

TO THE CENTRAL INVESTIGATIVE COURT No. 5

Don Juan Miguel Sanchez Masa, solicitor of the Fundación Presidente Allende, who is exercising the actio popularis, and of Ms. Josefina Llidó Mengual, Ms. María Alsina Bustos, Ms. Laura González-Vera, and of the other parties exercising the particular prosecution as is accredited in Summary Proceedings 19/97, separated piece N° 3, originating in Summary Proceedings 1/1998 of the Central Investigative Court N° 6, I appear before the Court and as provided for by law **STATE:**

That in relation to the separated proceedings for concealment of assets presented in our document of 3rd September 2004, I formulate a request by means of the present document for the enlargement of the criminal complaint for alleged money laundering against Don Oscar Custodio AITKEN LAVANCHY, of Chilean nationality, lawyer by profesión, with domicile, for the purposes of notifications, in Avenida Américo Vespucio Sur n° 406, oficina 71, Comuna de Las Condes, in the city of Santiago de Chile, tel. 00-56-2-2073321, on the basis of the following:

FACTS

1.- In the daily newspaper **The Washington Post** dated 4th September, 2004 it is affirmed that in the course of the investigation under way in the files of Riggs Bank:

*“Riggs Banks investigators have found evidence of possible criminal activities by some former employees who managed the accounts of former Chilean dictator Augusto Pinochet and have referred their findings to federal prosecutors, according to several sources familiar with the matter. The referrals emerged from an internal investigation of possible money laundering in Riggs's dealings with Pinochet and Chile **going back to the mid-1980s**”.*

The criminal actions related to the crimes which are the object of these proceedings, which took place in the second half of the 1980s, are included in the relevant period of time (11th September 1973 to 11th March 1990).

2.- In declarations to the media which were widely distributed (annexed document 1) Mr. Aitken Lavanchy has declared that he cooperated with the indicted Augusto Pinochet to create in 1999 the paper company called **ABANDA LIMITED** on Tortola Island in the British Virgin Islands. When asked *“For what reason was Abanda constituted?”*, his reply was:

“The writ of Baltasar Garzón! That was the period of the arrest in London and the Spanish judge was cudgelling him penally and in relation to his assets. He protected himself in that way. The proprietor now is a foreign company”

(Annexed Document No.1)

3.- **ABANDA LIMITED** had been constituted through the intervention of a Panamanian law firm, Alemán, Cordero, Galindo y Lee (annexed doc. n° 2).

4.- Likewise, Mr. AITKEN appears to be the manager of other companies whose purpose is to conceal the assets of the accused Augusto Pinochet, such as that which is identified by the name **BELVIEW INC.**, created in Tortola Island, British Virgin Islands (annexed doc. n° 2), and **BELVIEW S.A.** in Chile.

5. Mr. AITKEN calculates the value of that part of the accused Pinochet's assets of which he has knowledge as up to 15 million US dollars, independent of other parts managed by other persons. Thus, he affirms that he did not know of the Riggs Bank accounts before their existence was revealed in the US Senate Report (annexed document. N° 1).

6. –In reply to the question “Where is the money now?” Mr. AITKEN replied that it had been put at the disposal of Don Sergio Muñoz, magistrate of the Court of Appeals of Santiago:

“The judge made clear that the matter is under the proceeding secrecy. But he took the necessary, cautionary measures to give the maximum protection to those resources which the general put at his disposal. The resources are under his jurisdiction and control.”

LEGAL REASONINGS

I

Those about which we wrote in documents dated 19th July and 3rd September 2004, should be taken as reproduced in their entirety herewith, in particular those which are stipulated in **Articles 258¹ and 257² of the Penal Code** in relation to arts. **27³, 28⁴, 29⁵ y 31⁶** of the Law of Criminal Proceedings.

¹ 1. **Art. 258.** *The person who acts as an administrator, de jure or de facto, of a legal entity or acts in the name of, or in representation – legal or voluntary – of, another person will be held personally responsible, even if there is not a convergence in that person of the conditions, qualities or relationships that the corresponding characteristics of the crime require in the case of its active subject, provided that those circumstances are present in the entity or person in whose name, or in representation of whom, he acts.* 2. *On that basis, if a sentence imposes a fine on the author of the crime as a penalty, the legal entity which acted in his name or on his behalf will be responsible – jointly and severally - for its payment. 1. Will be punished with prison terms of from one to four years and a fine of twelve to twenty four months:*

1st The person who hides his assets prejudicing his creditors. 2nd The person who, for the same purpose, carries out any act of dispersal of property or creation of obligations which defers, renders difficult or impedes the efficacy of seizures or of a process whose nature is executive or binding, be it judicial, extra-judicial or administrative, which has been initiated or is foreseen as likely to be initiated 2. *That which is foreseen in the present article will be applied, whatever the nature or origin of the obligation, when an attempt is made to evade compliance or payment, including the economic rights of the workers, independent of whether the creditor is a private individual or a legal entity, public or private.*

² **Article 257. [Concealment of assets]** 1. *Will be punished with prison terms of from one to four years and a fine of twelve to twenty four months:*

1st The person who hides his assets prejudicing his creditors. 2nd The person who, for the same purpose, carries out any act of dispersal of property or creation of obligations which defers, renders difficult or impedes the efficacy of seizures or of a process whose nature is executive or binding, be it

II JURISDICTION AND COMPETENCE OF THIS COURT

II.1.- We take as reproduced herewith the propositions referred to in our documents of 19th July and 3rd September 2004, in particular those which are stipulated in **arts. 23.4 and 65.e)**⁷ of the Organic Law of Judicial Powers.

II.2.- It is not necessary that Mr. AITKEN should have participated in the crime that is the cause to the proceedings, whether this be money laundering or concealment of assets: it is enough that he **knew** that the funds had their origin in the crime concerned and **wanted** to collaborate in their concealment. This is the classic figure of the receiver: he is a receiver precisely because he does not participate in the theft but profits from the outcome of it.

II.3.- The rule of connectivity is fully applicable to the facts described

II.4.- As regards the place in which the crime was committed, money laundering is a matter of universal jurisdiction (and that, at least in relation to terrorism and drug trafficking, is a norm governed by a convention ratified by Spain)

II.4.1.- This crime should be pursued in Spain even if *in whole or in part* the conduct took place outside Spanish territory. The legitimacy of the Spanish jurisdiction in these proceedings (the nexus between the conduct and the Court) derives from the fact that the penal and civil actions are prior to the typified conduct and have been accepted as being of the competence of the Spanish courts prior to the event.

II.5.- As regards the crime of concealment of assets, it is committed in Spain because it was here that the attempt to gain access to the assets was made and judicially

judicial, extra-judicial or administrative, which has been initiated or is foreseen as likely to be initiated
2. That which is foreseen in the present article will be applied, whatever the nature or origin of the obligation, when an attempt is made to evade compliance or payment, including the economic rights of the workers, independent of whether the creditor is a private individual or a legal entity, public or private.

³ **Article 27.** *The authors and accomplices are criminally responsible for the offences and misdemeanours.*

⁴ **Article 28. [Concept of «author»].** *The authors are those who carry out the act on their own, together with others, or through another, whom they use as an instrument. Also considered as authors are: a) Those who directly induce another, or others, to carry it out. b) Those who cooperate in its execution by means of an act without which it could not have been carried out .*

⁵ **Article 29. [Concept of «accomplice»]** *The accomplices are those who, while not being included in the above article, cooperate in the execution of the act through prior or simultaneous actions.*

⁶ **Article 31. [Criminal responsibility of the representative of a legal entity**

⁷ **Article 65.** *The Criminal Tribunal of the National Court will deal with: (...) e) Crimes committed outside the national territory in those cases in which,, in accordance with laws and treaties, the trial corresponds to the Spanish Courts. In every case, the competence of the Criminal Tribunal of the National Court will include taking cognisance of crimes connected with all of those previously indicated.*

recognized, and it was here that it was defeated by fraudulent means. Although Mr. Aitken's fraudulent conduct has been carried out (as regards actions) in Panama, the Virgin Islands and Chile, it is considered to have been carried out, as regards its consequences, in Spain.

II.5.1. Jurisprudence exists on matters of territorial competence between different Spanish courts which indicate that the concealment is understood to have been committed in the place where the assets are located .

Thus, the **Decision of the Supreme Court (Chamber II) of 4th October, 2000** (RJ 2001\1544), determined in the matter regarding competence núm. 750/2000 a case relative to a an alleged crime of concealment of assets and money laundering originating in the Central Court of Instruction No. 1 (Preliminary Proceedings 425/1994) committed in part outside Spanish territory (our highlighting):

“SOLE.- The reasons invoked by the Fourth Section of the Provincial Court of Pontevedra to refuse to accept the trial of the facts which are the object of these actions and raise an issue of negative competence on the grounds that the trial should be the competence of the National Court are based on letters d) and e) of section 1 of article 65 of the Organic Law of Judicial Powers (RCL 1985\1578, 2635 and ApNDL 8375), that refers to crimes related to trafficking in drugs and narcotics, committed by organised groups, whose effects are produced in places within the competence of different Courts and while being crimes committed outside the national territory, according to laws or treaties, the trial corresponds to the Spanish Courts.

In the accusation by the Prosecutor's Office, in his provisional conclusions, reference is made to a series of operations involving money originating in drug trafficking and to the withdraw of assets from on going claims made on them mentioning amongst them the constitution by Esther L. G., in the name of Pitville Ranger Corporation, of a unilateral mortgage on a property to provide a provisional surety in Proceedings handled by the Central Court of Instruction, that is in Madrid. Likewise the Prosecutor's Office includes in its account of events the creation of a contrivance of shell companies to dissimulate the illicit origins of important sums of money derived from the sale of of narcotic substances in various European countries and, in that context, reference is made, amongst other acts, to the opening of an account in a branch of a Spanish bank in the city of Zurich , to the purchase of purely instrumental companies in the Republic of Panama called Fashion Earrings, SA and Pitville Ranger Corporation, describing operations in which these companies played a role, and also referring to the transfer of an important sum of money to Germany, operations related to the Sociedad Portuguesa Batedor, SA and the deposit of money in the Banco Pinto Sotomayor of Valença do Minho, in Portugal. The crime of money laundering is present in the entire financial circuit of drug trafficking and in the events which are described in the written accusation of the Prosecutor's Office reference is made to episodes in various Spanish provinces, an organization having existed in a foreign country and what is most important some of the operations having taken place in a foreign country, as a result of which the competence of the

National Court is determined in accordance with the article of Organic Law of Judicial Powers to which reference has already been made

This jurisprudence is equally applicable in this proceedings *mutatis mutandi*, the crimes from which they originated being the result of terrorism, genocide and tortures.

III.- Art. 764 of the LECriminal permits the Court to adopt cautionary measures for the purpose of determining financial responsibilities, including costs.

IV.- Art. 28 of the bilateral Convention governing extradition and judicial assistance between Spain and Chile determines:

“Article 28. Obligation to provide assistance.

1. The parties are obliged to provide mutual assistance, in accordance with the provisions of this Treaty, in the carrying out of investigations and actions related to any criminal proceedings initiated by events whose knowledge is the competence of that requesting Party at the moment at which that assistance is requested.

2. The assistance may be provided in the interests of Justice even if that act is not punishable in accordance with the laws of the Party whose assistance is requested. Nevertheless, if measures to secure objects or carry out searches of homes are required, it will be necessary that the act for which the assistance has been requested is also considered as a crime in the legislation of the Party whose assistance has been requested.”

“Article 40. Requirements for the request.

1. The requests for assistance should include the following::

a) Authority of the person who is making the request and nature of the decision.

b) Crime to which the proceedings refer.

c) To the extent possible, identity and nationality of the person accused or convicted.

d) Precise description of the assistance which is requested and all such information as is considered useful to the effective compliance with the request.

2. Those requests whose object is any action other than simply handing over objects or documents must also include a summary description of the facts and the accusation which has been formulated, if that is the case.

3. When a request for assistance has not been complied with by the Part to which it was directed, it will be returned with an explanation of the reasons for this.

Article 41. Transmission of the request.

1. The request for assistance will be submitted by diplomatic channels. Nevertheless, the Parties may designate other authorities qualified to send or receive such requests

2. The Parties may entrust to their Consuls the carrying out of such actions as are permitted by the legislation of the recipient State.

V.- In addition, **art. 466 of the Chilean Penal Code** *determines:*

“The debtor not dedicated to commerce who conceals his assets, prejudicing his creditors or who becomes insolvent as a result of concealment or malicious squandering of those assets will be punished with “prisión menor” [a term of imprisonment below the minimum which is served in practice] in any of its degrees.

The same punishment will be applicable if, in prejudice of those creditors, he enters into simulated contracts..”

In accordance with Chilean doctrine and jurisprudence, the crime referred to in the Article 466 has a material aspect and not merely formal and it is, therefore, necessary that the action should be the cause of damage.

As regards whether the damage must be real and effective or it is enough that it should be potential or fortuitous, the author of treatises on penal law, Alfredo Etcheberry (one of the most notable penal specialists of Chile) in his work Derecho Penal, (Penal Law) Volume III, page 420, in reference to damage as a typified element in fraud as a result of deceit, sustains the following:

"SOLER (124), holds that effective damage is necessary. CARRARA (125) holds the opinion, on the other hand, that potential damage is sufficient.. The German doctrine in general favours this latter point of view. It is true that, in principle, real and effective it is necessary that damage should be done but often a mere potential damage is already sufficient, given the harm which is done."

Later on, he adds:

"As regards mere expectations, the doctrine is divided. It is necessary, in any case, to distinguish between those mere expectations that are based on an existing juridical situation and those which are simply hopes or possibilities. Losses arising from the former could be seen as damaging. That would not be the case in relation to the latter."

In the light of this general criterion, given that the stratagem of removing and concealing assets was employed after the Decision of 19th October 1998, whose purpose was to embargo assets and ensure that penal responsibilities could be attributed in the future, it is clear that harm is caused, in a financial sense, to the juridical content of that writ.

In the latter sense, the same author, Mr. Etcheberry, states that the majority of authors sustain that the concept of damage is juridical and not economic but that the damage should be quantifiable in money terms.

VI.- Art. 43 of the Chilean Code of Penal Proceeding states that:

“Provided that they are not opposed to what is established in the present Code or in special laws, the measures which are common to all proceedings and which are contained in Book I of the Code of Civil Proceeding are applicable to the penal procedure”.

VI.1.- Book I of the Code of Civil Proceeding of Chile provides in art. 242:

“The decisions made in foreign countries will have in Chile the force which is given to them in their respective treaties; and for their implementation the procedures established by Chilean law will be followed, to the extent that they have not been modified by such treaties.”

VII.- The Code of International Private Law of Chile (Bustamante Code, the State of Chile is a Party and it is applicable in a subsidiary sense), provides that:

“Book Three. INTERNATIONAL PENAL LAW
Chapter I. ABOUT PENAL LAWS

*“Art. 302.-When the acts that constitute a crime are carried out in diverse contracting States, each State may punish the act carried out in its country, if it constitutes in itself a punishable act.
Otherwise, preference will be given to the law of the local sovereignty in which the crime was committed”.*

“Art. 303.- If the matter relates to crimes committed in the territories of more than one contracting State, only that crime committed in its territory will be submitted to the penal law of each one.”

Chapter II. CRIMES COMMITTED IN A CONTRACTING FOREIGN STATE

“Art. 307. Those who commit a crime outside the territory, such as white slavery, which the contracting state is obliged to repress in accordance with an international agreement, will also be subject to the penal laws of any foreign State in which they may be apprehended and tried.”.

Book Four.INTERNATIONAL TRIAL LAW
Subtitle. COMPETENCE

Chapter III. GENERAL RULES REGARDING PENAL COMPETENCE

“Art. 340. The judges and courts of the contracting State in which crimes and offences have been committed have competence to take cognizance of them and give judgements on them.

“Art. 341.- This competence is extensive to all those other crimes and offences to which is applicable the penal law of the State in accordance with the provisions of this Code..”

“Art. 342. It is also applicable to the crimes and offences committed in foreign territory by national officials who are entitled to the benefits of immunity.”

VIII.- ACTIONS REQUESTED

1.- That in the Rogatory Letters requested in our previous documents the so-called **ABANDA LIMITED** should be added to the companies to be investigated

2.- That in compliance with what is provided for in **art. 118 of the LECriminal**, the request is made that Mr. AITKEN should be notified of the present enlargement of the criminal complaint, at the domicile indicated, together with a copy of the criminal complaint, and that he should be informed of his rights by means of a legal summons

2.1.- Note should be taken that in ratifying the Interamerican Convention on requisitorial or rogatory letters, the Republic of Chile formulated the following declaration:

Declaration made at the time of ratification, according to Article 16 of the Convention⁸

“The instrument of ratification corresponding to this Convention contains the declaration "that its provisions cover the execution of letters rogatory in criminal, labor, and contentious-administrative cases, as well as in arbitrations and other matters within the jurisdiction of special courts".

2.2.- It is requested that the action of notification should be carried out by the Spanish Consul in Santiago de Chile, in conformity with **art. 41.2 of the bilateral Convention on Extradition and Judicial Assistance on criminal matters**, of 14th April, 1992 (Official Gazette of 10th January 1995), arts. 2, 3, 4 and 13 of the **Interamerican Convention on requisitorial or rogatory letters**, which is in force in Chile and Spain (Official Gazette of 15th August 1987), and art. 5 of the Vienna Convention on consular relations.

3.- The adoption of the following cautionary measure is requested: agree to a provisional embargo of the assets of Don Oscar Custodio AITKEN LAVANCHY;

⁸ Article 16. *The States Parties to this Convention may declare that its provisions cover the execution of letters rogatory in criminal, labor, and "contentious -administrative" cases, as well as in arbitrations and other matters within the jurisdiction of special courts. Such declarations shall be transmitted to the General Secretariat of the Organization of American States.”*

4.- It is requested that the appropriate Letters Rogatory should be presented to the Authorities of Chile for the following purposes:

4.1.- communicate to the Judicial Authorities of Chile that the assets identified as being the property of Augusto Pinochet Ugarte, in his name or in the name of his family members or of third parties, have been embargoed in accordance with the Decision of 19th October 1998 in Proceedings 19/1997, Separated Piece;

4.2 agree to request of the Chilean authorities that they should make available to this Court the information which they have available about the identity of those goods, in whatever country they may be located, in the Proceedings which are being carried out by the Magistrate Don Sergio Muñoz, of the Court of Appeals of Santiago de Chile;

4.3 agree to request that the Chilean judiciary authorities, for the purpose of the responsibilities originating in the crime of concealment of assets, establish an embargo on such assets as, being located on Chilean territory, have been identified in the Proceedings carried out by the Magistrate Don Sergio Muñoz, of the Court of Appeals of Santiago de Chile, and put them at the disposal of this Court.

5. Such additional measures as may be appropriate.

In virtue of which,

I REQUEST OF THE COURT: That having received this document with the annexed documents and copies, the Court proceed to hold them admissible; and having enlarged the criminal complaint formulated on 19th July 2004, for alleged concealment of assets and money laundering to include Don Oscar Custodio AITKEN LAVANCHY; and having ensured that this person has been notified by the Spanish Consul in Santiago de Chile; accept the request for the adoption of measures as indicated in section VIII of the body of this document, and see fit to agree to them..

Madrid, 6th September, 2004

Dr. Juan E. Garcés y Ramón

Madrid Bar Association Register number 18.774