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EXAMINATION OF THE LEGALITY OF THE JUNTA-CONSTITUTION AND THE PLEBISCITE OF 11 SEPTEMBER 1980 .

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REPORT SUBMITTED BY P. VAN DIJK

Mr. Chairman, Members of the Commission, Ladies and Gentlemen,

I am afraid that I will have to start with apologizing for the fact that, since I received the invitation to introduce Item II only a few days ago, I had no time to prepare a comprehensive and well-documented speech. I have to rely on my own impressions and experiences during my stay in Santiago at the occasion of the plebiscite and the information I received there from different sources, and on a study I made concerning the violations of Chile's international legal obligations in the field of human rights in several provisions of the Junta-Constitution and its Transitorial Provisions.

My first remarks concern the preparation and adoption of the Constitution.
I take as a starting point the principle of self-determination. This principle has been embodied as a basic principle in the two International Covenants on Human Rights of the United Nations to which Chile is a party. This principle also includes the right of every citizen to take part in the conduct of public affairs, as set forth in Article 25 of the Covenant on Civil and Political Rights.
It is an understatement to say that the composition of the Ortúzar-Commission which was established to prepare a first draft, did not quite reflect the different groups and different opinions of the Chilean society. Although the way in which a constitution is prepared as a rule gives a clear indication of how those in power want the constitution to look like, this fact alone does not violate the above-mentioned principle of self-determination and popular participation, since we are dealing here only with a preparatory phase. The same holds true for the consultation of the Council of State, a body which also is a far cry from a model of proportional representation.
The real test is whether the proposal at a certain stage has been subjected to open discussion for a sufficient period of time, in a free atmosphere of information and expression, in a liberal attitude towards the right to

assembly and association, and is supported by free political activity, and whether the ultimate draft is either the product of a constituent assembly of proportional representation or leaves sufficient room for an alternative to the voters.
Indeed, the principle of self-determination includes the right of the people as a whole to choose in a free, independent and conscious way its constitutional system of government. This right presupposes a free option, guaranteed by a full enjoyment of the freedom of information and expression, and of political party freedom.
None of these rights have been respected by the Junta, neither during the period of preparation of the draft and the preparation of the plebiscite, nor on the day of the plebiscite itself. I base this conclusion mainly on the following facts:

1. The definitive draft by the Junta was made public only about one month in advance of the date fixed for the plebiscite, which left insufficient time for a public discussion, certainly in a country of such an expanse as Chile is, and with no representative national and local organs in function.
2. The Junta had extended the state of exception for a period covering also the time of the preparation of the plebiscite and the day on which the plebiscite was going to take place. A period of constitutional exception with broad powers for the governing régime to restrict freedom is the least appropriate moment for amending or replacing the constitution. On the contrary, the guarantees embodied in the Constitution have to remain fully in force until the return to the normal constitutional situation has been effected.
3. During the period preceding the plebiscite there was an obvious increase in the repression by the Junta and its executive organs, as the figures of arrests, detentions, tortures and razzias clearly show. This has created an atmosphere in which the free formation and expression of the will of the people was impossible.
4. Whereas the country was covered with pamphlets and posters propagating to vote "si", there were only very restricted possibilities, if at all, for the opposition to express their opinion. People who distributed or only were in the possession of materials propagating "no", were arrested or molested; the Junta is in complete direct or indirect control of all t.v.-channels which exclusively allowed information, discussions, messages etc. in favour of the Junta and its draft-constitution (and

as a result of the consumption-policy of the Junta the t.v. has become the only or main source of information for large parts of the Chilean population); the attention paid in leading newspapers such as El Mercurio to the supporters of and the opposition against the draft has been extremely disproportionate - in many instances the only possibility for the opposition to reach the press was by buying expensive advertisement space.

5. All activities of a political party character were prohibited, but also political discussions at the universities and other institutions of education, within labour unions and other social, economic or cultural groups. Even the work of academic expert-groups like the "Group of 24" and of other independent organizations such as the Chilean Commission of Human Rights in relation to the Draft was hampered to a large extent. Freedom of assembly was very restricted and so was the freedom of expression in favour of "no". The only noticeable exception was of course the permission to Mr. Eduardo Frei to address a meeting in the Teatro Caupolicán, but as Mr. Frei himself told me, the Minister of the Interior has interfered in order to have even this meeting cancelled at the last moment and afterwards more than 70 attenders of the meeting were arrested.
6. As I said before, if a draft-constitution is not adopted by a constituent assembly of proportional representation, the voters must be offered a real alternative. The situation as described above did not allow for the presentation of such an alternative. It was stressed again and again by the Junta in public statements that the only alternative was a return to "chaos" and this "chaos" was illustrated by very deceptive means.

As far as the plebiscite itself is concerned, this is acceptable as a means of giving the nation a new constitutional basis only if, here again, there is the guarantee that the plebiscite is the true reflection of the free expression of the will of the people. This condition has not been fulfilled either. I mention to you the following well-known facts:

1. The electoral register, which was destroyed after the coup of 1973 has never been restored by the Junta, and no general census has taken place for the last ten years, which made it impossible to compare the votes cast with the number of those entitled to vote, and to verify that no double votes have been casted. The means used by the authorities to remedy this defect - an ink mark on the thumb and a seal on the I.D.

card - proved totally inadequate, since both the ink and the seal were easily removable. The registration of the numbers of the I.D. cards of those who casted a vote was inadequate as well, since the final check on this could not be publicly supervised.
2. The names of the presidents and assessors for the individual "tables" clearly indicated that there was no proportional representation in this respect either. I think you are all familiar with the lists published in El Mercurio, indicating that representatives of *e.g.* Bayer and the Banco de Chile were listed for a whole series of tables.
3. Blank votes were counted as "si" which was a misappreciation of the will of the voter and opened the way for manupilations with blank votes.
4. Although I must say that the counting at the tables was public the final counting of the votes was not.
5. Last but not least: whereas foreigners with residence in Chile for a certain period of time had the right to vote, this right was denied to the numerous Chilean citizens who unvoluntarily had to stay outside of their country, and thus were not allowed to help to determine the political, economic and social system of their country.

From all this one can reach no other conclusion than that the declaration by the Junta that their draft-constitution had been accepted by a large majority of the votes cast, does not give any legality to that constitution and thus cannot give any constitutional basis to the Junta itself either. Both under Chilean law and under international law the régime of the Junta has remained an illegal régime, and it is the duty of all nations to help to create a situation in which the Chilean people can exercise its right of internal self-determination.

I will now turn to the contents of the Junta Constitution and its Transitory Provisions and discuss a few of its provisions in relation to Chile's international obligations in the field of human rights.

Here, too, I first have to say a few words on the principle of self-determination and popular participation, since this principle is at the basis of the implementation of human rights; also from an international point of view, as is clearly indicated by the fact that it is included as a basic principle in the two Covenants on Human Rights

of the United Nations.

How is the implementation of this principle guaranteed in the Junta Constitution?
Article 4 states that Chile is a *democratic republic*. However, a reading of the further provisions makes it abundantly clear, that the democracy which is at the basis of this constitutional system is of a very particular kind. And indeed, already in July 1978, in a speech given to the Frente Juvenil de Unidad Nacional Pinochet had made it clear that it would be an "authoritarian democracy" and a "protected democracy". And that is exactly what it is, and to such an extent that the most elementary features of democracy are lacking and the result is a sad caricature of democracy. I have to restrict my self to just a few examples:

First, the principle of popular soverignty is violated by the broad restrictions on the right to vote and to be elected.
Article 16 stipulates in a very general way that the right to vote will be suspended

1. when a person is prosecuted for an offence involving major penalty (no further definition is given);
2. when a person is prosecuted for an offence which is determined by law as terrorism (and we all know how broad this determination by law is in the case of Chile);
3. when a person is prosecuted for an act that propagate doctrines against the family, promote violence or a concept of society, state or legal order with a totalitarian character or based on the class struggle.

It is clear that this provision leaves ample room for arbitrary exclusion of large parts of the population from voting.

And as far as the passive side, the right to be elected as a representative, is concerned, Articles 44 and 46 restrict eligibility as a Deputy or Senator to those who have completed secondary education or its equivalent, obviously based upon the assumption that educational institutions are the only places where to learn what the real interests of the people are. Those condemned for propagating the doctrines just mentioned are not eligible for 10, and those condemned for terrorism for 15 years.

But even if one has the right to vote and to be elected, this does not mean that one has sovereignty in his hands.

If we leave aside for the moment the transitorial period during which there will be no congress at all and all the legislative powers rest with the Junta and Pinochet personally, even if after that period elections will take place and Congress will be re-established its functions are very restricted.
Because instead of indicating those matters which *have to be regulated* by law, the Junta Constitution in Article 60 contains an exhaustive list of matters which the legislature may act upon. That means that all other public affairs fall under the direct control of the President using his regulatory powers under Article 32(8). Besides, the President, under Article 62, has the exclusive power of initiative to legislation of a great number of very important issues.

Moreover, very important matters which in a democracy are controled by the representatives of the people, are decided upon by organs like the Central Bank Council, the National Security Council and the Constitutional Council, bodies the members of which are not democratically elected, and are not controled by Congress but on the contrary control Congress.

So far for the issue of popular participation.

Finally, I will turn to the problem of human rights in general.
Although the Junta Constitution contains in its Chapter III a "Bill of Rights" which at first sight looks as a very advanced and complete catalogue of human rights, this first impression is very deceiving and has indeed already misled on purpose or not many superficial observers.

In order to get the real picture one has of course to examine which rights are lacking, but also, and even more important, which powers are provided for to restrict or suspend the rights and freedoms set forth.

I have made a study of both aspects, especially in view of the rights and freedoms which the Chilean government has to guarantee under its international obligations, and this has brought me to the conclusion that there are many violations on very basic points.

I think, Mr. Chairman, that it would take me too far to give an enumeration of all those violations. The results of the study will be published as part of a book on the Chilean Constitution to appear soon in Spanish and English.
I will restrict myself to saying a few words on what is I think the most important part of it: the power to declare a state of exception and then to suspend several rights.

The Constitution distinguishes between the following four "states of constitutional exception":
1. the state of assembly, in the event of a foreign war;
2. the state of siege, in the event of internal agression or internal disturbance;
3. the state of emergency, in grave cases of alteration of public order, damage or danger to the national security, from external or internal causes;
4. the state of catastrophe, in the case of a public disaster.

After the declaration of any of those four states of exception the President has broad powers to suspend or restrict the freedom of opinion and information, personal liberty, assembly and association, and the freedom to enter and leave the country.

The right to derogate from certain international obligations concerning human rights in order to cope with an emergency situation, has been expressly recognized in Article 4 CCPR. However, when relying on this provision, the government concerned has to respect the conditions and limitations laid down in that international instrument.
The main condition is the following: the situation in the country concerned has to be such as to constitute a "time of public emergency which threatens the life of the nation" and the measures taken must be "strictly required" to cope with the situation. The interpretation of this condition is of the utmost importance.

Since the wording of this conditions is identical to that of the comparable provision in Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the international case law with respect to the latter provision is of a certain relevance here. According to that case law a public emergency must show the following characteristics:
1. the threat must be actual or imminent;
2. its effects must involve the whole population;

3. the continuance of the organized life of the community must be threatened; and
4. the crisis or danger must be exceptional, in that the normal measures of restrictions, permitted by law for the maintenance of public safety, health and order, are plainly inadequate.

The viewpoint that the *whole population* must be affected in an extremely serious way by the situation in order to be qualified as an emergency situation, was shared by the drafters of Article 4 CCPR. Thus, a situation which deviates from the normal pattern but is not of such a serious character and/or does not occur on such a scale that the authorities cannot control it with their normal powers - taking into account the several possibilities of restricting human rights authorized by the Covenant for the protection of national security and public safety in normal times - cannot be considered a "public emergency" in the sense of Article 4. I should also stress that the life of the nation is not necessarily linked with a certain government or régime, in a way that action directed against a government or régime always also threatens the life of the nation. Therefore, members of the UN Human Rights Committee, when considering the Chilean report transmitted under Article 40 CCPR, "inquired whether the concept of 'national security' was defined in terms of the stability of the régime or the stability of the State and whether it was invoked when the Government feared for its stability or when its interests had been threatened". In the same context it was pointed out "that it was the Junta itself that constituted the real state of emergency for the Chilean people and that article 4 of the Covenant had not been intended to justify the acts of persons who themselves created the emergency".

Moreover, it is clear from the above mentioned European "jurisprudence" that the threat to the life of the nation must be *actual or imminent*, and that a potential threat forms an insufficient reason to justify derogating measures. Thus, the European Commission took the position in the case of Greece under the colonels that, even if an opposition movement had the intention to gain control of government, there was no justification for taking derogating measures.
In the same sense, some members of the UN Human Rights Committee, when considering the report submitted by the Chilean Government under Article 40 CCPR,

> "pointed out that the Covenant did not authorize any derogation from its obligations on the grounds of 'latent subversion'. ....

They also asked how the term 'latent subversion' should, in the view of the Government of Chile, be defined since, in those countries of Latin-America where illiteracy, poverty and disease were rife, there could be said to exist a state of latent subversion that would last as long as social and political rights had not been substantially implemented."

Moreover, the requirement that the threat is actual or imminent implies that the situation constituting the threat *still* exists. Therefore, if a government publicly states, as the Junta has done, that it "has gradually been gaining control of the situation, that the subversive action of organized groups has been controlled and that the groups themselves have been controlled" and that "the country is now living in an atmosphere of widespread tranquillity", this forms a strong indication that in that respect no state of emergency exists anymore if it has existed at all. It is submitted in that respect that an emergency situation in the meaning of Article 4 refers to a situation of such an exceptional character that it must be presumed to be generally of limited duration. Prolongations without gradual mitigations of the connected measures are most likely a course of rather than a remedy for tensions and "latent subversion" in the country.

It is obvious that the international body which is charged with examining the fulfilment by a State of its international obligations in the field of human rights, must also be competent to assess whether the reliance by that State on a treaty provision authorizing it to derogate under certain circumstances from (some of) its obligations, is justified. In this respect, too, the case-law under the European Convention on Human Rights may serve as an indicator. Both the European Commission and the European Court of Human Rights have made it clear, that the burden of proof that the conditions justifying the invocation of Article 15 of the European Convention have been and continue to be met, but that it rests upon the institutions established under the Convention to ensure that the requirements of Article 15 are met, and that thus the final ruling rests with them. When making their assessment the Commission and the Court leave the national authorities a "margin of appreciation" as to the character of the situation and its impact on the life of the nation, but they clearly do not take the government's submissions for granted without further examination.

In the same way both the *Ad Hoc* Working Group and the Special Rapporteur have expressed their opinion on the legality of the prolonged state of emergency and the derogatory measures under Article 4, which opinions have been accepted by the Commission on Human Rights. And as far as the competence of the Human Rights Committee in the reporting procedure under Article 40 is concerned: as has been indicated above, several of its members have made critical observations on the interpretation and application of Article 4 by the Chilean authorities. It may therefore be concluded that in the future the question of whether the Chilean authorities have acted in conformity with Article 4 when taking derogatory measures in view of a state of exception which has been declared under Article 40 of the Chilean Constitution, may be assessed by the Human Rights Committee and by other UN bodies charged with supervising the UN law of human rights. This again leads to the conclusion that all States have the duty to see to it, individually or through collective bodies, such as the Human Rights Committee and the Commission of Human Rights of the UN, that respect for human rights must be restored, to begin with the right of self-determination, and that thus a constitutional system is created which enables Chile to fulfil its international obligations.