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# REPLIES TO THE LIST OF ISSUES (CCPR/C/CHL/Q/5) TO BE TAKEN UP IN CONNECTION WITH THE CONSIDERATION OF THE FIFTH PERIODIC REPORT OF THE GOVERNMENT OF CHILE (CCPR/C/CHL/5)*

[23 February 2007]

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**REPLIES TO THE LIST OF ISSUES TO BE TAKEN UP IN CONNECTION WITH THE CONSIDERATION OF THE FIFTH PERIODIC REPORT OF CHILE ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS**

1. In connection with the status of the 1978 Amnesty Decree-Law No. 2191, mention should be made of some extremely important milestones.

Firstly, as pointed out in paragraphs 114 and 115 of the report, in 1998 the Supreme Court began to stop upholding judgements handed down by military tribunals that had applied the Amnesty Decree-Law. In another change in Supreme Court practice, disappeared detainees were construed to be victims of permanent kidnapping, and consequently no amnesty or time-bar should apply. In recent judgements,[1] the Supreme Court has found that Decree-Law 2191 cannot be invoked because during the period it was in force - 11 September 1973 to 11 March 1978 - Chile was in a state of war, declared by Decree-Law No. 5. Hence the appropriate procedure under the law is the application of the Geneva Conventions, which proscribe the issuance of amnesty laws or prescription.

Secondly, it should be noted that on 26 September 2006 the Inter-American Court of Human Rights issued a judgement in the case entitled *Almonacid Arellano y otros vs. Chile*. This discusses the case of Almonacid Arellano, a Chilean citizen detained at his home in the village of Manso de Velasco on 16 December 1973 by policemen who shot him in front of his family as they left the house. He died at the Rancagua Regional Hospital on 17 September 1973. The judicial investigation was systematically dismissed by the Chilean courts, which applied the amnesty proclaimed in 1973 when the country was governed de facto by a military dictatorship.

The operative section of the Inter-American Court decision states that the Decree in question, in attempting to amnesty those responsible for crimes against humanity, is incompatible with the American Convention and thus has no legal force. The judgement goes on to say that Chile must ensure that the Decree-Law does not continue to impede further investigation of Mr. Almonacid Arellano's extrajudicial execution or the identification and appropriate punishment of those responsible. In conclusion, it says that Chile must also ensure that the amnesty does not continue to impede the investigation, trial and, where appropriate, punishment of those responsible for similar violations committed in Chile.

To give full effect to the Inter-American Court ruling and restrict the application of the amnesty law so as to bring it into line with international human rights law in its various manifestations, the Government of Chile has supported and sponsored a parliamentary legislative initiative currently in second reading in the Senate,[2] although it has not ruled out the idea of legislating on the subject.

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[1] For instance, cases Rol: 559-04 of 13 December 2006, and Rol: 2665-04 of 18 January 2007.

[2] *Boletín No. 3.959-07*.

The aforementioned initiative, a single article, approves standard interpretation of article 93 of the Criminal Code, which sets forth the grounds for extinction of criminal liability: it states that such grounds shall in no case be applicable to crimes and single offences constituting crimes against humanity and war crimes under the binding rules of *ius cogens*, customary international law or international conventions ratified by Chile and currently in force.

**The State Defence Council has played an outstanding role in combating impunity in a series of cases linked to extremely grave human rights violations committed by agents of the State, especially executions and forced disappearances. It has done so by appearing as plaintiff in the various judicial proceedings, playing an active role of constant collaboration in order to make substantive progress in each of the cases.**

The Defence Council has also defended the National Treasury in connection with civil compensation claims from direct victims of human rights violations or their relatives.

2. On this topic, mention should be made of two fundamental steps taken by Chile.

(a) There is a major bill submitted by the Government to the National Congress to set up a national human rights institute, with the status of an autonomous corporation under public law, with legal personality and its own assets; the bill is currently in second reading in the Senate.[3]

The main purpose of the new institute is to promote and protect the human rights of persons living in Chilean territory as called for by the Constitution and law and by the international treaties and conventions signed and ratified by Chile which are currently in force, and in accordance with international human rights law and international humanitarian law.

The most salient tasks assigned to this new body include identifying any act that connotes discrimination on grounds of race, colour, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition.

In addition, the institute is to propose to the public authorities measures that in its view should be adopted to encourage the promotion and protection of human rights, seek the harmonization of national legislation, regulations and practice with international human rights instruments and principles, and promote their effective implementation.

It must also promote the approval, signature and ratification of international declarations, treaties and conventions on human rights submitted for discussion or approved by specialized bodies or committees of the United Nations, the Organization of American States and other regional institutions.

[3] *Boletín No. 3.878-17.*

Lastly, the institute is to be entrusted with the task of handling complaints and taking other legal action in response to acts constituting genocide, crimes against humanity or war crimes. That responsibility also extends to crimes and single offences that need to be investigated and punished in accordance with the international treaties ratified by Chile and currently in force.

(b) A Presidential Advisory Commission for the Protection of the Rights of Persons, better known as the Citizen Defence Commission, has been set up.[4] This is an advisory body to the President of the Republic whose task is to defend and uphold individuals' rights and interests in the face of acts or omissions on the part of public bodies in providing services to satisfy citizens' needs.

The remit of the Commission, a body subordinate to the Office of the President, is restricted to bodies under the authority of the Central Administration. Still the Commission marks the first step towards the creation of an Ombudsman as an autonomous entity within the executive, by means of a constitutional amendment giving it permanence and full powers to defend citizens.

On 4 December 2003 a parliamentary motion emanating from the Chamber of Deputies to create an Ombudsman was submitted to the National Congress. It is currently in first reading.

3. When Alberto Fujimori arrived in Chile on 6 November 2005, the Government of Peru requested his detention for extradition purposes. The request was made under article VII of the 1932 extradition treaty between Chile and Peru and the "… international treaties governing the fight against impunity in crimes against humanity and acts of corruption …".

The Ministry of Foreign Affairs immediately transmitted the Peruvian Government's request to the Supreme Court of Justice, which appointed Judge Orlando Alvarez Hernández to examine it. On 7 November 2005 he ordered the detention of Mr. Fujimori. On 8 November 2005 Mr. Fujimori's counsel applied for release on bail, which was refused on the grounds that, since Mr. Fujimori was being detained under special circumstances, the request could only be granted once the extradition request had been formalized.

The Government of Peru sent the request for Mr. Fujimori's extradition, based on his alleged liability for various crimes relating to human rights violations including torture and grievous bodily harm and forced disappearances, and acts of corruption to the detriment of a number of Peruvian citizens and of the Peruvian State, on 3 January 2006. The request was received on the same day, with all the background information on which it was founded.

On 18 May 2006 the Supreme Court of Justice granted Mr. Fujimori bail for the duration of the extradition proceedings.

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[4] Created by Supreme Decree No. 65 of the Office of the Secretary-General of the Presidency, 2001.

The investigation stage of the proceedings was closed in November 2006; judgement in first instance was still pending in January 2007.

Extradition in Chile is a matter ruled exclusively by court decision. The Government does not interfere in extradition proceedings and must abide fully by what the courts decide, i.e. by purely legal decisions taken on the merits of the proceedings. The ruling on an outstanding extradition request must come, in first instance, from the investigating magistrate of the Supreme Court of Justice and, on appeal, from the Supreme Court (Criminal Chamber), which must hear the appeal or, should there be none, advise on the case.

In settling extradition issues, judges must adhere to the international norms governing extradition, in this case the bilateral treaty between Chile and Peru, and domestic rules, in this case the old Code of Criminal Procedure, which still applies to extradition for acts committed outside Chile before 16 June 2005. For matters not so regulated, they are required to follow the general principles of international law as they apply to extradition. Judges must determine whether the premises for granting extradition are correct: whether the offence concerned is designated as criminal in both countries and carries the requisite minimum penalty, among other requirements. In addition, under Chilean law, the courts in Chile, unlike other countries, require the supporting documents to contain a modicum of evidence to the effect that there are good grounds for supposing that the person whose extradition is being sought committed the crimes of which he or she is accused as principal, accomplice or accessory.

4. Chile has never used the law punishing terrorism to evade legitimate demands by indigenous communities in connection with land disputes or legitimate related claims. Such demands have always been taken up by democratic governments and channelled through institutional machinery to respond to the claims of all sectors of Chilean society, including the indigenous peoples. One significant example is the protection of the right to land enshrined in the 1993 Indigenous Peoples Act, and the annual budgetary allocation for expansion of indigenous landholdings.

Eight members of the indigenous community have been punished under the law against terrorism since 2001, because of extremely violent situations threatening the rule of law and, consequently, the constitutional guarantees of other Chileans, indigenous or otherwise. The anti-terrorism law was most recently invoked against members of the indigenous community in 2003. President Bachelet has given instructions that it must not be invoked by the Government.

Guarantees of due process were fully respected in the judicial proceedings concerned, and the accused received professional assistance from the Public Criminal Defence System or private counsel, as they wished. That acquittals and release from prison are possible also helps ensure the rule of law for all inhabitants of Chile. Three members of the Mapuche community are currently out on parole.

Under democratic governments the guarantee of due process enshrined in the Constitution has been fully upheld through incorporation into domestic law of the international human rights treaties that Chile has ratified. Similarly, the law against terrorism has been

reformed substantially to make it compatible with full respect for human rights and the principles and procedures established in the reform of criminal procedure; thus the institutional standard of procedural guarantees has been raised considerably.

5. The bill, originating in a parliamentary motion, to "amend the Civil Code and additional laws relating to joint property or community of property, conferring equal rights and obligations on husband and wife",[5] is currently in second reading in the Senate. The main aim of the motion and the text substituted by the Executive was to replace the current joint-property system with a new system of community of acquisitions.

The bill was approved by the Chamber of Deputies on 18 October 2005 and went before the Senate Committee on Constitution, Legislation, Justice and Regulations on 13 December of that year.

Work on the bill in the Committee resumed on 16 January 2007 with the Director of the National Women's Service (SERNAM) in attendance, and it was agreed that the Committee would hear the views of renowned professors of civil law from various law faculties on the need to amend the statute in force. As a result, the stages to be followed to carry the initiative through are: completion of discussions and broad approval by the Senate, probably in March 2007; detailed discussion, which should end some time this year; return of the bill to the Chamber of Deputies, which, if it accepts any amendments made by the Senate, will approve it and submit it for promulgation as a law by the President of the Republic. Any disagreements between the Chamber of Deputies and the Senate will have to be resolved by a commission comprising representatives of both houses, which should not take longer than three months.

6. The topics of discrimination against women and the importance of eliminating its cause as a requirement for progress towards becoming a developed country have become increasingly visible in recent times. In response, Chile had taken a series of measures: it has incorporated non-discrimination and equal pay for work of equal value into the Labour Code; it has set up regulatory and procedural machinery to enforce the law against sexual harassment; and it has passed regulations to protect fundamental rights which punish and offer prompt remedies for infringements of rights in the workplace, thereby benefiting working women, who have traditionally been the worst affected in this regard.

It is important to point out that there has been progress in legislation for the protection of mothers, not only in the rights of children and mothers, but also in expanded paternity rights. Within the framework of shared family responsibility and with a view to more equal roles, post-natal paternity leave has been extended from one to five days.

A range of policies have been applied to stimulate and encourage women to enter the labour market depending on degree of poverty (poor female heads of household, families living in extreme poverty, etc.), geographical location (urban and rural women) and dependence on an employer or not (microenterprises, dependent working women, etc.).

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[5] *Boletín Legislativo No. 1707-18.*

At the same time, the current Government has assigned top priority to the reform of the Social Security system. Its proposal, currently at the stage of a bill, addresses many of the situations unfavourable to women in the current social security system. By way of example, the bill virtually doubles the meagre pensions of women with average salaries of under US$ 600; this increase would make a considerable difference to their quality of life and ensure that they can live above the poverty line in retirement. In addition, as of now, the minimum pension will cease to be an ad hoc benefit and will become an entitlement for all women who have never done paid work or have done so only sporadically (temporary workers) or in highly unstable jobs.

President Bachelet has made access to childcare for working mothers a government priority, and 800 new crèches were created nationwide in 2006.

With the firm intention of improving the conditions in which women work, reducing existing disparities and breaking cultural moulds, the President has promulgated a Code of Good Labour Practices and Non-Discrimination in the Public Sector. This is designed to permit and guarantee equality of opportunities in all ministries and State departments, ensuring fulfilment of the principle of non-discrimination, especially equal treatment for men and women in access to work, pay, promotion, vocational training, and working conditions.

In order to promote practices that ensure the exercise of women's rights in the private sector, the Government has established alliances with Chilean businesses; one of the first successes has been the elaboration, by the Chilean Confederation for Production and Commerce, one of the country's major trade associations, of a Good Labour Practices Guide modelled on the aforementioned Government Code for the public sector.

Likewise, this year SERNAM has begun implementing a Programme of Good Labour Practice with Gender Equity, the aim being to frame a comprehensive policy for a new labour culture embodying the notion of equality between women and men as subjects of law and as citizens, both earning income for the household and being responsible for the care of the family. A special objective of this programme is to have access to high-quality paid work recognized as a universal right of all women. It seeks to establish gender-balanced labour practices in large public and private enterprises, and mechanisms affording women access and (equitable) promotion to high-quality posts, chiefly through the use of a Labour Exchange Portal.

The objectives of this programme are: to match the supply of qualified women workers better to demand for senior posts in industry and public institutions; to introduce and entrench general equal-opportunity practices for men and women in large private and public enterprises, from the viewpoint of corporate responsibility, participation and gender equity; to make the general public more aware, showing what progress is being made towards a new culture of work that embraces women and men as subjects of law who are equally responsible for earning income for the household and caring for their children; and to generate proposals for public policy, legislation and public and private models for action on employment for highly educated women.

The programme comprises the following components: models of corporate responsibility for gender equity in employment, so as to generate, in a group of large public and private enterprises, reproducible models of equal-opportunity employment practice; the (*Contrata Mujer*) (Hire Women) Portal, which offers women a set of computer tools that help them find

employment; the propagation of a new culture of work, in which businesses experience is publicized as progress towards the notion of female and male workers as equal subjects of rights, citizens, providers and carers within the family.

Another programme that SERNAM has been running since 2007 is entitled “Improving the employability and employment conditions of women heads of household”. Its main purpose is to demolish the gender barriers that hinder the employment of poor and middle-class women. This initiative will be coordinated by SERNAM and implemented with other ministries and public services.

Some areas that this programme will address have to do with: training for work, improving employability by establishing equivalences between different academic qualifications offering vocational training for better-paid jobs, guidance in job-seeking, and support with regard to child care and occupational health. Dental, ophthalmic and preventive health care, and preferential quotas in kindergartens of the National Kindergartens Board, with extended hours for working women will figure prominently.

The challenge to Government is to generate and apply in the labour market gender policies making for better working conditions for women by the time that the bicentenary comes around. Designing tools to evaluate gender policies that seek equal pay and equal treatment at work is a matter of especial concern.

7. The report of the National Commission on Political Prisoners and Torture shows that reparation during the transition towards democracy not only serves the individual victim to be compensated, but also has important social, historical and preventive functions. The reasons for compensation in cases of mass and systematic violations have to do with the victims, but they are also one way in which society lays the foundations for coexistence based on respect for human rights. They afford an opportunity to reformulate historical appraisals so that all concerned can feel respected and in possession of their rights. Lastly, reparation is linked to the possibility of preventing a recurrence of events abhorred by society as a whole.

The proposals and recommendations in the Committee’s report are based specifically on:

- The State’s obligation to make reparation for imprisonment for political reasons and torture;

- The consequences for the victims recognized as such by the Commission;

- The need for society to take preventive action so that such acts never recur and human rights are upheld.

The Commission conducted individual interviews to assess the consequences that the acts reported had on their victims. Serious as they are, they vary in nature and magnitude and have affected each victim in different ways, depending on personal characteristics, conditions of detention, socio-economic circumstances and opportunities for political and social reintegration. Those are the consequences that the Commission had in mind when it proposed the measures set out below.

**Individual reparation**

Proposed for people on the list of victims given in the report, whose names were published to meet the requirement that access to the benefits later proposed should be transparent. The measures proposed and ultimately approved encompass legal, economic, health, education and housing issues.

(a) In the legal sphere reparation seeks the re-establishment of rights breached in judicial proceedings brought against the victims which in many cases did not offer minimum safeguards of due process.

(b) In the economic sphere reparation consists in the payment of a compensatory benefit for life. The Commission proposed uniform financial compensation for everyone it recognized as a victim, without regard to duration of imprisonment or intensity of torture. The first benefits were paid in April 2005, five months after the report was published. All the victims recognized by the Commission receive a monthly benefit of 112,817 pesos if they are under the age of 70; 123,357 pesos if they are between 70 and 75; and 129,119 pesos if they are over the age of 75. The benefit was declared incompatible with the allowance granted to people dismissed from public service or enterprises owned or intervened in by the State (another reparation policy for victims of human rights violations that Chile is pursuing), given the need to focus resources on people who have not received other forms of reparation. The law also gives people the right to choose between the two, receiving a lump sum payment of 3 million pesos. Some 50 individuals who were not political prisoners and were not tortured but whose mothers were detained while pregnant with them and, once released, gave birth prematurely, or who as children were detained with their parents but freed immediately without legal proceedings, were awarded lump sums of 4 million pesos each, equivalent to 33 times the minimum wage.

(c) In the health sphere, reparation takes the form of free, comprehensive therapeutic medical care, both physical and psychological, in establishments belonging or attached to the national health system, for victims of political imprisonment and torture recognized as such by the Commission. This has resulted in victims' being granted entitlement to an existing scheme that has recently been institutionalized by law, the Programme of Compensation and Comprehensive Health Care (PRAIS).

(d) In the educational sphere reparation allows people to complete their primary, secondary or university education.

(e) In the housing sphere reparation consists in a special bonus for victims who have not found housing with the help of the State subsidy, have no housing, or do not have stable housing.

It must be borne in mind that it would be difficult for large-scale reparation dispensed through a process of this kind to comply with the standards of an individual compensation procedure defining benefits according to the harm or damage a particular victim has sustained. Having so many victims to assess makes it hard to determine precisely what suffering each has endured, all the more so where three decades have elapsed since the events.

That was what the Commission meant when it acknowledged the complexity of the notion of *victim of political imprisonment and torture*, which does not mean it has been demonstrated that each and every one of the victims was tortured, nor that the prejudice suffered by each of them has been precisely, individually evaluated. On the contrary, the reparation measures taken by the Government and approved by the National Congress are a concrete admission by the State of its responsibility, it being understood nonetheless that the damage inflicted was such that reparation through a proceeding of this type is not possible.

The action taken by the State on the recommendation of the Commission is intended to make some redress for the suffering caused, but not, of course, on the same scale, particularly given the country's resources and other obligations, especially in the social sphere. The allowances finally awarded are equivalent to the pensions many people receive at the end of their working lives.

The President of the Republic was careful to point this out and reduce unrealistic expectations, describing the measures as austere and symbolic, especially in the light of claims for reparation put forward by human rights organizations and victim groups, which bear no relation to the country's capacities.

**Symbolic and collective reparation**

These measures are designed to provide moral redress, restore the personal dignity of the victims, allow victims to be recognized as such by the rest of society, and reinforce the national community's commitment to respect for and the inviolability of human rights. They imply recognition of the fact that reparation is not just for victims considered individually or implies that the State organs owe them a particular debt, but that it is also an undertaking by society as a whole. Their purpose is to ensure that the events described in the report are never repeated, and to help enable Chileans to live together in respect for the dignity of every individual.

(a) Guarantees of non-recurrence and preventive measures consisting of amendments to national legislation through the incorporation of norms of international human rights law that seek to guarantee that rights are not violated again. The objective is to establish legal safeguards that strengthen and institutionalize the promise that those painful events will not recur but that human dignity will be respected. These measures call for a deep-reaching review of domestic legislation; some of them have been translated into legislative initiatives. For example, the National Congress has been asked to approve ratification of the Rome Statute creating the International Criminal Court, and incorporation of the crime of forced disappearance into national legislation.

(b) Symbolic gestures of recognition and reconciliation, including the declaration of the main centres of torture as national monuments and the creation of memorials and remembrance sites for victims of human rights violations and political violence. Some of these initiatives are being developed through the Human Rights Programme of the Ministry of the Interior, which has supported the construction of 18 memorials to the victims of human rights violations throughout the country and is working on the construction of 10 more.

(c) Publicity about and courses on human rights in teaching curricula, including more training on human rights for the armed forces and the police.

(d) Institutional measures, such as the creation of the National Human Rights Institute.

8. Administrative inquiries into alleged physical abuse by prison guards of persons in their custody

Altogether 68 administrative inquiries were launched in 2005 into alleged abuse - assault, verbal abuse, ill-treatment and sexual harassment - by prison guards of persons in their custody. By September 2006, 38 inquiries had been completed and 30 were still in progress.

Of the 38 cases on which inquiries were completed, 30 were dismissed, 2 resulted in acquittals, 4 resulted in fines, 1 resulted in a reprimand and 1 resulted in suspension.

Some 27 administrative inquiries were launched between January and December 2006 into alleged abuse - assault, verbal abuse, ill-treatment and sexual harassment - by prison guards of persons in their custody. By September 2006, only two of these investigations had been completed by being dismissed.

**Judicial proceedings against prison guards for unlawful coercion of or causing bodily injury to prisoners**

Eight judicial proceedings were initiated in 2005, of which three have been completed and five are pending. Under investigation are one case of alleged abuse, one of alleged injury and unlawful coercion, two of slight injury, two of unlawful coercion, one of causing physical suffering and unlawful coercion and one of causing detainees physical suffering and injury.

Three judicial proceedings launched between January and December 2006 concerned Concepción prison, Coyhaique prison and Temuco prison. The first two are still at the investigation stage; the third resulted in a sentence of 61 days' imprisonment for ill-treatment and suspension of the prison guard involved.

**Number of victims and family members that have been compensated and the compensation they have received**

No victims or family members have received compensation in 2005 or 2006.

9. The expression "without due reason" in the definition of this criminal offence means without justification. If this provision is interpreted consistently in accordance with the principles of criminal law, the conclusion must be that "unnecessary violence" is violence employed without a sufficient or relevant cause to justify it and which therefore lacks due reason.

Renato Astrosa, in his treatise "Commentary on the Code of Military Justice", states that in order for an act to be defined as a criminal offence of this kind, two criteria must be met: the

act must be "unnecessary", meaning that the use of violence cannot be objectively justified and is an excessive response by the military or police against a third party; and "irrational", meaning that this offence does not include all types of excessive response since there must be a subjective element determined by the discretion or whim of the soldier or police officer.

These two criteria should not be interpreted to mean that Chile would allow or accept unnecessarily aggressive conduct on the grounds that there was "due reason" insofar as there is a combination of offences that result in injury, as stated by writer Mario Verdugo Marinkovic based on case law.[6] As a consequence, since military offences are a special type of criminal offence, such conduct can be punished under the standard provisions of the Criminal Code if the circumstances required to classify it as a military offence do not obtain. Military criminal regulations tend to protect different legal interests and assign greater liability and stiffer penalties to individuals that threaten them. The increased penalty makes it necessary for the legislature to be more rigorous in describing the offence. Under article 397 of the Criminal Code, sentences for the offence of causing serious injury range from medium-term rigorous imprisonment (541 days to 3 years) to minimum long-term rigorous imprisonment (5 years 1 day to 10 years), whereas under rule 330 of the Code of Military Justice, sentences range from medium-term rigorous imprisonment (541 days to 3 years) to medium long-term rigorous imprisonment (10 years 1 day to 15 years).

The only exemptions from liability are the use of weapons "when there is no other reasonable method of carrying out an order" and the right of guardians of public order to self-defence, as established in articles 208 and 410 to 412 of the Code of Military Justice.

The updated jurisprudence of the Court Martial comments on the matter, recognizing that even if the offence does not meet both criteria, liability is only absolved if there is an express, specific reason for doing so such as the right to self-defence of guardians of public order under article 410 of the Code of Military Justice. Conclusions about the substance of the offence must therefore be drawn in light of the doctrine and jurisprudence discussed above, which show that the two criteria must be met because of the special nature of the offence and the stricter sentence imposed. This cannot be interpreted as absolving criminal responsibility, for the standard provisions and existing jurisprudence still apply.

A fundamental consideration in interpreting the rule under discussion is that article 19, paragraph 1, of the Chilean Constitution, guarantees all persons "the right to life and to the physical and mental integrity of the individual" and, to safeguard this right, prohibits "any unlawful coercion". Article 33 of the Code of Military Justice must be interpreted in accordance with this constitutional rule.

10. The Government of Chile is fine-tuning a legal initiative, soon to be sent to the National Congress, that restricts the scope of the military justice system to hearing and trying military offences committed by uniformed personnel.

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[6] Articles 396 onwards of the Criminal Code.

On 22 November 2005 the Inter-American Court of Human Rights handed down a judgement in *Palamara Iribarne v. Chile*. This concerned a ruling affecting a civilian employee of the Chilean Navy who, in March 1993, was refused permission to publish his book, "Ethics and Intelligence Services", in which he discussed matters related to military intelligence and the need to acquire military intelligence within certain ethical parameters. Mr. Palamara also faced legal proceedings for contempt and failure to carry out military duties in connection with the publication and circulation of the book.

The Court ordered Chile to rectify the situation, which infringed the rights of the individual concerned, and to bring its legislation into line with the requirements of the Inter-American Convention on Human Rights.

Chile has complied with almost all the particulars of this ruling, circulating the banned book, rehabilitating the defendant and amending its legislation to remove the offence of contempt. The only outstanding point is completion of the reform of the military justice system to adapt it to international human rights standards.

11. Three bills on this subject are currently making their way through Congress. Work on the first, amending the Criminal Code to impose tougher penalties for the crime of abortion, began on 20 June 2002. Work on the second, amending article 119 of the Health Code to re-introduce therapeutic abortion, began on 23 January 2003; and on the third, a proposal to reform the Chilean Constitution so as to establish a new constitutional guarantee of sexual and reproductive rights, giving constitutional rank to the right - of women in particular - to choose the most scientifically appropriate methods of preventing and planning pregnancies, work began on 7 October 2004.

It should be said that these three bills are at the first stage of consideration and work on them has yet to resume. Legislative initiatives relating to abortion require political consensus if they are to succeed, and there is every indication that the political will does not exist in Chile: in addition to the bills mentioned above, two others concerned with the decriminalization of abortion have also been submitted to the National Congress, one proposing a constitutional amendment to increase the number of votes needed to decriminalize abortion, and the other aimed at incorporating into the Penal Code a new article 345 bis making repeal of the crime of abortion possible only through a constitutional amendment.

Legislation on this topic is not on the agenda of President Bachelet's Government, and it has stated as much, with the consequence that policies on the subject have focused on prevention of pregnancy through formal education and health care. One of the latest measures adopted is a Supreme Decree empowering health consultants to distribute the emergency contraceptive pill to girls over 14 years of age without their parents' consent.

12. Regarding improvement of prison conditions, the Prison Regulations referred to in the report establish the following criteria for the creation or modification of penitentiary establishments:

- The age of the people who may be placed in them;

- Their sex;

- The nature of the activities and action undertaken to return inmates to society;
- The type of offence committed;
- The level of delinquency of the inmates;
- The special security or health measures that certain inmates may necessitate;
- Additional criteria adopted by the prison administration.

These criteria are strictly applied in the construction of prison complexes and all detention areas. Prison complexes bring together, within a single perimeter, various detention units designed for the application of different internal rules and treatment to inmates, supported by single centralized security, administration, health, technical and labour services and services relating to the registration and movement of the prison population.

The segregation programme permits classification and physical separation by day and/or night, in keeping with the stage of proceedings, degree of delinquency and other factors, so that inmates with compatible sociocultural characteristics can be housed in the same unit. This has helped increase inmates' personal safety, reduce sociocultural conflicts and criminological contamination and facilitate work on programmes, projects and activities relating to differentiated prison treatment suited to the characteristics of each different group of the prison population.

**Specific mechanisms for supervision of prison conditions**

The Courts Organization Code regulates supervisory visits by judges to prisons or facilities in which detainees, prisoners or convicts are being held.[7]

Weekly visits are paid on the last working day of each week by the judge responsible for procedural safeguards, who is appointed by the panel of judges of the local court, in order to determine whether detainees or prisoners are being subjected to improper treatment, whether their right to defence is being restricted or their cases are being unlawfully prolonged. Prosecutors from the Public Prosecutor's Office, lawyers and legal representatives of the accused, and the parents or guardians of defendants who are minors may accompany the judge on these visits. A report on the weekly visit is drawn up and a copy is sent to the Court of Appeal. Also, all judges must visit any prison where detainees or prisoners are being held at least once every three months.

Six-monthly visits are also made to penitentiaries and prisons in order to check on security, order and hygiene, the execution of sentences, and inmates' complaints. In communes where a Court of Appeal is situated, weekly visits are undertaken by one of its judges, a judge from an oral proceedings court and a judge responsible for procedural safeguards. The judge from the Court of Appeal is appointed on an annual rota basis, beginning with the least senior.

[7] Articles 567-585.

In other communes, the visit is paid by a safeguards judge appointed by the Court of Appeal on a monthly rota basis, and the court official appointed by the judge to serve as secretary for the visit. A report on each six-monthly visit is drawn up and a log kept in each prison with a copy of the report. Another copy of the report is submitted to the Ministry of Justice, which receives all comments and refers them to the appropriate administrative authorities.

The President of the Supreme Court and a judge appointed by that Court may visit any prison or facility in the Republic when the President, who will lead the visit, deems it necessary. Similarly, the President and judge from the Court of Appeal making the visit in the town where that Court sits may visit any prison or facility within its jurisdiction when the serving President so decides, or at the request of one of its members. During these visits, the buildings are inspected to determine the treatment and food inmates are receiving; compliance with the regulations, and the administration of the inmates' savings accounts. The President must inform inmates that they may make any claims they please. In the event of undue harassment, restrictions on the freedom of defence or unwarranted prolongation of trial proceedings, a written statement will be taken and forwarded to the Court of Appeal so that it can take appropriate measures. If the visitors hear of abuses or defects that they have the authority to correct, they will give appropriate instructions. They may decide to make representations to the President of the Republic, should the need arise, on behalf of any prisoner or in connection with the facility itself.

The chief prosecutor of the Supreme Court is required to inspect penal facilities, either personally or through the intermediary of any of the prosecutors of the Supreme Court; he may also make appropriate representations to the pertinent authorities, depending on the subjects he deems worthy of comment.[8]

One programme implemented in order to receive complaints from inmates is that of the Information, Complaints and Suggestions Offices (OIRS**)** of the Chilean Prisons Department (*Gendarmería*).[9] These offices have been permanently established in all parts of the country since 2002, and function with a handbook of procedure and responsible personnel. They receive an average of 4,000 queries and 30 complaints a month. The commonest queries relate to transfers of inmates, their work, benefits, computation of sentences, state of trial proceedings and so forth. Thus far, the complaints have mostly been to do with overcrowding, unfairness on the part of prison guards, absence of house rules, and delays in the registration of visits to penal units.

The Chilean National Department of the Prison Service has issued instructions that staff must report and collaborate with criminal investigations into acts that may constitute crimes

[8] Article 353 No. 2.

[9] Created through Exempt resolution No. 1972 of 31 July 2001.

occurring inside prison facilities,[10] and must process and monitor pretrial proceedings and administrative inquiries.[11] Officers will face administrative proceedings if their failure to carry out duties and obligations warrants a disciplinary measure, which shall be applied after a summary or administrative investigation.

13. As reported, the Prison Infrastructure Concession Programme calls for 10 prison complexes to be built in four groups and come into operation in phases.

The original distribution by group and prison establishment was as follows:

**Group 1: Alto Hospicio, Rancagua and La Serena**

This group has been in full operation since the earlier part of 2006. It includes the prison complexes at Alto Hospicio (46,645 $m^2$, 1,679 inmates); La Serena (48,719 $m^2$, 1,656 inmates) and Rancagua (48,935 $m^2$, 1,689 inmates).

**Alto Hospicio inmate population**

| Establishment | Inmate population | | | | | | |
|---|---|---|---|---|---|---|---|
| | Type of population | Stage of proceedings | Security level | No. of modules | Capacity per module | % | No. of inmates |
| ALTO HOSPICIO<br><br>HIGH SECURITY | Males | Facing trial | Maximum | 2 | 50 | 6 | 100 |
| | | | High | 6 | 50 | 17.9 | 300 |
| | | | Subtotal | 8 | | 23.8 | 400 |
| | | Convicted | Maximum | 4 | 50 | 11.9 | 200 |
| | | | High | 10 | 50 | 29.8 | 500 |
| | | | Medium | 6 | 80 | 28.6 | 480 |
| | | | Subtotal | 20 | | 70.3 | 1 180 |
| | | Total males | | 28 | | 94.1 | 1 580 |
| | Under-age males | Facing trial | | 1 | 50 | 0.3 | 50 |
| | | Total under-age males | | 1 | | | 50 |
| | Special section | Homosexuals/HIV/Insane | | 1 | 24-50 | 1.4 | 24 |
| | | Total, special section | | 1 | | | 24 |
| | Residential treatment centre | Convicted males | | 1 | 25 | 1.5 | 25 |
| | | Total, residential treatment centre | | 1 | | | 25 |
| TOTALS | | | | 31 | | 100 | 1 679 |

[10] Circular No. 95 of 16 May 2006.

[11] Circular No. 246 of 16 November 2006.

**La Serena inmate population**

| Establishment | Inmate population | | | | | | |
|---|---|---|---|---|---|---|---|
| | Type of population | Stage of proceedings | Security level | No. of modules | Capacity per module | % | No. of inmates |
| LA SERENA<br><br>MEDIUM SECURITY | Males | Facing trial | Maximum | 2 | 50 | 6.0 | 100 |
| | | | High | 4 | 50 | 12.1 | 200 |
| | | | Subtotal | 6 | | | 300 |
| | | Convicted | Maximum | 2 | 50 | 6.0 | 100 |
| | | | High | 6 | 50 | 18.1 | 300 |
| | | | Medium | 8 | 80 | 38.6 | 640 |
| | | | Low | 2 | 80 | 9.8 | 160 |
| | | | Subtotal | 18 | | | 1 200 |
| | | Total males | | 24 | | | 1 500 |
| | Females | Convicted | Maximum | 1 | 10 | 0.6 | 10 |
| | | | High | 1 | 30 | 1.8 | 30 |
| | | | Medium | 1 | 40 | 2.4 | 40 |
| | | | Low - nursing | 1 | 10 | 0.6 | 10 |
| | | Total females | | 1 | | | 90 |
| | Under-age males | Facing trial | | 1 | 20 | 1.2 | 20 |
| | | Total under-age males | | 1 | | | 20 |
| | Special section | Homosexual/HIV/Insane | | 1 | 21-47 | 1.3 | 21 |
| | | Total, special section | | 1 | | | 20 |
| | Residential treatment centre | Convicted males | | 1 | 25 | 1.5 | 25 |
| | | Total, residential treatment centre | | 1 | | | 25 |
| TOTALS | | | | 28 | | 100 | 1 656 |

**Rancagua inmate population**

| Establishment | Inmate population | | | | | | |
|---|---|---|---|---|---|---|---|
| | Type of population | Stage of proceedings | Security level | No. of modules | Capacity per module | % | No. of inmates |
| RANCAGUA<br><br>HIGH SECURITY | Males | Facing trial | Maximum | 2 | 50 | 5.9 | 100 |
| | | | High | 4 | 50 | 11.8 | 200 |
| | | | Subtotal | 6 | | | 300 |
| | | Convicted | Maximum | 4 | 50 | 11.8 | 200 |
| | | | High | 8 | 50 | 23.8 | 400 |
| | | | Medium | 4 | 80 | 18.9 | 320 |
| | | | Subtotal | 16 | | | 920 |
| | | Total males | | 22 | | | 1 220 |
| | Females | Convicted | High | 2 | 50 | 5.9 | 100 |
| | | | Medium | 2 | 80 | 9.5 | 160 |
| | | | Low - nursing | 2 | 80 | 9.5 | 160 |
| | | Total females | | 6 | | | 420 |
| | Special section | Homosexual/HIV/Insane | | 1 | 24-50 | 1.4 | 24 |
| | | Total, special section | | 1 | | | 24 |
| | Residential treatment centre | Convicted males | | 1 | 25 | 1.5 | 25 |
| | | Total, residential treatment centre | | 1 | | | 25 |
| TOTALS | | | | 30 | | 100 | 1 689 |

## Group 2: Antofagasta and Concepción

Antofagasta and Concepción prisons are due to go into operation in mid-2009. This group was originally intended to begin operating in 2007 but the contract had to be terminated owing to financial problems on the part of the concessionaire. Bidding for the completion of the work is now in progress, and the group should commence operation in 2009.

**Concepción inmate population**

| Establishment | Inmate population | | | | | | |
|---|---|---|---|---|---|---|---|
| | Type of population | Stage of proceedings | Security level | No. of modules | Capacity per module | % | No. of inmates |
| CONCEPCIÓN<br><br>HIGH SECURITY | Males | Convicted | Maximum | 4 | 50 | 16.8 | 200 |
| | | | High | 6 | 50 | 25.3 | 300 |
| | | | Medium | 6 | 80 | 40.3 | 480 |
| | | | Low | 2 | 80 | 13.4 | 160 |
| | | Total males | | 18 | | 95.8 | 1 140 |
| | Special section | Homosexuals/HIV/Insane | | 1 | 25-47 | 2.1 | 25 |
| | | Total, special section | | 1 | | 2.1 | 25 |
| | Residential treatment centre | Convicted males | | 1 | 25 | 2.1 | 25 |
| | | Total, residential treatment centre | | 1 | | 2.1 | 25 |
| TOTALS | | | | 20 | | 100 | 1 190 |

**Antofagasta inmate population**

| Establishment | Inmate population | | | | | | |
|---|---|---|---|---|---|---|---|
| | Type of population | Stage of proceedings | Security level | No. of modules | Capacity per module | % | No. of inmates |
| ANTOFAGASTA<br><br>MEDIUM SECURITY | Males | Convicted | Maximum | 2 | 50 | 8.6 | 100 |
| | | | High | 6 | 50 | 25.9 | 300 |
| | | | Medium | 6 | 80 | 41.4 | 480 |
| | | | Low | 2 | 80 | 13.8 | 160 |
| | | Total males | | 16 | | 89.7 | 1 040 |
| | Special section | Homosexuals/HIV/Insane | | 1 | 45 | 3.9 | 45 |
| | | Total, special section | | 1 | 45-75 | 3.9 | 45 |
| | Under-age males | Under-age males | | 1 | 25 | 2.2 | 25 |
| | | Total under-age males | | 1 | 25 | 2.2 | 25 |
| | Residential treatment centre | Convicted males | | 2 | 25 | 4.3 | 50 |
| | | Total, residential treatment centre | | 2 | 25 | 4.3 | 50 |
| TOTALS | | | | 20 | | 100 | 1 160 |

**Group 3: Santiago 1, Valdivia and Puerto Montt**

Work began in the first quarter of 2007 on Santiago 1 (53,925 $m^2$, 2,568 inmates), Valdivia (32,591 $m^2$, 1,248 inmates), and Puerto Montt (38,126 $m^2$, 1,245 inmates).

By 1 February 2007 the prison at Santiago was making great progress and it was hoped to admit inmates in March. Work at Puerto Montt and Valdivia will end in late February, and it is hoped that inmates can be admitted in April 2007.

**Santiago 1 inmate population**

| Establishment | Inmate population | | | | | | |
|---|---|---|---|---|---|---|---|
| | Type of population | Stage of proceedings | Security level | No. of modules | Capacity per module | % | No. of inmates |
| SANTIAGO 1<br><br>HIGH SECURITY | Males | Facing trial | Maximum | 4 | 55 | 8.8 | 220 |
| | | | High | 16 | 90 | 57.4 | 1 440 |
| | | | Medium | 8 | 100-108 | 33.8 | 848 |
| | | Total males | | 28 | | 100 | 2 508 |
| | Special section | In isolation | | 1 | 30 | - | 30* |
| | | Held incommunicado | | 1 | 30 | - | 30* |
| | | Total, special section | | | 1 | 0 | 60 |
| TOTALS | | | | 29 | | 100 | 2 568 |

**Puerto Montt inmate population**

| Establishment | Inmate population | | | | | | |
|---|---|---|---|---|---|---|---|
| | Type of population | Stage of proceedings | Security level | No. of modules | Capacity per module | % | No. of inmates |
| PUERTO MONTT<br><br>MEDIUM SECURITY | Males | Convicted | Maximum | 2 | 40 | 6.6 | 80 |
| | | | High | 3 | 50 | 12.4 | 150 |
| | | | Medium | 4 | 100-102 | 33.6 | 406 |
| | | | Subtotal | 9 | | 52.7 | 636 |
| | | Facing trial | Maximum | 1 | 60 | 5.0 | 60 |
| | | | High | 2 | 60 | 9.9 | 120 |
| | | | Medium | 2 | 100-102 | 16.7 | 202 |
| | | | Subtotal | 5 | | 31.6 | 382 |
| | | Total males | | 14 | | 84.3 | 1 018 |
| | Females | Facing trial | Medium | 1 | 15 | 1.2 | 15 |
| | | Convicted | Medium | 1 | 15 | 1.2 | 15 |
| | | Held incommunicado | | 1 | 3 | - | 3* |
| | | Total females | | 1 | | 2.5 | 30 |
| | Under-age males | Under-age males | | 1 | 36 | 3.0 | 36 |
| | | Total minors | | 1 | | 3.0 | 36 |
| | Special section | Homosexuals | | 1 | 19 | 1.6 | 19 |
| | | HIV | | 1 | 19 | 1.6 | 19 |
| | | Insane | | 1 | 15 | 1.2 | 15 |
| | | Disabled | | 1 | 15 | 1.2 | 15 |
| | | Beyond working age | | 1 | 15 | 1.2 | 15 |
| | | In isolation | | 1 | 20 | - | 20* |
| | | Held incommunicado | | 1 | 15 | - | 15* |
| | | Total, special section | | 1 | | 6.9 | 83 |
| | Residential treatment centre | Total, residential treatment centre | | 2 | 20 | 3.3 | 40 |
| TOTALS | | | | 19 | | 100.0 | 1 245 |

**Inmate population at Valdivia penitentiary centre**

| Establishment | Inmate population | | | | | | |
|---|---|---|---|---|---|---|---|
| | Type of population | Stage of proceedings | Security level | No. of modules | Capacity per module | % | No. of inmates |
| VALDIVIA<br><br>MEDIUM SECURITY | Men | Facing trial | Maximum | 1 | 50 | 4.1 | 50 |
| | | | High | 2 | 70 | 11.5 | 140 |
| | | | Medium | 2 | 90 | 14.8 | 180 |
| | | | Subtotal | 4 | | 30.3 | 370 |
| | | Convicted | Maximum | 1 | 50 | 4.1 | 50 |
| | | | High | 4 | 60 | 19.7 | 240 |
| | | | Medium | 4 | 120 | 39.3 | 480 |
| | | | Subtotal | 9 | | 63.1 | 770 |
| | | Total, men | | 13 | | 93.4 | 1 140 |
| | Women | Facing trial | Medium | 1 | 40 | 3.3 | 40 |
| | | Convicted | Medium | 1 | 20 | 1.6 | 20 |
| | | Incommunicado | | 1 | 3 | - | 3* |
| | | Total, women | | 1 | | 4.9 | 60 |
| | Special section | In isolation | | 1 | 15 | - | 15* |
| | | Incommunicado | | 1 | 10 | - | 10* |
| | | Total, special section | | 1 | | 0.0 | 25 |
| | Residential treatment centre | Total, residential treatment centre | | 1 | 20 | 1.6 | 20 |
| TOTALS | | | | 16 | | 98 | 1 248 |

## Group 4: Santiago 2 and Talca

The fourth group, with facilities of 35,000 $m^2$ and 45,000 $m^2$, respectively, is expected to begin operation at the end of 2009. The land for the construction of these facilities is now being acquired. Consideration is also being given to incorporating a new facility in Valparaíso in this group, with capacity for approximately 2,500 inmates.

**Inmate population at Talca penitentiary**

| Establishment | Inmate population | | | | | | |
|---|---|---|---|---|---|---|---|
| | Type of population | Stage of proceedings | Security level | No. of modules | Capacity per module | % | No. of inmates |
| TALCA | Men | Facing trial | Maximum | 2 | 40 | 5.0 | 80 |
| | | | Individual unit | 2 | 60 | 7.5 | 120 |
| | | | Collective unit | 2 | 60 | 7.5 | 120 |
| | | Total, convicted men | | 6 | | 20.0 | 320 |
| | | Convicted | Maximum | 2 | 50 | 6.2 | 100 |
| | | | Individual unit | 4 | 60 | 15.0 | 240 |
| | | | Individual unit | 6 | 80 | 30.0 | 480 |
| | | | Collective unit | 4 | 84 | 21.0 | 336 |
| | | Total, men in detention | | 16 | | 72.2 | 1 156 |
| | | Total men | | 22 | | 92.1 | 1 476 |
| | Special section | Homosexuals | | 1 | 10 | 0.62 | 10 |
| | | HIV | | 1 | 10 | 0.62 | 10 |
| | | Insane | | 1 | 10 | 0.62 | 10 |
| | | Disabled | | 1 | 10 | 0.62 | 10 |
| | | Beyond working age | | 1 | 20 | 1.25 | 20 |
| | | In isolation | | 1 | 10 | 0.62 | 10 |
| | | Incommunicado | | 1 | 10 | 0.62 | 10 |
| | Total, special section | | | 1 | | 4.99 | 80 |
| | Under-age males | | | 1 | 21 | 1.31 | 21 |
| | Residential treatment centre | | | 0 | 25 | 1.56 | 25 |
| TOTALS | | | | 24 | | 100 | 1 602 |

**Inmate population at Santiago 2 penitentiary**

| Establishment | Inmate population | | | | | | |
|---|---|---|---|---|---|---|---|
| | Type of population | Stage of proceedings | Security level | No. of modules | Capacity per module | % | No. of inmates |
| SANTIAGO 2 | Men | Convicted | Maximum | 2 | 50 | 3.9 | 100 |
| | | | Individual unit | 4 | 60 | 9.4 | 240 |
| | | | Individual unit | 22 | 80 | 68.6 | 1 760 |
| | | | Collective unit | 4 | 84 | 13.1 | 336 |
| | | Total men | | 32 | | 94.9 | 2 436 |
| | Special section | HIV | | 1 | 10 | 0.4 | 10 |
| | | Homosexuals | | 1 | 10 | 0.4 | 10 |
| | | Insane | | 1 | 10 | 0.4 | 10 |
| | | Disabled | | 1 | 10 | 0.4 | 10 |
| | | In isolation | | 1 | 10 | 0.4 | 10 |
| | | Beyond working age | | 1 | 20 | 0.8 | 20 |
| | | Incommunicado | | 1 | 10 | 0.4 | 10 |
| | Total, special section | | | 1 | | 3.1 | 80 |
| | Residential treatment centre | Total, residential treatment centre | | 2 | 25 | 1.9 | 50 |
| TOTALS | | | | 35 | | 100 | 2 566 |

In establishments run under a concession, it is the State that provides security and surveillance through the Prison Service, but the financial capacity and expertise of other private services are also used to ensure a high level of performance at the facilities, for example in ensuring the security of the public and officers working at the facilities, and in inmate rehabilitation.

Prison complexes are designed in sections holding between 50 and 80 inmates in individual cells. In some cases there are cells, each with a toilet, shared by three inmates (low- and medium-security). Cells are 6.12 $m^2$ in area and the average usable floor space per inmate is 21 $m^2$. Each complex has normal and technical classrooms, industrial and crafts workshops, residential treatment centres for the treatment of addictions, infirmaries for primary health care and a medium-level hospital. When there are women's modules, they are equipped with nurseries and gynaecological and paediatric care rooms. The education services for juveniles are independent of those for adults.

The entire prison population is distributed according to a strict principle of segmentation, separating and isolating all inmates in modules according to the gravity of their offence. Each module holds a group of approximately 50 or 80 inmates. This tends to give rise to clearly defined areas within the facility, thus optimizing surveillance, supervision and social reintegration efforts by eliminating the pernicious influence among inmates that produces further criminal behaviour.

The infrastructure is designed so that all internal movement takes place in separate flows monitored and controlled by technical surveillance and signalling systems, thus preventing visitors, inmates and prison staff from encountering one another in areas not designed for such contact. Thus both numbers of prison staff and the procedures for managing and overseeing visits can be slimmed and optimized, increasing the operating capacity of the prison and security services.

Infrastructure maintenance, equipment, washing and kitchen services are the responsibility of the private contractor. Within the security perimeter, a portion of the inmates convicted of minor offences can perform paid work after training.

These arrangements have allowed public funding to be concentrated on surveillance and the guarding of prisoners. Both social rehabilitation programmes and the gradual overall improvement of prison standards in Chile have thus begun to bear real fruit, while the basic rights of prisoners are always respected.

Please find enclosed photographs and drawings of the new installations and facilities.

14. The Ministry of Defence has drawn up a preliminary military justice reform bill that will narrow the scope of military court jurisdiction so that in general it will cover only infractions of the Code of Military Justice committed by members of the military. This would thus generally exclude civilians from the scope of military jurisdiction.

In January 2007 a study commissioned by the Ministry of Justice was officially submitted by an expert in military criminal law, Jorge Mera Figueroa, of Diego Portales University. Entitled *Estudio y diagnóstico de la Justicia Militar en Chile en el contexto de la Corte*

*Interamericana* (*Study and diagnosis of military justice in Chile in the context of the Inter-American Court*), it analyses the concept of "military offence" in the current Code of Military Justice and its consequences, and discusses Chilean military criminal procedure in the light of trial guarantees. This study also contains a proposal for a preliminary bill on substantive aspects of military justice, especially in respect of the relationship with the new classification of military offences.

Both the study and the preliminary bill will be studied by an inter-ministerial expert group in the coming months. Based on such input, it is expected that this year, one or more bills will be drawn up to address military justice reform in a comprehensive manner.

15. The Juvenile Criminal Responsibility Act adopted by Congress changed the age of criminal responsibility, eliminating the discernment procedure and establishing a special criminal procedure for offences committed by youths aged between 16 and 18. This law was supposed to enter into force on 8 June 2006. Following the usual review assessments, however, and in order to ensure that it fully met the objectives set for it upon adoption, it was decided to postpone entry into force until 8 June 2007. The bill approving this postponement also established a committee of experts, coordinated by the Ministry of Justice, to assess the implementation of the law and to report quarterly to the corresponding congressional committees.

16. The platform of the current Government, which has popular support, makes specific commitments on the subject of the electoral process. One of the major changes it calls for is the adaptation of the binominal system. Among the first 36 issues addressed by the current Administration is the reform of this system. A constitutional reform bill sent to Congress sets out the constitutional changes required to make headway in designing a new electoral system.

**(a) History of the reform of the binominal electoral system**

This is not the first time that Congress has considered a constitutional reform of the electoral system. All the Concertation Governments have tried to change the binominal system. President Aylwin attempted to do so in June 1992, and later President Frei tried, in November 1997. In 2005, President Lagos too attempted to change the binominal system. None succeeded, as the opposition would not agree.

The recent constitutional reforms of August 2005 have made headway towards the elimination of appointed senators and senators for life and the removal from the Constitution of the electoral system, which has been made the subject of a special organization law requiring support from three fifths of deputies and senators, not four sevenths, as is the general rule for this type of law.

**(b) Background to the binominal system**

When the Constitution was being drawn up in 1980, the Study Commission for a New Constitution rejected the proportional system, arguing that it had a divisive and atomizing influence on opinions and parties and turned parties into monopolistic channels for the expression of citizens' views. It was consequently proposed that the procedure for election to the Chamber of Deputies should result in an effective reflection of a majority by relying on multiple electoral colleges yielding one or more deputies per district. The Chamber was

composed of 150 members elected by direct ballot. The Senate, on the other hand, had 30 members elected by a single electoral college for the entire country. For elections, a system of multiple, non-cumulative voting would be established, with those candidates who received the highest individual majorities being elected.

The Council of State reduced the number of members of the Chamber to 120, elected by direct ballot, equal to the number of election districts established by the relevant organization act, so that each district elected one deputy. It proposed that Senate members for each of the 13 regions should be elected by direct ballot. Each region would elect two senators, except for regions V and VIII, which would elect three each, and the Metropolitan region, which would elect six. The Senate thus had 32 elected members. Within each list, those who received the highest individual majorities were elected once the highest averages method was applied.

The binominal system was designed by the "Fernández Commission", or the Commission for the Study of Constitutional Organization Acts. Former Senator Sergio Fernández, who had also been a Minister of State under the military dictatorship, acknowledged that the binominal system was his idea; the aim was on the one hand to ensure stable majorities and on the other hand to avoid a complete break with everything the military Government had done.

The military junta disapproved of the proportional system's encouragement of multiparty rule and ideology. It considered that the binominal system would produce fewer political movements with popular backing, would guarantee the existence of a minority and would ensure that decisions would be taken pragmatically. This is the system incorporated in the General Election and Vote Count Act that is currently in force in Chile.[12]

Under this system, members of the Chamber of Deputies are elected in 60 districts, each of which has two deputies (art. 178). On the other hand, for the election of senators, each region constitutes a senatorial district, except for region V (Valparaíso), the Metropolitan Santiago region, regions VII (Maule), VIII (Bío-Bío), IX (Araucanía) and X (Los Lagos), each of which is divided into two senatorial districts. Each senatorial district elects two senators (art. 180).

The system is designed according to a formula that allows the two candidates on any one list to be declared elected as senators or deputies if the list in question receives the most votes, provided its total number of votes is greater than double the number received by the list or roll placing second (art. 109 bis).

If no list wins both seats, the two lists or rolls that receive the two highest numbers of total votes win seats; each list or roll declares its candidate who receives the most votes to be elected as senator or deputy.

If two or more lists or rolls have equal claim to the second seat, the Electoral Commission declares the candidate who receives the highest number of individual votes as the winner.

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[12] Act No. 18.700.

In the event of a tie between candidates of a single list or between candidates of different lists or rolls who are, in turn, tied, the Commission holds a public hearing to determine who is elected, and declares the person favoured by the hearing to be the winner.

**(c) Criticism of the binominal system**

The binominal system described above has been criticized for various reasons:

- Firstly, it produces unequal representation, as a seat can be won with 33 per cent of the vote, even if the majority list receives 66 per cent. In addition, sometimes parliamentarians are elected on fewer votes than those received by unelected candidates;

- Secondly, it makes for distorted representation, as significant minorities are left out of the system if they do not win 33 per cent of the votes. At the same time, the fact that the system excludes third parties strengthens the major blocs;

- Thirdly, it keeps independents from being elected to Congress;

- Fourthly, it leads to competition within alliances, as the candidate enjoying the most support within each coalition is elected. This penalizes weaker allies. The competition can be so harsh that some alliances avoid it altogether by dropping one candidate and running with a list of one, so as to ensure his or her election. It also gives rise to complex negotiations among the party leaders, which produces tension, and tarnishes the public's image of political leaders. The system also makes for over-representation.

- Fifthly, over time, the system has tended to force a tie. While the Concertation won both seats in 12 districts in 1989 and 11 in 1993 and 1997, in 2000 it won both in just four districts, and lost both in one. For the Senate, in 1989 the Concertation won both seats three times, but in 2005 this only happened once.

**(d) Basic substance of the reform**

The reform makes five changes in the Constitution. They are essentially concerned with introducing proportional representation into the electoral system; encouraging women to participate in politics; changing the machinery for re-electing members of Parliament; ineligibility for election to Congress; and the number of members of Congress.

17. A bill to combat discrimination has been sent by the Government to Congress; it is well into the adoption process and is now in second reading before the Senate.[13] In substance, this draft addresses the following main themes:

[13] Bulletin No. 3.815-07.

- It establishes as the law's objective the prevention and elimination of all forms of discrimination against anybody;

- It establishes that the State has an obligation to develop policies and take the action required to ensure that individuals are not subject to discrimination in the full, effective and equal enjoyment and exercise of their rights;

- It defines arbitrary discrimination as any arbitrary distinction, exclusion, restriction or preference by act or omission based on any of the various criteria established by law;

- It establishes a complaints procedure for arbitrary discrimination. Action under this procedure is without prejudice to special actions. The right to take action is confined solely to the victim alone; the grounds may be any act or omission producing arbitrary discrimination. The competent court to hear complaints is the respective Appeals Court; and the (summary) proceedings are governed by the principles of informality and officiality;

- It includes a new aggravating circumstance to criminal liability - the commission of a criminal act motivated by discrimination - applicable to any crime, offence or infraction. This requires proof of some of the factors of discrimination set out in the law.

18. Studies have shown that the indigenous population receives approximately 10 per cent more in State benefits than the population overall. This reflects the fact that the positive discrimination policies implemented under the Indigenous Peoples Act have been translated into specific plans and programmes for indigenous peoples, such as land purchases, student grants and bilingual and intercultural education and health programmes, and since 2001, the implementation of a specific development programme for indigenous communities, worth approximately US$ 130 million. In addition, public servants have been trained with a view to improving services for the country's indigenous peoples and bringing such services in line with their needs.

Notwithstanding the above, in 2003, according to information from the National Social and Economic Survey (CASEN survey), some 28.7 per cent of the indigenous population was living in poverty - 10.6 per cent more than the non-indigenous population. The Chilean population living under the poverty line has been gradually declining since the 1990s. The percentage of the indigenous population living in poverty fell by 3.6 points between 2000, when it had been 32.3 per cent, and 2003. This situation stems from the fact that until the 1980s there was strong social and economic discrimination against all Chilean indigenous peoples, which hindered their social and cultural development and consequently their economic development.

Various initiatives taken to rectify this situation are described briefly below.

*Comprehensive Development Programme for Indigenous Communities ("Origins Programme")*

Further to the information on the first phase of this programme given in paragraph 319 of the report, it should be added that the programme has focused on 642 indigenous communities in regions I, II, VIII, IX and X, in 44 localities with high concentrations of Aymara, Atacameña and

Mapuche people. The investments have gone into development plans, community initiatives, cultural heritage rescue and recuperation projects and projects to strengthen and develop indigenous medicine and develop productive capacities.

The second phase of this programme will extend coverage to 1,000 indigenous communities in the period from 2006 to 2010.

The National Indigenous Development Corporation (CONADI) complements the Origins Programme through the Indigenous Development Fund, with investment feasibility studies, work to encourage indigenous economic development, social management support and initiatives to develop capacity and participation mechanisms. From 2000 to 2004, the Ministry of Agriculture carried out a Production Support Programme for Native Peoples through related services, such as the National Institute for Agricultural Development (INDAP).

*Intercultural health*

The Ministry of Health is running a *Health and Indigenous Peoples Programme*, which is being carried out by 22 health services in the regions with the highest concentrations of indigenous peoples. There are two main sets of regulations that apply. One was issued as part of the public health system reform. It encourages cooperation and intercultural relations,[14] stating at one point[15] that it is the duty of the Ministry of Health to formulate policies incorporating an intercultural health approach into health programmes, allowing and encouraging collaboration and complementarity between the health care provided by the public health system and that provided by indigenous medicine, so that individuals in communities with high concentrations of indigenous people can have their health needs addressed in a timely and comprehensive manner and in their cultural context. The other regulations govern the practice of alternative medicine as an auxiliary health profession, and the places where such medicine is practised.[16] There are currently three hospitals that offer intercultural medical care, in Iquique, Tarapacá region; Nueva Imperial, Araucanía region; and Coyhaique, Aysén region.

*Restitution of lands*

Altogether 232,000 hectares of land was transferred to indigenous communities between 2000 and 2005; when added to the land transferred between 1993 and 1999, this brings the total to 491,000 hectares, benefiting over 19,200 families. More specifically, Mapuche lands have grown by 102,000 hectares since 2000.

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[14] Ministerial Health Regulation, Decree No. 136/04, published in the *Diario Oficial* (Official Gazette), 21 April 2005.

[15] Article 21.

[16] Decree No. 42 of 2004, published in the *Diario Oficial* (Official Gazette), 17 June 2005.

*Watering and irrigation activities*

Between 2000 and 2005, 8,165 hectares of irrigated land were added, bringing the total to 16,056 hectares. At the same time, 209 litres per second of water were acquired for Atacameña communities in a high water-risk area; the water capacity acquired in regions I and II is currently 838 litres per second. During this period, rights relating to 8,643 litres per second of capacity were awarded as a result of the reform of water rights.

*Intercultural education*

The Bilingual Intercultural Education Programme seeks to improve upon progress in teaching by strengthening the ethnic identity of girls and boys attending primary school in areas of cultural and linguistic diversity. The Ministry of Education funds 365 schools through this programme, in regions I, II, V, VIII, IX, X and XII and in the Metropolitan region. For its part, the Origins Programme finances and manages 162 focal-point schools in conjunction with the Ministry of Education.

*Preschool education*

The National Kindergartens Board (JUNJI) and Fundación Integra operate preschool programmes for over 1,500 preschool indigenous children at 78 kindergartens in regions I, II, III, VIII, IX, X and XII.

*Indigenous grants*

The budget for the Ministry of Education programme of indigenous grants has increased by over 80 per cent in the last six years; the programme has issued a total of 152,317 indigenous grants during this period for primary, intermediate and higher education. In addition, there are nine university student residences, and grants are also given for post-graduate studies.

*Housing subsidy*

In 2001 the Ministry of Housing and Town Planning established a special indigenous housing subsidy which increased to 250 development units (*unidades de fomento*) the maximum subsidy for families wishing to acquire or build a home in one of the country's areas of indigenous development. From 2000 to 2004, over 3,000 subsidies were granted to indigenous families living in the Alto Bío-Bío and Lleu Lleu development areas, in the Bío-Bío region; in the Lleu Lleu Lake area and Puel Nahuelbuta, Araucanía region; and to families taking part in the Indigenous Development Plan in the Lagos region.

19. Constitutional recognition of indigenous peoples is a goal that has been under discussion in Congress for over 15 years. It has featured in all the plans and programmes of Governments of the Concertation of Parties for Democracy, which have sent Congress three legislative initiatives to that end. Each has failed, Congress not having mustered the quorum required for adoption, which is two thirds of the deputies and senators currently in office. These initiatives have been rejected by those who cannot accept the concept of "*indigenous peoples*". The Concertation Governments have refused to grant constitutional recognition if it excludes the

concept of *indigenous peoples*, and have not agreed that it should be replaced by a different term. The latest initiative on this subject was submitted in January 2006, by Concertation members of Parliament.

20. Following an undertaking by President Bachelet, a dialogue between Chile's indigenous peoples called the National Debate of Chilean Indigenous Peoples was conducted in 2006. The debate was convened by the indigenous peoples themselves, through the indigenous members of CONADI and organizations in the country's various territories. Its aim was to assess current public policies and make related proposals. The main topics addressed were political participation and representation of indigenous peoples, ratification of ILO Convention No. 169, sustainable development, and the establishment of public institutions to deal with indigenous questions.

Broadening the scope [of Act No. 19253] to cover "ancient" lands is not currently under discussion in Chile. The owner or owners of indigenous lands have the same property rights as anyone else, except for the right of transfer to non-indigenous persons; they may enjoy and make use of the property and its natural resources in the broadest legal sense. Underground resources in Chile belong to the State.

21. The Indigenous Peoples Act was enacted in 1993 and addressed the main indigenous claims of the time, which were: the right to recover and protect lands and waters; the right to a bilingual and intercultural education; and the right to have a public service that addressed indigenous questions. Fourteen years after the Act's adoption, the claims of the indigenous movements have changed, as indicated in the report and reflected in the National Debate process mentioned above.

In respect of legal amendments to the extent of rights, the Government has always been in favour, but there is serious apprehension in the indigenous movement that such a step might open the way to a loss of acquired rights.

The "new deal" policy included various short-, medium- and long-term measures; all recommendations that were dependent on administrative decisions and did not require legislative changes were implemented immediately. Similarly, the groundwork was laid for broadening and strengthening rights by means of ratifying basic legal instruments such as ILO Convention No. 169.

22. The Human Rights Department in the Ministry of Foreign Affairs is the Government body responsible for drawing up State reports on compliance with human rights treaties in force in Chile. It does this in coordination and collaboration with the various public bodies responsible for the fields and rights addressed by each of these international conventions, whose officials have been made aware of the treaty bodies' guidelines and parameters for the proper discharge of this international commitment. It has thus been possible to make State officials aware of the significance, scope and consequences of the commitment. The concluding observations giving the committees' recommendations after consideration of the reports are thus circulated to the various State bodies, in particular those that can give effect to them.

The reports drawn up by the Government are submitted in due course to various representatives of civil society, in particular non-governmental organizations (NGOs) working in the human rights fields covered by each treaty, so that they can submit parallel reports or comments to the committees that consider such texts.

On 22 September 2006 Chile's fifth periodic report on implementation of the International Covenant on Civil and Political Rights was presented to representatives of various NGOs at a meeting called by the Human Rights Department of the Ministry of Foreign Affairs. During the meeting, various aspects of the effect given in Chile to the human rights covered by this agreement were discussed.

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