Before the

PERMANENT COURT OF ARBITRATION
CASE PCA N.º 2017-30

FONDATION ESPAGNOLE « PRÉSIDENT ALLENDE », VICTOR PEY CASADO ET CORAL PEY GREBE
Demandeurs

c.

L'ÉTAT DU CHILI
Défenderesse

LEGAL OPINION ON THE JUDGMENT GIVEN IN CASE NO. 0-3510-1995 BY THE 1ST CIVIL COURT OF SANTIAGO, ENTITLED 'PEY v TREASURY'

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PURPOSE OF THIS OPINION

This opinion is intended to analyse the judgment given in the proceedings of case no. C-3510-1995 by the 1st Civil Court of Santiago, entitled "PEY/FISCO DE CHILE" (Pey v Chilean Treasury), of whose proceedings I have seen a copy. I am also cognisant with the parties' submissions and the opinions and statements of Mr Libedinsky (the Chilean state's expert) in the ICSID arbitration proceeding between Pey Casado and the Republic of Chile (case no. ARB/98/02, resubmission).

The chief purpose of our analysis is to determine whether the judgment in question recognised the existence of public law annulment in acts by the Chilean state affecting the ownership rights of Víctor Pey and constituting the cause of action.

1.- NULLITY IN CHILEAN LAW

1. By way of introduction, we should keep in mind that in Chilean law a dissolved company cannot be party to proceedings, that the identity of *res judicata* extends to a judgment's "decisive clauses", and that the basis of a claim is founded on the cause of action.

2. In its judgment of 24 May 2000 ("Novoa Chevesich v National Tax Agency", case no. 2540-1999), the Appeals Court of Santiago judged the case of a dissolved company that brought a claim against the Treasury and won damages. The Appeals Court ruling deemed that a dissolved company lacks legal existence in filing a claim to the extent that this had resulted in an apparent and fraudulent situation of *res judicata*; it concluded that the decision could not be enforced in the Chilean system and could be cancelled *ex officio*. The Court's doctrine is that if a company is dissolved, the presence of an "apparent" *res judicata* must be declared *ex officio*, as one of the prerequisites for trial – the party – is lacking, which entails its non-existence even once *res judicata* exists.

3. According to the Supreme Court (judgment of 13 September 2005, 7th Recital, case no. 4416-04):

"Res judicata *is normally objectively identified with the operative part of the judgment. Exceptionally, this effect will extend to certain whereas which doctrine and case-law refer to as "*decisive clauses*" and which, due to their direct link with the operative part, also acquire* res judicata *effect."*

In qualified Chilean procedural doctrine, professor Tavolari defines "decisive clauses" as follows:

> *"In order for an argument in the whereas to qualify as* operative*, it must meet several requirements: a) Formally, it should be among the grounds to the judgment. Its presence in the operative part would in principle preclude discussion and result in the phrase being regarded as part of the decision; b) Substantively, it should effectively anticipate the decision and may or may not be restated in the operative part; c) It may establish the facts of the case, or at least those whose existence forms the immediate basis of the judgment" (Tavolari Oliveros, Raúl (2000):* "Límites objetivos de la cosa juzgada civil (Intento de delimitar la cuestión en el derecho chileno)" *(Objective limits of civil* res judicata *– An attempt to define the question in Chilean law), p. 216, in* El proceso en acción *(Editorial Libromar))*

4. The Chilean Code of Civil Procedure defines the "basis of a claim" [*causa petendi*] as the immediate legal grounds cited in the proceedings (art. 177 paragraph 2, drawing on the French Code of Civil Procedure, based on the "cause of the action"), and *res judicata* may be pleaded both by the litigant and by anyone who is legally benefited by the ruling (art. 177 paragraph 1 of the Code):

> Art. 177. *A* res judicata *plea may be brought by the winning litigant as well as by anyone legally benefiting from the ruling, provided that between the new claim and the one previously ruled on there is: 1) Legal identity of persons; 2) Identity of remedy sought; and*

3) Identity of the basis of claim. The basis of a claim refers to the immediate legal grounds cited in the proceedings.

As the Supreme Court has stated repeatedly, at least since its Judgment of 3 April 1914:

"the basis of a claim is what particularly determines the legal nature of the actions or pleas brought and, consequently, to accept or reject a plea for a basis of claim other than that invoked involves ruling on a plea other than that submitted for trial by the parties."

5. That said, nullity is the legal sanction provided by Chilean law for legal acts (declarations of intent designed to have legal effects) vitiated by certain illegalities. The effect of this sanction is that things return to their state prior to the invalidated act.

6. The invalidities applicable in private law are expressly regulated by articles 1681 and 1682 of the Civil Code that came into force in 1857.

Art. 1681. *"Any act or contract shall be void if it lacks any of the requirements specified by law for such an act or contact to be valid, according to its kind and the capacity or status of the parties.*
Such nullity may be absolute or relative."

Art. 1682. *"Nullity resulting from an unlawful purpose or cause, and nullity resulting from the omission of any requirement or formality indicated by the law in order for particular acts or contracts to be valid, in view of their nature and not of the capacity or status of the persons executing or establishing them, are absolute invalidities. Absolute nullity also exists in acts and contracts made by persons wholly lacking capacity.*
Any other kind of defect results in relative nullity, and is grounds for the rescission of the act or contract."

Art. 1683. *"Absolute nullity can and must be declared by the judge, even if not so requested by a party, where it appears manifestly in the act or contract; it may be invoked by anyone with an interest therein, except the person who executed the act or entered into the contract, who would or should have known of the invalidating defect; a declaration of such nullity may also be sought by the public prosecutor in the interests of public morals or of the law; and it is not remediable by ratification of the parties, or by a lapse of time not exceeding ten years."*

Art. 1684. *"Relative nullity cannot be declared by a judge other than at a party's request; nor may a declaration thereof be sought by a public prosecutor merely in the interests of the law; nor may it be claimed by anyone other than those for whose benefit it is provided by law, or by their heirs or assigns; and it is remediable by a lapse of time or by ratification of the parties."*

7. An example of relative nullity would be the signing of an employment contract by a person who lacks full capacity due to being underage. An example of absolute nullity owing to illegality would be a contract whose cause (the motivation of one or all of the parties) were to commit a crime, such as a hired-gun contract (an assignment to commit murder).

8. As we see, in relative nullity there is a private interest which the law seeks to preserve, but requesting its declaration is left up to any interested party seeking protection. In the case of absolute nullity the severity of the illegality is such that there is a public interest at stake, i.e. it is society that is affected by the illegal act.

9. As the legal acts in question concern private parties and are intended to have legal effects between such parties, and given the importance of legal certainty, the Civil Code provides various time limits for seeking remedy, of which the longest is 10 years. It is worth noting that this time limit is the same as the maximum period provided for acquiring third-party rights or extinguishing third-party action by prescription.

10. Absolute nullity is regulated differently in view of the public interest at stake, and there is a great difference in the court's approach on learning of it.

> Art. 1683. *"Absolute nullity can and must be declared by the judge, even if not so requested by a party, where it is manifestly apparent in the act or contract; it may be invoked by anyone with an interest therein, except the person who executed the act or entered into the contract, who would or should have known of the invalidating defect; a declaration of such nullity may also be sought by the public prosecutor in the interests of public morals or of the law; and it cannot be remedied by ratification of the parties, or by a lapse of time not exceeding ten years."*

11. This rule is quite exceptional for any Chilean court and especially for a civil one, for it is obliged to act *ex officio, motu proprio,* even without a request from a party, provided that the absolute nullity appears "manifestly".

12. The Chilean courts follow the principle of passiveness, i.e. they decide only on the dispute that the parties submit to their jurisdiction; it is the parties, with their claims and defences, and if applicable their replies and rejoinders, that ultimately determine the direction and scope of the legal dispute, i.e. what is to be ruled on.

This principle is enshrined in article 10 paragraph 1 of the Chilean Court Statutes, which reads:

> Art. 10. *"The courts may not perform their functions other than at a party's request, except in cases where the law empowers them to act* ex officio*."*

In this case, i.e. that of absolute nullity appearing "manifestly", judges must by legal imperative rule on something that has not necessarily been submitted for their consideration. This exception is accounted for by the public interest at stake. This exception must moreover be kept in mind in connection with the main subject of this opinion, as we shall see below.

13. Notwithstanding all the above, a minority view in doctrine and case-law also envisages "non-existence" as a sanction for legal acts by individuals in breach of the law. These are legal acts infringing the law in such a way that the remedy of the passage of time could not make the act appear before the law as having valid effects. An example would be someone leaving a legacy in their will to a horse. As a horse is not a legal person there would be no way of carrying out the act without further breaches of law. Such an act would be not so much invalid as non-existent, as it neither arose lawfully nor was remediable.

14. In the case of legal acts of the state or intended as such, doctrine and case-law have established what is called "constitutional action for public law annulment". By "established" we mean that the action was given a name and the steps in processing and ruling on it have been progressively filled out, for public law annulment has always existed in Chilean constitutions, and has been clearly enshrined therein throughout our republican history.

15. Such action for nullity is as old as the Chilean state and Chilean law. Chile's independence was secured at national level in 1818 and at regional level Latin American independence was achieved in 1824. In 1828 the 1st Political Constitution of an independent and republican Chile was enacted with a certain haste, without properly resolving the problems of state administration and citizens' rights and also giving rise to other issues. Accordingly in 1833 another Constitution was passed, known by its year of enactment and remaining in force until 1925.

16. This constitutional text and the subsequent constitutions known as those of 1925 and 1980 all contain a provision designed to prevent the state, its agents or private individuals who have vested themselves with powers that are not theirs from acting in breach of the Constitution or the law. With very few changes of wording, this provision appears as follows:

> - Constitution of 1833. Article 160.- *"No court, no person and no group of persons may, even with the pretext of extraordinary circumstances, confer on itself, himself or themselves any other authority or rights than those that have been expressly bestowed by law. Any act in breach of this article is void."*
>
> - Constitution of 1925. Article 4.- *"No court, no person and no group of persons may, even with the pretext of extraordinary circumstances, confer on itself, himself or themselves any other authority or rights than those which have been expressly bestowed by law. Any act in breach of this article is void."*
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> - Constitution of 1980. Article 6.- *"The organs of the state must act subject to the Constitution and to the laws enacted pursuant thereto, and safeguard the institutional order of the Republic. The precepts of this Constitution are binding both for the heads or members of such organs and for any other person, institution or group. Any infringement of this provision shall give rise to the responsibilities and sanctions provided by law."*
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> Article 7.- *"The organs of the state act validly once their members have been properly sworn in, within their sphere of responsibility and as prescribed by law. No court, no person and no group of persons may, even with the pretext of extraordinary circumstances, confer on itself, himself or themselves any other authority or rights than those which have been expressly bestowed by the Constitution or by law. Any act in breach of this article is void and shall give rise to the responsibilities and sanctions provided by law."*
> *(Our underlining)*

17. It is thus perfectly clear that in the sphere of public law, i.e. the field of action of the state, legal acts may be enacted only by: 1) An authority previously vested with powers, 2) And with sufficient responsibilities in the relevant sphere, and 3) By the procedures established by law.

18. The term "public law annulment" does not appear, as we have seen, in the constitutional texts, but its existence in Chilean doctrine and case-law since 1833 is beyond question; its theoretical construction and expression in article 160 of the 1833 Constitution quoted above is attributed to the jurist Mariano Egaña, drafter of the text. The Chilean courts habitually conduct and rule on proceedings for public law annulment brought against the Chilean state. This constitutional action is unanimously accepted.

19. As the Constitution does not indicate a specific procedure for processing these actions in the courts, recourse is had to ordinary large-claims proceedings under the Code of Civil Procedure, which procedure is used for all actions to which no specific form of process is assigned by law.

Code of Civil Procedure. Art. 3 *"Ordinary procedure shall be applied in all proceedings, formalities and actions which are not subject to any special rule, whatever their nature."*

20. Where public law annulment involves possible amounts payable by the state, actions are processed according to the rules for fiscal proceedings, regulated by Title XVI of Book III of the Code of Civil Procedure, articles 748-752, which are similar to ordinary proceedings albeit with minor changes intended to ensure that the state is not held liable due to negligence by its representatives. Thus for example a judgment obliging the state to pay is subject to automatic appeal, which in this event is called "consultation".

21. But this process according to the rules of civil procedure does not in any event mean that the merits of the case must be decided on according to the provisions of private law. What is provided for in the two cases is clearly distinct as regards the active subject of the offence, the scopes of illegality and the social consequences. An individual committing an act in breach of legal requirements, such as by signing a contract to paint a house, is not at all the same as an authority acting in breach of legal requirements, such as by enacting a finance bill without parliamentary approval.

22. It is axiomatic in Chilean law that in the sphere of private law, all that is not forbidden is allowed, and in the sphere of public law, all that is allowed is what is expressly authorised.

23. The provisions on nullity in the Civil Code apply to public law annulment insofar as compatible and as the nature of the situation so requires. The court's obligation to rule on and declare absolute nullity appearing manifestly in a legal act under review, for example, pursuant to article 1683 of the Civil Code, even without a party's request, is justified by there being a public interest at stake in absolute nullity.

24. This obligation of the court to act *ex officio* is all the more so in the case of public law annulment, where what is involved are illegal or unconstitutional acts of authority or acts by persons or groups of persons conferring on themselves the powers or responsibilities of authorities that are not theirs.

2.- NULLITY OF PUBLIC LAW IS NOT SUBJECT TO LIMITATION

25. Legal doctrine and the case-law of the Chilean courts have unanimously held that action for public law annulment is not subject to statutory limitation. This question has no longer been debated in Chile since at least 1993.

26. The basis of this lack of limitation is, firstly, that illegality in a legal act by the state prompts a response *ipso jure* from the law, so the illegal act does not even come into being, and, as a direct and necessary consequence, what never existed cannot be remedied by the passage of time. Limitation cannot apply to a non-existent act. The reaction in defence of state legality is *ex tunc*, i.e. operating from the outset, not from the time at which a judgment declares the existence of nullity.

27. What came into being problematically or illegally can be remedied; what never came into being cannot. The protection provided by the Constitution here and for legality in general is automatic. As Eduardo Soto Kloss, professor of administrative law at Universidad de Chile, said on 21 November 1990 (annex 4, p. 23):

4) *And as public law annulment as enshrined in the Constitution is ipso jure, ab initio, irremediable and not subject to statutory limitation, it has some very particular procedural consequences.*

Must it be declared by a court?

And if it must be declared, can it or must it be declared ex officio by the judge? And if it only can be, should it therefore be pleaded for? By way of an action and/or of a defence?

Without going into this point (though it is of crucial importance), as this is only an inaugural lecture and so just an intellectual "starter" (or so I believe it should be), suffice it to say that, as nullity ipso jure, it plainly does not need to be declared by a judge in order to exist; any such declaration will be merely declaratory, as it simply recognises a situation that arose in the past, and thus its effects will be retroactive.

28. Since 1997, with the decisive ruling in "Pérsico París v Treasury", no one in Chile has disputed the non-applicability of statutory limitations to public law annulment.

In this case Mario Enrique Pérsico París applied to the 28th Civil Court of Santiago to have public law annulment declared in respect of the Interior Ministry's Extraordinary Decree no. 34 and Supreme Decree no. 396 of 1976. He stated that in the week of 11-18 September 1975 agents in the employ of the Interior Ministry took possession of a Ford van belonging to him. Then pursuant to Decree no. 34 his property was declared to be under investigation and he was informed that he was debarred from entering into acts or contracts involving any of his assets, and warned that if he did not submit a defence within 10 days, these would be treated as assets of banned political parties, entailing their seizure. Then under Supreme Decree 396 the van was declared to become the property of the Chilean Treasury.

The Treasury claimed lack of jurisdiction due to this being a matter for the administrative courts, along with non-existence of the facts and statutory limitation on public law annulment and on the action to reclaim the van for its owner.

The court of first instance upheld the claim. The Appeals Court of Santiago confirmed the ruling, and in a judgment of 20 November 1997 the Supreme Court, on hearing an appeal in cassation (case no. 34.087-95) filed by the Treasury, ratified all the previous proceedings, expressly stating that a request for recognition of public law annulment was not subject to statutory limitation.

The basis cited for this was that an action for public law annulment does not come under ordinary law; this was expressed in the judgment as follows:

> *"what is at issue in this case is public law annulment, involving not only the claimant's private interest but also that of society, for inasmuch as the actions of the public authorities cannot infringe the rule of law, we must recognise that the provisions of ordinary law may apply only where those of public law refer us to them or where the nature of the concept allows public law to be combined with ordinary rules."*

If the law were not applied in this way, we would have to *"admit that acts in breach of article 7 of the Chilean Constitution may be cleansed of their defects after a certain time, which conflicts with the very wording of that precept in that it states that such acts are invalid and give rise to the responsibilities and sanctions provided by law."*

Regarding the property-related action brought to reclaim the van in question for its owner, the Court stated that this could likewise not be time-barred, as in private or ordinary law a limitation period applies only from when it starts to run in favour of the person acquiring property by acquisitive

prescription. The period for acquisitive prescription could never start running in the Treasury's favour on the basis of an act vitiated by public law annulment, i.e. which never took on legal existence.

The Supreme Court also stated that the decrees in question had to be declared invalid as they contained decisions and instructions characteristic of court rulings, which could result only from a due process conducted by the judiciary, and that this separation of powers was included in the legal text entitled "Institutional Foundations" imposed by the military dictatorship itself. Neither the President of the Republic nor the Congress may in any event perform judicial functions.

29. This is the doctrine applied unanimously in recent times by the Chilean courts.

30. However, there are judgments of the Chilean Supreme Court that have made a distinction between action for public law annulment and property-related actions where these are lodged jointly. These rulings have reiterated the absence of statutory limitation on public law annulment, albeit stating that property-related actions must be treated in the framework of private law and be subject to lapse by time limitation. Such is the case, inter alia, of the Supreme Court judgments of:

- 29 October 2008 (12th Recital)

> *"Whereas the judgment under review thereby infringed the provisions of articles 2514 and 2515 of the Civil Code by applying statutory limitation to action for public law annulment, which means that the appeal asserting nullity on the merits must be allowed, for these errors affect the operative part of the ruling, as they have led to the claim being wholly rejected in circumstances in which it should not have been as regards the invalidation of public law."* (Annex 1);

- 8 April 2013 (120th Recital):

> *"Whereas these actions for declaratory judgments on rights, also called "full jurisdiction" actions, with clearly property-related content, have relative effects, limited to the proceedings in which nullity is declared and subject as regards time limitation to the general rules on that concept provided in the Civil Code, in its articles 2497, 2514 and 2515, inter alia.*
>
> *Accordingly what is in reality time-barred is not the public law annulment but the action seeking a declaration of rights in an individual's favour. Indeed, the very nature of the rights whose recognition is sought is always property-related and private, even where they arise from public law annulment, and as such they are liable to the possibility of lapsing by the mere passage of time. The law does not provide a particular statute for the effects of an invalid administrative act, so if it affects only the private property of an individual, it must be governed by the ordinary general rules in this regard, namely those provided by the Civil Code."* (Annex 2).

These judgments of the Supreme Court applying an absence of statutory limitation to public law annulment, attached (as annexes 1, 2 and 3), are merely examples, for case-law is unanimous on this point.

31. It is an interpretative principle of Chilean law that incidental matters share the fate of the main matter. This principle was abandoned in these latter two rulings of 2008 and 2013 not on legal grounds but for de facto reasons. For as public law annulment is not subject to statutory limitation, judgments seriously detrimental to the public purse could easily be rendered.

32. This doctrine is liable to the following criticisms:

1) **Inconsistency**, for insufficient grounds are apparent for decoupling the invalidated act from the declaration of nullity for property-related purposes. An incongruous situation arises of a non-existent act, which never came into being, resulting in valid acts. Two legal statutes are applied in a parallel but contradictory way to the same facts. For extinctive prescription applies in parallel to acquisitive prescription by another party, as two simultaneous and interlinked mechanisms. If there is no acquisitive prescription there can be no extinctive prescription.

Following the principle that where the reason is the same the provision should be the same, and that incidental matters share the fate of the main matter, and with reference also to a situation of human rights abuses, the Chilean Supreme Court has ruled (12/12/2017, annex 6) that limitation applies consistently to any one situation, and that one cannot deny statutory limitation and accept partial limitation for mitigating sentences. This situation is similar to one we are discussing: it offends logic that whereas for the purposes of public law annulment the contested act did not even come into being, for property-related purposes it did exist. It is not acceptable that the same act should be subject to limitation for some purposes and not for others, for limitation is a single principle.

The judgment (attached) reads as follows:

> *"Santiago, December twelfth, two thousand and seventeen. 1. Whereas with regard to the rejection of partial limitation, the judgment ruled that in this sphere we cannot dismiss the international human rights legislation that bans the application of statutory limitation to crimes against humanity, as in the case at hand. The non-applicability of limitations to crimes against humanity is common to total and gradual limitation, as the two concepts have the same legal character and it is not logical or rational that what applies to the former should not to the latter, in circumstances in which their basis is the same. 2. Whereas notwithstanding the judgment's reasoning, it is worth remembering that article 103 of the Criminal Code not only appears in the same Title as statutory limitation but also comes directly after it, pointing to a close link between the two principles. As this case involves crimes against humanity, which gave rise to the proclamation of the non-applicability of limitations on prosecution, we may assert that according to the norms of international law, and given that the application of both half-limitation and grounds for the lapse of criminal responsibility are based on the passage of time, the inappropriateness of applying total limitation necessarily extends to partial limitation, as we see no reason to grant time the effect of reducing the penalty, for both principles have the same basis rejected by international humanitarian law, and thus neither one is appropriate to offences such as the one in hand.*
>
> *Case no. 11.601-17. Delivered by the 2nd Chamber made up of Milton Juica A., Carlos Künsemüller L., Lamberto Cisternas R., Manuel Valderrama R., and Court Counsel Jean Pierre Matus A. Not signed by Judge Valderrama and Court Counsel Matus, though they were present at the hearing of the case and in the deliberation on the ruling, owing to their being seconded and absent respectively. MILTON IVAN JUICA ARANCIBIA, Judge. Date: 12/12/2017"*
> (Our underlining)

Doctrine: statutory limitation is a single principle and there cannot be limitation for some purposes and not for others; conversely, if limitation applies for major purposes it also applies for minor ones.

2) **The purposes of law are contradictorily dispersed**. Indeed, if the purpose of public law annulment is to protect the primacy of the constitution and the law and a declaration of nullity concerning an act of the state does not result in nullity as regards property, in the supposed interest of legal certainty, the two purposes of law coexist at the same level and contradictorily. We have a paradoxical and contradictory situation in which an act declared to be unconstitutional may still have valid legal effects.

3) This interpretation by state organs (i.e. the judiciary) in the state's favour is illegitimate. It appears more like a peremptory exception to favour the debtor than a proper restoration of legality. And what has gone unnoticed, but which reality will in time bring to light, is that limitation for economic purposes may also be detrimental to the Treasury. For example, if someone receives a discretionary pension not covered by the events provided by law, it would offend the judicial conscience for the relevant decree to be declared invalid while the unlawful pensioner continued to receive an allowance under cover of statutory limitation.

4) The law becomes ineffective, for claims by individuals against unconstitutional or illegal acts by the state often seek property-related remedy. For the state to recognise and declare illegality but not to recognise or repair its harmful or illegal effects removes the efficacy of actions intended to preserve the constitution and legality. Legal conflicts are conflicts of interest, and parties apply to the courts not to settle philosophical disputes or to seek historical declarations but to assert interests relating to property. An ineffective right ceases to be a right.

33. Without prejudice to the above, there are many judgments (unanimous in recent years) which on referring to offences committed in the context of abuses by the military dictatorship (1973-90) state that civil liability follows criminal liability as "the shadow follows the body". Thus the non-applicability of limitations to crimes against humanity means civil liability is likewise unlimited.

34. The judgment of the 1st Civil Court of Santiago in question here is clearly dealing with an abuse by the state committed within a general assault on the civil population of Chile by our country's armed forces. In 1975 the *El Clarín* newspaper was the most widely read and bestselling paper in Chile and its sympathy for the constitutional and democratic government of Dr Salvador Allende was public knowledge.

The Chilean Supreme Court judgment of 18 July 2017 (annex 3, our underlining) describes the historical context of the measures taken by the military dictatorship against Víctor Pey Casado, and the standards of conventional and customary international law in force in Chile as they are applied by that high court:

> *"32nd (...) the events involved in this investigation correspond to crimes against humanity, occurring in a context inherent to such crimes. For they took place while a non-international armed conflict was in progress, in which situation the Geneva Conventions are fully applicable, involving the prohibition of certain forms of behaviour (as concerns this case, violations of the right to life and bodily integrity, especially homicide in all forms, mutilation, cruel treatment, torture and bodily harm) in relation to persons not taking part in hostilities.*
> *In such terms the legal framework applicable to the facts described in the judgment, as put on record, and analysed in the light of general principles of international law on crimes against humanity, indicates that in this case not only were legal interests normally protected by criminal law infringed but also the behaviour concerned involved a denial of the victim's very personality, thereby showing the close link between ordinary offences and the added value deriving from a disregard and contempt for personal dignity, for the main feature of crimes against humanity is the cruelty with which they are committed, clearly and manifestly*

contrary to the most basic notions of humanity, with the notable aspect of targeting a particular class of individuals, thereby involving an eminently deliberate element in the agent's specific intent.
In short, the conduct established reflects, as is characteristic of crimes against humanity, an outrage on human dignity and represents a grave and manifest violation of the rights and freedoms proclaimed in the Universal Declaration of Human Rights, reaffirmed and developed by other relevant international instruments."

"33rd (...) In the first Draft Code of Crimes against the Peace and Security of Mankind (1954), crimes against humanity were already treated separately, decoupled from the context of war. By that date they had been conceptualised as "inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities." To this concept it was added that the actions should be "part of a widespread or systematic attack directed against any civilian population and with knowledge of the attack," which aspect appears sufficiently demonstrated in the facts of this case, if we bear in mind how the victims were killed and the concealment of the circumstances.
The distinguishing features of this type of offence notably include the non-applicability of statutory limitations and a bar on all amnesties and on establishing exemptions of responsibility intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all prohibited by international human rights law.
Thus, bearing in mind the nature of the facts investigated in this case as set out in the judgment under review along with the context in which they must undoubtedly be placed and the involvement of state agents therein, there is no question that they must under international humanitarian law fall into the category of crimes against humanity which must be punished, for, as they strike at fundamental human values, they deserve the strongest censure of the universal conscience such that no convention, covenant or positive rule can override, waive or obfuscate."

"42nd: Whereas as regards the plea of limitation brought against the claimants' action for damages, the case-law of this Court has repeatedly stated that in the case of crimes against humanity, where criminal prosecution is not subject to statutory limitation, it is not consistent to hold that civil action for damages is subject to the rules on limitation in domestic civil law, as this is contrary to the express intention of international human rights standards, which are an integral part of domestic law according to article 5 paragraph 2 of the Constitution, enshrining the right of victims and other legitimate rights-holders to obtain due reparation for all harm sustained as a result of an unlawful act, and even by domestic law (...).
Consequently any differentiation aimed at dividing the two actions and giving them different treatment is discriminatory, preventing the law from preserving the consistency and uniformity that are required of it.
Thus, seeking to apply the Civil Code's provisions to responsibility arising from crimes against humanity liable to be committed with the active involvement of the state, as ordinary law supplementing other law, is today inadmissible.
Moreover the principle of full reparation for harm suffered is undisputed internationally, and it applies not just to the perpetrators of crimes but also to the state itself. International law has not created a system of liability but has rather recognised one, as this has certainly always existed, developing tools to make the declaration of liability quicker, simpler and more effective, according to the nature of the offence and of the law breached."

"43rd: Whereas in the situation at issue, given the context in which the offences were committed, with the involvement of state agents protected by a mantle of impunity made up of state resources, it is not only impossible to declare any limitation on criminal proceedings arising therefrom but also unfeasible to pronounce a time bar on the exercise of civil actions for damages arising from offences held to be proven."

"44th: Whereas, additionally, civil actions brought by relatives of victims against the Treasury, with a view to securing full reparation of the harm caused, are founded on the general principles of international human rights law and their legal enshrinement in the international treaties ratified by Chile, requiring the state to recognise and protect this right to full reparation, by virtue of article 5 paragraph 2 and article 6 of the Chilean Constitution.
Articles 1.1 and 63.1 of the American Convention on Human Rights declare that the state's accountability for offences of this kind is subject to the rules of international law, which may not be infringed on the pretext of giving priority to precepts of domestic law, for if an offence attributable to a state is committed, it immediately becomes internationally responsible owing to its having violated an international rule, with the consequent duty of remedy and of putting an end to the offence's consequences.
These precepts impose a limit and a duty of action on the public authorities, and especially national courts, in that these may not construe the rules of domestic law with disregard for the provisions of international law enshrining this right to reparation, for this could engage the Chilean state's international responsibility.
Accordingly for these purposes the Civil Code's rules on statutory limitation for ordinary civil actions for damages do not, as the appeal contends, apply, as they contradict the provisions of higher international law."

"45th: Whereas (...) all this led the civil actions brought here, seeking full reparation for the harm caused by actions of agents of the Chilean state, to be upheld, as is required by the application in good faith of the international treaties signed by our country and the interpretations of international law regarded as jus cogens *by the international legal community. These precepts must take precedence in our domestic legal order, pursuant to article 5 of the Constitution, over national rules allowing liabilities incurred by the Chilean state through the criminally culpable actions of its officials to be eluded, and thereby we comply with the Vienna Convention on the Law of Treaties."*

"46th: Whereas it is further worth keeping in mind that the system of state responsibility also derives from article 6 paragraph 3 of the Chilean Constitution and article 3 of Organic Constitutional Law no. 18,575 on the general bases of state administration, which, if the appeal's thesis were accepted, would be infringed."

35. Furthermore, the Chilean state has acknowledged the illegal and unconstitutional conduct of its agents during the military dictatorship by enacting laws intended to restore assets appropriated by the dictatorship or to repay their value if they cannot be returned in kind due to the time elapsed or the circumstances. Thus Law 19,568 provides for "the restoration of or compensation for assets confiscated or acquired by the state via Decree-Laws 12, 77 and 133 of 1973, 1,967 of 1977 and 2,346 of 1978". Decree-Law 77 was the one applied to the assets and rights of the companies CPP S.A. and EPC Ltda owned by Víctor Pey Casado.

36. In the sphere of doctrine, the aforesaid eminent professor of public and administrative law, Eduardo Soto Kloss, has written on and discussed in forums, seminars and classes the *ipso jure* and *ex tunc* effect of public law annulment. The following appears in the Law Journal of the Catholic

University of Valparaíso, no. XVIII (1997), “La nulidad de derecho público, su actualidad” (Nullity of public law, current aspects):

> *“A verb expresses action and the verb form used by the Constitution plainly shows that it is that fundamental law which declares the effects or consequences of a breach thereof committed in any act by any state organ. It is the Constitution itself which declares that that act is invalid, i.e. it does not envisage the possibility of being invalid in the future (*will be*), or require such nullity to apply only insofar as a court decision says so and as from the time of such a ruling. No, far from it; it is invalid as from the very time when it is drafted or enacted in infringement of the Constitution’s requirements for validity. It should never be forgotten that the aim pursued by article 7 in conjunction with article 6 is to ensure the Constitution’s supremacy, especially as regards all organs of the state being subject to the law, which supremacy is the means by which the state may effectively be at the service of the people and fulfil its purpose, viz. of promoting the common good with full respect for the rights of individuals (art. 10 paragraph 41). From this stems one of the typical features of public law annulment, namely that of applying automatically* ipso jure*, i.e. merely by operation of the Constitution.*
>
> *“The debate of interest to some a few decades back and which today there appears to be a wish to revive now seems like hair-splitting, i.e. how to combine this direct operation according to article 7 paragraph 3 with the judicial declaration of nullity. Not rightly understanding our system, some thought that if it operates automatically it does not require a judicial declaration; or, by contrast, if such a declaration is required, it does not operate* ipso jure*. The fallacy here is to pose a false dichotomy, for the fact that nullity applies automatically does not* per se *preclude such a judicial declaration; it is forgotten that there is no internal review in our law (with express exceptions), and therefore neither an authority nor an individual may, by or to it or himself, declare an act invalid where it involves a legal controversy, for this is a matter solely for the courts of law (art. 73 of the Constitution). And recourse must be had to judges so that they may declare with* res judicata *effect whether the act whose validity is disputed is invalid or not. But if the claim for invalidation is accepted, the judge merely recognises a prior fact – that the act is invalid as stated by the Constitution because it infringes its provisions (art. 7).*
>
> *“Some might object that as the text does not say “automatically”, it cannot be asserted that nullity applies* ipso jure*; but this is to disregard both the established history of the precept’s origin (see our "*Derecho Administrativo*" (Administrative Law), ibid. vol. 2. pp. 123-130) and its purpose; a jurist may not demand that everything be spelled out in law when it suffices to read the article, to see how it fits into the law and to know its purpose to grasp the full meaning of its provisions. Here it is the Constitution itself that declares the nullity of acts infringing it, and such a declaration: 1) is from the moment at which the defect arises or the infringement is committed; 2) means that the act as such never enters the statute book; 3) and that at no time, then, does it become valid; 4) and that the judge merely recognises a past fact on upholding an action for invalidation of an act by a state organ. And if the act has effects due to having been applied, it must be ascertained if it has beneficiaries, and if any such have benefited in good faith there will be acquired effects, for these lie beyond the error or ineptitude of the act’s authors; and if the application causes harm, liability is incurred by the state and whoever issued the act (art. 7 paragraph 3 in relation to art. 38 paragraph 2 for state officials).”*

37. This debate is today practically non-existent in Chilean doctrine and case-law; constitutional action for public law annulment is not subject to statutory limitation. No universities teach anything else, no one disputes the point, and the courts rule accordingly.

3.- CONFISCATION OR SEIZURE OF CITIZENS' PROPERTY IS A SANCTION THAT MAY BE APPLIED ONLY BY THE JUDICIARY FOLLOWING DUE PROCESS

38. Chile emerged as an independent state from the wars of independence of 1810-17. Its break with the kingdom of Spain occurred not only in the sphere of a dispute for sovereignty but also and chiefly in that of political philosophy. Chile discarded absolutist monarchical notions in favour of republican ones. The French Declaration of the Rights of Man and of the Citizen informs all of our constitutional legislation since those times.

The first Chilean constitution, dating from 1828, did not afford the country stability or last long. There was a nationwide consensus that a new constitution needed to be drawn up.

The constitution that put the political process on track was that of 1833, which lasted nearly 100 years. When it was replaced by the constitution of 1925 the only change was that a presidential system took the place of a parliamentary one, while the legal traditions remained intact.

The drafter and proponent of this constitution was the parliamentarian Mariano Egaña, advocate of a strong presidency, but despite this background the very broad 21 powers of the president (the executive branch) provided in article 82 did not include that of disposing of citizens' assets and property.

However many powers a president may have he is evidently not an absolute monarch.

Moreover article 12(5) provided the following:

> *"5. The inviolability of all property, without distinction between that belonging to individuals or to communities; no one may be deprived of his property or of any part thereof, however small, or of his title thereto, other than by a court order, except in the event that the state's interests, as qualified by a law, require the use or disposal thereof, in which case the owner shall previously receive compensation as agreed with him, or as appraised in the judgment of lawful men;"*

This provision should be read in relation to the provisions of the following article:

> Article 108. "*Competence to judge civil and criminal cases rests solely with the courts established by the law. Neither Congress nor the President of the Republic may in any event exercise judicial functions, or take over pending cases, or reopen completed proceedings."*

39. The Chilean state has always been a republic. The existence of citizens with rights, and especially the right to property, and who cannot be deprived of it by mere acts of the executive, has no exception in law and case-law. On this political basis the authority to seize, confiscate or impound property owned by individuals has always been reserved for the courts of law, which may deprive citizens of property only following a judicial procedure conducted according to the rules of due process and as expressly stated in the applicable judgment.

40. The most common cause of anyone being deprived of property rights is the confiscation of instruments for committing offences, such as weapons, but this occurs only once a final non-appealable judgment has been given, not before.

41. Even in criminal judicial proceedings, objects that were part of the means by which the crime was committed remain in the custody of the court, which may not dispose of them. Harsh sanctions have been meted out, for example, when the police have made use of goods, such as cars, kept in judicial custody during criminal proceedings.

42. Expropriation procedures may be conducted in Chile on grounds of public interest, and indeed have always existed, but with the obligation to pay compensation. Nowadays this must be paid in advance, before possession is taken of the property, and citizens may contest the amount in the courts. But this is not so much to remove a right as to change its subject.

43. These notions of legal and political philosophy are vital to apprehending that a seizure or confiscation of property by the executive branch is an unconstitutional act that appears "manifestly" so to any Chilean judge or lawyer. It is a basic question of our legal training and notions. No one graduates in constitutional law at university by maintaining that government may confiscate the property of individuals, and without a court ruling.

4.- HOW THE JUDGMENT OF THE 1ST CIVIL COURT OF SANTIAGO RECOGNISES NULLITY OF PUBLIC LAW

Summary of the case and the judgment.

44. The case may be summarised as follows (a full copy of the judgment is attached as annex 6).

Víctor Pey is suing the Chilean Treasury (i.e. the Chilean state in financial and property terms) for the return of a Goss printing press, or, if its return is materially impossible, for compensation, and states that his newspaper office was occupied by the military and that persons unknown took possession of the shares recording his ownership of the company, and finally on 17 March 1975, with the Interior Ministry's Supreme Decree 165, invoking powers assigned by Decree-Law 77 (decrees issued by the military junta to which it gave legal status by fait accompli, as the Congress was dissolved), the newspaper firms were declared wound up and their assets confiscated. Mr Pey's claim noted as an evident matter of fact that Decree 165 was vitiated by public law annulment due to its infringing article 4 of the Constitution, with a self-attribution of powers inherent to the judiciary. Article 4 remained in force in 1975 and the judiciary's powers were intact, as the military authorities expressly asserted. In view of the above the concept that arose was that of "deposit by necessity" provided for by article 2236 of the Civil Code, as the Chilean state was never the owner of the property but rather a mere depositary. Mr Pey had to flee the country because of the political repression, and so the printing press passed into the hands of its material holders in the midst of a public calamity.

The Chilean state was defended by the State Defence Council (CDE), as the body legally obliged and entitled to do so. The Treasury replied stating that Mr Pey was not the holder of the rights claimed and that he lacked *locus standi*, and that the Treasury was the owner of the property and thus no one but the state had standing. It argued that Supreme Decree 165 is valid, that the powers of the judiciary were not encroached on "*but rather it was simply declared that all chattels belonging to* Empresa Periodística Clarín Limitada *were transferred to state ownership*", that the state became the possessor of the property, allowing acquisitive prescription to apply, and it was not a mere holder thereof; more than 20 years had elapsed, so any actions arising were time-barred.

The evidence phase was started, with the following specified as points to be determined: whether the plaintiff (i.e. the claimant) had *locus standi*, under which title the claimant sought the return of property; the existence of a contract of deposit by necessity, by virtue of which the Treasury

possessed the printing press; whether the limitation periods had effectively elapsed; and whether the claimant had been actually aggrieved.

The judgment ruled that the claim had to be rejected inasmuch as the claimant lacked *locus standi* due to being a natural person, whereas the rights claimed in respect of the confiscated printing press supposedly pertained to a legal person, and actions were time-barred.

Reasons for which the judgment must be taken to recognise the existence of public law annulment.

a.- The judge rules on public law annulment because this appeared manifestly. Article 1683 of the Civil Code

45. This article of the Civil Code, regarding absolute nullity, in which as we have seen there is a public interest at stake, states that, in the case of absolute nullity, and taking account of the public interest involved, different rules apply.

> Art. 1683. *"Absolute nullity can and must be declared by the judge, even if not so requested by a party, where it appears manifestly in the act or contract..."*

46. This rule on absolute nullity in the Civil Code must be applied, and always is applied, by the Chilean courts to any public law annulment. The rationale is that if the public interest at stake in absolute nullity, in an act between private parties, allows and requires the principle of party disposition to be set aside, this will apply all the more in acts involving the Chilean state and normally with greater scope and significance than acts between individuals intended to have effects on individuals.

47. In these proceedings the claimant did not request a declaration of public law annulment; he merely pointed to that nullity, as a self-evident fact. In Chilean law facts that are public knowledge do not need proving; the court simply treats them as established. No declaration of public law annulment regarding Decree 165 is sought in the claim, as we have seen; what is sought is the return of the printing press or, alternatively, compensation in lieu of it.

48. Here the judge of the case can refer to public law annulment in the judgment if this is manifestly apparent in the act. "Manifestly" should be taken to refer to an illegality or unconstitutionality that is apparent from a mere reading of the facts.

49. This occurs clearly for any Chilean lawyer or court in the presence of a legal act in which the Chilean state, without having recourse to the judiciary, gives itself, by and to itself, the ability to transfer the ownership of citizens' assets to itself. The nullity here is glaring.

50. The obligation to refer to it, as the judge does, stems from its manifest nature. The court is complying with a legal and procedural obligation, casting off the principle of party disposition (i.e. of ruling only on what the parties submit to it as the subject of their dispute).

51. If public law annulment did not appear manifestly, there was no need to refer to it and the Decree would simply have had to be taken as valid. It would have sufficed to reject the claim owing to the supposed lack of *locus standi*.

b.- How public law annulment was one of the main bases of the claim

52. Mr Pey's claim is based on the argument that we are dealing with a "necessary deposit" pursuant to article 2236 of the Civil Code.

53. The relevant articles read as follows:

> Art. 2236. *"Deposit in itself is referred to as 'necessary' where the choice of depositary does not depend on the depositor's free will, as in events of fire, ruinous damage, looting or other similar misfortunes."*
>
> Art. 2237. *"Regarding deposit by necessity, any kind of proof is admissible."*
>
> Art. 2238. *"A deposit by necessity taken by an adult not entitled to freely manage his property, but of sound mind, constitutes a quasi-contract that binds the depositary without his legal representative's authorisation."*
>
> Art. 2239. *"The depositary's liability extends as far as minor negligence."*
>
> Art. 2240. *"In other respects, necessary deposit is subject to the same rules as voluntary deposit"*

54. Given the depositor's affliction, misfortune and pressing need, deposit by necessity involves several rights exceptional to contracts of this type, benefiting the depositor alone: 1. The depositary is liable for minor negligence (i.e. he must act with the care expected of a prudent man), as in contracts with mutual benefit, despite the fact that in this case the beneficiary is the depositor; 2. All forms of proof are accepted, which is a major exception given that, in contracts, notarial certification is required as from a small sum of money; 3. A relatively incapable person may act validly.

55. As we see, Mr Pey's legal situation as from his necessary deposit was highly favourable to him and easy to prove.

56. But this favourable situation would have quickly receded if Decree 165 were not vitiated by public law annulment. In other words, Mr Pey's legal claim was legally viable only if the Interior Ministry Decree was void, as only then would necessary deposit arise. This is thus a key issue for the plaintiff and for the resolution of the dispute.

c.- The validity of Supreme Decree 165 was at issue even without being specified as a point to be determined

57. The importance of the validity of Decree 165 was first noted by the respondent, which, though aware that the issue is not explicitly specified in the claim's prayer for relief, argues in favour of the validity of Supreme Decree 165 and of Decree-Law 77, invoking Decree-Law 788.

58. As the court was obliged to refer to public law annulment, for this is mentioned as a basis of the claim and the respondent argues against it, and it is a point at issue, for the Treasury asserts in its counter-case and rejoinder that the Decree was not vitiated by public law annulment, why was this not specified by the court as a point to be determined? The answer is that in Chilean law only facts need to be determined, not law, which is assumed to be known by the court.

How law should be applied or construed is something to be resolved by the court on the basis of the parties' submissions in the discussion phase.

But there can be no doubt that public law annulment was at issue, for the claimant specifies it as one of the grounds of his suit, the respondent raises arguments against it and the ruling refers to it explicitly and extensively.

d.- Only existing actions and rights can be barred by limitation. Nullity of public law existed, and as a result the judge declared it to be time-barred. If public law annulment did not exist, it was not subject to limitation. Only what exists can be limited.

59. Although it is well known that in Chilean law, action asserting public law annulment is not subject to limitation, the following needs to be pointed out.

60. In Chile, contracts do not transfer ownership but rather just grant a right to demand compliance. The transfer of ownership resides in the "modes of acquiring ownership".

61. In order for ownership of property to be acquired, a title is required (e.g. of purchase) and a "mode of acquiring ownership" should apply, which in this case would be handover, i.e. the delivery of the thing with, on the one hand, the intention and ability to transfer ownership, and on the other, the ability and will to acquire ownership.

62. The modes of acquiring ownership are as follows:

> Art. 588 of the Civil Code. *"The modes of acquiring ownership are occupation, accession, handover, succession upon death, and prescription."*

63. We may classify some modes of acquiring ownership as original, i.e. arising with their first owner in that they come into being with this mode of acquisition, namely:

> Occupation: Art. 606. *"Occupation is the acquisition of ownership of things that belong to no one, of which the acquisition is not forbidden by Chilean legislation or international law."*

Examples given in this case are the hunting and fishing of wild animals.

> Accession Art. 643. *"Accession is a mode of acquisition by which the owner of a thing becomes the owner of what it produces, or of what is added to it. The products of things are natural or civil fruits."*

64. Also, though not an original mode, there is acquisitive prescription, as a mode of acquiring property and extinguishing third-party actions. This concept originating in Roman law exists in the criminal and civil spheres.

The latter is defined by the following provision of the Civil Code.

> Art. 2492. *"Acquisitive prescription is a mode of acquiring the personal property of others, or of extinguishing third-party claims and rights, as a result of having possessed the things or of such rights and claims not having been exercised for a certain period, along with other legal requirements. A claim or right is held to be time-barred when it is extinguished by prescription."*

65. Acquisitive prescription as a mode of acquiring ownership is derivative, i.e. not arising wholly and fully for the person in whose favour it operates. The prescription that is acquisitive for one

party is extinctive for the other against whom time has run. It is a mechanism that operates with two sides of the same coin, i.e. what is extinguished for one is acquired by another.

66. Acquisitive or extinctive prescription involves a pre-existing right, unlike occupation or accession, in which ownership arises with the mode of acquisition.

67. That prescription is closely linked to the previous owner is evident if we consider what in doctrine and case-law we refer to as "futile possession". This includes violent possession and clandestine possession, though, unlike with regular or irregular possession, property held by violent and clandestine possession may never by acquired by prescription.

67. The way in which the previous owner lost tenure of the thing is significant to whether or not prescription is viable.

> Art. 709. *"Violent and clandestine possession are defective possession."*
> Art. 710. *"Violent possession is that acquired by force. Such force may be current or imminent."*
> Art. 711. *"Anyone who takes possession of a thing in the owner's absence, and repels the owner on his return, is likewise a violent possessor."*
> Art. 712. *"The defect of violence is present whether this is used against the true owner of the thing or against someone possessing it without being the owner, or holding it in another's place or on another's behalf. It matters not whether the violence is used by a person or by his agents, or is used with his consent or, after it was used, is expressly or tacitly approved."*
> Art. 713. *"Clandestine possession is that exercised while concealing it from those entitled to contest it."*

68. All the above leads to the conclusion that in order for either acquisitive or extinctive prescription to operate, as is apparent from the legal definition (art. 2492) and from the spirit of the related legislation, there must be pre-existing rights or claims of others. Nothingness is never time-barred, for it simply does not exist. Nothingness is intangible. Nothingness is nothing.

69. Thus when the court, after asserting that it is EPC Ltda that has standing to bring action for deposit by necessity in the Claim of 4 October 1995 (9th Recital), declares, in error as we have seen (for public law annulment is not subject to limitation), that action for public law annulment is time-barred (sheet 450, 14th Recital), stating:

> *"Whereas, in this case, action for public law annulment is not immune to statutory limitation and is subject to the rules on limitation for civil proceedings,"*

it is clearly saying that public law annulment existed, but that, in its particular and solitary way of applying law, any action to assert it is barred by the passage of time.

70. What is significant for our purposes is that this declaration of limitation is the judicial recognition that the public law annulment mentioned by the claimant (and so vital to his claim) and which the respondent replied to in its arguments, and which the court had to address and rule on pursuant to article 1683 of the Civil Code, fully existed.

71. For the 1st Civil Court of Santiago, alone among its peers, this was time-barred. We know that the case-law of the Supreme Court is unanimous in stating that statutory limitation does not apply to public law annulment, and that if this case had reached that level the final judgment would have been diametrically different, upholding the nullity appearing manifestly to the judge. The case

would without doubt have been settled on the basis that public law annulment applies currently and is not time-barred as asserted by the 1st Civil Court of Santiago.

5.- OTHER CONSIDERATIONS REGARDING THE JUDGMENT

a.- The judgment's invocation of a constitutional rule in order to apply private law to public law annulment is enigmatic.

72. In its judgment the 1st Civil Court stated, on sheet 448 (Recital 12):

> *"Whereas public law annulment is regulated by default in the case of the 1925 constitution or, by express constitutional mandate in the case of the constitution of 1980, by civil law."*

73. If this judgment had been reviewed by higher courts there is no doubt that it would have been overturned.

74. For the 1980 constitution does not at any point state that public law annulment is regulated by civil law; public law annulment as such is moreover not mentioned. Nullity of public law is dealt with by the civil courts for lack of any other procedural forum, but the merits of the matter are evidently settled according to the principles and rules of public law.

b.- Limitation was not applicable to the claimant even under private law. Limitation applies when a right-holder neglects to preserve a right.

75. Between 1973 and 1990 Chile underwent a dictatorship in which all manner of abuses were committed. The Chilean army as an institution has apologised to the country for this. The Supreme Court Judgment of 3 October 2016 (annex 5) says:

> *"5th (...) at the time of the military uprising of 11 September 1973 the constitution applicable in Chile was that of 1925, enshrining the separation of powers for the purpose of preventing any abuse of power by the authorities, which reciprocally reviewed each other's actions and were jointly subject to applicable law (...) through various decree-laws the executive authorities ordered that the National Congress and the Constitutional Court be dissolved; the political parties forming the deposed president's* Unidad Popular *coalition were banned and the suspension was decreed of all other groupings (though in 1977, given the Christian Democratic party's growing opposition to the military regime, it too was banned); and the electoral registers were destroyed. (...)*
>
> *Strict censorship was imposed on the press, radio and television, doing away with any mass media liable to question or monitor the military regime's actions and providing conditions conducive to abuses of power, in the form of political imprisonment or torture. Simultaneously a curfew, in force for years, removed from public scrutiny the actions of state agents engaged in repression, able to move about freely in the forbidden hours. Thousands of people had to go directly into exile for political reasons, and many suffered political imprisonment and torture before leaving the country."*

76. The claimant had to leave the country in order to preserve his life. He could not be expected and indeed had no chance to bring legal action against a dictatorship with full powers, and to assert nothing less than the unconstitutionality of the decrees by which repression was being institutionalised.

77. Action for public law annulment is not time-barred, but even on the mistaken assumption that it legally might be, such action was not time-barred because the statutory limitation could start to run only as from 11 March 1990, on which date the civilian president Patricio Aylwin Azócar took office. In this case the period had not elapsed, and limitation could not operate.

78. Statutory limitation operates against negligent litigants who fail to assert their rights in due time, and thus rights give way to the principle of legal certainty. In this case there was no negligence but simply an inability to bring legal action in the Chilean courts for invalidation of the decree-laws of a military dictatorship as it was operating with full powers.

c.- According to notable recent rulings of the Chilean Supreme Court and public information offered by Chilean state bodies, the decree-laws enacted by the dictatorship were mere legal fictions (i.e. covers) for political repression. This includes Decree-Law 77 of 1973.

79. Openly infringing the provisions of the aforesaid article 4 of the 1925 Constitution, the dictatorship conferred on itself the power to enact laws. Owing to Congress being dissolved and to a residual decorum, its orders were called not laws but *decretos leyes* (decree-laws).

80. These decree-laws covered various subjects. Those dealing with the ordinary matters of any state administration have not been questioned by the judiciary. But those with purposes of political repression and of covering up crimes have simply been disregarded and not applied by the courts.

1) With its Decree-Law 2191 of 18 April 1978 the military dictatorship enacted an amnesty for its crimes. This decree-law has never been explicitly annulled, but as its intent to grant the military impunity is manifest, all the Chilean courts give rulings on human rights violations without taking account of it, quite simply. This is more effective than it being repealed, as a repeal would affect only the future and could not be applied retroactively, as this would be detrimental to defendants.

2) In 1973, court-martials were set up in the Chilean air force (Fach) to try members of that force that the military junta believed did not share their aims. This involved illegal procedures and the use of cruel torture. On the restoration of democracy (in 1990), those affected sought the annulment of these court-martials, in which they had been convicted of treason, but the Chilean courts never acceded to this, saying they lacked the necessary powers.

Accordingly the victims applied to the Inter-American Commission on Human Rights, which ultimately accepted their suit and ordered the Chilean state to provide expeditious judicial remedy for these purposes.

Finally the Chilean Supreme Court gave a judgment allowing an appeal for review, stating as follows (7th Recital):

> *"As mentioned, Decree-Law no. 5 of 11 September 1973, published in the official journal of the 22nd of that month, included an interpretative declaration that the state of emergency decreed due to civil strife should be regarded as a "state or time of war". But in breach of basic legal rules, the new penalties were applied by the court-martials and other military courts, acting during the "state or time of war" under this new law, to facts occurring prior to its enactment, expressly infringing the provisions of article 11 of the Chilean Constitution of 1925, in force at the time, and article 18 of the Criminal Code, enshrining the non-retroactivity of criminal law – a universally accepted principle. <u>In short, the legal declaration of war served as a legal fiction and political justification for repressive measures out of proportion to the context, using the military courts in time of war as an instrument of coercion and punishment</u>"* (our underlining).

This ruling given on 3 October 2016 (case no. 27.543-2016, annex 5) clearly establishes that these decree-laws did not correspond to a rational legal order for the common good, and were rather mere instruments to justify and cover political repression.

3) Regarding DL 77 of 1973, the National Archive of Chile, at the Directorate for Libraries, Archives and Museums (a Chilean state body), says literally on its website http://bit.ly/2ho9a8e (visited 24-12-2017):

> *"Up to 31 October the National Government Archive (ARNAD) is holding the exhibition '**Decree-Law no. 77 and the appropriation of property by the civil-military dictatorship (1973-90)**', with documents giving various examples of that decree's application.*
>
> *This Decree-Law of 8 October 1973 (...) involved the cancellation of their legal personalities, the expropriation of their assets and the assignment thereof to purposes that suited the military dictatorship. It decreed that any infringement of its provisions would be punished with prison, relegation and perpetual debarment from public employment.*
>
> *Indeed the documents in the exhibition show how under this mechanism the dictatorship seized large amounts of property, land, cars, small firms and media outlets, inter alia.*
>
> *Among the documents displayed are Extraordinary Decree 128 of 11 June 1974, of the Interior Ministry Collection, declaring the winding-up of* Empresa Periodística Horizonte, *the printing firm by which the* Diario El Siglo *newspaper and other publications were printed, and Decree 101 of 10 March 1977, of the Ministry of National Assets Collection, assigning two specified buildings to the National Intelligence Directorate (DINA), located at calle Santa Lucía 162 and calle José Domingo Cañas 1367, among other documentation."*

The Chilean state, through its own bodies, describes the application of DL 77 here as *despojo* (plunder).

d.- Rejecting the claim for lack of *locus standi* involves recognising the existence of an infringed right

81. Even in its erroneous application of law the judgment is consistent in its internal logic. Thus the claim is ultimately rejected for **time limitation and lack of *locus standi***.

82. As we know, lack of *locus standi* means an action is being brought by someone who does not hold the right in question or have power of attorney on the right-holder's behalf, or the action brought does not correspond to the protected right.

83. In this case, as is expressly stated, the claim is rejected for lack of *locus standi*. In the court's view the right existed, but it was asserted by a person who is not the right-holder and who does not have power of attorney, and the property rights claimed are time-barred.

84. In both grounds for rejection it is clear that the right existed, which is exceedingly significant for any other actions brought by the claimant.

e.- Not ordering the claimant to pay legal costs means the litigant was not completely defeated and had plausible grounds to bring action. Such plausible grounds are the existence of the contested public law annulment.

85. In addition to the above there is an aspect of the operative part relating to the payment of procedural costs, after the Treasury repeatedly asked the court to order Mr Pey to pay them (Counter-case, pp. 3,12,14,16; Rejoinder, p. 4).

86. These are regulated by the Civil Procedure Code.

Civil Procedure Code, art. 144. *"A party that is totally defeated in proceedings or an incidental issue shall be ordered to pay costs. The court may however excuse the party from paying them where that party appears to have had plausible grounds to bring action, as shall be expressly stated in the decision."*

87. Consistently with the two grounds on which the claim was rejected, the judgment does not order the claimant to pay the costs of the proceedings, as occurs with a totally defeated litigant except where he/she had plausible grounds to bring action.

88. The judgment rules that there were plausible grounds to bring action. Those grounds were that it was evident to the court that the nullity and the depositor's rights existed. It did not grant what the claim sought, i.e. the return of the printing press, but public law annulment existed and it was on this that all the legal actions seeking the restoration of the printing press to its owner were based.

89. It is worth noting what is meant by "*plausible*". In our interpretative system provided by articles 19-24 of the Civil Code, one form of interpretation is to have recourse to "the grammatical element", which has always been taken to mean referring to the dictionary of the Spanish Royal Academy of Language.

Applicable provisions.

> Art. 19. *"Where the meaning of the law is clear, its wording shall not be neglected on the pretext of invoking its spirit. But it is permissible, in order to interpret an obscure phrase of law, to refer to its intention or spirit, as clearly expressed therein, or in the reliable history of its drafting."*
>
> Art. 20. *"Words in law shall be understood in their natural and self-evident sense, according to the normal usage of such words; but where the legislators have defined them expressly for certain matters, in such matters they shall be given their legal meaning."*

90. The word *plausible,*[1] according to the dictionary of the Spanish Royal Academy of Language, and to Chilean legal practice, is defined as follows:

> "From the Lat. *plausibĭlis*. 1. adj. Worthy or deserving of applause. 2. adj. Receivable, admissible, recommendable. *There were plausible grounds for that*."

91. In other words Mr Pey's legal actions were receivable and admissible except that, in the court's view, they were time-barred and he lacked *locus standi*; but even with this erroneous application of law, they existed.

CONCLUSION: From all the above we may conclude, without a doubt, that the 1st Civil Court of Santiago (Chile) determined in its judgment that there was public law annulment, as discussed in case C-3510-1995 entitled Pey v Treasury, and that this affected Víctor Pey's rights.

[1] Substantially the same in meaning as the identically spelled English word (translator's note).

Santiago, 30 December 2017

Signed and stamped:
ROBERTO AVILA TOLEDO, LAWYER, CHILE

ANNEXES

0. Judgment Given in Case No. 0-3510-1995 by the 1st Civil Court of Santiago, Entitled 'Pey V Treasury

1. Supreme Court Judgment of 29 January 2008 (case no. 5341-2006), declaring that action for public law annulment is not subject to statutory limitations

2. Supreme Court Judgment of 29 January 2008 (case no. 8867-2012), declaring that action for public law annulment is not subject to statutory limitations

3. Supreme Court Judgment of 18 July 2017 (case no. 5989-17), on the Chilean state's obligation to apply conventional and customary law, declaring that civil action relating to crimes against humanity is not subject to statutory limitations

4. Soto Kloss (E.): "*La nulidad de derecho público en el derecho chileno*" (Nullity of public law in Chilean law)

5. Supreme Court Judgment of 3 October 2016 (case no. 27.543-16), on the Chilean state's obligation to apply conventional and customary law

6. Supreme Court Judgment of 12 December 2017 (case no. 11601-2017), aggravated abduction of Aliste and others

7. Pérsico Paris v Treasury judgment

STATEMENT OF INDEPENDENCE

The undersigned declares as follows:

- Neither the payment of his fees nor their amount depend on the outcome of the dispute.

- He is not aware of any conflict of interest.

- In his Opinion he has disclosed all the sources of information of which he made use

In preparing his Opinion he was, insofar as possible, accurate and comprehensive.

- He included in his Opinion all the aspects of which he is aware or has been informed.

- In his Opinion he gave his own opinion, with full independence.

- He is aware that the Court, in the presence of the parties and their respective advisors and experts, may question him on all the matters discussed in his Opinion.

STATEMENT OF TRUTH

I declare on my honour that the facts and arguments set out in my Opinion correspond to my own knowledge and are true and accurate, and that the view I have expressed truly and fully reflects my professional view.

Santiago de Chile, 30 December 2017

Signed: Roberto Ávila Toledo,
National identity card no. 8.045.543-7
Lawyer

Signed and stamped:
ROBERTO AVILA TOLEDO, LAWYER, CHILE