and Cruel, Inhuman or Degrading Treatment or Punishment, which states:

[T]orture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an

disappearances,⁴² prolonged incommunicado detention, and forced exile, both internal and external.⁴³ On June 14, 1974, this group became by a partially secret decree the National Intelligence Directorate (the "DINA").⁴⁴

The DINA was formally dissolved in early 1977.⁴⁵ On April 18, 1978, the Junta issued Decree Law No. 2191, a blanket amnesty law covering crimes from the date of the coup through March 10, 1978. The

act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.

Id. at 38-39; *cf. Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978), in 2 Eur. H.R. Rep. 25, 79-80 (1978) (Court report) (Distinctions between torture, inhuman treatment, and degrading treatment are derived "principally from a difference in the intensity of the suffering inflicted."); *The Greek Case*, 12 Y.B. Eur. Conv. on H.R. 186 (1969) (Commission report) (defining torture as "an aggravated form of inhuman treatment," generally for a purpose).

42. See Report, *supra* note 2, at 35-36, 44, 495-98. In this Note, the expressions "disappeared" and *detenidos desaparecidos* (disappeared prisoners) refers to the following:

[T]he situation of those who were arrested by government agents or by persons in their service and about whom the last information is that they were apprehended or that they were seen later in a secret prison. Officials deny having arrested them, claim to have freed them after a certain period of time, offer other unsatisfactory explanations, or simply say nothing.

.....

[A]ll the cases . . . under this term involve an arrest along with, or followed by, measures to conceal it and official denials. Torture was generally used during such detention, and there is a moral certainty that it ended in the victim's death and the disposal of the remains so as to prevent their being discovered.

Id. at 35-36; see generally Iain Guest, *Behind the Disappearances: Argentina's Dirty War Against Human Rights and the United Nations* (1990) (discussing Argentine military regimes' use of disappearances, with references to other Latin American nations).

43. *Relegación* or internal exile involves forced relocation to a specified urban area, generally in a remote part of the country. Under Transitory Article 24 of the constitution, the Executive could administratively order *relegación* for up to three months. See Americas Watch, *supra* note 23, at 93-94.

44. *Dirección de Inteligencia Nacional*. The military government had the power to issue secret decree orders, or include secret articles in otherwise public decrees. The DINA, for example, was created by Decree Law No. 595, of which Articles 9, 10 and 11 were not generally published. See Report, *supra* note 2, at 82. Those articles allowed the Junta to involve the intelligence services of the armed forces in the DINA's operations, and they empowered the DINA to conduct its own raids and arrests. See *id.* For a full discussion of the DINA, its functions, resources and operations during the period covered by the amnesty, 1974 through 1977, see *id.* at 471-505.

45. See *id.* at 88. Decree Law No. 1876, published in *Diario Oficial* (Aug. 13, 1977) (repealing Decree Law No. 521, which had created the DINA). On the same day, the DINA was replaced by the National Center for Information (*Central Nacional de Informaciones* ("CNI")) which was created by Decree Law No. 1878, and which operated through March 11, 1990. See *id.* For a full discussion of the CNI, its functions, resources and operations in the period of military rule not covered by the amnesty decree, 1978 through 1989, see *id.* at 636-45.

amnesty decree did not apply to most common crimes⁴⁶ nor to those individuals involved in the car-bomb assassination in Washington, D.C., of former Chilean foreign minister Orlando Letelier.⁴⁷ In 1980, the Junta consolidated constitutional documents issued from 1976 through 1979 into a new constitution that was ratified in a plebiscite held while the nation was still under a State of Siege and Emergency.⁴⁸ The new constitution contained provisions protecting the amnesty decree, as well as twenty-nine transitory articles creating the process for eventual return to civilian rule.⁴⁹

Under Transitory Articles 27 and 28, Chile began restoring democracy with a 1988 plebiscite that voted General Pinochet out of the presidency.⁵⁰ Elections followed in 1989.⁵¹ On March 11, 1990, Patricio

46. Among those common crimes not excepted, and therefore protected by the amnesty law, are murder, kidnapping and assault. See *infra* note 71 (text of Article 3 exceptions). This unusual construction—forgiving major crimes while still punishing minor offenses—highlights the Junta's purpose in promulgating the decree: protection of state agents who had committed heinous violations of human rights. See Inter-Am. C.H.R. 128 (1978), OEA/ser. L./V./II.47, doc. 13 rev. 1 (1979).

47. See Inter-Am. C.H.R. 128 (1978), OEA/ser. L./V./II.47, doc. 13 rev. 1 (1979); Americas Watch, *supra* note 21, at 43. Orlando Letelier, former Chilean foreign minister under the Allende government, was murdered on September 21, 1976 in Washington D.C. when a radio-controlled bomb exploded under the front seat of his car. Ronni Moffit, an aide to Letelier, was also killed. Michael Moffit, her husband, was injured in the attack. See *de Letelier v. Republic of Chile*, 502 F. Supp. 259, 265 (D.C. Cir. 1980). Ronni and Michael Moffit were United States nationals. See *id.* at 260. The United States Congress pressured Chile to except those responsible from the amnesty law, conditioning foreign aid on Chile's efforts to bring to justice those indicted in the United States for their involvement in the murder, thus implicating the principle of *aut dedere, aut judicare*—extradite or prosecute. See *infra* note 98 and accompanying text.

In January of 1992, the Chilean government agreed to pay compensation to Michael Moffit and the families of Ronni Moffit and Orlando Letelier, after a five-member panel of international arbitrators awarded them \$2,611,892 in damages. See Barbara Crossette, *\$2.6 Million Awarded Families in Letelier Case*, N.Y. Times, Jan. 13, 1992, at A11. While not dispositive evidence of Chile's recognition of affirmative obligations, it raises the issue of compensation as a mitigating factor. See *infra* notes 277-81 and accompanying text.

On November 12, 1993, Chilean Supreme Court Judge Adolfo Banados convicted and sentenced retired general Manuel Contreras to seven years in prison and active-duty brigadier general Pedro Espinoza to six years for the murders. See *supra* note 6.

48. See Report, *supra* note 2, at 83-84, 90. For a general discussion of the plebiscite, see Americas Watch, *supra* note 23, at 19-29, 125-69; Jorge Correa S., *Dealing With Past Human Rights Violations: The Chilean Case After Dictatorship*, 67 Notre Dame L. Rev. 1455, 1458-60 (1992).

49. See Constitución Política de La República de Chile (1980). Most transitory Articles were effective until March 11, 1990 when President Aylwin took office. See Americas Watch, *supra* note 23, app. A at 216-22; Inter-American Comm'n on Hum. Rts., *supra* note 37, at 14-17.

50. General Pinochet currently retains his position as Commander-in-Chief of the armed forces. Under the 1925 constitution, Commanders-in-Chief served a four-year term and could not be reappointed. Under Transitory Article 8 of the 1980 constitution, however, General Pinochet could retain the position for eight years after his presidential term ended. See Americas Watch, *supra* note 23, app. A at 216-17. This means that General Pinochet could command the armed forces until March 1997, three years after President Aylwin's term expires. See *id.* While Pinochet has repeatedly stated that he

Aylwin took office as the first President of Chile's transition period. Thus, only recently has it been possible to challenge seriously the amnesty decree.⁵²

2. The Crimes

By October 1973, agents of the military and DINA began detaining thousands of Chilean citizens. Members of the Allende government and leftist political parties were clear targets.⁵³ Of those known killed, fifty percent were members of either the Socialist Party, the MIR, or the Communist Party.⁵⁴ Once arrested, detainees were subjected to prolonged incommunicado detention, criminal charges, acts of violence, disappearance, and summary execution.⁵⁵ Mistreatment and torture in various forms were an "almost universal feature" of detention and interrogation.⁵⁶ At least thirty-seven persons were tortured to death.⁵⁷ There

will not resign prior to 1997, President-elect Frei has pledged to seek agreements in the Senate and Chamber of Deputies granting the president power to remove the commanders-in-chief, either by amending the constitution or by legislation offering "certain 'guarantees' for the general and his family, possibly protecting him from prosecution." *Frei Meets with Pinochet, Military High Command*, Agence France Presse, Dec. 13, 1993, available in LEXIS, Nexis Library, Currnt File. Constitutional amendment is unlikely because the Frei administration does not command the necessary majority in the Senate. *See id.*; *infra* note 254 and accompanying text. Of course, guarantees of protection from prosecution raise the same concerns as the general impunity created by the 1978 amnesty decree.

51. On December 14, 1989, Patricio Aylwin was elected president with the support of the *Concertación*, "a coalition composed of eighteen center and moderate left parties." *See Report, supra* note 2, at 767 note d.

52. The Aylwin administration undertook many measures with regard to the violations of human rights committed under the military regime. *See infra* notes 270-95 and accompanying text. None of these proposals seriously challenged the impunity created by the amnesty decree and the most recent, the so called "Aylwin Law," threatened to perpetuate it. *See infra* notes 297-301 and accompanying text. While this proposal was stalled in the legislature, it helped to revive the amnesty decree as an issue facing the new administration of Eduardo Frei, which assumes power in March of 1994. *See infra* note 302.

53. *See Report, supra* note 2, at 136.

54. *See id.* at 902. Moreover, reflecting the impact of Cold War ideologies, roughly 75% of the victims were under 35 years old. *See id.* at 902. Over 94% of the dead were male. *See id.* at 901.

55. *See id.* at 498-505.

56. *Id.* at 133. The official Report states:

Torture methods were extremely varied. An almost universal technique was violent and continual beating until blood flowed and bones were broken. Another form was to make detention conditions so harsh that they themselves constituted torture, for example, keeping prisoners lying face down on the ground or keeping them standing rigid for many hours; keeping them many hours or days naked under constant light, or the opposite, unable to see because of blindfolds or hoods, or tied up; keeping them in cubicles so narrow—sometimes made just for this purpose—that they were unable to move; holding them in solitary confinement along with one or more of these conditions; denying them food or water, or clothing, or sanitary facilities. It was also common to hang prisoners up by their arms with their feet off the ground for very long periods of time. They might be held under water, foul smelling substances, or

are no figures available on the number of survivors, but the physical and emotional damage was significant.⁵⁸ Similarly, there is no way to know how many persons were detained.⁵⁹

In total, state agents killed at least 1213 persons in the first four months, including 648 executed without trial and 403 disappeared.⁶⁰ They killed at least 599 more between January 1974 and August 1977, including sixty-six executed without trial and 464 disappeared.⁶¹ All of these acts are covered by the amnesty decree passed in April 1978.

For the purposes of examining Chile's treaty obligations, this Note considers only those acts involving serious violations of the physical integrity of the victim—disappearance, torture, and death.⁶² Such acts are universally recognized as contrary to international law.⁶³ Such acts may also constitute crimes against humanity as currently defined. Original definitions of crimes against humanity implied a nexus to war requirement such that the violations in Chile might not qualify.⁶⁴ Subsequent

excrement to the brink of suffocation. There are many accusations of sexual degradation and rape. A common practice was a simulated firing squad. In some places, torturers used highly developed tortures, such as the *pau de ararú* [a torture practice in which a person is hung, head hanging down, by a pole or stick placed beneath the legs and arms], [attacks by] dogs, and mistreating prisoners in front of their relatives or vice versa.

Id. at 134; see *supra* note 41 (defining torture).

57. See Report, *supra* note 2, at 44, 141, 499, 644-45 (16 persons from September through December 1973; 14 persons from January 1974 to August 1977; 7 persons from August 1977 to March 1990).

58. See *id.* at 777-800 (discussing damage to individuals, their survivors, and society at large from torture, disappearances and other abuses).

59. For an indication of how difficult it is to account for all of the offenses that occurred, in 1986 (years after the worst of the repression had ended), the Chilean Human Rights Commission recorded 21,000 cases of *allanamientos*—large-scale police raids on generally poor neighborhoods involving cordoning, warrantless searches, destruction of property, detention, and often physical abuse. See Americas Watch, *The Vicaría de la Solidaridad in Chile* 27 n. (1987); Americas Watch, *supra* note 23, at 76-78; Zabel et al., *supra* note 36, at 435. This figure does not include any other types of detention or rights abuses, and includes only those violations actually reported.

60. See Report, *supra* note 2, at 154-453 (giving account of each case).

61. See *id.* at 507-620 (giving account of each case). Before the return to civilian rule, at least 160 more persons died, of whom 86 were executed and 33 disappeared by agents of the State. See *id.* at 645-79 (giving account of each case). The official total reached 3877, of which 2279 have been confirmed dead and an additional 1598 involve unresolved cases where death has been presumed. See *id.* at 899.

62. Rape involves serious violation of both the physical and emotional integrity of the victim. In this Note, rape may be considered under the category of torture when the specific circumstances so compel. See Report, *supra* note 2, at 134, 500; *supra* note 41 (defining torture and distinguishing inhuman or degrading treatment). For a general discussion of rape as a violation of international law, see Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 Am. J. Int'l L. 424 (1993).

63. See Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 Yale L.J. 2537, 2580-82 (1991); see also *Filartiga v. Pena-Irala*, 630 F.2d 876, 884-85 (2d Cir. 1980) (torture is contrary to international law); *Forti v. Suarez-Mason*, 694 F. Supp. 707, 709-10 (N.D. Cal. 1988) (recognizing the international tort of "causing disappearances").

64. See Orentlicher, *supra* note 63, at 2587 (citing the definition of crimes against

definitions, however, omitted such nexus language.⁶⁵ As crimes against humanity, a state could derogate⁶⁶ neither from its international obligations to protect individuals from such acts, nor, it has been argued, from its obligations to hold the guilty responsible.⁶⁷

3. The Amnesty: Decree Law No. 2191

On April 18, 1978, the Junta issued Decree Law No. 2191.⁶⁸ Article 1 of the decree created the greatest part of the current impunity by granting amnesty to those not yet convicted or on trial:

The Government Junta has agreed to dictate the following:

Article 1: Grant amnesty to all persons who committed, as perpetrators, accomplices, or as covering up, criminal offenses during the period of the State of Siege, between 11 September 1973 and 10 March

humanity in the Charter of the International Military Tribunal at Nuremberg, art. 6(c), 59 Stat. 1546, 1547 (1945), 82 U.N.T.S. 284 (crimes against humanity defined as "acts committed against any civilian population, before or during the war").

65. See *id.* at n.222, 2589 n.231 (citing definition of crimes against humanity in Control Council Law No. 10., which gave jurisdiction to war trials within occupied Germany after the Nuremberg trials, as omitting nexus to war language (crimes against humanity are "[a]trocities and offences, . . . or other inhumane acts committed against any civilian population"). Presumably, the violations occurring within Chile fit this definition. See José Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 Hastings L.J. 1425, 1436 (1992) (stating that some of the pre-1978 offenses qualify as crimes against humanity, at least by analogy).

66. Derogation is a means for a state to temporarily relieve itself from some or all of its obligations under a particular law or treaty. See *infra* note 209 and accompanying text.

67. See Joinet, *supra* note 20, at 17, ¶ 62 (Suggestions by the General Assembly that "torture, forced disappearances and even summary executions might . . . be considered international crimes or crimes against humanity are of considerable interest for the purposes of . . . better defining the cases to which amnesties should not apply."); Zalaquett, *supra* note 65, at 1436 (acts constituting crimes against humanity should be excluded from measures of forgiveness). The argument that states cannot derogate from their obligations to investigate and to punish acts constituting crimes against humanity stems from the assertion that such acts violate peremptory norms of customary international law. See *infra* note 92.

68. Decree Law No. 2191 (Apr. 18, 1978), published in *Diario Oficial*, No. 30,042 (Apr. 19, 1978). In the text of the Decree, the Junta noted three considerations leading to the issuance of the amnesty decree:

Considering:

1. The general tranquility, peace and order that the country currently enjoys, being the ends of having overcome internal disorder, making it possible to put an end to the State of Siege and the curfew throughout the nation;
2. The ethical imperative to make all efforts conducive to strengthening the bonds uniting the Chilean nation, leaving behind hatreds that are meaningless today, and encouraging all those initiatives that might solidify the reunification of Chileans;
3. The necessity of a strong national unity to support the development of the new institutions that must govern Chile's destiny.

The Junta has agreed to dictate the following decree law:

Id. (translation by author); Report, *supra* note 2, at 89.

1978, unless they are currently on trial or have been convicted.⁶⁹

Article 2 extended the amnesty to the military courts:

Article 2: Amnesty persons who at the time of application of this decree law have been convicted by military tribunals after September 11, 1973.⁷⁰

Article 3 listed common crime exceptions to the grant of amnesty, but did not list murder, kidnapping, or assault.⁷¹ Article 4 excepted from the grant anyone involved in the assassination of the former Chilean Defense Minister Orlando Letelier in Washington, D.C.⁷² Finally, Article 5 required persons outside of Chile (exiles or refugees) to apply for application of the amnesty decree before they return.⁷³

While superficially benefiting all sides, in practice the decree excluded most opponents of the government, in part because many had already been killed, disappeared, or were in exile.⁷⁴ Primarily military personnel and their agents benefitted from the amnesty decree.⁷⁵ Thus, the decree

69. Decree Law No. 2191, art. 1 (Apr. 18, 1978); see Report, *supra* note 2, at 89.

70. Decree Law No. 2191, art. 2 (Apr. 18, 1978); see Report, *supra* note 2, at 89.

71. Article 3 states:

Not considered within the amnesty of Article 1 are those persons against whom there have been brought criminal actions for the crimes of parricide, infanticide, robbery by arms, violence or intimidation of persons, manufacture or traffic of narcotics, theft, corruption of minors, arson and other disorder, violation and rape, incest, drunk driving, embezzlement of property or public securities, fraud and extortion, swindles and other deceptions, abuses or dishonesty, crimes contemplated in Decree Law No. 280 of 1974 and subsequent modifications, bribery, fraud and smuggling, and crimes foreseen in the Tax Code.

Decree Law No. 2191, art. 3 (Apr. 18, 1978); see Report, *supra* note 2, at 89.

72. Article 4 states: "Nor will they be covered by the application of Article 1, those persons who are responsible, whether as perpetrators, accomplices, or as covering up, for the actions being investigated in legal proceeding No. 192-78 of the military tribunal of Santiago, Office of the Public Prosecutor, Ad-Hoc." Decree Law No. 2191, art. 4 (Apr. 18, 1978); see Report, *supra* note 2, at 89.

73. Article 5 states: "Persons covered by the present decree law who are currently outside of the Republic, in order to reenter the country, must file as laid out in Article 3 of Decree Law No. 81 of 1973." Decree Law No. 2191, art. 5 (Apr. 18, 1978); Inter-Am. C.H.R., *supra* note 46, at 128.

74. See Inter-Am. C.H.R., *supra* note 46, at 128-29. Several hundred persons imprisoned without formal trials, however, were released under Article 2. See Americas Watch, *supra* note 21, at 43.

75. See Joinet, *supra* note 20, at 9, ¶ 31. Decree Law No. 2191 "benefitted principally 'those responsible for assassinations, torture and other offences committed during the administration of the Junta, rather than to grant a genuine amnesty to political opponents.'" *Id.* (quoting *Special Report of the Ad Hoc Working Group on the Situation of Human Rights in Chile*, A/33/331, ¶ 273, and annex XXVIII).

Because the amnesty decree did not apply to individuals who were already convicted or on trial—meaning against whom investigations were proceeding—hundreds of political prisoners (*presos políticos*) were imprisoned for years without convictions or under convictions obtained despite clear violations of due process. See Americas Watch, *supra* note 21, at 54-61.

At the beginning of the Aylwin administration there were approximately 500 political prisoners. Many have been released under pardons and compromise legislation secured

is more accurately referred to as a self-amnesty.

4. The Challenge

There is currently a petition before the Inter-American Commission on Human Rights⁷⁶ (the "Commission") challenging Decree Law No. 2191. The case began in August 1978, only months after the promulgation of the amnesty decree, when the *Vicaría de Solidaridad*⁷⁷ brought a complaint on behalf of the families of seventy disappeared Chileans.⁷⁸ The Second Military Tribunal of Santiago⁷⁹ held the petition in process for eleven years.⁸⁰ On November 30, 1989, the Tribunal closed thirty-five of the cases, declaring that the amnesty law excused the crimes between 1973 and 1978.⁸¹ On August 24, 1990, the Supreme Court unanimously affirmed that decision and the constitutionality of the amnesty law, stating that the law terminated the judicial investigative process.⁸²

by Aylwin, most notably those contained in the "Cumplido laws" of 1991. See *id.* at 52-61; Inter-Am. C.H.R. 135-36 (1989-90), OEA/ser. L./V./II.77, doc. 7 rev. 1 (1990); Zalaquett, *supra* note 65, at 1437. Eleven of these persons remain in prison as of January 1994. See Malcolm Coad, *The Healing Path Through Purgatory Fire*, Guardian (Manchester), Feb. 6, 1993 at 11; William R. Long, *Chile's Political Prisoners Put Aylwin on Spot*, L.A. Times, Jan. 8, 1994, at A2. There is some concern that the political right will seek to extend the application of the amnesty law from 1978 to 1998 in exchange for a compromise on the resolution of these cases. See *infra* notes 296-301 and accompanying text (discussing the possibility of new, expanded amnesty laws).

76. See *infra* notes 131-32 and accompanying text (discussing the role of the Inter-American Commission on Human Rights (the "Commission") and the Inter-American Court of Human Rights (the "IAC")).

77. The *Vicaría de Solidaridad* (Vicariate of Solidarity) was organized under the Archdiocese of Santiago to provide assistance to poor communities and to monitor violations of individual rights. The *Vicaría* recorded thousands of alleged violations of human rights during the dictatorship, including hundreds of *recurso de amparo* (habeas corpus) motions that helped to document disappearances, to prevent some ill-treatment and deaths, and to secure release of some detainees. See Americas Watch, *supra* note 59 (full treatment of the work of the *Vicaría* in the protection of rights and the preservation of legal processes in Chile); Report, *supra* note 2, at 81 n.1 (giving basic information on *recursos de amparo*).

78. See Americas Watch, *supra* note 59, at 21-22; Americas Watch, *supra* note 21, at 45-48. Representing the families of the victims in these actions were representatives of the *Agrupación de Familias de los Detenidos Desaparecidos* (Association of the Families of the Disappeared Prisoners).

79. *Segundo Juzgado Militar de Santiago*.

80. See Americas Watch, *supra* note 21 at 45-48.

81. See *id.* at 45.

82. See *id.*; Report, *supra* note 2, at 125 ("courts have ordered procedures be halted based on the amnesty"); *Suprema Declaró Constitucional Decreto Ley de Amnistía del 78* [Supreme Court Declared Constitutional the 1978 Amnesty Law], *El Mercurio*, Aug. 25, 1990 [hereinafter *Supreme Court Declared*].

Since Chile is a civil law nation, criminal procedures generally begin with an "initial summary investigation:"

This stage begins when a complaint or suit is initiated. The judge is then independently responsible for investigating the evidence and matters relating to the case. If, during the course of the investigation, the judge establishes or has reason to believe that a crime was committed, he/she may preliminarily indict the alleged perpetrator, accomplice, or accessory. . . . The judge's investigation

Thereafter, Americas Watch and the Center for Justice and International Law ("CEJIL") submitted a petition on behalf of the families with the Commission, where disposition is pending.⁸³

II. CHILE'S OBLIGATIONS UNDER TREATY LAW

The charter instruments of the United Nations (the "U.N.") and the Organization of American States (the "OAS") pronounce the broad principles of human rights protections elaborated in the respective declaration of each group, the Universal Declaration of Human Rights (the "Universal Declaration")⁸⁴ and the American Declaration on the Rights and Duties of Man (the "American Declaration").⁸⁵ Collectively, the charters and declarations provide the clearest statement of states' obligations not to violate the human rights of the peoples under their jurisdiction. International criminal treaties go further, imposing liability upon individuals and requiring states to act against violators. Human rights treaties present the most comprehensive protections. They contain both prescriptive and proscriptive provisions, and recognize the rights of the victims as individuals. By maintaining the blanket amnesty decree, Chile violates the rights provided by these human rights treaties, particularly the American Convention on Human Rights (the "American Convention").⁸⁶

. . . may be lengthy and quite detailed. In most instances it is conducted in camera. Upon completing the investigation the judge may decide to temporarily or definitively dismiss the case or proceed to the second "plenary" stage of the procedure during which the judge formally makes an accusation. Evidence is then presented by the plaintiff and/or defendant and their legal representatives. Finally a verdict is delivered and a sentence is ordered by the same judge.

Report, *supra* note 2, at 866 note g. Moreover, by barring these summary investigations, the Supreme Court's ruling effectively removed the means of identification of perpetrators, and thereby wiped out the right of victims to fair hearings of their civil claims. *Cf.* Report, *supra* note 2, at 866 (Secret nature of initial summary investigations "violates the human right to a hearing.").

On September 28, 1990, the Chilean Supreme Court unanimously rejected petitioners' request for clarification. See *Corte Suprema Ratificó la Plena Constitucionalidad De la Ley de Amnistía* [Supreme Court Ratified the Constitutionality of the Amnesty Law], *El Mercurio*, Sept. 29, 1990 [hereinafter *Supreme Court Ratified*]. Petitioners assert that the legal consequences of this decision, issued after the American Convention on Human Rights became effective in Chile, make their claims admissible before the Commission. See *infra* note 157.

83. See *infra* notes 161-208 and accompanying text.

84. See Universal Declaration of Human Rights, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948) [hereinafter *Universal Declaration*].

85. See American Declaration on the Rights and Duties of Man, May 2, 1948, OAS Official Rec., OEA/ser. L./V./II.23, doc. 21 rev. 6 (1979) [hereinafter *American Declaration*]. The Declaration was adopted as Resolution XXX by the Ninth International Conference of American States, held in Bogotá, Columbia from March 30 to May 2, 1948.

86. See The American Convention on Human Rights, Nov. 22, 1969, 36 O.A.S.T.S. 1, OAS Off. Rec., OEA/ser. L./V./II.23, doc. 21 rev. 6 (1979), reprinted in 9 I.L.M. 673 (1970) [hereinafter *American Convention*] (entered into force July 18, 1978).

A. *Charters and Declarations*

Chile is a founding member of both the U.N. and the OAS.⁸⁷ As such, Chile is bound by the respective charters of those organizations, as well as the Universal Declaration and the American Declaration. These documents contain general proscriptions on state action in the area of human rights. Articles 55 and 56 of the Charter of the U.N.,⁸⁸ for example, obligate states to "obey and respect" the human rights specified in the Universal Declaration.⁸⁹ Chile has previously acknowledged these obligations.⁹⁰ Similarly, membership in the OAS imposes obligations with respect to human rights, regardless of whether the state has ratified the American Convention.⁹¹

The question, however, is not whether these instruments impose obligations, but what those obligations entail. They unquestionably entail proscriptions against specific human rights violations. They obligate states to refrain from torture, for example. These types of negative obligations are recognized both in customary and treaty law,⁹² and the acts

87. See Inter-American Comm'n on Hum. Rts., *supra* note 37, at 43.

88. See U.N. Charter, art. 55, *reprinted in* 1983 U.N.Y.B. 1325, 1329-30. Article 55 states, in pertinent part, "[T]he United Nations shall promote . . . (c) universal respect for, and observance of, human rights and fundamental freedoms . . ." *Id.* Article 56 states: "All Members pledge themselves to take joint and separate action . . . for the achievement of the purposes set forth in Article 55." *Id.* at 1330.

89. See John Detzner, *Tribunales Chilenos y Derecho Internacional de Derechos Humanos* [Chilean Courts and International Human Rights Law] 82-83 (citing Advisory Opinion on the Continued Presence of South Africa in Namibia (S.W. Africa), 1971 I.C.J. Rep. 16 obliging member states to obey and to respect human rights ("a obedecer y respetar a los derechos humanos")).

90. See *id.* at 82-83 nn.76-77 and accompanying text.

91. See *id.* at 85-86. In the Baby Boy Case, the Inter-American Commission explained that the international obligations of members of the OAS are governed by the Charter of OAS (Bogotá, 1948), as amended by the Protocol of Buenos Aires on February 27, 1967. See Case No. 2141, *The Baby Boy Case*, Inter-Am. C.H.R. 25, ¶ 15 (Res. No. 23/81, 1980-81), OEA/ser. L./V./II.54, doc. 9 rev. 1 (1981) (United States) (discussing obligations of the United States as a member of OAS not party to the American Convention). The Commission further explained that, as a consequence of the OAS Charter, "the provisions of other instruments and resolutions of the OAS on human rights, acquired binding force." *Id.* ¶ 16. Those instruments and resolutions include the American Declaration of the Rights and Duties of Man (Bogotá, 1948), the Statute and Regulations of the Inter-American Commission on Human Rights (as amended in Rio de Janeiro, 1965), and the Statute and Regulations of the Inter-American Court of Human Rights of 1979-80. See *id.* Where conflicts arise, therefore, OAS member states party to the American Convention are bound by understandings of human rights under that instrument. All other OAS member states are bound by the OAS Charter to understandings developed under the 1948 American Declaration on the Rights and Duties of Man. See *id.* ¶ 17; Inter-American Comm'n on Hum. Rts., *supra* note 37, ¶ 91 & n.10.

92. Customary law evolves over time from a "general and consistent practice of states followed by them from a sense of legal obligation." 1 Restatement (Third) of Foreign Relations Law of the United States § 102(2) (1987). Although analysts disagree about the scope of customary law, it is universally recognized that customary law contains peremptory norms which may not be ignored with impunity. See, e.g., Vienna Convention on the Law of Treaties, *adopted* May 23, 1969, art. 53, U.N. Doc. A./C.39/27 (1969) [hereinafter Vienna Convention] ("A treaty is void if, at the time of its conclu-

committed under the Pinochet regime violated these proscriptions.

These instruments are limited, however, in their ability to prescribe affirmative state action—investigation, prosecution of those responsible, and compensation of victims—because their prescriptive provisions are broadly worded and because they do not recognize individual actions, but only actions between states. Whether Chile, under its treaty obligations, must undertake affirmative measures depends, therefore, upon examination of the more specific language of obligation contained in the criminal and human rights treaties to which Chile is a party.

B. *Criminal Treaties*

International criminal treaties, unlike the charters and declarations described previously, impose liability on individuals. They also oblige states to take specific actions in their dealings with individuals, thereby constraining the otherwise unfettered discretion of the state. Thus “an amnesty law or an exercise of prosecutorial discretion that is valid under domestic law may nonetheless breach a state’s international obligations.”⁹³

Chile is a party to the Convention on the Prevention and Punishment of the Crime of Genocide (the “Genocide Convention”),⁹⁴ the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treat-

sion, it conflicts with a peremptory norm of general international law.”). The Vienna Convention defines a peremptory norm as one “accepted and recognized by the international community of States as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” *Id.*; see also 2 Restatement, *supra*, § 702, comment n & n.11. In terms of human rights protections, it is widely accepted that customary law contains peremptory norms that prohibit the types of acts committed in Chile—disappearances, torture and summary executions. See, e.g., 2 Restatement, *supra*, § 702 (Government practices of genocide, slavery, murder, causing disappearances, torture or other cruel, inhuman or degrading treatment or punishment are violations of customary international law.).

This Note does not examine the question of whether customary law includes affirmative obligations to investigate and to prosecute for past acts, although evidence suggests that states generally, and Chile in particular, recognize such obligations. See, e.g., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant (Chile)*, 22 Human Rights Committee (529th mtg.) at 4-5, U.N. Doc. CCPR/C/SR.529 (1984) (remarks of Chilean representative to the U.N. Human Rights Commission assuring the investigation of disappearances and prosecution of those responsible); U.N.G.A. Res. 33/173, ¶ 1(b) (1978) (calling on Chile to “investigate and clarify the fate of persons who have disappeared for political reasons, to inform the relatives of those persons of the outcome of the investigation and to prosecute and punish those responsible for such disappearances”). This Note argues that, even if customary law does not include affirmative obligations to investigate and to prosecute, Chile is bound by its treaty obligations to provide effective judicial remedies for the violation of those rights protected by the instruments to which Chile is a party.

93. Orentlicher, *supra* note 63, at 2553.

94. See Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, 78 U.N.T.S. 278 [hereinafter Genocide Convention] (entered into force Jan. 12, 1951). The Genocide Convention entered into force in the United States on February 23, 1989. See 28 I.L.M. 763 (1989).

ment or Punishment (the "Convention Against Torture"),⁹⁵ the Inter-American Convention to Prevent and Punish Torture (the "Torture Convention"),⁹⁶ and the Geneva Conventions of 1949 (the "Geneva Conventions").⁹⁷ These instruments provide examples of a state's bind-

95. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) [hereinafter Convention Against Torture] (entered into force June 26, 1987). Chile ratified the Convention by Decree No. 808 on September 30, 1988, and it was published in *Diario Oficial* on November 26, 1988. See Report of the Committee Against Torture, U.N. GAOR, 45th Sess., Supp. No. 44, at 101, U.N. Doc. A/45/44 (1990). Chile made several reservations, including denying the competence of the Committee Against Torture, reserving the defense of due obedience for military officers, and stipulating that when provisions conflict, it would apply the Inter-American Convention on Torture, which lacks the express prohibition on cruel, inhuman or degrading treatment contained in the Convention Against Torture. The Committee Against Torture has stated that the latter two reservations are incompatible with the provisions of the Convention. See *id.* at 63-64, ¶¶ 347, 349; *cf.* The Effect of Reservations on the Entry into Force of the American Convention (Arts. 74 and 75), Inter-Am. Ct. H.R. (Advisory Opinion OC-2/82), ¶¶ 35, 37, September 24, 1982, OEA/ser. L./V./III/9, doc. 13 (1983) (Article 75 of the American Convention enables states "to make whatever reservations they deem appropriate, provided the reservations are not incompatible with the object and purpose of the treaty. As such, they . . . do not require acceptance by any other State Party . . . [and] the instruments of ratification or adherence containing them enter force . . . as of the moment of their deposit.") (emphasis added).

96. See Inter-American Convention to Prevent and Punish Torture, Dec. 6, 1985, O.A.S.T.S. 67, reprinted in 25 I.L.M. 519 (1986) [hereinafter Torture Convention] (entered into force Feb. 28, 1987). Chile ratified the Convention with reservations on September 30, 1988 with Decree No. 809, which was published in *Diario Oficial* on November 26, 1988. On May 18, 1990, Chile deposited an instrument withdrawing its reservations to the Torture Convention (Article 4 and the last paragraph of Article 13). See 30 I.L.M. 1148 (1991).

For a discussion of the impact of reservations in the Inter-American System, generally, and under the American Convention, in particular, see Reservations, Inter-Am. Ct. H.R. (Advisory Opinion OC-2/82), ¶ 29 (modern human rights treaty is not a "reciprocal exchange of rights for the mutual benefit of the contracting States"); see *id.* ¶ 33 (A human rights treaty is "a multilateral legal instrument or framework enabling States to make binding unilateral commitments not to violate the human rights of individuals within their jurisdiction.") (emphasis added); see *id.* ¶¶ 35 (states may make appropriate reservations not incompatible with the object and purpose of the treaty); see also Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Inter-Am. Ct.H.R. (Advisory Opinion OC-3/83), ¶ 61, September 6, 1983, OEA/ser. L./V./III/10, doc. 10 (1984) ("[A] reservation which was designed to enable a State to suspend any of the non-derogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention, and consequently, not permitted by it.").

97. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (ratified by Chile at 78 U.N.T.S. 365, effective Apr. 12, 1951); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (ratified by Chile in 78 U.N.T.S. 366, effective Apr. 12, 1951); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (ratified by Chile at 78 U.N.T.S. 367, effective Apr. 12, 1951); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (ratified by Chile at 78 U.N.T.S. 368, effective Apr. 12, 1951) [hereinafter Geneva Con-

ing obligations to investigate and to prosecute persons responsible for grave violations of human rights.⁹⁸

Under Article I of the Genocide Convention, for example, Chile is bound "to prevent and to punish" those responsible for the crime of genocide.⁹⁹ Subsequent articles elaborate on these obligations, making clear that a party state must prosecute persons before judicial tribunals, must provide "necessary legislation" to effect such prosecutions, and must provide "effective penalties" for those convicted.¹⁰⁰ While the Genocide Convention applies only by analogy, if at all, to the DINA's targeting of persons based on their political ideology,¹⁰¹ it provides an important illustration of the principle of accountability in international law, generally, and criminal treaties in particular.

Similarly, the Convention Against Torture obligates a state to take action—to "extradite [or] submit [cases] to its competent authorities for the purpose of prosecution."¹⁰² Although the Convention Against Torture likewise does not bind Chile with respect to the acts committed under the Junta—because those acts occurred prior to Chile's entering into the treaty¹⁰³—it provides further evidence that states, Chile in-

ventions]. The Geneva Conventions were published in *Diario Oficial* in 1951, and are therefore valid in Chile. See Decree No. 752 (Dec. 5, 1950), published in *Diario Oficial* (Apr. 17-20, 1951). On April 24, 1991, Chile ratified with declarations Protocol I to the Geneva Conventions concerning the protection of victims of armed conflicts. See Protocol I to the Geneva Conventions, June 8, 1977, S. Treaty Doc. No. 2, 100th Cong., 30 I.L.M. 1145 (1991) (the Protocol entered into force Dec. 7, 1978).

98. See, e.g., Genocide Convention, *supra* note 94, art. VI (persons may be prosecuted "in the territory . . . the act was committed, or by . . . international penal tribunal") and art. VII (genocide not political crime for purpose of barring extradition; parties "pledge" to grant extradition); see Orentlicher, *supra* note 63, at 2552-67; Naomi Roht-Arriaza, Comment, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 Cal. L. Rev. 449, 462-66 (1990).

99. Genocide Convention, *supra* note 94, art. I.

100. *Id.* at art. V.

101. The Genocide Convention defines genocide as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group." See Genocide Convention, *supra* note 94, art. II; see also Orentlicher, *supra* note 63, at 2565 ("acts directed against 'political groups' were excluded").

102. Convention Against Torture, *supra* note 95, art. 7(1).

103. In a similar case from Argentina, the panel charged with interpreting the Convention Against Torture, the U.N. Committee Against Torture, found that the obligations of the Convention did not apply because Argentina's amnesty provisions were promulgated before the Convention entered into force. See Report of the Committee Against Torture, at 108, U.N. GAOR, 45th Sess., Supp. No. 44, U.N. Doc. A/45/44 (1990); Orentlicher, *supra* note 63, at 2567 ("[T]he duty arises only when the alleged torture occurred after the Convention entered into force with respect to the State Party."). Since Chile's amnesty law was also promulgated before the Convention Against Torture took effect, the Convention's obligation to prosecute is not binding. Nevertheless, Chile may be bound by the peremptory norms against torture in customary international law. See George C. Rogers, *Argentina's Obligation to Prosecute Military Officials for Torture*, 20 Colum. Hum. Rts. L. Rev. 259, 295-307 (1989) (arguing that because torture has long been recognized as a crime against humanity, states are obligated to prosecute under customary law and their ratification of the Convention

cluded, recognize the importance of prosecuting perpetrators of grave violations of human rights.

The Geneva Conventions also explicitly discuss obligations to discover and to prosecute violators. In 1979, Chilean jurist Hernán Montealegre first argued that the provisions of the Geneva Conventions apply to acts in Chile committed under the Junta.¹⁰⁴ Montealegre asserted that the internal state of war declared by the Junta,¹⁰⁵ and affirmed by the courts in order to justify the expanding jurisdiction of the military tribunals,¹⁰⁶ should also justify invocation of Article 3, which is common to all four of the Geneva Conventions.¹⁰⁷ Common Article 3 invokes the protections of the Geneva Conventions for individuals in time of "armed conflict not of an international character."¹⁰⁸ Since Article 3 also identifies as nonderogable certain human rights protections,¹⁰⁹

Against Torture only reinforces that obligation); *supra* note 92 (discussing customary law).

104. See Hernán Montealegre K., *Los Convenios de Ginebra de 1949 Y el Caso Chileno* [The Geneva Conventions of 1949 and the Case of Chile] (Aug. 6, 1979) [hereinafter Montealegre, *Los Convenios*] (unpublished manuscript, on file with the *Fordham Law Review*); Hernán Montealegre, *La Ley de Amnistía de 1978 ante el Derecho Internacional* [The 1978 Amnesty Law Under International Law] (no date) [hereinafter Montealegre, *Amnistía*] (unpublished manuscript, on file with the *Fordham Law Review*).

105. Shortly after the coup, the Junta declared the country to be in a state of siege (Decree Law No. 3) and a state of emergency (Decree Law No. 4). See Inter-American Comm'n on Hum. Rts., *supra* note 37, at 12. Pursuant to Decree Law No. 5 of September 12, 1973, the state of siege was to be officially treated as a state or time of internal war. See *id.*; Verónica Reyna et al., *Proyecto de Ley Sobre Nulidad de los Efectos del D.L. 2.191 de 1978 Sobre Amnistía en Delitos de Violaciones de Derechos Humanos* [Legal Project Concerning the Null Effects of D.L. 2191 of 1978 Concerning Amnesty for Crimes in Violation of Human Rights], *Reflexión*, June 1990, at 30.

106. See Americas Watch, *supra* note 21, at 46 n.75 (noting August 1974 Supreme Court decision recognizing the internal state of war).

107. See Montealegre, *Los Convenios*, *supra* note 104, at 2-5. The military's assertion that it was engaged in an internal conflict with several thousand Cuban-aligned, leftist guerrillas has been widely discredited. Montealegre's invocation of the Geneva Conventions, therefore, should not be confused with an attempt to give credence to that account or to any other assertion that a genuine state of war existed within Chile. Montealegre's argument attempted only to compel a measure of consistency from the State. The Supreme Court, he argued, should either reverse its earlier decision acknowledging an internal state of war—which would imply subsequent removal of extraordinary powers, restoration of civil liberties, and more active supervision of military courts—or ratify the legal fiction of the internal state of war—bringing with it the protections of Common Article 3 of the Geneva Conventions.

108. See Geneva Conventions, *supra* note 97, art. 3, reprinted in Heather A. Wilson, *International Law and the Use of Force by National Liberation Movements* 43 (1988); Montealegre, *Los Convenios*, *supra* note 104, at 3.

109. Common Article 3(1) states that the following acts "shall remain prohibited at any time and in any place whatsoever . . . :"

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular, humiliating or degrading treatment;
- (d) the passing of sentences and carrying out of executions without previous judgement pronounced by a regularly constituted court affording all the

Montealegre argued that the amnesty law is "judicially ineffective" for acts contrary to those protections.¹¹⁰

Attorney Alfonso Insunza offered this argument before the Chilean Supreme Court.¹¹¹ He argued that under revised Article 5 of Chile's 1980 constitution,¹¹² which incorporates Chile's treaty obligations into domestic law,¹¹³ the Geneva Conventions are domestically at the constitutional level.¹¹⁴ Therefore, the Geneva Conventions should prevail over the amnesty law.¹¹⁵

The difficulty with this argument rests in defining "armed conflict not of an international character."¹¹⁶ While the text provides little guidance, the history and practice associated with Common Article 3 do not support an assertion that a state of internal war existed in Chile under the Junta.¹¹⁷ The Chilean Supreme Court, accordingly, declined

judicial guarantees which are recognized as indispensable by civilized peoples.

Geneva Conventions, *supra* note 97; Wilson, *supra* note 108, at 43.

110. See Montealegre, *Los Convenios*, *supra* note 104, at 11.

111. See Blanca Arthur, *Ley de Amnistía: Hora de la Verdad [Amnesty Law: The Hour of Truth]*, *El Mercurio*, July 8, 1990, at D6 (discussing the *recurso de inaplicabilidad*, *infra* note 162, filed by Insunza in Case No. 553-78, Manuel Contreras y otros); *Impunidad Ante la Encrucijada [Impunity at the Crossroads]*, Pluma y Pincel, July 19-Aug. 1, 1990 (same).

112. Before amendment, Article 5 read, "The exercise of sovereignty recognizes as its limit the respect of those essential rights that emanate from the human nature." ("*El ejercicio de la soberanía reconoce como limitación el respeto a los derechos esenciales que emanan de la naturaleza humana.*"). The amendment added, "The Organs of the State must respect and promote such rights, guaranteed by this constitution, as well as by the international treaties ratified by Chile that have entered into force." ("*Es deber de los órganos del Estado respetar y promover tales derechos, garantizados por esta Constitución, así como por los tratados internacionales ratificados por Chile y que se encuentren vigentes.*") See Constitución Política de La República de Chile, art. 5; Comité de Defensa de los Derechos del Pueblo, *La Constitución de 1980 y sus Reformas* 15 (1980).

113. Others have expressed similar views regarding the role of revised Article 5 in relation to the amnesty law. Minister of Justice Francisco Cumplido, for example, stated that the change to Article 5 and recent treaty ratifications worked as "tacit derogation" of the amnesty decree. See *Ministro de Justicia: Es Innecesaria una Ley Interpretiva de la Amnistía [Minister of Justice: An Interpretive Law is Unnecessary]*, *La Segunda*, June 19, 1990; see also Arthur, *supra* note 111, at D6 (citing Minister Cumplido as among those lawyers alleging "tacit derogation"); *El Porque ministro Cerda no dictó el 'Cumplase' en fallo sobre 10 detenidos-desaparecidos [The Reason Judge Cerda did not Rule 'Closed' the Case of 10 Disappeared Prisoners]*, *La Segunda*, Aug. 2, 1990 (discussing opinion by Judge Carlos Cerda citing Article 5 as derogation of the amnesty law).

114. See *Impunity at the Crossroads*, *supra* note 111, at D6; see also Reyna, *supra* note 105, at 30-31 (discussing proposal for an interpretive law based on the same argument); Long, *supra* note 6 (noting similar challenge based on international treaties presented by Insunza in the case of Carmen Soria).

115. See Arthur, *supra* note 111, at D6; *Impunity at the Crossroads*, *supra* note 111.

116. See Wilson, *supra* note 108, at 45 ("[T]he greatest barrier to [Article 3's] application has been that 'armed conflict not of an international character' has not been defined.").

117. See Wilson, *supra* note 108, at 45-48. As noted above, those persons attempting to invoke the protections of Common Article 3 would not necessarily dispute the finding that a state of internal war did not exist in Chile. See *supra* note 107.

to recognize the applicability of the Geneva Conventions,¹¹⁸ despite the apparent contradiction of their holding with their earlier ruling enabling the expanded jurisdiction of the military courts.¹¹⁹ The Court also declined to examine the issue of the tacit derogation of the amnesty law under Article 5.¹²⁰ The Supreme Court did not, however, deny Chile's obligations to investigate and prosecute under the Geneva Conventions, once applied.

Chile, therefore, is not explicitly bound, under the criminal treaties to which it is a party, to investigate and to prosecute those responsible for the violations of the past. As interpreted by the Chilean courts, those violations were either not within the treaty's parameters or occurred prior to Chile's entering into the particular instrument.¹²¹ Nonetheless, Chile's ratification of these treaties manifests its recognition of the importance of identifying and punishing those responsible for grave violations of human rights. Chile's ratification of multilateral human rights treaties, moreover, not only provides further evidence of this recognition, but also establishes binding obligations applicable to the crimes of the past.

C. Human Rights Treaties

Chile is a party to the International Covenant on Civil and Political Rights (the "International Covenant")¹²² and the American Conven-

118. See Americas Watch, *supra* note 21, at 46 n.75. The rejection of this challenge constituted an exhaustion of domestic remedies such that the case was then presented to the Inter-American Commission of Human Rights. See Americas Watch, *supra* note 21, at 45-46.

119. See *supra* note 105.

120. The court noted that none of the international agreements in force in Chile limited the State's power to grant amnesty, and that the International Covenant on Civil and Political Rights explicitly recognized that power. See *Supreme Court Declared*, *supra* note 82.

121. Again, this Note does not address the question of whether Chile is bound by affirmative obligations to investigate and to prosecute stemming from customary international law. See *supra* note 92.

122. See International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 reprinted in 6 I.L.M. 368 (1967) [hereinafter International Covenant] (entered into force Mar. 23, 1976; for the U.S. on Sept. 8, 1992). Chile ratified the Covenant on February 10, 1972 and promulgated it as Decree Law No. 778 of November 30, 1976. See Inter-American Comm'n on Hum. Rts., *supra* note 37, at 43. However, because the military government refused to publish the law in *Diario Oficial*, the Supreme Court interpreted the Covenant as ineffective in Chile as to events under the military government. See *id.* This interpretation has been challenged by jurists in Chile and abroad, who argue that neither publication nor even promulgation is necessary for the law to be effective once it has been properly ratified. See *id.* at 309 n.9 (citing as example Professor Hugo Rosende's assertion that the "law is perfect and definitive from the time it has been approved by the competent agencies"). Ultimately, the military government published the instrument in *Diario Oficial* on April 29, 1989. See Americas Watch, *supra* note 21, at 45.

On May 27, 1992, Chile acceded to the Optional Protocol to the International Covenant on Civil and Political Rights, concerning recognition of the Human Rights Com-

tion.¹²³ These multinational human rights treaties expand the protections of charters, declarations, and criminal treaties. Where charters and declarations contain broad proscriptive provisions, human rights treaties also contain prescriptive language. This language, however, is unlike the prescriptive language in the criminal treaties discussed above. The language in human rights treaties does not explicitly require the state to investigate and to punish past violations,¹²⁴ although authoritative interpretations of treaty provisions calling on states to respect and to ensure human rights strongly indicate that states are obligated to advance cases involving the most serious violations.¹²⁵ Moreover, the prescriptive language in human rights treaties recognizes the right of victims to effective remedies for violations of protected, substantive rights.¹²⁶ Ultimately, Chile must dismantle the amnesty decree because it obstructs any meaningful exercise of these independent, remedial rights.

1. Respect-and-Ensure Provisions

The respect-and-ensure provisions that are common to human rights treaties obligate states to investigate and to punish past violations of fundamental rights.¹²⁷

Comments by the United Nations Human Rights Committee (the

mittee. The Protocol entered into force in Chile on August 27, 1992. Chile's accession, however, contains the following declaration:

In recognizing the competence of the Human Rights Committee . . . it is the understanding of the Government of Chile that this competence applies in respect of acts occurring after the entry into force for that State of the Optional Protocol or, in any event, to acts which began after 11 March 1990.

U.N. Depository Notification, Aug. 27, 1992, Ref. No. C.N. 178.1992.Treaties-5/10/5 (accession by Chile). The accession, therefore, does not recognize the competence of the Committee for events prior to President Aylwin's term, including all acts of the military government.

123. See American Convention, *supra* note 86. Chile ratified the American Convention on August 21, 1990. See 30 I.L.M. 575 (1991). It was published in *Diario Oficial* on January 5, 1991. See Americas Watch, *supra* note 21, at 45.

124. See Orentlicher, *supra* note 63, at 2568; Goldman, *supra* note 3, at 5.

125. See Orentlicher, *supra* note 63, at 2568.

126. See *id.* at nn.129-32 and accompanying text; Anne M. Latham, Note, *Duty to Punish: International Law and the Human Rights Policy of Argentina*, 7 B.U. Int'l L.J. 355, 373 (1989); Roht-Arriaza, *supra* note 98, at 475.

127. See Orentlicher, *supra* note 63, at 2568. Article 2(1) of the International Covenant states, in pertinent part:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind . . .

International Covenant, *supra* note 121, art. 2(1) (emphasis added). Similarly, Article 1(1) of the American Convention states, in pertinent part:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination . . .

American Convention, *supra* note 86, art. 1(1) (emphasis added).

"U.N. Committee"), the body charged with interpreting the International Covenant, support this finding. Relating to the proper interpretation of Article 2(1) and its requirement that each party "undertakes to respect and to ensure . . . the rights recognized in the present Covenant,"¹²⁸ the U.N. Committee stated:

[I]t follows from article 7 [which prohibits torture], read together with article 2 of the Covenant, that States must ensure an effective protection through some machinery of control. Complaints about ill-treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible¹²⁹

The U.N. Committee's decisions in a number of cases have applied this interpretation of obligations arising under the respect-and-ensure language of Article 2 of the International Covenant.¹³⁰

The Inter-American Court of Human Rights¹³¹ (the "IAC") is part of the system of human rights protections established under the OAS and

128. International Covenant, *supra* note 121, art. 2(1).

129. *Report of the Human Rights Committee*, U.N. GAOR, 37th Sess., Supp. No. 40, at 7(16), ¶ 1, U.N. Doc. A/37/40 (1982). The quote continues, "and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation." *Id.*

130. *See, e.g.*, Communication No. 124/1982 (*Muteba v. Zaire*), U.N. GAOR, 39th Sess., Supp. No. 40, at 188, U.N. Doc. A/39/40 (1984) (finding Zaire obligated to investigate and to punish those responsible for torture); Communication No. R.7/30 (*Bleier v. Uruguay*), U.N. GAOR, 37th Sess., Supp. No. 40, at 136, U.N. Doc. A/37/40 (1982) (finding Uruguay obligated to investigate disappearance and probable death, to punish and to provide compensation); Communication No. 107/1981 (*Quinteros v. Uruguay*), U.N. GAOR, 38th Sess., Supp. No. 40, at 224, U.N. Doc. A/38/40 (1983) (finding Uruguay obligated to investigate disappearance, to secure release from detention, to punish and to provide compensation).

131. The Inter-American Court (the "IAC") was established in 1979 to apply and interpret the American Convention. *See* Statute of the Inter-American Court of Human Rights, Oct. 31, 1979, OAS GA Res., 9th Sess. (1979), *reprinted in* 19 I.L.M. 634 (1980) (entered into force Jan. 1, 1980). The IAC may also interpret other human rights treaties and may examine the compatibility of the domestic law of member states with obligations under those instruments. *See* "Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights), Inter-Am. Ct. H.R. (Advisory Opinion OC-1/82), ¶ 52, September 24, 1982, OEA/ser. L./V./III/9, doc. 13, app. I (1983). The IAC has advisory jurisdiction under which it may accept requests for interpretive opinions from OAS member states and permanent OAS bodies, like the Commission. *See id.* ¶¶ 14-31. It also has contentious jurisdiction limited to interpretation and application of the Convention. *See* Statute of the Inter-American Court, *supra*, at 635. Rulings under the IAC's contentious jurisdiction are binding on member states. *See* Dinah Shelton, *Improving Human Rights Protections: Recommendations for Enhancing the Effectiveness of the Inter-American Commission and Inter-American Court of Human Rights*, 3 Am. U.J. Int'l L. & Pol'y 323, 328 (1988) (discussing powers and functions of the Court). The IAC may order restoration of rights or payment of compensation. For enforcement, the IAC may submit its decisions to the General Assembly or the Permanent Council of the OAS for review and possible sanction. *See generally* Paul Sieghart, *The International Law of Human Rights* 401-14 (1983) (powers, composition, mandate, and procedures of the Commission and Court); Juan E. Méndez & José M. Vivanco, *Disappearances and the Inter-American Court: Reflections on a Litigation Experience*, 13 Hamline L. Rev. 507, 519-21, 527-30 (1990) (overview of the Inter-American system).

consisting principally of the Inter-American Commission on Human Rights¹³² (the "Commission") and the IAC. Like the U.N. Committee's interpretation of the International Covenant, the IAC has found affirmative obligations in the American Convention.¹³³ In two of its first three contentious cases,¹³⁴ all involving the disappearance of persons in Honduras, the IAC found obligations to investigate, to punish, and to compensate¹³⁵ arising out of the general respect-and-ensure language of Article 1(1) when coupled with the violation of other specific provisions of the American Convention, in these cases Article 4 (life), Article 5 (humane treatment) and Article 7 (liberty).¹³⁶

The most significant of these cases was the Velásquez Rodríguez Case.¹³⁷ The complaint, filed with the IAC in April 1986, concerned the arrest, torture, and murder of a student activist by the Honduran mili-

132. Founded in 1959, the Commission is an advisory board empowered to monitor and protect human rights under both the American Convention and the American Declaration on the Rights and Duties of Man. The Commission is a quasi-judicial body having both legal and political powers. The Commission has three main goals: addressing individual complaints of human rights violations, reporting on the human rights situation in OAS states, and promoting steps to increase respect for human rights. Methods commonly used by the Commission include investigation of complaints, mediation between parties, publication of resolutions, including resolutions condemning a party's actions with regard to actual violations or noncompliance with the Commission, submission of reports to the General Assembly of the OAS and referral of cases to the Inter-American Court (the "IAC"), provided the parties have recognized the IAC's contentious jurisdiction. See Sieghart, *supra* note 131, at 403-04; Méndez & Vivanco, *supra* note 131, at 519-27; Shelton, *supra* note 131, at 323-29.

133. The Commission has found that the obligations of states in the Inter-American system are rooted in the OAS Charter, through which the principles of the other instruments of the OAS have acquired binding force. See Case No. 2141, The Baby Boy Case, Inter-Am. C.H.R. 25, ¶ 15-16 (Res. No. 23/81), OEA/ser. L./V./II.54, doc. 9 rev. 1 (1981) (United States). OAS member states party to the American Convention are bound by understandings of human rights under that instrument, as interpreted by the Commission and the IAC. See *id.* ¶ 17.

134. See Velásquez Rodríguez Case, Inter-Am. Ct. H.R. (Ser. C) No. 4, Judgment of July 29, 1988, OEA/ser. L./V./III.19, doc. 13 (1988); Godínez Cruz Case, Inter-Am. Ct. H.R. (Ser. C) No. 5, Judgment of January 20, 1989.

135. In the third case, the IAC disagreed with the Commission and found insufficient evidence that the disappearances had occurred in Honduras, and therefore did not address the issue of affirmative obligations. See Fairén Garbí and Solís Corrales Case, Inter-Am. Ct. H.R. (Ser. C) No. 6, Judgment of March 15, 1989.

136. See Dinah Shelton, *Private Violence, Public Wrongs, and the Responsibility of States*, 13 Fordham Int'l L.J. 1, 9-11 (1989-90); Goldman, *supra* note 3, at 5. The IAC noted:

The second obligation of the States Parties is to "ensure" the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. . . . As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention.

Velásquez Rodríguez Case, Inter-Am. Ct. H.R. (Ser. C) No. 4, ¶ 166.

137. Velásquez Rodríguez Case, Inter-Am. Ct. H.R. (Ser. C) No. 4, Judgment of July 29, 1988, OEA/ser. L./V./III.19, doc. 13 (1988).

tary.¹³⁸ In its decision of July 29, 1988, the IAC found Honduras in violation of its obligations under the American Convention. Without proving the state's involvement in the specific violations asserted, the IAC recognized a general pattern of rights abuses, and found that the Honduran government's failure to guarantee the rights enumerated in the American Convention against that pattern was itself a violation of the state's "affirmative" duties.¹³⁹ These duties, the IAC explained, are rooted in the obligation to "ensure" human rights found in Article 1 of the American Convention.¹⁴⁰

Had Chile been a party to the International Covenant or the American Convention at the time of the Junta, the amnesty decree would openly conflict with the determinations of the U.N. Committee and the IAC regarding the affirmative obligations to investigate and to punish past human rights violations.¹⁴¹ Because Chile may not have effectively ratified, promulgated, and published these treaties until 1990,¹⁴² however, the violations of the past may not be directly implicated by the interpretive holdings of the respect-and-ensure provisions of Article 1(1) of the American Convention and Article 2(1) of the International Covenant alone.¹⁴³ Those violations are addressed, however, by Chile's in-

138. See Velásquez Rodríguez Case, Inter-Am. Ct. H.R. (Ser. C) No. 4, ¶ 2; Shelton, *supra* note 136, at 5-6; Roht-Arriaza, *supra* note 98, at 469.

139. See Velásquez Rodríguez Case, Inter-Am. Ct. H.R. (Ser. C) No. 4, ¶¶ 160-67; Shelton, *supra* note 136, at 9-10.

140. See Shelton, *supra* note 136, at 11-14. The IAC noted:

The State has a legal duty to take reasonable steps to prevent human rights violations, and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.

Velásquez Rodríguez Case, Inter-Am. Ct. H.R. (Ser. C) No. 4, ¶ 174.

141. Chile was a member of both the U.N. and the OAS at the time of the Junta, and therefore was bound to prevent violations of the rights protected by their respective charters and declarations. See, e.g., Case No. 2141, The Baby Boy Case, Inter-Am. C.H.R. 25, ¶¶ 15-16 (Res. No. 23/81, 1980-81), OEA/ser. L./V./II.54, doc. 9 rev. 1 (1991) (United States) (International obligation of a member of the OAS is governed by the Charter.). The language of those instruments, therefore, may provide an additional basis for asserting Chile's affirmative obligation to investigate and to punish those responsible for the acts committed under the Junta. This assertion, however, lacks the benefits of the more developed language of protection in the International Covenant and the American Convention, as well as the explicit interpretation of that language in cases such as Velásquez.

142. See *supra* notes 86 & 121.

143. In its decision in a recent case challenging Uruguay's amnesty provisions, the Commission distinguished the present-time claim of denial of justice under Articles 8 and 25 (in relation to Article 1(1)) from claims based on past violations of substantive rights "which triggered the right to a fair trial and the right to judicial protection, but that occurred before the Convention entered into force for Uruguay on April 19, 1985, and therefore were not a subject of these complaints." Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374, and 10.375, Inter-Am. C.H.R. 154, ¶ 53, OEA/ser. L./V./II.83, doc. 14, corr. 1 (1993) (Uruguay).

In a related case challenging Argentina's amnesty provisions, the Commission distinguished the petitioner's right to economic compensation for "the original or substantive

dependent, present-time obligations under provisions in each treaty requiring effective judicial remedies for violations of protected rights, as well as by the "free and full exercise" provision of Article 1(1) of the American Convention.

2. Present-Time Obligations

Both the International Covenant and the American Convention recognize an individual's right to effective remedies under international law.¹⁴⁴ Article 2(3) of the International Covenant provides to "any person" a right to "an effective remedy," determined "by competent judicial, administrative or legislative authorities," and enforced "by competent authorities."¹⁴⁵ The history of the Article indicates that it was directly intended to provide accountability for violations committed by state agents.¹⁴⁶ As with the respect-and-ensure language in Article 2(1) and (2), the U.N. Committee has interpreted Article 2(3) to oblige states to use their resources to investigate, to punish violators, and to compensate victims of past abuses.¹⁴⁷ The U.N. Committee's decisions in several Uruguayan cases reflect this interpretation.¹⁴⁸

violations, most of which took place . . . before Argentina's ratification of the Convention" and the denial of justice that "was the legal consequence of the [amnesty] laws . . . at issue." Cases 10.147, 10.181, 10.240, 10.262, 10.309, and 10.311, Inter-Am. C.H.R. 41, ¶ 51, OEA/ser. L./V./II.83, doc. 14, corr. 1 (1993) (Argentina). The Commission noted: "While both questions . . . are intimately related, they must not be confused. Each question materially differs and moreover concerns events that occurred at different times; the rights or provisions of the Convention affected also differ." *Id.*

144. See International Covenant, *supra* note 121, art. 2(3)(a)-(c); American Convention, *supra* note 86, art. 25(2). Note that these obligations are independent of other, prospective provisions in each treaty requiring member states "to give [domestic] effect to" the rights protected in each instrument. See International Covenant, *supra* note 121, art. 2(2); American Convention, *supra* note 86, art. 2.

145. International Covenant, *supra* note 121, art. 2(3)(a)-(c). Article 2(3) of the International Covenant states:

Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

Id.

146. See Roht-Arriaza, *supra* note 98, at 476.

147. See *supra* notes 128-30 and accompanying text.

148. In the Bleier case, for example, the Committee concluded that Uruguay "has the duty to investigate in good faith . . . [to] bring to justice any persons found to be responsible for [Bleier's] death . . . and to pay compensation." Communication No. R.7/30 (Bleier v. Uruguay), U.N. GAOR, 37th Sess., Supp. No. 40, at 135-36, U.N. Doc. A/37/40 (1982). In the Quinteros case, the Committee similarly concluded that Uruguay "has a duty to conduct a full investigation . . . to bring to justice any persons found to be responsible for [Quinteros'] disappearance and ill treatment . . . [and to] pay compensa-

Similarly, Article 25 of the American Convention states: "Everyone has a right to simple and prompt recourse . . . against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention."¹⁴⁹ Article 8.1, moreover, provides petitioners with a right to a fair hearing for the "determination of [their] rights . . . of a civil, labor, fiscal or any other nature."¹⁵⁰ The Commission has explained that these rights to a hearing and judicial protection are interpreted, like the conduct-specific articles discussed above, in conjunction with the obligations in the language of Article 1(1).¹⁵¹

In addition to the respect-and-ensure language common to both the American Convention and the International Covenant, the IAC has

tion for the wrongs suffered." Communication No. 107/1981 (Quinteros v. Uruguay), U.N. GAOR, 38th Sess., Supp. No. 40, at 224, U.N. Doc. A/38/40 (1983).

149. American Convention, *supra* note 86, art. 25(2). Encompassing the right to judicial protection, Article 25 states:

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
2. The State Parties undertake:
 - a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
 - b. to develop the possibilities of judicial remedy; and
 - c. to ensure that the competent authorities shall enforce such remedies when granted.

Id. at art. 25.

150. American Convention, *supra* note 86, art. 8(1). Article 8(1) states:

Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal or any other nature.

Id. (emphasis added). Note that the Convention applies the term "hearing" to the rights of defendants and petitioners in both criminal and civil proceedings. In an attempt to distinguish these roles, this Note shall, wherever possible, employ the term "hearing" to refer to the general right protected by the Convention, and restrict the term "trial" to refer specifically to criminal prosecutions.

151. Regarding an amnesty law in Uruguay, the Commission described a denial of justice claim as stemming from Article 1: "[T]he Commission must make clear that the purpose of these petitions is to object to the denial of justice (Articles 8 and 25 in relation to Article 1 of the Convention) with enactment and application of the 1986 [amnesty] Law . . ." Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374, and 10.375, Inter-Am. C.H.R. 154, ¶ 53, OEA/ser. L./V./II.83, doc. 14, corr. 1 (1993) (Uruguay).

Regarding Argentina's amnesty provisions the Commission stated: "[T]he violation of the right to a fair trial (Article 8) and of the right to judicial protection (Article 25) in relation to the obligation of the States to guarantee the full and free exercise of the rights recognized in the Convention (Article 1.1) is denounced as incompatible with the Convention." Cases 10.147, 10.181, 10.240, 10.262, 10.309, and 10.311, Inter-Am. C.H.R. 41, ¶ 50, OEA/ser. L./V./II.83, doc. 14, corr. 1 (1993) (Argentina).

drawn on language in Article 1(1) of the American Convention that obligates state parties to ensure "the full and free exercise" of the protected rights and freedoms.¹⁵² The IAC stated in the Velásquez Case:

If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure *the free and full exercise* of those rights to the persons within its jurisdiction.¹⁵³

The IAC therefore reasoned that the state must affirmatively "organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights."¹⁵⁴

The Commission has noted, moreover, that with respect to this affirmative guarantee of free and full exercise, the rights to a hearing and judicial protection are distinct from the rights violated under substantive, conduct-specific articles protecting physical integrity. Substantive violations which occurred in the past might not be covered by subsequently assumed treaty obligations.¹⁵⁵ In contrast, the Commission has indicated that the rights to a hearing and judicial protection involve distinct,

152. American Convention, *supra* note 86, art. 1(1) (For the text of Article 1(1), see *supra* note 127.). This language may distinguish the breadth of a state party's obligation to ensure protected rights under Article 1(1) of the American Convention from the same obligation under Article 2 of the International Covenant, which lacks explicit reference to the affirmative "exercise" of protected rights. See International Covenant, *supra* note 127, art. 2. Moreover, the IAC's broad interpretation of the obligation to ensure protected rights in the Velásquez Case does not bind the Human Rights Committee in its interpretation of Article 2 of the International Covenant (Upon proper request, however, the IAC may issue its own advisory opinion on "any provision dealing with the protection of human rights set forth in any international treaty [including the International Covenant] applicable in the American States." "Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights), Inter-Am. Ct. H.R. (Advisory Opinion OC-1/82), ¶ 52, September 24, 1982, OEA/ser. L./V./III/9, doc. 13, app. I (1983)). These distinctions suggest that the recognition of affirmative, present-time obligations requiring dismantling of an amnesty law may be currently more difficult to achieve under the International Covenant than under the American Convention.

153. Velásquez Rodríguez Case, Inter-Am. Ct. H.R. (Ser. C) No. 4, ¶ 176 (emphasis added).

154. *Id.* ¶ 166. The Court further noted:

The obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation — it also requires the government to conduct itself so as to *effectively* ensure the free and full exercise of human rights.

Id. ¶ 167 (emphasis added). This statement suggests that states have an affirmative obligation to effect measures beyond the mere procedural obligations of Article 2, which requires states to adopt legislative or other measures that "give effect" to protected rights. See Goldman, *supra* note 3, at 4. Amnesty laws which prohibit the effective exercise of protected rights (such as the right to a hearing (Article 8) and judicial protection (Article 25)) would appear to interfere with this affirmative obligation.

155. See *supra* note 143 (distinguishing denial of justice claims from underlying substantive violations).

present-time obligations.¹⁵⁶ A state violates these obligations at such time as the legal consequences of an official state action bar effective exercise of one of these rights.¹⁵⁷

A state, therefore, commits a distinct violation of its treaty obligations by applying amnesty provisions that obstruct fair hearings or other remedies after the state has become a party to the American Convention (or by analogy the International Covenant), at least in so far as the amnesty decree precludes civil claims for remedy against state agents or the state itself.¹⁵⁸ Such a violation is presently actionable, even if the underlying substantive violations occurred before the treaty was in effect with respect to the offending state.¹⁵⁹ Chilean Decree Law No. 2191, therefore, would appear to violate Chile's treaty obligations under the American

156. See *supra* note 143.

157. In the recent Uruguay cases, the Commission noted that "[w]hat is denounced as being incompatible with the Convention are the legal consequences of the law with respect to the right to a fair trial." Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374, and 10.375, Inter-Am. C.H.R. 154, ¶ 40, OEA/ser. L./V./II.83, doc. 14, corr. 1 (1993) (Uruguay); see also Cases 10.147, 10.181, 10.240, 10.262, 10.309, and 10.311, Inter-Am. C.H.R. 41, ¶ 33, OEA/ser. L./V./II.83, doc. 14, corr. 1 (1993) (Argentina) (same). The Commission also noted that "[w]hen it enacted the [amnesty] law, Uruguay ceased to guarantee the rights stipulated in Article 25.1 and violated the Convention." Uruguay Cases, Inter-Am. C.H.R. 154, ¶ 49 (1993); see also Argentina Cases, Inter-Am. C.H.R. 41, ¶ 39 (1993) (same).

At first consideration of these statements, the Commission appears to have equated the date of legal consequences with the date of the amnesty provision's enactment. This interpretation might have the effect of barring the challenge to Chile's amnesty decree currently before the Commission. Chile's amnesty decree was enacted years before the Convention took effect in Chile, whereas the amnesty provisions in Uruguay and Argentina were enacted after the Convention took effect for those nations. See, e.g., Argentina Cases, Inter-Am. C.H.R. 41, ¶ 50 (1993) ("These violations occurred with enactment of the disputed legal measures in 1986, 1987 and 1989, after the Convention had entered into force for Argentina in 1984.").

A closer examination of the facts in each nation indicates, however, that the date of legal consequences may differ from the date of enactment, especially where the amnesty provisions were not definitively applied until a later date. The Commission appeared to support this interpretation in the case of Uruguay, when it stated: "By enacting *and applying* the Law the Uruguayan Government failed to abide by the obligation to guarantee observance of the rights . . . and thereby infringed those rights and violated the Convention." Uruguay Cases, Inter-Am. C.H.R. 154, ¶ 46 (1993) (emphasis added). Since the definitive application of the amnesty law in Chile was established by Supreme Court's decision of August 1990 affirming its constitutionality, the petitioner's challenge should proceed under the Convention, which by then was in effect.

158. See Goldman, *supra* note 3, at 5. Professor Goldman notes that "preclusion of such a civil remedy to the victim would make illusory the State's obligations to respect, ensure and remediate internally violations of guaranteed rights . . ." *Id.* Thus a state is obligated to investigate and to allow recourse to adequate compensation for current claims of denial of justice. See Uruguay Cases, Inter-Am. C.H.R. 154, ¶ 50 (obligation to investigate), ¶ 53 (compensation for denial of justice) (1993); Argentina Cases, Inter-Am. C.H.R. 41, ¶ 40 (obligation to investigate), ¶¶ 51-52 (compensation) (1993). A requirement of criminal prosecution under Article 1(1), however, while supported by *dicta* in the Velásquez case and subsequent Commission reports concerning Uruguay and Argentina, remains undetermined. See Goldman, *supra* note 3, at 5.

159. See, e.g., Argentina Cases, Inter-Am. C.H.R. 41, ¶¶ 50-52 (1993) (recommending compensation for current denial of justice claim distinct from substantive violations oc-

Convention, and by analogy the International Covenant, in so far as it has been applied to obstruct investigations and hearings. A challenge to Chile's amnesty decree based in part on this assertion is presently being heard by the Commission.

3. Challenging Grants of Amnesty in the Inter-American System¹⁶⁰

Recent decisions by the Commission and the IAC, building on earlier interpretations of a member state's obligations, urge the conclusion that Chile's amnesty decree is incompatible with the guarantees of the American Convention.

a. Case History

A complaint challenging Chile's amnesty decree is pending before the Commission.¹⁶¹ Prior to filing with the Commission, petitioners had filed a recourse of inapplicability with the Second Military Tribunal in Santiago, for transmission to the Chilean Supreme Court.¹⁶² The petition included arguments that international law, including the Geneva Conventions¹⁶³ and the Genocide Convention,¹⁶⁴ barred the grant of amnesty and that the 1988 revisions to Article 5 of the constitution¹⁶⁵ (incorporating Chile's international obligations into domestic law) tacitly derogated the decree law.¹⁶⁶

On August 24, 1990, the Supreme Court dismissed the recourse.¹⁶⁷ On September 28, 1990, the Court unanimously rejected petitioners' request for clarification, confirming the earlier dismissal.¹⁶⁸ Petitioners thereafter filed their complaint with the Commission on March 27,

curing prior to the Convention's taking effect in the state, compensation for the latter not being required).

160. The author respects the confidential nature of the Commission's proceedings pending publication of a report of settlement (Article 48) or other resolution (Article 51). See *infra* note 173. The discussion of the case, *infra*, including petitioner's argument and the government's response, is therefore without the benefit of official source material and is compiled from secondary sources, analogy to comparable actions, and interviews.

161. See Case No. 10.843 (Chile), Inter-Am. C.H.R. (filed Mar. 27, 1991).

162. Rol. No. 27,640. The recourse of inapplicability (*recurso de inaplicabilidad por inconstitucionalidad*) "permits a defendant (or his/her defense) to argue that a law or proceeding is unconstitutional and therefore 'inapplicable.'" Report, *supra* note 2, at 81 l; see Americas Watch, *supra* note 21, at 45.

163. See Geneva Conventions, *supra* note 97; *supra* notes 103-17 and accompanying text.

164. See Genocide Convention, *supra* note 94; *supra* notes 98-100 and accompanying text.

165. For the text of revised Article 5, see *supra* note 112.

166. See Americas Watch, *supra* note 21, at 45-46; Arthur, *supra* note 111, at D6; *Impunity at the Crossroads*, *supra* note 111; *Supreme Court Declared*, *supra* note 82.

167. See Americas Watch, *supra* note 21, at 45; *Supreme Court Declared*, *supra* note 82.

168. See Americas Watch, *supra* note 21, at 46 (noting rejection of petitioners' *recurso de aclaración* (request for clarification)); *Supreme Court Ratified*, *supra* note 82.

1991.¹⁶⁹ The government of Chile filed a response on August 19, 1991.¹⁷⁰ Petitioners filed a counter-response on October 5, 1993, addressing the government's claims of inadmissibility and requesting a continuation of the proceedings.¹⁷¹ This counter-response will most likely result in a hearing,¹⁷² after which a report from the Commission would be expected within a year.¹⁷³

169. See Case No. 10.843 (Chile), Inter-Am. C.H.R. (filed Mar. 27, 1991).

170. The Commission's procedures for the handling of complaints may be found at Articles 48-51 of the American Convention, and in the Commission's Regulations.

Article 48(1) of the American Convention sets out generally the Commission's procedures for processing a petition or communication:

- a. If it considers the petition . . . admissible, it shall request information from the government of the state indicated as being responsible for the alleged violations
- b. After the information has been received . . . the Commission shall ascertain whether the grounds for the petition . . . still exist. If they do not, the Commission shall order the record to be closed.
- c. The Commission may also declare the petition . . . inadmissible or out of order on the basis of information or evidence subsequently received.
- d. If the record has not been closed, the Commission shall, with the knowledge of the parties, examine the matter . . . to verify the facts . . . [and if] necessary . . . carry out an investigation
- e. The Commission may request . . . information, and, if so requested, shall hear oral statements or receive written statements
- f. The Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention.

American Convention, *supra* note 86, art. 48(1). Article 48(2) provides an accelerated procedure for "serious and urgent cases."

Articles 49-51 address the settlement of complaints and the transmission and publication of Commission reports, including findings and recommendations. See *infra* note 173.

171. The proceedings had been suspended after December 17, 1991, at which time the Commission had received from the governments of Argentina and Uruguay a request for an advisory opinion on the interpretation of several relevant articles of the American Convention. The decision was released on July 16, 1993. See *Certain Attributes of the Inter-American Commission on Human Rights* (Arts. 41, 42, 46, 47, 50 and 51 of the American Convention on Human Rights), Inter-Am. Ct. H.R. (Advisory Opinion OC-13/93), July 16, 1993.

172. See American Convention, *supra* note 86, art. 48(1)(e) (petitioners may request oral hearing).

173. The public release of the Commission's report, however, may take longer, depending upon the nature of the resolution. Articles 49-51 of the Convention govern the Commission's transmission and publication of findings and recommendations. Article 49 governs publicly released reports resulting from settlement between the parties. Article 49 states:

If a friendly settlement has been reached in accordance with paragraph 1.f of Article 48 [(*supra* note 170)], the Commission shall draw up a report, which shall be transmitted to the petitioner and to the States Parties to this Convention, and shall then be communicated to the . . . [OAS] for publication. This report shall contain a brief statement of the facts and of the solution reached.

American Convention, *supra* note 86, art. 49.

Articles 50-51 govern the transmission and publication of confidential reports on complaints where settlements are not reached. Article 50 states:

1. If a settlement is not reached, the Commission shall . . . draw up a report

b. *Argument*

Petitioners advanced claims based on the rights of the families of the victims to fair hearings and to judicial protection and remedy, under Articles 8 and 25 of the American Convention, respectively.¹⁷⁴ Petitioners also alleged that the Supreme Court's August 24, 1990 finding that the amnesty decree terminates the judicial process—thereby barring investigation and identification of those responsible—violates Chile's obligations to prevent, to investigate, and to punish under the respect-and-ensure language of Article 1.¹⁷⁵ Finally, petitioners argued that the amnesty decree is incompatible with Chile's obligations under Article 2 (state parties undertake to give effect to Convention provisions through domestic laws) and Article 43 (state parties undertake to provide information regarding domestic measures taken to ensure protected rights) of the American Convention.¹⁷⁶

Petitioners therefore asked the Commission to find that, because of the amnesty decree, the government of Chile has failed to ensure fair hearings and judicial remedies for past violations, to declare that such failure is incompatible with Chile's obligations under the American Convention, and to recommend investigation and compensation.¹⁷⁷

In its response, the government offered procedural and substantive objections. Procedurally, Chile argued that petitioners had not exhausted internal remedies as required by Article 46(1)(a), and that the petition to

setting forth the facts and stating its conclusions. . . . [attaching any] separate [dissenting] opinion [and the] written and oral statements made by the parties in accordance with paragraph 1.e of Article 48

2. The report shall be transmitted to the states concerned, *which shall not be at liberty to publish it*.

3. In transmitting the report, the Committee may make such proposals and recommendations as it sees fit.

American Convention, *supra* note 86, art. 50 (emphasis added). Article 51 sets out the procedure for resolving these cases which have not reached "friendly settlement." Article 51 states:

1. If, within a period of three months from the date of the transmittal of the report of the Commission to the states concerned, the matter has not either been settled or submitted . . . to the Court [(the IAC)] . . . the Commission may . . . set forth its opinion and conclusions

2. Where appropriate, the Commission shall make pertinent recommendations and shall prescribe a period within which the state is to take the measures that are incumbent upon it to remedy the situation examined.

3. When the prescribed period has expired, the Commission shall decide . . . whether the state has taken adequate measures and *whether to publish its report*.

American Convention, *supra* note 86, art. 51 (emphasis added).

174. Telephone Interview with José Miguel Vivanco, Executive Director, Center for Justice and International Law ("CEJIL") and counsel for the petitioners (Feb. 4, 1994); *supra* notes 149-59 and accompanying text.

175. Telephone Interview, *supra* note 174 (relying on Velásquez Rodríguez); *supra* notes 127-40 and accompanying text.

176. Telephone Interview, *supra* note 174.

177. *Id.*

the Commission was not timely under Article 46(1)(b).¹⁷⁸ The government asserted that internal remedies were still available because the appeal to the Court Martial of the Second Military Tribunal's November 30, 1989 decision was still pending.¹⁷⁹ The government claimed that the Supreme Court decision of August 24, 1990, declaring the amnesty decree constitutional, rather than a termination of internal remedies as the petitioners asserted, was merely an interlocutory decree that did not bind the Court Martial.¹⁸⁰ In the alternative, presumably, the government asserted that the petition was not timely because petitioners had filed their complaint with the Commission seven months after the August 24, 1990 Supreme Court decision.¹⁸¹

Substantively, the government of Chile disputed neither the occurrence of the underlying violations (the disappearance of seventy persons) nor the fact that the amnesty law obstructs judicial investigation.¹⁸²

178. *Id.* The formal requirements for admissibility are stipulated in Article 46(1) of the Convention and Article 32 of the Commission's regulations. Article 46(1) lists as requirements:

- a. that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;
- b. that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment

American Convention, *supra* note 86, art. 46(1).

Article 46(2), however, provides exceptions to Article 46(1) when actions of the state party interfere with effective domestic remedies or conditions of admissibility, rendering state remedies futile. Article 46(2) states that the provisions of Article 46(1)(a) and (1)(b) shall not be applicable when:

- a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
- b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
- c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

American Convention, *supra* note 86, art. 46(2).

179. The Court Martial's opinion affirming the application of the amnesty decree was subsequently released. *See* Causa Rol. 553-78, *Manuel Contreras y otros*, Corte Marcial, Chile (Jan. 24, 1992); *infra* notes 192-94 and accompanying text.

180. Telephone Interview, *supra* note 174. The government also asserted that the decision of the Court Martial could be appealed, either to the Supreme Court for modification or under a 1991 modification of the Military Code allowing for *casación*, a form of judicial review. *Id.*; *see* Report, *supra* note 2, at 865 note f (distinguishing *recurso de casación en el fondo*, which permits Supreme Court invalidation of lower court decision solely for reasons regarding the application of the law, from *recurso de casación en la forma*, which permits invalidation based on incorrect procedure).

181. Telephone Interview, *supra* note 174. Article 46(1)(b) requires filing with the Commission within six months of exhaustion of internal remedies. *See supra* note 178. If the August 24, 1990 decision represents the exhaustion of internal remedies for purposes of Article 46(1)(a), the complaint would have to have been filed in February 1991. The government rejected the petitioners' assertion that the Supreme Court's September 28, 1990 rejection of the request for clarification constituted the final decision for purposes of the six month requirement of Article 46(1)(b). Telephone Interview, *supra* note 174.

182. Telephone Interview, *supra* note 174.

Rather, the government denied responsibility for the actions of the military dictatorship, claimed that the constitutional plebiscite of 1988 consisted of a popular ratification of the amnesty law, and asserted that the actions of the democratic government to establish truth and reconciliation satisfy its international obligations under Article 1(1) of the American Convention.¹⁸³

The government, therefore, asked the Commission to find the petition inadmissible for lack of timeliness and failure to exhaust remedies.¹⁸⁴ Alternatively, assuming a finding of admissibility, the government sought a finding that the current government of Chile is not responsible for the violations alleged, and that the work of the National Commission on Truth and Reconciliation¹⁸⁵ and (presumably) the National Corporation on Reparation and Reconciliation¹⁸⁶ satisfies Chile's obligations under Article 1 of the American Convention.

c. Resolution

The Commission should resolve the procedural assertions of the Chilean government in favor of the petitioners.

On October 2, 1992, the Commission issued reports on cases involving amnesty provisions from Uruguay¹⁸⁷ and Argentina.¹⁸⁸ In each of the cases, the respective state asserted claims of inadmissibility similar to the assertions of the Chilean government in the current petition.¹⁸⁹ And in each case, the Commission rejected the state's contentions.¹⁹⁰

With regard to exhaustion of internal remedies, in particular, the Commission found that because the amnesty provisions in each nation had been held constitutional, continuation of judicial proceedings was futile.¹⁹¹ Since the Chilean Supreme Court has repeatedly affirmed the

183. *Id.*

184. *Id.*

185. *Id.*; see *infra* note 270 and accompanying text.

186. See *infra* note 277 and accompanying text.

187. See Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374, and 10.375, Inter-Am. C.H.R. 154, OEA/ser. L./V./II.83, doc. 14, corr. 1 (1993) (Uruguay).

188. See Cases 10.147, 10.181, 10.240, 10.262, 10.309, and 10.311, Inter-Am. C.H.R. 41, OEA/ser. L./V./II.83, doc. 14, corr. 1 (1993) (Argentina).

189. The Argentine government asserted that the petition was untimely and that the violations alleged occurred years before Argentina ratified the American Convention. See *id.* ¶¶ 7, 9-13. The Uruguayan government asserted that internal remedies were not exhausted and that the amnesty provision did not violate the American Convention because it was ratified in a popular referendum. See Uruguay Cases, Inter-Am. C.H.R. 154, ¶ 11 (1993).

190. See Uruguay Cases, Inter-Am. C.H.R. 154, ¶¶ 15-16 (1993); Argentina Cases, Inter-Am. C.H.R. 41, ¶¶ 10, 19 (1993).

191. See Uruguay Cases, Inter-Am. C.H.R. 154, ¶¶ 15-16 (1993) ("[O]nce the law was declared constitutional, its effect was to prevent continuation of the proceedings underway in the courts of the land. . . . Therefore, the petitions cannot be considered inadmissible on the ground of a failure to exhaust the remedies under domestic law."); Argentina Cases, Inter-Am. C.H.R. 41, ¶¶ 10, 19 (1993) ("There are no suitable and effective domestic remedies to nullify the measures being challenged, since the Argentine

constitutionality of Decree Law No. 2191, the Commission should find that domestic remedies have been exhausted.

Moreover, on January 24, 1992, the Court Martial of Chile issued a decision affirming the original November 30, 1989 decision of the Second Military Tribunal that first applied the amnesty law to the cases of disappearance involved in the current petition.¹⁹² The Court Martial explicitly based its ruling on the Supreme Court's August 24, 1990 decision upholding the constitutionality of the amnesty law.¹⁹³ Given this ruling, as well as the Supreme Court's rejection of the request for clarification of September 28, 1990 and the Commission's above mentioned decisions concerning the admissibility of the Argentine and Uruguayan petitions, the Commission should find that petitioners have exhausted internal remedies.¹⁹⁴

The Commission should also resolve the substantive issues in the complaint in the petitioners' favor.

In the Argentine and Uruguayan cases, the domestic courts had interpreted their respective amnesty provisions as precluding investigations and prosecutions of violations committed by agents of the states' prior military regimes.¹⁹⁵ The Commission, thereafter, found that the effects of these provisions were incompatible with the states' obligations under the American Convention, as developed in the Velásquez Rodríguez decision, because they effectively denied fair hearings, judicial recourse, and remedy.¹⁹⁶ The Commission therefore recommended compensation on the claims of denial of justice.¹⁹⁷ Based on the similar effects of Chile's amnesty decree, these Uruguayan and Argentine cases suggest

Supreme Court has dismissed those cases submitted to it that had argued that the instruments were unconstitutional.").

192. See *Causa Rol. 553-78, Manuel Contreras y otros*, Corte Marcial, Chile (Jan. 24, 1992).

193. See *id.*

194. With regard to the issue of timeliness, the Commission should recognize the petitioners' reliance on the September 28, 1990 decision of the Supreme Court (regarding the request for clarification) as the date of the exhaustion of domestic remedies. To do otherwise would privilege the government's alternative pleading and penalize petitioners' good faith efforts to follow internal legal procedures.

195. While not technically "amnesty laws," these provisions have largely the same effect as Chile's Decree Law No. 2191. See Cases 10.147, 10.181, 10.240, 10.262, 10.309, and 10.311, Inter-Am. C.H.R. 41, ¶¶ 1-5, OEA/ser. L./V./II.83, doc. 14, corr. 1 (1993) (Argentina) (discussing effects and provisions of the Punto Final [Full Stop Law], Law No. 23,492 (Dec. 24, 1986), the Due Obedience Law, Law No. 23,521 (June 8, 1987), and the Presidential Decree of Pardon No. 1002 (Oct. 7, 1989)); Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374, and 10.375, Inter-Am. C.H.R. 154, ¶¶ 2-7, OEA/ser. L./V./II.83, doc. 14, corr. 1 (1993) (Uruguay) (discussing effects and provisions of the Ley de Caducidad de la Pretensión Punitiva del Estado [Expiration of Criminal Complaints Law], Law No. 15,848 (Dec. 22, 1986)).

196. See *Argentina Cases*, Inter-Am. C.H.R. 41, ¶ 52 (1993); *Uruguay Cases*, Inter-Am. C.H.R. 154, ¶ 54 (1993).

197. See *id.*; *supra* notes 143 (distinguishing the present-time claim of denial of justice from claims based on past violations of substantive rights), 149-59 and accompanying text.

that the Commission should find Chile's Decree Law No. 2191 incompatible with that nation's obligations under the American Convention.

In addition, in response to earlier Commission cases, the governments of Argentina and Uruguay had submitted to the IAC a request for an advisory opinion.¹⁹⁸ The request sought the IAC's interpretation of several articles of the American Convention as they related to the situations in the earlier cases and in the October 2, 1992 reports.¹⁹⁹ Specifically, with regard to the Commission's findings that the Argentine and Uruguayan amnesty provisions were incompatible with the American Convention, the request raised the following question:

As regards Articles 41 and 42, the Court is hereby requested to render an opinion as to whether, in order to justify its dealing with a case involving communications alleging the violation of the rights protected by Articles 23, 24 and 25 of the Convention, the Commission is competent to assess and offer an opinion on the legality of domestic legislation adopted pursuant to the provisions of the Constitution, insofar as the "reasonableness," "advisability," or "authenticity" of such legislation is concerned.²⁰⁰

The IAC ruled in the affirmative: the Commission is competent to rule "that a norm of internal law violates the Convention."²⁰¹ The IAC noted that the manner in which a state violates an international treaty and, specifically, the American Convention—whether by failure to enact measures giving domestic effect to the American Convention or by affirmative promulgation of contrary provisions²⁰²—makes no difference for the purpose of determining the power of the Commission to express

198. See Request for Advisory Opinion OC-13 (Argentina & Uruguay), Inter-Am. Ct. H.R. (1992), app. II, at 53-54, OEA/ser. L./V./III.27, doc. 10 (1993).

199. The request sought interpretations of Articles 41 (functions of the Commission), 42 (annual reporting), 44 (standing of nongovernmental agencies, groups and persons), 46 (admissibility of petitions), 47 (inadmissibility), 50 (drafting and transmission of preliminary report without friendly settlement) and 51 (drafting, transmission and publication of final report) as those articles relate to the situation and circumstances expressed in the request, and in the concrete cases that the Commission had already addressed. See *id.* (citing as examples Cases No. 9768, No. 9780, No. 9828, No. 9850, and No. 9893).

200. *Id.* at 53 (emphasis added). The request included two additional questions. It asked whether it was proper for the Commission, with respect to Articles 46 and 47, to address the merits of a communication pursuant to Article 44 after having declared the application inadmissible. See *id.* It also asked whether the Commission could publish a report under Article 50 before the time specified in Article 51 has expired. See *id.* The Court answered these questions in the negative. See Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 46, 47, 50 and 51 of the American Convention on Human Rights), Inter-Am. Ct. H.R. (Advisory Opinion OC-13/93), ¶ 57, July 16, 1993.

201. Certain Attributes, Inter-Am. Ct. H.R. (Advisory Opinion OC-13/93), ¶ 37.

202. See *id.* ¶ 26. The IAC noted that a state may violate the Convention "by failing to establish the norms required by Article 2. Likewise, it may adopt provisions which do not conform to its obligations under the Convention. Whether those norms have been adopted in conformity with the internal juridical order makes no difference for these purposes." *Id.*

itself on matters of alleged violations.²⁰³ Domestic laws or other provisions, therefore, including amnesty provisions, are not shielded from the Commission's scrutiny simply because a state has passed the provisions in accordance with its internal constitutional norms.²⁰⁴ Indeed, the IAC specifically acknowledged that states had promulgated such laws and that the Commission nevertheless could find them incompatible with the states' obligations under the American Convention.²⁰⁵ Following the advisory opinion, therefore, the Commission is authorized to find Chile's amnesty decree incompatible with the American Convention.

The Commission should, therefore, produce findings that Chile's Decree Law No. 2191 is incompatible with the Commission's reports and the IAC's holding in the Velásquez Rodríguez case. This result seems even more likely after the IAC's advisory opinion explicitly recognizing the Commission's authority to pronounce a state's internal norm incompatible with the rights protected by the American Convention.

Specifically, the Commission should find that under Articles 1(1), 8, and 25 of the American Convention, Chile must permit investigative efforts of a judicial nature, and should recommend that Chile advance prosecutions, wherever possible. Where such investigations and prosecutions are not permitted, such that civil remedies against state agents or the state itself are foreclosed, the Commission should recommend compensation for claims based on the denial of justice. Given the limited enforcement power of the Commission²⁰⁶ and the good-faith efforts of Chile's transition government,²⁰⁷ however, it remains to be seen to what extent the Commission will confront the government of Chile on the issues of post-conviction punishment or the outright elimination of the amnesty law.²⁰⁸

203. See *id.* ¶ 27 ("The powers of the Commission in this sense are not restricted in any way by the means by which the Convention is violated.").

204. See *id.* ¶¶ 27-28. The IAC distinguished, however, the Commission's authority to determine the compatibility of an internal norm with a state's obligations under the Convention from a state's authority "to decide whether the norm contradicts the internal juridical order of that State." *Id.* ¶¶ 37, 57(1). With respect to Chile's Decree Law No. 2191, therefore, the Commission has the authority to declare the law incompatible with Chile's obligations under the American Convention, but the Commission lacks the authority to declare the law in contravention of Chile's constitution.

205. See *id.* ¶ 28. The language of the opinion may even be read as implicitly addressing grants of amnesty for violations by a prior regime. See *id.* ("There are *historical situations* in which states have promulgated laws which conformed with their juridical order, but which did not offer adequate guarantees for the exercise of human rights, *imposed unacceptable restrictions* or, simply, ignored them.") (emphasis added).

206. See Méndez & Vivanco, *supra* note 131, at 523-25 (listing the powers of the Commission); Shelton, *supra* note 131, at 334-36 (same). Essentially, if the Commission cannot facilitate a "friendly settlement" under Article 49 it can submit the petition to the Court (if jurisdiction is accepted), publish its findings and recommendations, or submit its findings and recommendations to the General Assembly of the OAS. See *supra* note 173.

207. For discussion of the efforts of the Aylwin administration, see *infra* notes 270-95 and accompanying text.

208. For a general history of Chile's response to OAS reports on the human rights

III. ESCAPING THE OBLIGATIONS OF INTERNATIONAL LAW

The International Covenant and the American Convention generally require Chile to provide hearings and effective judicial remedies, even for violations occurring in the past. The Commission is likely to find Chile's Decree Law No. 2191 explicitly incompatible with the government's obligations under Articles 8 and 25 of the American Convention. Therefore, unless Chile can legally escape from these treaty obligations, it must either eliminate the amnesty decree or demonstrate alternative means of compliance that are acceptable under international standards. The commendable efforts of Chile's transition government have been, to date, insufficient to satisfy such standards, although these efforts do offer hope that the new administration will continue to develop an acceptable program that may eventually be a model for other nations.

A. *Methods of Escape*

While ultimately it cannot escape its treaty obligations by means of derogation, Chile may be able, with some change to the current interpretation of the amnesty law, to mitigate its lack of full compliance with them.

1. Derogation

Derogation is a means for a state to temporarily relieve itself from some or all of its obligations under a particular law or treaty.²⁰⁹ Some obligations, however, are nonderogable.²¹⁰ These include crimes against humanity and prohibitions on violations of physical integrity—including disappearance, torture, and execution.²¹¹ Some treaties also explicitly

situation under the military government, see Cecilia M. Quiroga, *The Battle of Human Rights: Gross, Systematic Violations and the Inter-American System* 261-313 (1988).

209. Derogation is defined as the "partial repeal or abolishing of a law, as by a subsequent act which limits its scope or impairs its utility and force." *Black's Law Dictionary* 444 (6th ed. 1990). Derogation is similar to the justification of necessity, in that derogation relieves states of their obligations under a written law, whereas necessity relieves obligations of customary law.

A state invoking necessity must show the presence of a grave and imminent risk, that the state did not contribute to the risk, that no less offensive means are available, and that the state is not bound by any conflicting treaty obligations. See Roht-Arriaza, *supra* note 98, at 505.

A state cannot claim necessity to escape the obligations of a treaty into which it voluntarily entered, nor to escape an obligation involving the protection, including investigation and prosecution, of peremptory norms. See Orentlicher, *supra* note 63, at 2609.

Necessity, therefore, is not available because Chile is bound by its obligations under the American Convention and the International Covenant. See *supra* notes 145-59 and accompanying text.

210. See Orentlicher, *supra* note 63, at 2607; Symposium, *Transitions to Democracy and the Rule of Law*, 5 Am. U.J. Int'l L. & Pol'y 965, 1052-53 (1990) (remarks of Diane Orentlicher); Roht-Arriaza, *supra* note 98, at 485-88.

211. See Orentlicher, *supra* note 63, at 2607.

prohibit derogation.²¹² Whether derivative obligations to investigate, to prosecute, or to provide effective remedies for violations of nonderogable rights are themselves nonderogable is undetermined.²¹³

The American Convention may provide the most compelling evidence that derivative obligations are nonderogable when the underlying violations involve nonderogable rights.²¹⁴ Article 27(2) states that the Convention "does not authorize any suspension of the [enumerated] articles . . . or of the judicial guarantees essential for the protection of such rights."²¹⁵ Interpreting this provision, the IAC concluded that the right to seek habeas corpus cannot be suspended because it is necessary to ensure protection of the nonderogable rights to life, liberty and freedom from torture or forced disappearance.²¹⁶ Arguably, this rationale would make all derivative rights nonderogable where the underlying violation involved grave harms. States would be obligated to investigate, to prosecute, and perhaps to provide compensation in all such cases.

Alternatively, derivative obligations to investigate, to prosecute, and to provide a remedy could be considered derogable because, unlike habeas corpus, derivative rights serve a primarily deterrent function and cannot, in a given case, prevent violation of the underlying norm.²¹⁷ Strict requirements on when a state may derogate derivative rights are then required to ensure that only bona fide claims are excepted.²¹⁸ Both the International Covenant and the American Convention provide examples of such requirements for permissible derogations.²¹⁹ Article 27 of the American Convention and Article 4(1) of the International Covenant, for example, discuss the public emergency exception, the most common ground for derogation.²²⁰

Derogation based on public emergency requires a showing of immi-

212. See American Convention, *supra* note 86, art. 27(2) (certain substantive rights are nonderogable); Torture Convention, *supra* note 96, art. 2(2)-(3).

213. Compare Orentlicher, *supra* note 63, at 2607 (arguing that derivative obligation may be derogable even when the underlying violations are not) with Roht-Arriaza, *supra* note 98, at 487 (arguing that in order to protect effectively underlying nonderogable rights, derivative obligations must also be nonderogable).

214. See Orentlicher, *supra* note 63, at 2607.

215. American Convention, *supra* note 86, art. 27 (emphasis added). Suspension of the following provisions is not authorized: Article 3 (judicial personality), Article 4 (life), Article 5 (humane treatment), Article 6 (slavery), Article 9 (ex post facto laws), Article 12 (religion), Article 17 (family), Article 18 (right to a name), Article 19 (rights of the child), Article 20 (nationality), and Article 23 (participation in government). See *id.*

216. See Orentlicher, *supra* note 63, at 2607-08 (citing Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8, American Convention on Hum. Rts.), Inter-Am. Ct. H.R. (Advisory Opinion OC-9/87), O.A.S. Doc. (Ser. A) No.9 (1987)).

217. See *id.* at 2608.

218. See *id.* at 2606-12.

219. See Inter-American Comm'n on Hum. Rts., *supra* note 37, ¶¶ 93-97 (discussing requirements and exigencies of state limits on exercise of internationally recognized rights and freedoms); Roht-Arriaza, *supra* note 98, at 485.

220. See American Convention, *supra* note 86, art. 27(1); International Covenant, *supra* note 121, arts. 4(1); Hernán Montealegre, *The Compatibility of a State Party's*

nence and gravity,²²¹ and usually requires states to report to other party states when invoking the exception.²²² Generally, derogation should be the only means available of responding to a threat not otherwise caused by state agents. In principle, this precludes derogation under the public emergency exception where a prior regime, the military, or other state agents committed the violations, as in Chile.

In practice, however, states may lack total control over their armed forces which, although formally organs of the state, substantively pose a threat to civilian control.²²³ Rules governing derogation must take into account this reality and "provide incentives for governments to assert control over their armed forces,"²²⁴ while keeping in mind that "[t]he threat of instability is minimized when prosecutions are backed by unambiguous international law whose requirements are confined within principled limits."²²⁵

In Chile's case, the threat of civil unrest in the past does not merit derogation from obligations to provide fair hearings or other remedies in the present. Similarly, any threats of resurgent military intervention today, of the type that accompanied Argentine prosecution efforts,²²⁶ are neither imminent nor outside the control of the State.²²⁷ Chile is, therefore, precluded from derogation of its treaty obligations.

Derogation Under Human Rights Conventions with its Obligations Under Protocol II and Common Article 3, 33 Am. U. L. Rev. 41 (1983).

221. See Inter-American Comm'n on Hum. Rts., *supra* note 37, at 44, ¶¶ 93 & 97 (suspension of internationally recognized rights must be "strictly temporary," and limited to "extremely serious situations"); Orentlicher, *supra* note 63, at 2609.

222. See, e.g., International Covenant, *supra* note 121, art. 4(3) (state availing itself of exception "shall immediately inform the other States Parties . . . of the provisions from which it has derogated and of the reasons by which it was actuated"); American Convention, *supra* note 86, art. 27(3) (same effect).

223. See Orentlicher, *supra* note 63, at 2611; Zalaquett, *supra* note 15, at 643-45.

224. Orentlicher, *supra* note 63, at 2611.

225. *Id.* at 2606.

226. For a discussion of the Argentine military's resistance to prosecutions, see Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina*, 100 Yale L.J. 2619, 2627-30 (1991); Rogers, *supra* note 103, at 265-67; Zalaquett, *supra* note 15, at 652-53.

227. With Pinochet remaining Commander-in-Chief, possibly until March 1997, relations between the military and the civilian government remain uncomfortable, marked by repeated incidents of military sabre-rattling and rhetorical posturing. For example, in addition to General Pinochet's statement about the end of the rule of law, *supra* note *, General Fernando Matthei said, "If they are going to put [the military] in the pillory, as in Argentina, that will bring the gravest consequences." Americas Watch, *supra* note 21, at 48 (citing interview in *El Mercurio*, July 30, 1989). More recently, on May 28, 1993, while President Aylwin was on an official tour of several European nations, heavily armed troops in full combat gear appeared in the capital. Ostensibly guarding the headquarters of the armed forces during a meeting between Pinochet and the top generals—who also wore combat uniforms—such displays of force are taken as reminders of the military's displeasure with continued examination of military personnel involvement in past violations of human rights. See Long, *supra* note 22, at A13 (describing the "Boinazo" of May 28, in reference to the soldiers *boinas* (berets)); Nathaniel C. Nash, *Coup Anniversary is Marked in Chile*, N.Y. Times, Sept. 12, 1993, § 1, at 9; David Pill-

2. Mitigation

Although Chile cannot outright escape its treaty obligations by derogation, it may be able to mitigate its noncompliance.²²⁸

Obligations to investigate, to prosecute, and to provide hearings and remedies serve a deterrent function by shifting the burden of proof to the state.²²⁹ It follows, therefore, that once a state has assumed this burden, and thereby acknowledged to the international community and to the individual victims its responsibility for past violations, the deterrent function is largely served. Subsequent extraordinary efforts at full compliance might then be unnecessary.²³⁰

In that event, however, international law must still hold states acknowledging responsibility for past violations to a standard of conduct sufficient to deter future breaches or omissions. One commentator has suggested a due diligence standard consisting of the reasonable measures of prevention, deterrence, and apprehension of those responsible "that a well-administered government could be expected to exercise under similar circumstances."²³¹ Others have suggested programs of compliance tailored to the events in each nation but grounded in basic principles of law and justice.²³²

Chilean scholar José Zalaquett²³³ suggests a standard based on three

ing, *No Easing of General's Grip in 'Free' Chile: The Coming 20th Anniversary of Pinochet's Coup*, *Fin. Times*, Sept. 7, 1993, at 4.

Despite these unsettling actions by the military—which is nevertheless an agent of the State for purposes of derogation—there is little concern that the military would attempt another coup. See Long, *supra* note 22, at A13 (quoting retired colonel and former Pinochet minister Cristian Labbe saying "[t]here is no possibility of a coup"); Nash, *supra* ("no one fears military intervention").

228. Mitigation is defined as "to make less severe. Alleviation, reduction, abatement or diminution of a penalty or punishment imposed by law." *Black's Law Dictionary* 1002 (6th ed. 1990).

229. See Jaime Malamud-Goti, *Trying Violators of Human Rights: The Dilemma of Transitional Democratic Governments*, in *State Crimes: Punishment or Pardon: Papers and Report of the Conference* 71, 79, 82 (1988); Orentlicher, *supra* note 63, at 2600 ("deterrence rationale"); Zalaquett, *supra* note 15, at 628; Roht-Arriaza, *supra* note 98, at 506-08 (burden shifting).

230. See, e.g., Malamud-Goti, *supra* note 229, at 83 ("[I]t is reasonable to expect that indictments and convictions will begin to have a decreasing deterrent effect after trying a number of cases.").

231. Shelton, *supra* note 136, at 23.

232. See Malamud-Goti, *supra* note 229, at 76 (recognizing moral imperative of bringing violators to trial ("even at the expense of exposing democracy to the risk of a military rebellion") while permitting limitations of those trials ("fail[ure] to punish all violators . . . does not constitute a breach [sic] of moral duties")); Orentlicher, *supra* note 63, at 2598 (discussing limits to prosecutions); Symposium, *supra* note 210, at 1048 ("[S]tates cannot unilaterally relieve themselves of international legal obligations. There may, nevertheless, be room for discussion as to the rigor of application of the rule requiring prosecutions in cases of amnesties that genuinely reflect a national will . . .") (remarks of Nigel Rodley, former head of the Legal and Intergovernmental Organizations Office, Amnesty International, London).

233. Mr. Zalaquett was an Aylwin appointee to the National Commission on Truth and Reconciliation. See *infra* note 270. He was a founder and head of the Human

conditions: official publication of the truth of the events of the past, popular ratification, and consistency with international law.²³⁴ Once these conditions of legitimacy are met, he argues, a state should have discretion to decide how to implement its policy.²³⁵ But even this discretion must be exercised within practical, political, and legal limits.²³⁶

Practically, a state's ability to mitigate its burden of compliance is limited by temporal and financial considerations.²³⁷ Particularly where large numbers of violations occurred, a state's ability to investigate and to prosecute may be constrained by time, cost, and the ability of the state's legal system to absorb rapidly large numbers of complaints.²³⁸ In Argentina for example, where nearly 9000 cases of grave violations were officially documented, courts were inundated with complaints prior to implementing filing limits embodied in the Full Stop Law.²³⁹ In nations like Guatemala, where over 40,000 persons are believed to have disappeared, or El Salvador and Nicaragua, where an additional 100,000 persons died,²⁴⁰ the sheer volume of cases could have unintended negative effects on the judicial system.

International law must therefore permit states to develop standards for limiting prosecutions. Such standards should keep in mind the diminishing deterrent value of successive prosecutions, degrees of culpability, including a rejection of the "following orders" defense, and the need to avoid scapegoating.²⁴¹

Along with allowing limits to prosecution, international standards must recognize a state's discretion in the timing of prosecutions and other forms of compliance. Most analysts believe that a prosecution must happen quickly, before the new regime is distracted by the demands of governing and before the displaced powers have had a chance to close ranks.²⁴² Chile, however, appears to be experimenting with the

Rights Department of the Committee for Peace in Chile (subsequently the *Vicaría de Solidaridad*) and former Executive Committee Chair of Amnesty International. Under the Junta, he was "imprisoned twice without charges and then expelled from Chile (1975-76)." Introduction, 13 *Hamline L. Rev.* 463 (1990).

234. See Zalaquett, *supra* note 65, at 1430-31 (listing truth and ratification as conditions of legitimacy, and international law as limit on state discretion in implementation); Zalaquett, *supra* note 15, at 629-33.

235. See Zalaquett, *supra* note 65, at 1431; Zalaquett, *supra* note 15 at 628, 633.

236. See Zalaquett, *supra* note 65, at 1428, 1430-31; Zalaquett, *supra* note 15, at 638, 642.

237. See Orentlicher, *supra* note 63, at 2596-99; Zalaquett, *supra* note 24, at 17 (economic constraints of Alfonsín regime in Argentina).

238. See Orentlicher, *supra* note 63, at 2596; Symposium, *supra* note 210, at 1054-55 (remarks of Diane Orentlicher).

239. See Alejandro M. Garro & Henry Dahl, *Legal Accountability for Human Rights Violations in Argentina: One Step Forward and Two Steps Backward*, 8 *Hum. Rts. L.J.* 283, 334-36 (1987); Orentlicher, *supra* note 63, at 2596; Rogers, *supra* note 103, at 265-66.

240. See Moore, *supra* note 16, at 734.

241. See Orentlicher, *supra* note 63, at 2598-2603; Zalaquett, *supra* note 15, at 641-42.

242. See Alice H. Henkin, *Conference Report*, in *State Crimes: Punishment or Pardon: Papers and Report of the Conference* 1, 7 (1988) (citing conference participants'

opposite course.

The Aylwin administration rejected the idea of immediate prosecution by special tribunals,²⁴³ and repeatedly proclaimed that the Executive supported the use of normal judicial processes for complaints against agents of the prior regime.²⁴⁴ At the same time, by creating the National Commission on Truth and Reconciliation²⁴⁵ early in the term, the administration forestalled divisive discussion of human rights while it gained crucial stability.²⁴⁶ Even as it released the Commission Report, the administration maintained its position in support of normal (time-consuming) avenues of judicial investigation.²⁴⁷ But it also reemphasized its position that courts should not apply the amnesty law broadly,

emphasis on "acting expeditiously in investigating charges and bringing the violators to trial to take advantage of initial elan and fresh memories"). In Argentina, for example, the ultimate failure of the prosecutions of military officers is credited to delays in actions by military courts. See Nino, *supra* note 226, at 2627 (delays in prosecutions led to unrest in the military); Zalaquett, *supra* note 15, at 654 ("momentum was lost when a fruitless investigation dragged on for months"). Similarly, the passage of time before a plebiscite on the issue of granting amnesty in Uruguay is credited with assisting the measure's passage. See Correa, *supra* note 48, at 1457, 1463 ("The Uruguayan experience taught many Chileans to do quickly whatever had to be done.").

243. See Inter-Am. C.H.R., *supra* note 75, at 137-39 (quoting Aylwin's inaugural promise to "cooperate with the courts to the extent possible"); *Aylwin Rechaza un 'Nuremberg Chileno'* [Aylwin Rejects a Chilean Nuremberg], La Nación, July 30, 1990 at 3.

244. See Americas Watch, *supra* note 21, at 50. In this regard, the program of Aylwin's governing coalition stated:

[T]he democratic Government will put forth its best efforts in order to establish the truth . . . [and to] procure the trial according to the actual penal law, of the human rights violations that represent atrocious crimes against life, liberty and personal integrity . . .

. . . .

Cases are to be tried in civilian courts, which should act in accordance with the principle of due process of law, and with full respect of the procedural guarantees of victims and those held responsible.

Patricio Aylwin, Programa de Gobierno: Concertación de Partidos Por la Democracia 2 (1989) (copy on file with the *Fordham Law Review*); see also Correa, *supra* note 48, at 1460 (translation). Upon taking office, Aylwin reiterated the position:

[B]ringing someone to trial for an alleged criminal act is the role of the courts of justice. My Government is firmly resolved to cooperate with the courts to the extent possible to enable them to fully play their role in determining individual responsibility in every case that has or will come before them.

Inter-Am. C.H.R., *supra* note 75, at 138.

245. See *infra* notes 270-75 and accompanying text (discussing the Commission and its report).

246. See Correa, *supra* note 48, at 1483. This Note does not suggest that the administration intended to extend the time-frame for addressing the violations of the past, as much as it intended to forestall divisive discussions of those violations, perhaps indefinitely. See Inter-Am. C.H.R., *supra* note 75, at 138 ("[D]elays in clarifying the truth disrupt community life and conspire against the desires of Chileans for peaceful reconciliation.").

247. On March 4, 1991, in a nationally broadcast speech to the nation presenting the findings of the Commission, President Aylwin stated:

Today, I have sent the Supreme Court a message to which I have attached the text of the Report and I ask that . . . they instruct the relevant courts to activate with greatest expediency the cases which are pending on human rights

especially not to obstruct investigations prior to the identification of victims and the location of physical remains.²⁴⁸

This policy favoring normal judicial processes—which helps to prevent a permanent impunity pending final resolution of cases—has extended the time-frame in which to address violations by the military regime. In so doing, it has enabled the democratic government to revisit repeatedly the issues of the amnesty decree and prosecutions without risking direct confrontation with the military.²⁴⁹ Spurred on by the media, nongovernmental groups, and sections of the populace, the democratic government has been required to respond, for example, to discoveries of mass graves,²⁵⁰ to dramatic turns of events in high profile

violations and those which must be heard as a result of the information that the Truth and Reconciliation Commission has forwarded to them"

Americas Watch, *supra* note 21, at 51 (translation, full text of speech reprinted in *El Mercurio*, Mar. 5, 1991).

248. Discussing its position on the amnesty law, the governing coalition's campaign program stated:

Due to its very legal nature and true meaning, the amnesty decree-law of 1978 has not and cannot become an impediment for the disclosure of the truth, the investigation of the facts and the establishment of criminal responsibilities in cases of crimes against human rights The democratic government will continue the program to promote the derogation or nullification of the Amnesty Law.

Aylwin, *supra* note 244, at 3; Correa, *supra* note 48, at 1461 (translation). Note that the coalition did not promise to repeal the amnesty law, "but to make efforts to achieve that result." Correa, *supra* note 48, at 1461.

Upon presenting the findings of the Commission to the Supreme Court, Aylwin informed the Court that "in [Aylwin's] view, the amnesty in force, which the Government respects, cannot be an obstacle to the realization of a judicial investigation and the determination of responsibilities, especially in the cases of disappeared persons." Americas Watch, *supra* note 21, at 51 (translation from text of speech, reprinted in *El Mercurio*, Mar. 5, 1991) (footnote omitted).

249. The government has actually worked to restore the traditional respect for the armed forces, while marginalizing individuals and groups within those forces—perhaps intentionally setting the stage for future prosecutions. The Commission's findings reflect the government's dual tone:

[T]he fundamental role played by the armed forces and security forces in the history of the country should be fully appreciated, as should be their character as permanent and essential national institutions. Finally, it is praiseworthy to strive to avoid any use of the issue of human rights to attempt to sully these institutions, or to detract from their contribution to the country and the role they are called to play in the future.

Nevertheless, these points cannot be invoked to deny the historic and moral responsibility that may befall one institution or another as a result of the practices it ordered, or to which it consented, or with regard to which it failed to do all that was required to impede or prevent their recurrence. . . . The armed forces and the security forces are no exception. It is human beings who forge and make institutions great, and it is also human beings who can affect them negatively.

Report, *supra* note 2, at 34-35.

250. In March 1990, only two weeks after the start of Aylwin's term, the remains of three victims of the military regime were found in Colina. In early June 1990, 19 bodies were found preserved—some still wearing blindfolds—in the desert soil near Pisagua. In all, nearly 20 clandestine graves were opened during 1990. See Americas Watch, *supra*

cases,²⁵¹ and to revelations by former Pinochet agents about past crimes.²⁵² Since such discoveries and revelations result from the covert nature of the violations committed by the military regime, Chile and other nations emerging from periods of repression might reasonably expect a stream of such events to provide repeated opportunities to further press opposition to the impunity.²⁵³

note 21, at 13-16. Discovery and identification of other remains continue. *See, e.g.*, Amnesty International, 1993 Ann. Rep. 93 (identification of 127 bodies exhumed in 1991 continues).

The media coverage and public outcry following the discoveries, especially Pisagua, increased pressure on the democratic administration to address the violations of the past, as well as on the military to accept some action by the new government. At the same time, the military continued its rhetorical posturing, releasing statements that the victims of Pisagua, for example, were legitimate casualties of war and that the people should "be careful" not to seek too much truth about the past. *See Americas Watch, supra* note 21, at 16 n.23.

251. Some of the more famous cases include the *Degollados*, the *Quemados*, the *Desaparecidos*, and the Letelier case.

The *Degollados* (ones with slit throats) case involves the 1985 abduction, torture and murder of three Communist Party members whose bodies were found outside Santiago with their throats slit. *See Zabel et al., supra* note 36, at 448-54. The *Quemados* (burned ones) case involves the brutal burnings of two youths, one fatally, in 1986. *See id.* at 441-48. The *Desaparecidos* (disappeared ones) case or the "Cerde" case is a consolidation of missing persons cases that resulted in an indictment from Judge Carlos Cerda of some 40 persons—of whom 38 were military or police agents. *See id.* at 454-56. A Santiago Appeals Court subsequently barred the indictments under the amnesty law. *See Inter-American Comm'n on Hum. Rts., 1987 Y.B. on Hum. Rts. 376-80 (1987)*. The Letelier case, involving the assassination of the former Chilean foreign minister in Washington, is the only case specifically exempted from the amnesty law and the only one in which prosecutions for past violations of human rights have been won. *See supra* notes 6 & 47.

252. Former DINA officer Osvaldo Romo Mena was found hiding in Brazil, arrested and returned to Chile in 1992, sparking a flurry of media coverage and re-examination of the amnesty law. *See Los Efectos Políticos Del Caso Romo: Todo de Nuevo [The Political Effects of the Romo Case: Everything is New]*, Hoy, Aug. 17-23, 1992, at 6-10; Francisco Martorell, *Bienvenido Señor Romo (I): El Factor Inesperado [Welcome Mr. Romo: The Unforeseen Factor]*, Análisis, Aug. 17-30, 1992, at 8-14; Felipe Pozo, *Los Fantasmas Revividos [The Ghosts Come Back to Life]*, *id.* at 5; Domingo Namuncura Serrano, *Romo: Signo de Dolor y Vergüenza [Romo: Symbol of Pain and Disgrace]*, *id.* at 22-23. Romo may be implicated in over 100 disappearances. The most visible of these, the Chanfreau-Romo case, has led already to the first interrogation by a civil judge, Gloria Olivares, of a serving army officer, Colonel Miguel Krasnoff Marchenko, Romo's former commander. *See Coad, supra* 75, at 11.

Romo is not the only former agent to come forward. Two other former Pinochet collaborators, Alejandra Merino and Luz Arce have also recently given evidence to courts. *See id.* Moreover, Romo, Merino, and Arce are only three of many DINA fugitives and collaborators who, like the Nazis before them, are likely to continue being discovered for many years, providing a stream of opportunities to challenge the amnesty law and to slowly dismantle its effect. *But see Garro & Dahl, supra* note 239, at 344 (commenting with irony on the relative ease of prosecuting Nazi criminals in Argentina for violations decades earlier as opposed to the impunity for active-duty Argentine officers for violations of the last twenty years).

253. *See, e.g.*, Zalaquett, *supra* note 65, at 1431 ("[P]olitical situations are far from static, and if the new government consistently follows the best possible approach, despite being limited by the circumstances it faces, new possibilities may open up along the way.").

Unlike practical limits on time and resources, however, political capital²⁵⁴ should not be considered a limited resource for purposes of mitigation.²⁵⁵ It is too difficult to measure, easily misrepresented, and has minor bearing on legal obligations.²⁵⁶ Understandably, the predominant interest of all transition governments is to maintain political stability and civilian rule. And despite the arguments to the contrary,²⁵⁷ new governments believe that investigation of past crimes and prosecution of those responsible, especially military agents, is destabilizing.²⁵⁸ International standards for mitigation should recognize these concerns, but not from a political perspective.²⁵⁹

One alternative might be to recognize states' concerns for domestic stability by considering the nation's economic stability.²⁶⁰ Unlike political capital, economic conditions can be objectively quantified and independently verified. Military interventions, moreover, have often been linked to economic disorder, as in both Argentina and Chile.²⁶¹ But any

254. For the purposes of this Note, political capital is the leverage or good will necessary to effect programs addressing past violations of human rights. The democratic government is most limited politically by dependence on the cooperation of conservative members of the Senate. As part of the transition, nine of the 46 Senate seats were appointed under Pinochet to ensure a conservative majority capable of blocking attempts to amend the constitution (which requires a two thirds vote of both the Chamber of Deputies and the Senate). See Correa, *supra* note 48, at 1462. Also under the terms of the transition, each former president automatically becomes a member of the Senate. See Americas Watch, *supra* note 23, at 45. In the December 1993 elections, president-elect Frei's coalition of parties (the *Concertación*) gained a 70-50 majority in the House of Deputies, but only 22 of 47 seats in the Senate. See *Frei Meets With Pinochet, Military High Command*, *supra* note 50.

Nevertheless, the democratic administration's inability to secure passage of specific legislation—due to obstruction from other elements of the State—does not relieve Chile of its obligations under international law.

255. See Symposium, *supra* note 210, at 1054 ("that prosecution . . . may be politically inexpedient is no excuse for a state's failure to discharge its obligations under international law") (remarks of Diane Orentlicher, then Visiting Lecturer, Yale Law School); Zalaquett, *supra* note 15, at 642-45; Moore, *supra* note 16, at 734-38 (arguing against using grants of amnesty as political bargaining chips).

256. See Zalaquett, *supra* note 15, at 642-45.

257. See Malamud-Goti, *supra* note 229, at 79 (trials "tend to consolidate democratic institutions"); Hernán Montealegre, *The Security of the State and Human Rights*, in *Human Rights in the Americas: The Struggle for Consensus* 187 (Alfred Hennesly & John Langan eds., 1982) (arguing that respect for human rights is a component of national security); Orentlicher, *supra* note 63, at 2606.

258. See Nino, *supra* note 226, at 2637-39; Zalaquett, *supra* note 15, at 626, 642-45; Roht-Arriaza, *supra* note 98, at 506.

259. *But see* Zalaquett, *supra* note 15, at 642-46 (discussing need to account for political constraints, including position adopted by political and military forces).

260. See Crahan, *supra* note 23, at 48 (Factors encouraging or discouraging intervention by the armed forces include "the severity of the political and economic crisis" in the country.).

261. One commentator, for example, noted with regard to Chile:

[I]t was only after Chile entered into a period of severe political and economic crisis that civilian acceptance of military intervention grew The Chilean case suggests that relatively strong traditions of democratic participation and civilian government are not sufficient barriers to military intervention unless

reliance on economic conditions as a component of mitigation must be tempered with concern that the standards of measurement employed are not themselves contrary to the respect for human rights.²⁶²

Standards must also allow states to address any residual political concerns through the state's discretionary powers, including the power to control the timing of compliance²⁶³ and the power to grant pardons, which are preferable to grants of amnesty because pardons are generally issued after prosecutions and thereby expose the circumstances of the violations and the identity of the violators.²⁶⁴

Along with practical and political limitations, standards governing a state's mitigation should consider the limitations of traditional legal processes and should recognize varying forms of investigation, punishment, and compensation.²⁶⁵ Official publication of the truth about past violations, for example, can serve an investigative function.²⁶⁶ Publication of the names of those responsible may serve both investigative and sanctioning purposes.²⁶⁷ Loss of social or professional status or rank, pensions, or other government benefits may constitute punishment (although distinct from prosecution).²⁶⁸ Similarly, subsidies, scholarships, and welfare benefits for victims and their survivors may compensate to some degree.²⁶⁹

B. *Chile's New Model*

The Aylwin administration's efforts to address human rights violations of the past fail to meet its international obligations. The broad

governments have a fair degree of success in mediating competing socioeconomic and political claims within society.

Id. at 60-61.

262. *See, e.g.,* Antonio Cassese, *Foreign Economic Assistance and Respect for Civil and Political Rights: Chile—A Case Study*, 14 *Tex. Int'l L.J.* 251, 256-57, 260-63 (1979) (economic conditions that favor foreign investment may result from increased repression and socioeconomic inequity).

263. *See supra* notes 242-53 and accompanying text.

264. *See* Orentlicher, *supra* note 63, at 2604. A pardon releases a convicted offender from punishment. A grant of amnesty erases the offense itself, and with it all official sanction. *See id.* at 2604; Rogers, *supra* note 103, at 304; Goldman, *supra* note 3, at 3-4; *supra* note 3.

265. *See* Zalaquett, *supra* note 15, at 635-36.

266. *See id.* at 651-52, 657. It can also support efforts aimed at prevention, compensation and reconciliation. *See* Correa, *supra* note 48, 1474-82.

267. *See* Zalaquett, *supra* note 15 at 634-35. Whether the Commission on Truth and Reconciliation should have published the names of individuals found to have violated human rights was a publicly discussed issue. Ultimately, concern for due process prohibited such action. *See* Correa, *supra* note 48, at 1472; Report, *supra* note 2, at 42-43; *infra* notes 270-75 and accompanying text.

268. *See* Zalaquett, *supra* note 15, at 635-36. In a recent move, for example, the Chamber of Deputies requested that the Army form a commission to purge itself of officers implicated in past violations. *See Chile: Purging the Military, supra* note 6. While not a substitute for formal prosecution, the request is an indication that opposition to the impunity persists.

269. *See id.*; Correa, *supra* note 48, at 1481-82.

scope of the amnesty law continues to deny victims and their families effective investigation and remedies for violations of protected rights. At the same time, the Administration has taken steps to establish an official record of the past and to compensate victims. If such measures are continued under the administration of Eduardo Frei, they may lead to a dissolution of the impunity that satisfactorily meets the above suggested standards for mitigating Chile's noncompliance. Chile may then be regarded as an acceptable model for other nations.

1. Publication of the Truth

One of President Aylwin's first official acts was to appoint an independent investigative body called the National Commission on Truth and Reconciliation (the "Rettig Commission").²⁷⁰ The State has asserted that the appointment of the Rettig Commission and its subsequent report mitigate Chile's obligations by demonstrating acknowledgement of state responsibility for past violations and by establishing an official truth about those violations which resulted in death.²⁷¹ Supporters of this position praise the Rettig Commission's report for acknowledging government involvement, memorializing an official truth as a deterrent to future violations, referring viable cases to the courts, and recommending the creation of government offices to provide compensation to surviving victims and their families.²⁷²

Detractors, in contrast, argue that the eleven-month life-span of the Rettig Commission was too short, that the mandate covering only cases which resulted in death was too narrow, and that the Rettig Commission's extra-judicial nature and refusal to publish names of wrong doers failed to address the interests of the victims' families and society.²⁷³

While the failure to publish names does diminish the report's truth-serving function, it is understandable from both policy and due process perspectives.²⁷⁴ More disturbing is the Rettig Commission's inability,

270. See Decree No. 355 (Apr. 25, 1990), published in *Diario Oficial* (May 9, 1990), reprinted in Report, *supra* note 2, at 5-9. The official report of the Rettig Commission, the *Informe de la Comisión Nacional de Verdad y Reconciliación* (also known as the *Informe Rettig* [Rettig Report]), has recently been translated by the Center for Civil and Human Rights of the Notre Dame Law School. See *id.* The Commission is often referred to as the Rettig Commission after its president, Raúl Rettig Guissen. The other members were Jaime Castillo Velasco, José Luis Cea Egaña, Mónica Jiménez de La Jara, Ricardo Martín Díaz, Laura Novoa Vásquez, Gonzalo Vial Correa, and José Luis Zalaquett Daher. See *id.* at 7; see also Correa, *supra* note 48, at 1464 (regarding creation of the Rettig Commission).

271. See Report, *supra* note 2, *passim*; Correa, *supra* note 48, at 1468-71.

272. See Correa, *supra* note 48, at 1466, 1471, 1473, 1481-82.

273. See Correa, *supra* note 48, at 1473-74 (discussing limits of the Rettig Report).

274. See Report, *supra* note 2, at 42-43 (explaining decision not to include names in the report). Were it not for the Chilean Supreme Court's interpretation of the amnesty law as barring even investigations, formal judicial truth-seeking would likely have resulted in the disclosure of the identities of many violators, and the Commission's withholding would be less relevant. See Zalaquett, *supra* note 65, at 1436 (discussing Supreme Court interpretation of the amnesty decree).

because of restrictions in its mandate, to examine any of the thousands of cases of violations of nonderogable human rights from which the victims survived—specifically cases involving torture.²⁷⁵ As previously discussed, there are no conditions which relieve a state's responsibility to protect against torture.²⁷⁶ Therefore Chile's failure to examine numerous cases of torture under the military government seriously undermines the claim that the work of the Rettig Commission should mitigate Chile's noncompliance with its treaty obligations.

2. Reparations

Following the report of the Rettig Commission, the government passed legislation providing assistance to victims and their families. Among these, Law No. 19,123 created the National Corporation for Reparation and Reconciliation.²⁷⁷ The National Corporation was charged with continuing to examine cases which the Rettig Commission left unresolved, with providing medical, educational, and monetary compensation to victims' families, and with developing educational programs that will foster a "culture of respect" for human rights in Chile.²⁷⁸ Supporters point to the National Corporation as a milestone in human rights protection because the State, of its own initiative, is providing reparations for victims of a prior regime.²⁷⁹

Critics charge, however, that the services and pensions the National Corporation provides are not fair compensation, as compared to the civil remedies precluded by the amnesty law and otherwise mandated by Chile's treaty obligations. Critics also argue that the National Corporation's mandate is both overbroad in its goals and too limited in its twenty-four month duration, and that the surviving victims of torture are again ignored.²⁸⁰

Whether one views the work of the National Corporation as mitigat-

275. See Correa, *supra* note 48, at 1473-74. The report does acknowledge the widespread use of torture and examines the incidents of torture which resulted in death. Thus the primary failing is that the Report, together with the amnesty decree, leaves survivors of torture without means to identify, and thus bring action against, their torturers. See *id.*; Report, *supra* note 2, at 28. Adding insult, many of the reparative measures recommended by the Commission did not apply to victims of torture because their cases were not included in the official report. See *infra* notes 277-81 and accompanying text.

276. See *supra*, notes 210-12 and accompanying text.

277. See Law No. 19,123, published in *Diario Oficial* (Feb. 8, 1992), reprinted in Ministry of Foreign Affairs, Republic of Chile, Law Nr. 19,123: Creating the National Corporation for Reparation and Reconciliation (1992) (copy on file with the *Fordham Law Review*). The operating regulations were not published in *Diario Oficial* until July 15, 1992.

278. See Law No. 19,123, published in *Diario Oficial* (Feb. 8, 1992); see also Louise Byrne, *Chile's Nightmare: Amnesty Law Protects Those Guilty of Past Abuses*, *Gazette* (Montreal), May 3, 1993, at B3 (discussing unique acts of reparation).

279. Interview with Alejandro Gonzalez, President of the National Corporation, in Santiago, Chile (Aug. 11, 1992).

280. *Id.*

ing Chile's international obligations seems to depend in part on one's view of compensation as a substitute for prosecution. Some commentators argue that punishment may not be necessary if the government fully reports the truth and provides compensation sufficient to restore individuals and society, as far as is possible, to the status quo ante.²⁸¹ However valid this view may be, the limited nature of the compensation and the failure to provide sufficient information for victims to bring civil actions prevents the work of the National Corporation from fully mitigating Chile's obligations.

3. Dismantling the Impunity

This Note has asserted that the amnesty law inhibits Chile's ability to satisfy the suggested standards governing mitigation because it obstructs investigation. Without investigation, victims are unable to exercise their rights to fair hearing and judicial remedy under the American Convention and the International Covenant. Chile should therefore undertake efforts to dismantle at least some element of the blanket amnesty law. A number of proposals have already been attempted in Chile, including several proposals for the total elimination of the amnesty law. Different implications arise from each, depending on whether they nullify, abrogate, or repeal the law.²⁸²

Before examining these proposals, however, it should be noted that many Chileans support the continued validity, and even the possible expansion, of the amnesty provisions. Among these are persons sympathetic to the protection of human rights, who assert that the amnesty law is an integral part of the reconciliation of the nation. Their assertions, rather than mere expediency, find their roots in principles of truth and justice,²⁸³ and merit careful consideration as they help to inform decisions, not only as to whether the protections of the amnesty decree should be dismantled at all, but also as to the manner and scope of any efforts in that direction.

One of the more visible efforts to dismantle the amnesty law was a petition drive begun on August 4, 1992, by the families of victims of past violations, human rights groups, and politicians.²⁸⁴ Their goal was to

281. See Zalaquett, *supra* note 15, at 629, 634.

282. Of all the options, nullification is most effective in terms of advancing prosecutions because it runs free of constitutional complications as well as the principle of non-retroactivity of criminal law. See Zalaquett, *supra* note 15, at 638-39 (discussing the choice to nullify, rather than abrogate, the Argentine military's self-amnesty law).

283. See Report, *supra* note 2, at 886 ("The stand people take concerning justice tends to determine how they view the notions of impunity and amnesty."). The Rettig Commission reported:

We have encountered divided opinions over what justice entails. . . . [Some] believe that given the amount of time that has passed and the manner in which the events took place and their context, it would not be advisable to open or reopen trial procedures, since the results could be the opposite of those sought.

Id. at 885-86.

284. See El Comité Organizador de la Campaña Pro-Anulación del Decreto Ley de

collect one million signatures demanding that the Congress nullify the amnesty law.²⁸⁵ Such total elimination of the amnesty law, however, is extremely unlikely, if only because the 1980 constitution requires any bill modifying the amnesty law to originate in the Senate, which is far less sensitive to popular sentiment than the *Concertación*-controlled House of Deputies.²⁸⁶ Total elimination of the amnesty law would, however, allow Chile to meet its international obligations and thereby would remove the need for mitigation.

The more likely options for dismantling the blanket coverage of the amnesty law are two types of restrictive changes. Socialist Party legislators in Chile called for an interpretive law to clarify that the amnesty law does not apply to grave violations where life was lost.²⁸⁷ Specifically, the first article of the proposal would clarify that Articles 1 and 3 of Decree Law No. 2191 must be interpreted consistently with Common Article 3 of the Geneva Conventions.²⁸⁸ This would remove from the protection of the amnesty law those pending cases involving the most serious violations of human rights.²⁸⁹ The proposal's second article would permit reexamination of cases closed under the earlier, broad interpretation of the amnesty decree.²⁹⁰ In theory, this would open the judicial process to the most serious violations of human rights. Critics of this approach charge that the proposal is not well drafted, and even if it were, the political distortions remaining from the transition would prevent passage.²⁹¹ Similarly-intended proposals were advanced by politicians Juan Pablo Letelier, Camilo Escalona, Sergio Aguiló, Jaime Naranjo, Laura Rodríguez, and Mario Devaud,²⁹² and by attorneys Ve-

Amnistía, Invitación (invitation to first event of the campaign) (copy on file with the *Fordham Law Review*); see also Paula Chain, *Manifestantes Marcharon Contra la Ley de Amnistía* [*Demonstrators March Against the Amnesty Law*], *La Nación*, Mar. 5, 1992, at 5 (discussing demonstrations organized by the same coalition).

285. See Byrne, *supra* note 278, at B3. Note that there are approximately six million eligible voters in Chile.

286. The constitution requires that any motion resulting in a change to the amnesty decree must originate in the Senate, where nine seats are occupied by Senators designated under Pinochet. See *supra* note 254.

287. See Rolando C. Aranguiz et al., *Motion to the Senate Concerning an Interpretive Law* (prepared for signature by Senators Rolando Calderón Aranguiz, Jaime Gazmuri Mujica, Hernán Vodanovic Schanke, and Ricardo Núñez Muñoz) (unpublished draft on file with the *Fordham Law Review*). The bill was first put forward to the legislature in April of 1992. See Malcolm Coad, *Chile Amnesty*, *Guardian* (Manchester), Apr. 9, 1992 at 7.

288. See *id.*; *supra* notes 103-17 and accompanying text.

289. See Aranguiz, *supra* note 287. Among those that would no longer be protected are crimes against the life or physical integrity of the individual, including, among others, all forms of homicide, mutilations, torture, the taking of hostages and summary executions. See *id.*

290. See *id.*

291. See *supra* notes 254 & 286.

292. See *Bancada de Izquierda Impulsará Proyecto para Anular Ley de Amnistía* [*Left Bench Will Push Project to Nullify the Amnesty Law*], *El Mercurio*, June 1990.

rónica Reyna, Carmen Hertz, and Alfonso Insunza.²⁹³

Similar to an interpretive law, a judicial reinterpretation of the amnesty decree could remove obstacles to investigation and prosecution, while perhaps continuing to bar punishment. Given the dramatic changes in the Chilean political climate and the number of high-profile cases still pending in the Chilean courts, a reinterpretation is possible, but the scope and terms of any new holding is difficult to discern. In recent experience, for example, the Supreme Court has allowed a civil judge to interrogate an active-duty military officer about past violations of human rights.²⁹⁴ But the Court also denied a claim that the amnesty decree did not apply to cases interfering with Chile's affairs with another state.²⁹⁵

In terms of mitigation, any change in either the interpretation or the application of the amnesty law should at least allow official identification of the parties responsible, since this might then make civil actions possible. A reinterpretation that would also allow prosecutions—even with subsequent pardons guaranteed—would satisfy the suggested standards, especially when the work of the Rettig Commission and the National Corporation are also considered.

The most unacceptable option discussed in Chile today is the promulgation of new, expanded amnesty laws intended to put to rest discussion of future prosecutions of military personnel, as well as to resolve the problem of political prisoners.²⁹⁶ But such laws would also foreclose further investigations, leaving many disappearances unresolved and Chile's international obligations unmet.

One recent proposal which threatened to have such effect was presented by the Aylwin administration on August 3, 1993. Responding to increasing tensions between the civilian government and the military,²⁹⁷ the Aylwin administration presented a bill—known as the *Ley*

293. See Reyna et al., *supra* note 105, at 31.

294. See *supra* note 252.

295. See *supra* note 6. In another recent development, the Supreme Court ruled for the first time that the country's former secret police force, the DINA, was directly responsible for the disappearance of at least one person, Maria Joui, during the Pinochet era. The Court, however, continued to apply the amnesty decree to the case, maintaining a prior denial of the argument that the amnesty decree should not apply to cases of unresolved disappearance because they constitute on-going kidnappings (and thus are beyond the 1978 limit of the amnesty law). See, e.g., *Chile: Court Makes "Historic" Ruling on Abuses Under Pinochet*, Inter Press Service, Sept. 16, 1993, available in LEXIS, Nexis Library, Currnt File (describing the DINA's implication in past abuses but noting the continued application of the amnesty law).

296. See Americas Watch, *supra* note 21, at 51. Some of these prisoners were arrested in connection with acts of violence after 1978. Others were arrested before the amnesty decree was issued but did not benefit because their cases were in process at the time. See *supra* notes 68-75 and accompanying text (discussing provisions of Decree Law No. 2191). Because such an expansion would cover left-wing militants as well as former government agents and nonviolent political prisoners, the proposal has gained little legislative support.

297. See *supra* note 227.

Aylwin or Aylwin Law—designed to resolve issues of past violations by speeding up on-going investigations and by facilitating the discovery of the truth in unresolved disappearances. The bill proposed that up to fifteen judges from the Courts of Appeals be assigned full time to investigate human rights cases, that the trials would be conducted in locations where the secrecy of military testimony could be guaranteed, that application of the amnesty law to events between 1973 and 1978 would be assured, and that military personnel convicted of later crimes would be held in special locations of confinement.²⁹⁸

The bill was opposed by both right- and left-wing parties. The Right objected to the bill's implied interpretation of the 1978 amnesty law that would allow investigations,²⁹⁹ charging that it had already been established that investigations were foreclosed. The Left objected to the bill's assurance that the 1978 amnesty law would be applied (effectively making the impunity permanent) and to the bill's third article guaranteeing secrecy for military testimony.³⁰⁰ After the failure of a compromise amendment on the secrecy issue, parties of the Left removed their support, forcing the Aylwin administration to withdraw the proposal.³⁰¹

While a political setback for the administration, the Left's defeat of the Aylwin Law may be a positive indication that Chile is developing a new model for redressing past violations of human rights: a model marked by gradual improvements over an extended time-frame. It suggests that, nearly four years into the transition, much of the populace is still not prepared to surrender the issue of human rights to the impunity of the amnesty law. It remains for the administration of president-elect Frei, therefore, to continue to develop this model.³⁰²

CONCLUSION

What we will have in Chile is what exists in any civilized country: Every citizen knows that the state cannot violate his rights with impunity. I have never met an American who thinks that the police can

298. See Ricardo Concha, *Chile Rights Cases*, L.A. Times, Aug. 21, 1993, at B7 (letter to the editor from Consul General of Chile); Alexandra Huneus, *Chile Still Divided Over Rights Trials*, S.F. Chron., Sept. 10, 1993, at A14; Nathaniel C. Nash, *Chile Refuses to Forget Crimes of Past*, N.Y. Times, Sept. 26, 1993, § 4, at 3.

299. See Huneus, *supra* note 298, at A18.

300. See Huneus, *supra* note 298; Nash, *supra* note 298.

301. See Huneus, *supra* note 298; Nash, *supra* note 298.

302. President-elect Frei has stated that he does not believe the amnesty law forecloses investigations. See Ronnie Lovler, *Chilean Military May Stall Chile's Move to Democracy* (CNN Television news broadcast, Dec. 14, 1993) (transcript #397-4) (via translator). He has also promised to seek amendment of constitutional provisions involving the military transition. See *Frei Meets with Pinochet*, *supra* note 50. Still, the president-elect's intentions on human rights are uncertain, with at least one commentator suggesting that Frei is not likely to press for a resolution of the issue. See *Forging Ahead to a Future of Democracy*, Business Latin America, Sept. 20, 1993 (quoting Professor William C. Smith, Univ. of Miami), available in LEXIS, World Library, Allwld File.

come and kidnap him at 5 A.M. Until now, Chileans have not managed that. But we are much closer to it now than we were a few years ago.³⁰³

Ultimately, Chile must narrow the amnesty law to permit investigation and punishment of at least the most severe violations of human rights committed by the former military regime. Without such narrowing, the work of the democratic government, including the Rettig Commission and the National Corporation, is insufficient to mitigate Chile's noncompliance with international law. The amnesty law will continue to deny victims and their survivors their rights to a fair hearing, judicial protection, and remedy under the American Convention and, by analogy at least, the International Covenant.

At the same time, the international community should recognize reasonable standards of mitigation that recognize nascent democratic administrations' concern for stability. The international community should recognize as well Chile's, and in particular President Aylwin's, efforts to meet such standards: efforts marked by official recognition of abuses, formal reparations, restoration of judicial remedies over an extended time-frame, and, in due course perhaps, prosecutions. When coupled with a dismantling of the blanket impunity, these efforts may lead to an acceptable model for other transition governments: a model that addresses both stability and compliance with the obligations of law and justice.

303. Drewifus, *supra* note 1, at 162 (remarks of Roberto Garreton, Aug. 13, 1990). The passage continues: "I will know that we have achieved respect for human rights here when I am positive that no one will violate them. I would like to reach the moment when Chileans feel that if the doorbell rings at 5 A.M., they will be certain that it is only the milkman." *Id.*