FINAL REPORT

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MISSION TO CHILE, APRIL 1974,

to study

THE LEGAL SYSTEM AND THE PROTECTION OF HUMAN RIGHTS

INTERNATIONAL COMMISSION OF JURISTS

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INTERNATIONAL COMMISSION OF JURISTS

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REPORT ON MISSION TO CHILE

on behalf of

The International Commission of Jurists

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I. INTRODUCTION

We went to Chile on behalf of the International Commission of Jurists in April 1974 in order to enquire into the situation concerning human rights and the rule of law. Our mission was undertaken at the request of the World Council of Churches and in response to the public invitation issued by the Chilean Foreign Minister to "respected organisations" to come to Chile and find out for themselves the true situation.

As was made clear to the Chilean government, the International Commission of Jurists was particularly concerned to enquire into the following matters:

(1) the reasons for the continuation of the State of Siege, the prohibition on all political activity, and the suspension or restriction of basic rights and freedoms such as freedom of speech, freedom of the press, freedom of association, right of assembly, freedom of movement, university freedom, etc.;

(2) the procedures for the arrest, detention, interrogation, charge and trial of persons held in custody for political offences and for offences against the security of the state;

(3) allegations of torture and ill-treatment of persons in custody;

(4) the facilities available for adequate legal representation of persons charged with political offences or offences against the security of the state;

(5) the position of persons who have sought asylum in foreign embassies.

We were in Chile from 19 to 28 April. We met a large number of jurists, including lawyers who have been engaged in the defence of political prisoners, as well as some distinguished academic lawyers. We also met representatives of international organisations who have been working in Chile, and had many conversations with individuals covering a wide spectrum of political viewpoints. We had formal meetings with the President and Members of the Supreme Court and with the Council of the College of Advocates (the Bar Council). We were granted interviews by the Minister of Justice and the Minister of the Interior. We also met Cardinal Raul Silva Enriquez.

We are particularly indebted to Sr Osvaldo Illanes Benitez, former President of the Supreme Court and Member of the International Commission of Jurists, to Sr Alejandro Silva Bascunan, President of the College of Advocates, and to Sr Bernal Gaston Anriquez, Secretary of the Committee for the Defence of the Rule of Law, the National Section of the ICJ, for all the trouble they took in arranging introductions for us and helping us in many other ways.

We were also greatly assisted by the staff of the interdenominational Committee of Cooperation for Peace in Chile, under the joint presidency of Bishop Fernando Ariztia (R.C.) and Bishop Helmut Frenz (Lutheran). This Committee is carrying out humanitarian work to assist persons who have been taken into custody for political or security reasons, and members of their families. They have organised a free legal aid service for those who are unable to afford legal assistance. This is operating in Santiago and many other parts of the country. It had, by April 1974, provided legal services for over 3,000 persons.

II. THE REASONS GIVEN IN JUSTIFICATION OF THE MILITARY COUP

As we made clear to all with whom we spoke, it was no part of our terms of reference to enquire into the reasons for or justification of the coup on September 11, 1973. Understandably enough, however, many of those whom we met were anxious to explain their views to us on these questions. As they help to explain the legal measures which have been adopted since the coup, we will state in summary form the principal arguments which were presented to us in support of the coup.

When President Allende was elected, he failed to obtain an absolute majority by popular vote, as has been usual in Presidential elections in Chile since 1925 (President Frei's election was an exception). It therefore fell to the Parliament (National Congress) to choose between the top two candidates. They chose Allende on his agreeing to certain constitutional amendments and on his giving a solemn undertaking to respect the principles of the Constitution.

In spite of this undertaking, the Allende government, it is said, acted illegally and unconstitutionally in a number of ways during the second half of the three years it was in office. In particular, it did nothing to prevent, if it did not encourage, illegal seizures of farms and factories and other property by peasants and workers. When the dispossessed owners successfully took legal proceedings to recover their property, the government refused to take action to execute the orders of the courts. Their supporters were allowed to demonstrate with impunity against the judiciary and the legislature. Insulting slogans were written on the walls of court buildings. Secondly, it is said that President Allende abused his power to grant pardons by granting them on a wide scale to active supporters of his government who had been condemned for criminal offences, in relation both to these illegal seizures and other matters. In this way he put his supporters outside the law and encouraged further illegalities. Thirdly, when the minority government were unable to obtain the consent of parliament to legislation they wanted, particularly for the nationalisation of certain industries, they used as a regular means of government a special power of delegated legislation which, it is said, was intended to be used only in exceptional circumstances.

This was a power to overrule the objections of the Controller-General of the Republic to a piece of delegated legislation by having it approved and signed individually by each member of the Cabinet. Fourthly, it is held against Allende that he refused to sign certain amendments to the Constitution proposed and passed by the National Congress. A conflict arose as to whether the amendments took effect or not. A deadlock was reached when the Constitutional Court held that it had no jurisdiction to determine the issue. President Allende refused to submit the matter to a referendum, which he could have done, and some say he should have done.

In addition, it is said that President Allende and his supporters illegally smuggled into the country a large number of weapons with a view to arming paramilitary forces. Although this had at least the tacit support of the government, it was illegal because President Allende had had to accept and sign a law passed by parliament conferring on the armed forces the power to control the possession of firearms and making it illegal for paramilitary bodies to be formed or armed. Some illegally held weapons had been seized by the military authorities before the coup, and it is said that evidence of a great many more has been found since then.

It is contended that by these and other means the Allende government acted contrary to both the letter and spirit of the Constitution and destroyed the necessary balance between the legislature, the judiciary and the executive. Before the coup, the Supreme Court, the Congress and the Controller-General (Contraloria) had each publicly protested against what they considered to be the illegal actions of the Allende government, and in this they were supported by the Council of the College of Advocates. The procedure of impeachment (which is similar to that in the United States) was, however, never set in motion, as the necessary two-thirds majority could not be obtained.

Answers have, of course, been given to these charges by supporters of the Allende government. On the first point, it is said that seizures of farms and factories by peasants and workers had occurred under previous governments, and that President Allende, as he stated publicly at the time, wished to avoid the violent bloodshed which had attended the enforcement of eviction orders in the former cases. He preferred to put in an official to take control and to

try by conciliation to resolve the dispute and to safeguard both the private and social interests involved. On the question of pardons, it is said that these were widely granted under previous governments and it is denied that the power was abused. It is agreed that the special power of delegated legislation was used more than by previous governments, but it is claimed that this was made necessary by the systematic rejection of legislation by the National Congress and the Controller-General. No previous government, and there had been many minority governments, had been subjected to such obstruction. For example, President Allende's government was the only one in recent times to be refused special powers to deal with the economic situation. On the constitutional issue there was a genuine difference of legal opinion. One of President Allende's former political advisers, Mr. Juan Garcés, has stated that on September 7, 1973, President Allende informed a number of military leaders (including General Pinochet) that he was proposing to announce on September 11 his decision to hold a referendum, and this intention was, indeed, reported in the foreign press at the time. (1) On the appointed day, the coup took place. As to the smuggling of arms, it is contended that this was done by supporters of parties on both sides and that some of the documents in the White Book published by the Junta showed that the arms supplied by left wing groups were intended to support the loyal military forces in case of a military rebellion against the constitutional government.

There were, of course, many other serious economic and political criticisms levelled against the Allende government, and there is no doubt that a very tense political situation had arisen by the middle of 1973, which strongly divided the nation. A number of prominent opposition leaders made scarcely veiled appeals to the armed forces to intervene, and widespread strikes and protest meetings and demonstrations were openly directed towards bringing down the regime.

III. THE JUNTA AND THE CONSTITUTION

On the day of the coup (September 11, 1973) President Allende met his death (whether he committed suicide or was shot by the armed forces is a matter of controversy). Article 66 of the Political Constitution of the Republic of Chile lays down the appropriate procedures for electing a successor to a

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(1) Cf. Le Monde, 9-10 September, 29 September and 19 December, 1973.

President who dies during his term of office. In spite of the fact that the Junta proclaimed on the radio on September 11 that they were intervening in order to "re-establish order and the constitutional law", these procedures were not set in motion. Instead, the Junta, comprising the Commanders in Chief of the Army, Navy and Air Force and the Director General of the Carabineros, seized power. The National Congress was at first put into recess (on September 13, 1973) and later dissolved (Decree Law No. 27, of September 21, 1973). The Junta, again by decree, vested in themselves the powers of the President and the Parliament (Decree Law No. 128 of November 16, 1973).(2) The Controller-General of the Republic (Contraloria) whose function was to verify the legality of acts of the Executive (including delegated legislation) was reduced to a purely advisory status. Later the Constitutional Court was suspended.

There is no provision in the Constitution authorising any of these decrees. By Decree Law No. 1 (September 11, 1973), the Junta said that they would "respect the Constitution and laws of the Republic to the extent that the present situation in the country allows for the better accomplishment of the objectives which it has set itself", and by Decree Law No. 128 of November 16, 1973, they declared that as from September 11, 1973, the provisions of the Constitution and the laws were to be considered as remaining in force unless expressly modified by Decree Law.

This assertion is not in accordance with the factual situation. Only one decree has expressly modified the Constitution (a Decree Law relating to loss of nationality for grave acts committed abroad against the essential interests of the state during a state of siege). Nevertheless, as has been seen, by means of the series of decrees already referred to, all the normal

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(2) By a new Decree Law No. 527 of June 26, 1974, it is stated that the executive power is exercised by the President of the Junta as "the Supreme Chief of the Nation", with the powers, attributions and prerogatives which that status confers. This in effect gives General Pinochet the powers of the President under the Constitution, without calling him President. It is said in the Decree that other members of the Junta will collaborate with him in the exercise of his functions, which are set out in great detail. It would appear from this lengthy new decree that the Junta envisage an indefinite continuation of the military dictatorship. They would hardly have promulgated such a detailed decree if they were intending to return the country in the short term to a democratic system under a new or revised constitution.

democratic processes of the Constitution have been overthrown. Indeed, the coup itself and the decrees of the Junta contravene directly certain provisions of the Constitution. Articles 3 and 4 of the Constitution read as follows:

> "3. No person or group of persons can claim to represent the people, to arrogate to themselves its rights, or to present petitions in its name. Any violation of this article is sedition.
>
> 4. No body, person or group of persons can attribute to itself, even under the pretext of exceptional circumstances, any powers or rights other than those expressly conferred on it by law. Any act in contravention of this article is null and void."
>
> (Underlining added.)

The Constitution is very clear on the subject of intervention by the military. Article 22 (as amended) reads: "The public force is constituted solely and exclusively by the armed forces and the corps of carabineros /militarized police/, which bodies are essentially professional, organised by rank, disciplined, obedient and not deliberative." In its context the words "obedient and not deliberative" imply that the armed forces may not question orders given to them by the government, or themselves take political decisions. Article 23 provides: "Any resolution of the President of the Republic, the Chamber of Deputies, the Senate or the Courts of Justice, agreed to in the presence of or at the demand of an armed force, a military commander, or any assembly of people, with or without arms, and in disobedience of the authorities, is legally void and of no effect."

Although there is no provision in the Constitution authorising the Decree Laws of the Junta, and although they are seen to be in violation of the Constitution and the law, the Supreme Court has expressly approved their validity. It has done so not, as one would expect, on the grounds that the courts must accept the fact of the revolutionary seizure of power by the military authorities, but on the grounds that the previous government had by its unconstitutional actions put itself byond the law, and that the intervention of the military was necessary in order to uphold the Constitution. It was repeatedly urged upon us by some eminent jurists, including the President of the Supreme Court, that this was not "just another South American military coup", but was a lawfully based government, and that the military authorities were exercising a necessary ultimate power to uphold the law. We confess we

find it difficult to follow this constitutional argument. Not only do the acts of the present government violate the Constitution far more than anything alleged against President Allende, but it has been made clear by the Junta themselves that they will not permit a return to democratic government under the former Constitution. They have appointed a Commission of Constitutional Reform, and, in November 1973, approved its statement of principles for a new Constitution of a very different character from the democratic Constitution of 1925.

Moreover, while the independence of the Judiciary has been publicly and formally affirmed (Decree Law No. 128), the jurisdiction of the civilian courts has been replaced in all matters relating to internal security, including the arrest, detention and trial of political suspects, by an extremely summary system of military tribunals. The Supreme Court has renounced even a supervisory jurisdiction over these tribunals. In the result, the vaunted independence of the Judiciary appears to be of little relevance.

IV. STATE OF SIEGE, STATE OF WAR AND STATE OF EMERGENCY

On the day of the coup, a Decree Law was announced on radio and television declaring a State of Siege over the whole country. This Decree was published in the Official Gazette on September 18 as Decree Law No. 3, dated September 11, 1973. On September 22 another Decree was published, Decree Law No. 5, dated September 12, 1973, declaring that the State of Siege was to be understood as a "State or Time of War" for the purpose of applying the time of war penalties established by the Code of Military Justice, and for the functioning of "military tribunals in time of war" with war-time legal procedures.

Again, no authority is found in the Constitution for these declarations by the Junta. The power to declare a State of Siege for internal disorder is vested by Article 72, No. 17 of the Constitution in the Congress or, for a limited period until the Congress meets, in the President. (The Congress refused to grant President Allende a State of Siege after the abortive military coup on June 29, 1973, contending that the President already had sufficient powers to deal with the situation.) A declaration of a State of War may be

made, under Article 44, No. 11, by the Congress passing a law to that effect on the proposal of the President. The power to declare a State of Emergency rests with the President. There is no authority under the Constitution or under the law entitling the military authorities by Decree Law to proclaim an Emergency or a State of Siege or to declare that it is to take effect as a State of War. In any event, as Congress was in session on September 11, only the Congress could lawfully proclaim a State of Siege or State of War.

According to Article 72, No. 17 of the Constitution, a declaration of a State of Siege may affect "one or several parts of the country". It must be for a fixed period, up to a maximum of 6 months (Article 44, No. 12). It may then be renewed by Congress. The present State of Siege was declared for an indefinite period to extend over the whole country. A further Decree Law in March 1974 purported to extend it to September 11, 1974.

According to the same Article 72 of the Constitution, the sole powers granted under a State of Siege are granted to the President. These are the powers:

(1) to transfer persons from one department (an administrative territorial division) to another, and

(2) to arrest and hold people under house arrest in their own homes or in other places, provided that they are not prisons or places of detention of common criminals.

The measures adopted by virtue of a State of Siege may not last longer than the State of Siege itself.

The effect of a declaration of a State of Emergency is that the zone which is covered by the declaration comes under the complete control of the Military Commander appointed for the zone, who can then govern it by means of ordinances (bandos). Decree Law No. 4 appointed Military Commanders to provinces and departments covering the whole country.

A declaration of a State of Siege is intended to apply to situations in which the country is threatened with attack from abroad, or is confronted

with an armed uprising by organised rebel forces. There was, of course, no armed uprising before the military coup on September 11, 1973. There was some fighting after the coup by forces resisting the military take-over, but all organised resistance was brought under control within about 10 days.

The Junta contend that the maintenance of the State of Siege and State of War is necessary to deal with the subversive forces which they say exist under-ground, heavily armed with weapons brought illegally into the country under President Allende. It is also suggested that there are some 14,000 supporters of these subversive forces waiting across the frontiers in Argentina and Peru, half of them armed, until the moment comes when they can invade the country in support of an armed uprising. We do not find this explanation convincing, and some persons close to the Junta with whom we spoke admitted freely that there was no longer any military threat to the regime. They, however, justified the maintenance of the State of Siege upon what seems more likely to be the real grounds. They argued that the country is still too divided for a return to democracy to be possible, and that in any event the nature of democracy must be altered in Chile. They contend that the government need to maintain the emergency powers and the military system of justice in time of war in order to keep control of the political situation, to eradicate marxism, and to prepare the country for a return to democracy under a revised Constitution. The fiction that the country is in a State of War is maintained for the sake of the increased powers which it confers upon the government.

V. SUSPENSION OF CIVIL RIGHTS AND FUNDAMENTAL FREEDOMS

All the basic rights and freedoms guaranteed under the Constitution have been suspended or severely eroded by Decree Laws and Ordinances (Bandos) promulgated by the military authorities.

All political parties are suspended and those of left-wing tendency are declared illegal. No political activity of any kind is allowed. No-one may demonstrate, even in favour of the government. No assembly may take place without prior permission being obtained. Even social gatherings or parties in private houses are prohibited during the hours of curfew.

Freedom of association has been severely restricted, many associations have been declared illegal or dissolved, including political, trade union, agricultural and poblacion (shanty town) organisations.

There is little or no freedom of expression. Newspapers and radio stations sympathetic to the former government have been closed. The press and radio are strictly controlled.

Academic freedom has been abolished. The Universities have been brought under control of the military authorities. Some departments, including the department of Sociology, have been closed on the grounds that the teaching was "subversive", and degrees conferred by them have been retrospectively annulled. Many institutes, schools and other centres of learning have been closed. A large number of the teaching and administrative staffs have been dismissed. Students have been required to re-register and have been controlled on political grounds.

Inviolability of the home is not respected. People's houses are liable to be searched by military or police authorities at any hour without a search warrant.

Freedom of movement is severely restricted, internally as well as externally. A cunfew is in force.

With respect to the right to work, guarantees against unjust dismissal (under pre-Allende legislation) are no longer available in the public sector. All public employees were placed on temporary employment after the coup and are liable to dismissal at the discretion of the authorities without any right of appeal. For the private sector, the previous Labour Courts have been replaced by special tribunals with one legally qualified judge, one representative of the armed forces and a labour inspector nominated by the Labour Board. Lawful grounds of dismissal have been increased. Among the thousands who are now unemployed in Chile are many who lost their jobs as a result of these measures, causing very severe hardship among the poorer sections of the community.

Perhaps the most severe restrictions on civil rights have been in relation to freedom from arbitrary arrest and detention, and in the trial procedure.

VI. THE SYSTEM OF MILITARY JUSTICE IN TIME OF WAR

The two main effects of the proclamation of a State of Siege are the substitution of the "time of war" procedures of military justice for the "time of peace" procedures, and the power given to the President to detain political suspects by administrative order without any form of judicial process.

"Military justice in time of war" is provided for in the Code of Military Justice and is meant to be applied in actual war situations, such as in besieged towns or in zones where serious military operations are in progress. The outstanding features of the time of war procedure are the summary nature of the proceedings, and the absence of any right of appeal.

Pre-Trial Investigation

Under the time of peace procedure, there are detailed and thorough preliminary proceedings. These take the form of a judicial investigation (sumario) carried out by a specially designated officer (Fiscal). Some of the Fiscales have legal training. This investigation is modelled upon the "instruction" stage of the civil law penal procedure. Defence lawyers are not able to participate in these proceedings, but they are able to see and advise their client after the initial short period of incomunicado has ended. After the completion of the sumario, the defence lawyer has full opportunities to have witnesses convened and examined on behalf of the defence.

Under the time of war procedure, the preliminary investigation is of a very summary nature and is supposed to be completed by the Fiscal within 48 hours (Article 180 of the Code of Military Justice). The Defendant is not entitled to see a lawyer until he has been charged following the sumario. The Military Commander then convenes a tribunal known as a Council of War, to try the case on a specified date. In practice the trial often begins within 48 hours. The Council of War is comprised of 7 military officers, only one of whom, the Auditor, is legally qualified. The Fiscal who has investigated the case is also the Prosecutor before the Council of War.

Right to a Defence Lawyer

In theory the Defendant is entitled to the advocate of his choice as soon as he has been charged following the sumario. If he has no lawyer, he should be entitled to free legal representation by the advocate de turno (i.e. the lawyer whose turn it is on a roster kept by the local College of Advocates). If none is available, a defending advocate should be designated by the Fiscal.

We were told that in very many cases the Defendant is not able to secure the advocate of his choice. In some cases the lawyers are unwilling to undertake the defence for fear of reprisals. In others, too short a period is available between the sumario and the trial for the lawyer to be contacted and to enable him to make the journey to the place where the tribunal is sitting. The roster system often breaks down and no duty lawyer is available. The Defendants usually have no confidence in an advocate nominated by the Fiscal.

In most cases the short period which is available before the hearing of the case also makes it impossible in practice for the defence lawyer to challenge the evidence collected for the prosecution in the sumario and to present evidence for the defence. Also, except in major trials the defence lawyer is usually unable to object to documents, demand expert appraisals or secure the attendance of prosecution witnesses for cross-examination.

In some cases the defence lawyer has not been allowed to see certain pages in the sumario report although they are seen by the Prosecutor and the Court. The reason given is that they touch on matters of national security. Thus the defence does not even know what evidence it has to meet.

The defence lawyer usually has to conduct the case on the basis of accepting the evidence presented by the prosecution, and putting forward what mitigation or legal arguments he can on behalf of his client. In most of these cases the Defendant has been in custody under investigation for a period of months with no access to a lawyer. There is no question of the sumario being completed within 48 hours in accordance with the Code of Military Justice. In certain show trials, like the Air Force trial in progress in Santiago

at the time of our mission, adequate facilities are given to the defence advocates to prepare their defence. We were assured, however, that this is not typical of the way in which Councils of War operate up and down the country.

There are other ways in which defence rights are rendered illusory. One advocate has had to renounce defending political prisoners because whenever he did so the sentence imposed was much severer than usual and out of all proportion to the gravity of the offence. This lawyer received threats of murder for undertaking defences free of charge.

Capital offences of treason, sedition and kindred offences are frequently charged against Defendants on the basis of their actions in support of President Allende and his government before or at the time of the coup. For example, in the Air Force trial in progress during our mission Carlos Lazo, former Vice-President of the Central Bank, was condemned to death (later reduced to 30 years) for having met with air force officers in an attempt to weed out those officers who were believed to be opposed to and plotting against the Allende government. Former Senator Erich Schnake was sentenced to 20 years imprisonment for having broadcast on the day of the coup an appeal to the people to support the Allende government. In such cases defence lawyers are debarred from raising "political issues" in their arguments. This effectively prevents them from dealing with the real issue in these cases, namely the respective legality of the Allende regime and the present regime.

Absence of Right of Appeal

The sentences of the Councils of War are subject to review by the Military Commander of the district where the case is heard. He may approve, revoke or modify (by reducing or increasing) the sentence (Article 74 of the Code of Military Justice). The defence lawyer may make a written submission to the Military Commander, but there is no hearing before him and, of course, he is not a judge, nor is he legally qualified.

There is no form of appeal or recourse against the decision as finally determined by the Military Commander, not even when gross irregularities have occurred during the course of a trial, or when the Council of War has exceeded its jurisdiction. Under the time of peace military procedure there is a

"Second Instance" or full right of appeal to a tribunal known as the Court Martial. This is a much respected court composed of the three Auditors (Judge Advocates General) of the three Armed Forces together with two civilian Appeals Court judges. In addition, there are other remedies (e.g. amparo and queja) by which recourse may be had to the "Ordinary Justice" (i.e. the civilian Court of Appeals and the Supreme Court) in cases where it is alleged that irregularities in procedure have occurred or that the military tribunal has exceeded its jurisdiction.

Under the time of war procedure there is no "second instance" and no right of appeal to the Court Martial. A number of attempts have been made to bring proceedings before the Court of Appeals and the Supreme Court, but the Supreme Court has steadfastly refused to exercise any supervisory jurisdiction over the system of military justice in time of war, holding that the proceedings and sentences of Councils of War fall exclusively within the sphere of the Executive. A short report of one of these cases, and the arguments deployed is at Appendix "A".

These decisions of the Supreme Court have been severely criticised by the most distinguished constitutional and penal lawyers, who contend that Article 86 of the Constitution expressly confers upon the Supreme Court a supervisory jurisdiction over "all the tribunals of the Nation". They assert that no precedent for these decisions is to be found on the previous occasions when the "time of war" procedure has been in force.

Whatever be the true interpretation of the Chilean Constitution on this matter, it cannot but be regarded as a deplorable feature of the military system of justice now in force in Chile that there is no procedure for correcting judicial errors. This is particularly so when it is remembered that the judicial procedure is a very summary one (a factor which itself tends towards error), and that the great majority of the judges have no legal training.

Judicial Errors

During conversations with defence lawyers we had our attention drawn to many serious errors which it is alleged had occurred and for which there was no remedy. The following are some examples:

(1) In a decision given by a Council of War at Pisagua on October 29, 1973, six men named Taberna, Sampson, Quinteros, Vargas, Ruz and Fuenzalida were condemned to death. The judgment stated that the court was not unanimous in that one of the members, namely the Auditor, considered that there should be a penalty of 10 years imprisonment. Article 73, paragraph 1, of the Organic Code of Tribunals (which is made to apply to the decisions of Councils of War by Article 87 of the Code of Military Justice) provides that a death sentence cannot be confirmed unless the Council of War was unanimous. In the event of a majority decision the next lowest punishment is applied. Nevertheless, the Military Commander confirmed the death sentence and, as there was no remedy available, the six men were illegally executed.

(2) Article 12 of the Constitution provides that no-one may be tried except by a tribunal specified by law and established prior to the alleged offence, and Article 11 of the Constitution and Article 18 of the Penal Code provide that no-one may be sentenced except in accordance with a law promulgated prior to commission of the offence. In reply to representations made by the College of Advocates the Minister of Justice stated publicly that this principle of non-retroactivity was being fully respected and that increased penalties provided for under Decree Laws would not be applied retrospectively. On September 11 and 12, 1973, Professor Nicolas Vega Angel, Vice-President of the University of Chile, Osorno, Professor Luis Freddy Silva Contreras, General Secretary of the University and 10 students of the same university were arrested. They were charged under Article 8, paragraph 2, of Law No. 17.798, on the Establishment of Weapon Control. The maximum penalty under that law at the time of the alleged offence (i.e. prior to their arrest on September 11 and 12) was 540 days. On September 22, 1973, Decree Law No. 5 was promulgated increasing the maximum penalties under this law. On November 17, 1973, a Council of War at Osorno (Case No. 1585/73, Fiscalia de Carabineros Osorno), condemned Professors Vega Angel and Silva Contreras to 15 years, and the 10 students to 3 years imprisonment. The defence advocate (de turno) pointed out the error in his written defence and in a submission to the reviewing authority. Nevertheless the sentences were confirmed. There is no means of appealing against this erroneous sentence. We were told that there have been many other similar

cases, including even cases of death penalties for offences committed before the proclamation of a state of war, although no death penalty was applicable at the time of the offence.

(3) It appears that in many cases Councils of War have tried offences which they have no jurisdiction to try. In particular, as a regular, and indeed it would seem invariable, practice civilians who are charged with having committed security offences before September 11, 1973, are tried by Councils of War. This include offences against the Law of State Security (No. 12.927 of August 6, 1958) and the Law on Weapon Control (No. 17.798 of October 21, 1972). By common agreement among the leading Chilean lawyers (3), this is in violation of Article 12 of the Chilean Constitution, since it applies retroactively the war time tribunals with their very summary procedure to offences committed in time of peace. The matter has been raised formally by the legal profession with the Minister of Justice whose assurance on the subject has not been carried out in practice (see Section VIII below). As there is no appellate system, there is no way of having the issue decided by the Supreme Court and of annulling any illegal trials and convictions.

(4) In many cases it is reported that Councils of War have convicted on the basis of confessions made in interrogation centres, which were denied before the Fiscal as having been extracted under torture, or where there was no other evidence against the accused apart from his confession. This is in violation of Article 509 of the Code of Penal Procedure which provides that a confession shall not be admissible unless (1) it is made before the Judge of Instruction (or Fiscal in the military system), (2) it is made freely and consciously, (3) the confession is possible and plausible considering the personal circumstances of the accused, and (4) the fact of the crime is proved by other evidence and the confession is consistent with that evidence. Article 511 provides that if the defendant wants to retract his confession made before the Judge of Instruction (or Fiscal) under Article 509, he will not be heard unless he proves "unequivocally" that there was error, pressure, or that he was not in the free possession of his reason. This is, of course, a very heavy

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(3) Cf. Section VIII below and the "Memorandum concerning the present application of criminals laws in force in relation to political trials" submitted to the government by Professor Eugenio Velasco Letelier and 11 other eminent penal lawyers in December 1973.

burden for the defendant to discharge, particularly when it is remembered that the Fiscal is the prosecutor before the Council of War. Moreover, the Councils of War will usually not allow the defendant to testify that he has been tortured, and defence lawyers who have alleged it have been ordered from the court, and in at least one case the lawyer was banned from further practice.

(5) Councils of War have enquired into matters which did not form part of the accusation by the Fiscal against the Defendant.

(6) Councils of War have convicted Defendants of offences which were not alleged in the charge and for which the defence advocate could not, therefore, prepare the defence.

(7) Defendants have been convicted in cases where proof of essential elements in the case was completely lacking.

(8) Defendants have been convicted of offences not known to the law.

(9) Councils of War have sat without a qualified advocate as Auditor, or without the necessary six other members.

(10) Defence witnesses have been intimidated.

(11) In some provinces Councils of War have sat in camera as a regular practice, although Article 196 of the Code of Military Justice requires them normally to sit in public.

In our preliminary report of April 27, 1974, we called attention to the fact that "many serious errors in law and procedure by ... military courts have occurred and that there is no judicial procedure by which these errors can be remedied". We recommended that the appeal procedures available in time of peace (i.e. an appeal or "Second Instance" before the Court Martial, with final recourse to the Supreme Court) should be introduced, if necessary by Decree Law. We were told that the introduction of an appeal system was under consideration, but as far as we are aware nothing has yet been done and

there is still no second instance and no procedure for correcting judicial errors under the system of military justice.

As we pointed out in our preliminary report this is a violation of Chile's obligation under Article 3 of the Geneva Conventions, 1949, to afford "all the judicial guarantees which are recognised as indispensable by civilised peoples". In his Commentary on the Fourth Geneva Convention, published by the International Committee of the Red Cross, Geneva, 1958, Dr. Jean S. Pictet says at page 39: "All civilised nations surround the administration of justice with safeguards aimed at eliminating the possibility of judicial errors. The Convention has rightly proclaimed that it is essential to do this even in time of war. We must be very clear about one point: it is only "summary" justice which it is intended to prohibit."

VII. THE ARREST, INTERROGATION AND DETENTION OF POLITICAL SUSPECTS

Number of Arrests

No statistics have been published by the Chilean authorities of the number of persons who have been arrested. Estimates with which we were provided and which we consider likely to be reasonably accurate suggest that up to the end of March 1974 a total of about 60,000 persons had been arrested by the armed forces and carabineros and held for a period of at least 24 hours. Many of these were held for only a few days or weeks and were then released. At the end of 1973, it is thought that about 18,000 persons were still being held in custody. The authorities then began sifting through the longer term prisoners and releasing many of them. By the end of March 1974 the figure of 18,000 had been reduced to about 9,000 to 10,000 and these included fresh arrests since the beginning of the year.

Arresting Authorities

The arrests are carried out by army, navy or air force personnel or by carabineros (militarized police). At first, mass arrests were carried out by the ordinary units of these forces. Towards the end of 1973 more discrimination was shown and the arrests increasingly were carried out by one of the

four apparently independent security services of the three armed forces and the carabineros. In January 1974, a National Department of Intelligence (DINA) was created to coordinate these various intelligence services, but they seem still to act with a considerable degree of autonomy.

Categories Arrested

The original mass arrests were directed not only against persons suspected of having illegal possession of arms, but against all who were believed to hold left-wing views, including members of the deposed government, political party leaders, leaders of trade unions, of the urban and rural poor and of students, as well as outstanding journalists, artists or intellectuals. Many other people of no particular importance or influence were arrested through denunciation or as a result of "military operations", i.e. search and arrest operations aimed at ensuring complete control by the military authorities. Arrests continue to be made of people in these categories, but appear to be made now in a more discriminating way.

Summary Executions

During these initial search and arrest operations many civilians were killed, some while offering resistance, others by "summary execution". Bando No. 24, issued by the Junta on September 12, 1973, ordered the surrender of all arms, and paragraph 2 stated that "anyone taken prisoner /while resisting with arms/ will be shot forthwith". This order was the subject of many protests abroad.

By Decree Law No. 5 of September 12 (published on September 22), 1973, Article 281 of the Code of Military Justice (which makes it an offence to attack military sentries or guards) was amended by the addition of the following paragraph:

> "When the security of those being attacked so requires, the persons responsible may be killed in the act."

If this amendment of the law meant no more than that soldiers on duty were entitled, if necessary, to kill their assailants in self-defence, it is difficult to see why it was needed. As in all countries, this is part of the ordinary law. There seems force in the contention that this Decree was an open

invitation to soldiers to shoot at sight. In any event, a considerable number of people were killed in the early stages and it is alleged that many of them were shot after capture by way of summary execution. Others were said by the authorities to have been shot trying to escape under the ley de fuga (law of flight). Such cases still occur occasionally.

It has been established beyond doubt that in October 1973 some senior military officers made a tour of five towns in the north of the country and ordered the immediate execution without trial of over 60 persons then in custody. The execution of 16 of these at La Serena was announced in the local press in October, 1973, together with a completely false report that they had been tried and sentenced by various Councils of War for specified offences. In fact, no such trials were held. Indeed, 4 of these 16 were being tried at the time for other (non-capital) offences before a Council of War. When their defence lawyer arrived at court on the day when they were executed, he was told that the court would not be sitting that day. Some weeks later, when the court eventually gave judgment (with respect to the other defendants in the case), it was stated that as the four missing defendants had "died" during the course of the trial, the proceedings against them were void.

Missing persons

During these indiscriminate arrests a very large number of people simply disappeared and their relatives and lawyers were unable to find out by whom they had been arrested or where they had been held. Eventually an information centre (known as SENDET - National Executive Secretariat of Detainees) was set up and it was said that information would be available there within 3 days of the arrest. In practice, this organisation proved of little value. The staff would not themselves pursue enquiries about missing persons, and if a missing person was not on their lists, they would simply deny that he had been arrested. In fact, the military authorities were continuing to arrest people without informing SENDET, or for that matter any higher authority. They acted, and continue to act, as a law unto themselves. The clearest proof of this occured a few days before our mission arrived in Chile, when a Swiss journalist, Mr. Pierre Rieben, disappeared. The most energetic enquiries by the Swiss Ambassador met with the response that he had not been arrested by any of the authorities. Even on the fourth day after his arrest the Secretary

of the Junta, Colonel Ewing, insisted that if the journalist had been arrested by any of the authorities, he would know about it. Four hours later the journalist was traced by the Swiss Ambassador to an Air Force interrogation centre where, as he alleged, he had been severely tortured.

Very large numbers of arrested persons have disappeared without trace. Of 3,089 persons whose arrest had been notified to the Committee of Cooperation for Peace in Chile since the coup, 547 (i.e. 17.6%) were missing at the end of March.

Amparo

Amparo is a remedy analogous to habeas corpus, but wider in its scope. It has proved in the past an effective and speedy remedy for securing the release of persons improperly held in custody. Under President Allende, the release of such persons was not infrequently secured within 24 or 48 hours, and the Court would pursue enquiries urgently, if necessary by telephone. The application is normally made to the Court of Appeals with a right of appeal from their decision to the Supreme Court.

Many cases have been brought by way of amparo to ascertain the whereabouts and to secure the release of persons who have been, or are believed to have been, unlawfully arrested, or who are being illegally detained or ill-treated. One such case was brought by Bishops Ariztia and Frenz in respect of 131 missing persons, giving details of their arrest. It is believed that in no case has any person's release been secured by an order made in amparo proceedings, and in very few cases has the court succeeded in locating a missing detainee. In most cases, the military authorities simply neglect to reply to the enquiries of the Court. Even where a person is located, the Supreme Court will not pursue the case further if the military authorities state that the person is held under an order made under powers granted by the State of Siege. Two cases of amparo were accepted by the Court of Appeal, but their decision was reversed by the Supreme Court. One of these related to a 15-year old boy, Luis Adelberto Muñez Meza, detained in the National Stadium at Santiago. At this age he is exempt from criminal liability. The only accusation which appeared to have been made against him was that he had participated in stoning a vehicle belonging to the municipality of Talagante

in 1970. The Court of Appeals ordered his release because there was no written order for his transfer to the National Stadium. By the time the case came to the Supreme Court such an order was produced and the Supreme Court revoked the decision of the Appeals Court, holding that the protection contained in the Law on Juveniles "cannot prevail over the provisions adopted by the authorities during the State of Siege".

Legal Authority for Arrests

Persons may be lawfully arrested either :

(1) as persons suspected of having committed criminal offences, or

(2) for administrative detention under Article 72, No. 17, of the Constitution, on the grounds that they are a danger to security.

Those belonging to the first category should be dealt with in accordance with the Criminal Procedure Code, which requires them to be placed under the jurisdiction and control of an Investigating Judge or, in the military jurisdiction, of a Fiscal within 5 days.

Those belonging to the second category should be arrested only on a written order by the President. On January 3, 1974, Decree Law No. 228 was promulgated stating that all arrests of persons by virtue of the State of Siege must be made under a written warrant issued by the Minister of the Interior. In the same decree, all arrests which had occurred up to that date were said to be retroactively validated. In spite of this decree many people continue to be arrested without any written warrant being produced, and many of these arrests are carried out quite anonymously by members of one of the intelligence services operating in plain clothes and arriving in cars with no number plates.

This supposedly clear-cut distinction between persons who are suspected of criminal offences and those who are arrested for administrative detention as security risks is often blurred in practice. A large proportion of the prisoners do not know in which category they fall, and persons who have been held without trial for months are suddenly charged with offences. This

violates the Code of Criminal Procedure which requires persons suspected of offences to be handed over to the Investigating Judge within five days of arrest (Article 294).

Incomunicado

Article 321 of the Code of Criminal Procedure lays down strict rules governing the period during which aperson in the first category may be held "incomunicado", which means that he is unable to communicate with his lawyer, his family, or indeed anyone outside the place of detention. He is usually kept in solitary confinement. The normal period is up to 5 days, but this may be prolonged for a further 5 days by the Investigating Judge. In the event of new information becoming available which requires investigation, the period of incomunicado may be extended for another 5 + 5 days.

We were told by General Bonilla, then Minister of the Interior, that written instructions had been issued that persons detained under the State of Siege (i.e. under Article 72, No. 17 of the Constitution) must normally be held incomunicado not more than 3 days, but that this period could be extended up to a total of 8 days on the written authorisation of a senior officer.

Interrogations and Torture

From information we received from sources we consider wholly reliable, the following picture emerges.

When people are arrested they are usually taken first to a military barracks or a police station or to one of the special interrogation centres established by the intelligence services. They may be held there for weeks or even months. "Pressure", often amounting to severe physical or psychological torture, is frequently applied during this period of interrogation. The Conference of Roman Catholic Bishops in their Declaration of April 24, 1974, specifically referred, among other abuses taking place, to "interrogation procedures which employ physical or moral pressure". Methods of torture employed have included electric shock, blows, beatings, burning with acid or cigarettes, prolonged standing, prolonged hooding and isolation in solitary

confinement, extraction of nails, crushing of testicles, sexual assaults, immersion in water, hanging, simulated executions, insults, threats, and compelling attendance at the torture of others. A number of people have died under torture and others have suffered permanent mental and nervous disabilities.

Among the more notorious torture centres have been the Tejas Verdes School of Military Engineering, the Air Force Base El Bosque, and the Cerro Chena Military Barracks.

The object of the torture appears to be three-fold: to obtain "confessions" to serve as the basis for subsequent prosecution; to obtain information about associates and activities; and to intimidate both the victim, his associates, and the public in general.

Usually the authorities deny that torture takes place, or deny that it is a regular practice, and draw attention to 6 or 7 cases in which military personnel are said to have been prosecuted for ill-treating people under arrest. We understand that none of those prosecuted were members of the intelligence services or came from the centres where the worst tortures occur. On some occasions authorities at the highest level are known to have admitted privately that they know torture is carried on and assert that they are unable to stop it. Others have sought to justify it as a means of preventing innocent people being killed by subversive militant organisations.

Most allegations of torture and ill-treatment relate to the period immediately after arrest while the suspect is held "incomunicado" and no-one knows where he is. (Other torture allegations relate to cases where detainees were taken by the intelligence services from a detention camp back to an interrogation centre.) We are satisfied from our discussions with defence lawyers that the instructions limiting the period of incomunicado are not being carried out. It is not uncommon for arrested persons to be held incomunicado for 8 to 12 weeks.

After the initial period of interrogation, the arrested person may be dealt with in one of three ways:

(1) he may be transferred to a Fiscal with a view to judicial investigation and prosecution for an offence (these are nearly always cases in which a "confession" statement has been obtained, admitting some offence);

(2) he may be held in detention, presumably under Article 72, No. 17 of the Constitution, or

(3) he may be released; there have been cases where the same person has been arrested, tortured, interrogated and released more than once, presumably for purposes of intimidation.

We have already described the system of military justice in time of war, and some of its shortcomings. Many of the charges preferred by the Fiscales relate to offences alleged to have occurred before the coup, in particular under the Law of State Security (No. 12.927 of August 6, 1958) and under the Law on Weapon Control (No. 17.798 of October 21, 1972). (Both of these laws have been amended by the Junta by Decree Laws.) As we have seen, such cases ought not to be tried under the "time of war" procedure, but they invariably are.

Administrative Detention

The second class of persons referred to above are those who are held by administrative order under the State of Siege. They are known as arrestados. About half of those in custody fall within this category.

The Constitution carefully distinguishes the treatment of arrestados from other persons in custody, namely persons held under judicial investigation by Fiscales (detenidos or procesados), accused persons or defendants (reos) and convicted offenders (condenados). As has been seen, Article 72, No. 17 of the Constitution authorises the President in a state of siege to hold arrested persons under house arrest or in places other than prisons for common law criminals. The Junta have assumed these powers for themselves and have also delegated them to all the Military Commanders.

The prohibition on detention in ordinary prisons clearly indicates an intention that administrative detainees should receive more favourable treatment than persons accused or convicted of criminal offences. In practice,

their conditions of detention are often worse. They are held virtually "incomunicado" receiving either no visits or only very limited family visits. Only rarely are lawyers given access to them. (The Minister of Justice assured us that lawyers had free access to their clients under arrest; the Minister of the Interior, however, agreed that lawyers had no such right and did not see the need for it, since their clients had not been accused of any offence.) The regime varies from camp to camp. In some there is a regime of very strict discipline and conditions are extremely hard. Those detained in camps are often forced to work (for which there is no legal authority). Their correspondence is subject to prolonged delays. Contrary to the express provision in the Constitution, many are held in prison together with persons accused or convicted of offences (but we were told that conditions in other places of detention are often worse).

Places which have been used for holding arrestados (after they have left the barracks, police station or interrogation centre to which they are first brought), include

- places within the city or area where the arrested person lives, e.g. the National Stadium in Santiago,

- camps in remote areas, e.g. Chacabuco Nitrate Office in the North, and Dawson Island in the South (in these places the detainees do not enjoy the right granted to common criminals to receive visits from their families),

- naval ships (no longer in use),

- places for the detention of common criminals (e.g. common gaol, penitentiary, women's prison).

House arrest may also be applied in several ways. A person may be ordered to stay at home at all times and to receive visits only from his family. In some cases he is merely ordered to stay at home during the hours of curfew. As this restriction applies to everyone, the effect is merely to warn the person that he may be re-arrested later. A person may also be released on parole, with a restriction on leaving the city or area where he lives.

Persons who are subject to these administrative measures of detention or house arrest are not given statements of the reasons or facts on which it is based. They have no means of challenging the case against them, which may of course be based on erroneous information or even on a mistake of identity. As indicated above, many of those who were arrested and detained have subsequently been released, but there is no system of review before an impartial tribunal or other review body. There is, however, no provision for these safeguards in the Constitution.

VIII. CORRESPONDENCE BETWEEN COLLEGE OF ADVOCATES AND MINISTER OF JUSTICE

Some of the matters which we have raised in this report have been the subject of an open correspondence between the President of the College of Advocates, Señor Alejandro Silva Bascuñan (a distinguished Professor of Constitutional Law), and the Minister of Justice, Señor Don Gonzalo Prieto Gandara. We were given copies of this correspondence which took place between October 24, 1973, and April 22, 1974, as well as of a letter from the College of Advocates to the Auditor General of the Army of December 4, 1973.

The College of Advocates raised three main points:

(1) They asked for adequate facilities to defend their clients, to be able to communicate with them, and to have time to study the case properly and to prepare the defence.

(2) They were insistent that the principle of non-retroactivity in penal law should be respected and in particular asserted that offences committed by civilians before the date of the coup must be tried either by the ordinary civilian courts or by military courts operating under "time of peace" procedures.

(3) They asked that appeal or review tribunals be established for cases with heavy penalties and that the supervisory jurisdiction of the Supreme Court over military tribunals in time of war (Councils of War) be recognised.

On the first point the Minister in his replies gave assurances that measures had been taken or would be taken to enable the advocates to carry out their professional duties satisfactorily. Our conversations with lawyers convinced us that whereas proper facilities have been given in some cases, such as the Air Force Trial held while we were in Santiago which was given wide publicity, the defence facilities in most cases suffer from the defects we have referred to above.

On the second point the Minister gave an absolute assurance (as he did in conversations with us). This assurance has not been implemented. In practice civilians charged with having committed security offences before September 11, 1973, are tried by military tribunals under the time of war procedure. Also, as we pointed out to the Minister, we were told of many cases in which heavier penalties promulgated in decree laws have been applied retroactively. We gave particulars of one such case to the Minister, stressing that what was needed was an appeal machinery so that these matters could be put right.

On the third point, namely the need for an appeal machinery, the Minister merely referred to the relevant articles of the Constitution and the Code of Military Justice, and to the decisions of the Supreme Court to which we have referred. This was, in effect, a negative reply. In conversation with us, the Minister appeared to agree about the necessity for an appeal procedure and said the matter was being studied within the government. Four months later, it seems that nothing has yet been done.

IX. TREATMENT OF FOREIGNERS

At the time of the coup a large number of foreigners were resident in Chile. Many of them, possibly over 10,000 were persons who came seeking refuge from the military regimes in other countries of South America.

After the coup many of these foreigners, being suspected of left-wing political activities or sympathies, were particularly sought after in the search and arrest operations carried out by the military authorities. At least 700 are known to have been arrested, and some were killed in the early

days following the coup. In consequence, a large number (approximately 2,000) sought refuge in foreign embassies.

Following very widespread international pressure, and with the assistance of a number of foreign governments, the United Nations High Commissioner for Refugees (UNHCR), the local churches backed by the World Council of Churches, the International Committee of the Red Cross and other agencies, nearly all the foreigners who wished to leave the country have been enabled to do so.

All foreigners who had been granted asylum in foreign embassies were eventually allowed to leave the country (there are still a small number of Chilean nationals in foreign embassies). About 2,600 foreigners were resettled outside Chile under the auspices of the UNHCR. About 1,500 left openly under their own arrangements with permits granted by the government, and it has been estimated that between 2,000 and 3,000 others went clandestinely to neighbouring countries. Their resettlement is a continuing problem.

A problem also remains concerning the reunion of families where foreigners left the country leaving behind them members of their families who are Chilean nationals. Many of these families are being reunited abroad under the auspices of the UNHCR.

Of those arrested, 3 were known to the office of the UNHCR in April 1974 to have been convicted of offences and 15 to be still in custody awaiting trial. In addition, about another 10 who had been charged with offences had been released on bail (conditional liberty).

During the early stages, following a statement made by a Chilean consul in Bolivia, it was erroneously believed that some 250 Bolivian refugees in Chile had been forcibly repatriated to Bolivia against their will.(4) In fact, these were migrant workers who had come without proper documentation, and the Chilean authorities said they could return to Chile when their papers were in order. There have, however, been isolated cases of repatriation of Bolivian refugees against their will.

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(4) Cf. ICJ Review No. 11, December 1973, p. 13

In general, it is right to say that the Chilean government appears to have made good its undertaking to fulfil its obligations under the various international conventions governing the right of asylum to which it is a party, though there are still a small number of missing persons in this category.

X. COMMENTS AND CONCLUSIONS

The first matter on which we were asked to report was the reasons and, by implication, the need for the continuation of the State of Siege. We appreciate that Chile is still going through an exceptionally difficult period following the events leading up to and following the coup on September 11, 1973. Those in power evidently consider that it is still necessary for them to retain some emergency powers under Article 72, No. 17 of the Constitution. However, the authorities with whom we spoke have stated not only in private but publicly their conviction that the country is back on the path to stability. It is apparent that the Armed Forces are in full control of all parts of the national territory. In these circumstances, we hope that the government will speed up the process of release of all persons held under administrative detention, keeping in custody only those who are charged with a criminal offence and placed at the disposal of the competent tribunal. When this has been done, the way will be clear to lift the State of Siege, and begin the return to normal democratic government.

Meanwhile, we are extremely concerned about certain procedural aspects of this administrative detention. First and foremost, we are dismayed to learn that people are still being arrested anonymously without their families or lawyers knowing who has arrested them, or why, or where they are being held, and that there is no effective way in which they or their lawyers can find out through official channels. While we accept that Article 72, No. 17 of the Constitution gives a discretionary power to the Executive, and that the motivations of such detentions cannot be challenged in the courts, the same provision indicates certain procedural requirements to which the Executive must adhere. These are the issuance of written arrest warrants by the highest executive authority, and detention either in the domicile of the person concerned or in some place other than one used for the detention of common

criminals. Under Chilean Law, as under the law of any civilised country, the period of incomunicado has to be restricted to a minimum and ill-treatment and torture are illegal. We, therefore, express the hope that strict administrative measures will be undertaken to enforce the procedures which, as we were told by the then Minister of the Interior, General Bonilla, have been laid down with respect to these matters.

However, the existence of such minimum conditions and safeguards is obviously of little consequence if there is no possibility of securing relief upon their violation. Enforcement is dependent upon the ability of the detainee to obtain legal assistance and to be able to present his complaints before a court. While this seems obvious, and some authorities assured us that this is what is being done, others (including General Bonilla) insisted that a detainee under Article 72, No. 17, cannot claim legal assistance as long as he is not charged with a criminal offence. This seems to indicate a dangerous confusion which should be reconciled as soon as possible.

We stress this point particularly in view of the many cases of ill-treatment and torture which have been reported. We have heard ample testimony by absolutely responsible and credible people who have persuaded us that these cases do exist. We do not wish to imply that these cases are the result of orders given by the Junta or that they are part of high level official policy. We suggest, however, that past experience in many countries has shown that torture is likely to occur whenever detainees are held for a considerable time incomunicado and without access to a lawyer.

We therefore urge, in the interests of the country as well as of the detainees, that :

(i) all arrests be made pursuant to a written order signed in accordance with Decree Law No. 228, and a copy given to the person concerned at the time of the arrest;

(ii) the maximum period of incomunicado (see Section VII above) be strictly enforced;

(iii) the families and defence lawyers be informed as soon as possible, and in any event at the end of the period of incomunicado, of the place

of detention, the legal situation of the detainee, and, if charged with an offence, the court in which he is to be tried;

(iv) following the period of incomunicado the detainee's lawyer should be able to see and speak to him at any time during his detention;

(v) those who are to be charged with criminal offences should be placed immediately at the disposal of the competent tribunal;

(vi) those who are to be detained by administrative order should not be confined with common criminals in gaols or penitentiaries. They should be kept in reasonable conditions where they can have regular visits from their families; excessively remote and forbidding places (such as Dawson Island and Chacabuco) should be abandoned;

(vii) the names of persons detained by administrative order under Article 72, No. 17 should (as in some other countries having administrative detention) be published in the Official Gazette at the end of the period of incomunicado and, in due course, the fact and date of their release;

(viii) an effective judicial remedy should be available to enforce these provisions; for this purpose writs of amparo presented on behalf of detainees should be dealt with by the courts as swiftly as possible, and full cooperation should be given by the Executive to the courts in replying to their enquiries.

We believe that if these procedures were strictly followed the allegations of torture and ill-treatment would be much reduced.

We find it very disturbing that amparo complaints, which traditionally are decided by Chilean courts very swiftly, are pending for many weeks before a decision, if any, is given. To re-establish the full effectiveness of the amparo procedure should be regarded as of the utmost importance.

Perhaps our greatest concern relates to the application to the present situation of the provisions of the Code of Military Justice concerning the "time of war" procedure. It was frequently stressed to us, and it is self-evident, that the military authorities gained full control of the country and

brought hostilities to an end within a very brief period following the coup. It is a simple matter of fact that the country has been quiet for many months. Although the mere possibility of terrorist acts may perhaps be thought to justify some emergency measures, there is no basis whatsoever for considering that Chile continues to be in a state of war. In order to permit the functioning of normal peace-time jurisdictions and procedural safeguards with respect to the many people accused of politically motivated crimes, we therefore urge that the declaration in Decree Law No. 5 that the State of Siege should be understood as a "state or time of war" should be rescinded without delay.

The summary nature of the time of war procedures in the Code of Military Justice can be understood only when it is realised that these procedures are intended by the legislator for extreme situations of emergency (e.g. in a besieged town, or when serious military operations are in progress in the zone where the offence occurred). For example, under this procedure the pre-trial investigation is supposed not to exceed 48 hours, other than in exceptional cases (Article 180 of the Code of Military Justice), and no form of appeal is provided for. Furthermore the time of war tribunals, the Councils of War, consist of six non-legal and only one legal officer. This virtual dominance by non-legal officers is particularly dangerous when, as in the present case, extremely complex legal questions arise (e.g. the question of the legality or illegality of the Allende government and of acts committed under or on behalf of that government). The Military Commander who appoints the judges is not subject to any procedural rules (e.g. to appoint them from a pre-established list). This creates a substantial risk that he will choose those he considers most likely to render decisions favourable to the prosecution, thereby restricting the chances of principled and impartial adjudication. Moreover, the arbitrary power of the Military Commanders to modify the judgments as they see fit means that the final decision lies not with the court but with the military hierarchy, since there is no form of appeal procedure.

It seems to us inconceivable that such procedures can exist and be continued when there is not the slightest trace of a war situation, and the examples we have quoted in our report indicate the serious judicial errors which can result.

We therefore strongly urge that, either by a Decree Law, or preferably by a return to the peace-time system of military justice, a review of first instance judgments by the "Corte Marcial" (Military Appeals Court) should be instituted without delay. In addition, there should be a right of final recourse to the Supreme Court.

We sincerely regret that one chamber of the Supreme Court ruled that it has no jurisdiction to review judgments of the Councils of War. This decision departs from previous precedents and renounces the supervisory jurisdiction which Chilean lawyers consider is given by the Constitution over all tribunals without exception. The decision is particularly regrettable in view of the repeated affirmations by the Junta of the independence of the Judiciary. Under present circumstances the Supreme Court, which is held in high esteem in Chile and abroad, could play a vital role in this period of transition when justice must be rendered amid circumstances of passion and strife. We hope that, as long as the system of military justice in time of war is retained, the decision to which we have referred will be reversed, either by a decision by the full Court or by a government decree (which, as we were assured, is under study).

Further concern is caused by the fact that the rights of the defence under present procedures are rather limited. There is generally no access of the defence lawyer to his client during pre-trial investigation, and the fact that this feature is not unique to war-time procedure does not prevent us from regarding it as a serious restriction upon the defence. Our impression is that some lawyers, with or without justification, fail to defend their clients as vigorously as one would expect, for fear of being politically misinterpreted. We think that the Judiciary and the Armed Forces could contribute to dissipate this fear.

We note that in a Memorandum presented to the Government by 12 distinguished Chilean penal lawyers last December, their first request was that measures be adopted to eliminate restrictions on freedom of the press and speech in matters involving political trials. We were frankly appalled by the completely one-sided reporting and prejudicial comment in the Chilean press on the FACh (Air Force) trial in progress during the time we were in Chile. Press reporting of current trials is always a sensitive matter, but

such reporting as we saw cannot conduce towards creating the impression of a fair and impartial trial system.

We understand that the Code of Military Justice of 1926 constituted, at the time of its inception, a substantial progress towards a modernized system of military justice. However, we would point out that during the last twenty years military justice in most Western countries has been profoundly reformed in order to adapt to a newer understanding of basic rights, and that Chilean military law has not undergone any such change. The present moment is hardly the time for legislative reform. We would, however, like to draw the attention of the many outstanding Chilean penal lawyers to the need for long-term reform of the military law, and encourage preliminary studies which might lead to the elaboration of a draft code by the internationally renowned Instituto de Ciencias Penales.

Finally, we feel bound to express our sense of disturbance over some of the Decrees which the Junta has promulgated amending the substantive criminal law. At a time when throughout the Western world the death penalty is being abolished or at least severely restricted, it is frightening to see that its scope of application is being enlarged in Chile. We certainly hope that the military authorities will not order the execution of any further death penalties, considering that bloodshed can only widen the divisions of the past and diminish the hope for harmony in the future. We also deplore the introduction of some new crimes in Chilean law which can only be explained by the extraordinary circumstances under which they were created. As an example we would mention Article 4 of Decree 81 of October 11, 1973, which makes it a crime punishable by long term imprisonment or death for anyone to enter the country clandestinely who had previously fled from it, taken asylum abroad, or been expelled. The reason for this extremely severe penalty is that, under the provisions of the Decree, it is presumed (and therefore does not need to be proved) that he is returning with the intention to attack the security of the state. Certainly such legislation, which violates the presumption of innocence and the principle that guilty intent must be proven, should be repealed without delay.

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Appendix "A"

Recurso de Queja to the Supreme Court of Justice against the Council of War of Valparaiso

Case No. 6603

On October 11, 1973, Juan Fernando Silva Riveros was sentenced to life imprisonment by the Council of War of Valparaiso (with one officer dissenting) under Article 252, No. 3, of the Code of Military Justice. This Article deals with espionage in time of war by making plans or sketches.

The defending lawyer, in an appeal by way of "recurso de queja", asked the Supreme Court to annul the judgment in exercise of their supervisory jurisdiction under Article 86 of the Constitution (5) and Article 540 of the Organic Code of Tribunals. His main arguments were as follows:

1. The basis of the charge against the defendant was that three plans of a sector of Valparaiso were found at his house. These had been traced from a newspaper El Mercurio, and differed from those published in the newspaper only in that the location of the police headquarters (carabineros), the German hospital and the prison had been marked on them. There was no evidence that the defendant had himself made the markings, or was responsible for them, and he expressly denied it.

2. Article 252 is in a section of the Code of Military Justice entitled "Treason, espionage and other crimes against the sovereignty and external security of the State", but the state of war proclaimed in Chile is not directed against an external enemy.

3. It was not proved that the plans had been prepared after the proclamation of the State of War.

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(5) Article 86 of the Constitution says: "The Supreme Court has the directive, correctional and economic supervision of all the Tribunals of the Nation, in accordance with the respective laws which determine their organisation and attributions ... ".

4. These plans had no relation to a zone of military operation, as required in order to constitute an offence under Article 252, No. 3, of the Code of Military Justice.

On November 13, 1973, the Supreme Court declared that it had no jurisdiction over military tribunals in time of war and in consequence rejected the appeal. The principal ground of the decision was that this jurisdiction would not be compatible with the function of military command, which is attributed by the law exclusively to the Military Commander of the zone.

The defendant's lawyer asked the court to reconsider this decision. He cited the opinion of several authors of treatises on Chilean constitutional law, according to which any law which sought to exclude a tribunal from the supervisory and correctional jurisdiction of the Supreme Court would itself be unconstitutional. Among other authors cited was Mr. Alejandro Silva Bascuñan, President of the College of Advocates.

In two powerful supporting pleas prepared by Mr. Daniel Schweitzer, who is one of the leading penal lawyers in Chile and is, incidentally, well-known for his right-wing political views, the following arguments were presented:

1. Chile is not in a state of war, civil or military, but only in a state of internal commotion, which enables a state of siege to be declared in conformity with Article 72, No. 17, of the Constitution. The "war" referred to in Decree Laws Nos. 3 and 5, of September 11 and 25, 1973, exists only on paper.

2. The laws relating to war do not prevent the Supreme Court exercising its supervisory jurisdiction over all tribunals of the nation, including military tribunals.

3. No law can withdraw a tribunal from this jurisdiction which belongs to the Supreme Court by a provision of the Constitution.

4. The Labour Code placed the tribunals which it created under the relevant Minister. This did not prevent the Supreme Court exercising a supervisory and correctional jurisdiction over them, even before this was expressly recognised by law.

5. In 1872 the Supreme Court made a formal protest to the Minister of War over a legal violation committed by a Military Commander who, in invoking a state of war, imposed penalties not only on soldiers but on civilians. The Minister of War replied saying he would have the abuse stopped at once. Similar cases occurred during the occupation of Peru by Chilean troops in 1883.

6. The Defendant is not asking the Supreme Court to intervene in the technical functions of the military command, but to correct the misuse by a military tribunal in time of war of its judicial powers.

7. In Decree Law No. 128 of November 12, 1973, the military Junta assumed the legislative and constitutional powers, but repeated what they had already said in Decree Law No. 1 of September 11, namely that they recognised the independence of the judicial power and the authority of the Supreme Court as its highest representative, and would avoid any act which could interfere with its functions under the constitutional and legal systems in force.

In spite of these arguments, the Supreme Court decided not to revoke its earlier decision declaring its lack of jurisdiction.