ANNUAL HUMAN RIGHTS REPORT CHILE 2020

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VIOLENCE AND STRUCTURAL DISCRIMINATION: SOCIAL UNREST AND THE PANDEMIC FROM A HUMAN RIGHTS APPROACH

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What follows is a panoramic view of an exceptional year, in which social mobilizations demanding a more just society, are intertwined with the violence exerted by order and security forces with hundreds of injured protestors and several deaths, and the deficiencies of the State that have become even more evident in the face of a pandemic.

For these reasons this year has been unparalleled, and as such our *Report* is structured differently than in previous years: it is arranged by chapters that review the State's response to events that have occurred since the close of our *Annual Report* in September 2019. This introduction not only attempts to outline the national situation during the past year—under the presumption, generally speaking, that the facts analyzed in this *Report* are well-known—but also to shed light on connections between social unrest, the demands for greater social justice, and economic, social, cultural and environmental rights. The response to the *estallido social* occurs, furthermore, amidst unprecedented challenges due to the pandemic and in a changing scenario resulting from the constitutional referendum process.

Our concern as a Center for Human Rights is that the exercise of human rights is best realized in a democracy, and as such it is essential that society, and especially the entire State apparatus, ensure the conditions for its reinforcement. This will hardly be forthcoming if the conditions of structural inequality that feed the social discontent and the disrepute of institutions continue.

1. A YEAR OF SOCIAL CONFLICTS, UNCERTAINTIES, CHALLENGES, AND HOPE

The *Human Rights Report* on the events of 2020 is shrouded by an exceptional context. What began with a series of demonstrations—the explosion of the social unrest beginning on October 18th 2019—was

preceded by mobilizations from different sectors demanding reforms related to economic and social rights, such as the *No + AFP* movement, and particularly from high school students rejecting the "Safe Classroom" Act approved in December 2018, which allowed the immediate expulsion of students from their schools as a result of their possible participation in acts that were classified as violent. The 30-peso (4 US cents) increase in the price of the capital's subway fare by Metro de Santiago, a state-owned company, was merely the catalyst for the unrest: all the conditions, prior to the specific act of increasing the fare, already existed for the citizens' unrest to manifest itself at any moment. Ultimately, the overall social disenchantment was heard in the typical clamoring of the pots and pans, the street protests, and also in acts of violence against property and looting of supermarkets.

The second theme discussed in this *Report* is the Covid-19 pandemic, which has shed light on the structural problems of inequality that the vast majority of the population lives with on a daily basis. An analysis of data on temporary permits issued for transiting in quarantined zones—conducted by the interuniversity group COES (*Centro de Estudios de Conflicto y Cohesión Social*)—showed that in the wealthy boroughs in Eastern Santiago, such as Las Condes, Vitacura or Ñuñoa, people requested permits mainly to walk their pets, while in the boroughs of the capital's southern sector, hit the hardest by Covid-19 mortality, permits were requested in order to take food to prisons or to attend funerals.[1] While the figures can only indicate trends—we have no record or systematic information in which people apply for permits in each borough, and we have been unable to cross-check these with actual mobility data, *i.e.*, the movement of people, for example, to attend communal soup kitchens or potlucks (*ollas comunes*) or to perform informal work, for which they might not have taken out a permit. What is clear, however: the pandemic has more severely impacted the most vulnerable boroughs, whether rural or urban.

Some could claim that the social unrest began on October 18, 2019, with around one hundred students who among themselves had organized to simultaneously jump the turnstiles and avoid paying the Metro fare at different subway stations throughout the city of Santiago. This was an act of protest against the announcement of a 30-peso increase in the subway fare, and the government failed to understand why citizens in different parts of the country were also disgruntled about something occurring in Santiago. The political management by the executive branch in the face of the criticism

1 COES, "Los permisos para salir de casa reflejan la desigualdad en Santiago de Chile", Agencia EFE, July 22, 2020.

was unfortunate: the former Minister of Economy, Juan Andrés Fontaine, called on passengers to wake up earlier to take advantage of lower fares and avoid traveling at peak times. Shortly beforehand, the former Undersecretary of Assistance Networks in the Ministry of Health, Luis Castillo, in an attempt to explain the queues of people waiting from early morning to obtain a number for being attended in the country's primary care centers, said that the users did this because the lines were conducive to personal interaction and social life. Meanwhile, another minister from the economic sector, dealing with the increase in the cost of certain basic necessity products and services, invited citizens to gift each other flowers as these were among the products that had dropped in price.[2] Ten days before the outbreak of the social unrest, President Piñera had indicated that Chile was an oasis in Latin America.[3] The country saw an executive branch that was completely removed from the reality of millions of Chileans. The social protest was not over 30 pesos; it was the reflection of a latent discontent in the social, political and economic spheres.

In this vein, a recent study by the Universidad de los Andes on the gaps of perception among the Chilean elite—businesspersons, academics, opinion leaders and politicians—regarding inequality is a sample of this. This sector perceives Chile as mostly middle class—believing that 57% of Chileans were part of it—in circumstances where the data indicate that only 20% of the population falls in this socioeconomic group, and that the vast majority hit poverty levels (around 77%) despite access to commodities only through debt and loans, and that a minimum percentage of 3% fall in the affluent class.[4] The elite, in turn, overestimates the number of people enrolled in the private healthcare system (39%)—when in fact this latter figure is around 18%—and believes that 8% of poverty stricken sectors are enrolled in the private healthcare system when, in fact, there are none.[5] What is most striking is that among the challenges they perceive for a more just society are education and employment (43%), followed by equal opportunities (33%), and only in last terms do they believe that the problem lies in wealth redistribution (16%).[6] Against this backdrop, the statement of the former Minister of Health, Jaime Mañalich, makes complete sense, who expressed

2 La Tercera: "Subsecretario Luis Castillo asegura que los pacientes van temprano al consultorio porque es 'un elemento social, de reunión social,'" July 9, 2020.
3 La Tercera: "Piñera asegura que 'en medio de esta América Latina convulsionada, Chile es un verdadero oasis con una democracia estable,'" October 8, 2020.
4 Círculo de Directores, Unsholster, and Centro de Gobierno Corporativo y Sociedad U. de los Andes, Percepciones de la élite sobre la desigualdad en la sociedad chilena, October 2020, p. 8.
5 Id., p. 12.
6 Id.

genuine surprise that in some boroughs of Santiago such levels of poverty and overcrowding existed.[7]

The massive and transversal character of the demonstrations – mostly performed by the younger generations – shows a consistency of the uprisings, that represent different struggles and social demands that were already present. Thus, the population of other cities in the country quickly joined *en masse*, strengthening a process that would last several months and that was only managed to be appeased thanks to the institutional agreement on a constituent process signed in November 2019 and, later, to the confinement measures adopted as a result of the Covid-19 pandemic. However, the violence that accompanied the peaceful demonstrations was also unprecedented since the return to democracy.

This is why the structure of this *Report* is different from that of previous years. While a first part describes and analyzes the reaction by different state agencies to police violence during the social unrest, a second part analyzes several of the citizens' demands and exposes how the problems of the "social agenda", once again laid bare later during the pandemic, respond to a common denominator: a structural discrimination due to socioeconomic reasons, a reflection of the historical inequality in our country that, as a society, we have not yet managed to remedy. The hopes placed on a new Constitution are, largely, the expectations of overcoming this structural discrimination. It is clear that there is no magic wand, and various changes cannot wait until a new Constitution, along with the appropriate laws required for these urgent transformations, come into force. Nevertheless, a new Magna Carta will facilitate the possibility of change if it places non-discrimination in the enjoyment of human rights, especially social rights, at the front and center of its content.

Lastly, given that a country without memory repeats its mistakes, since the first version of this *Report* in 2002, we have been providing an account of the truth, justice and memory of the human rights violations during the dictatorship and, especially, the obligations of non-repetition.

2. SOCIAL DEMANDS AND STRUCTURAL DISCRIMINATION

While it is true that several of the mass demonstrations were called on to demand the resignation of the President of the Republic, social claims and, subsequently, the protest against police violence, marked

7 La Tercera: "Mañalich reconoce que en un sector de Santiago 'hay un nivel de pobreza y hacinamiento del cual no tenía conciencia de la magnitud que tenía,'", May 28, 2020.

the agenda of the peaceful protests. In this respect, the social unrest represents a continuation of previous demands, especially for decent pensions, access to healthcare, the right to water, but also for the right to education and to live in a healthy environment.

The agenda of the peaceful demonstrations was an agenda for social rights. The lack of protection and guarantee of social rights is due to the insufficient regulation of the involvement of private entities in public services, and gives rise to significant levels of discontent, especially in view of the evident indirect and structural discrimination within these spheres. This phenomenon has been highlighted in previous *Reports* and was also reported in the Centre's Baseline Study on Business and Human Rights,[8] and which has also been reflected in the recommendations that Chile has received from human rights treaty bodies.

This structural discrimination again became apparent during the pandemic: 65% of households in the lowest 40% of the population measured by income (Quintile 1 and 2) were unable to cover their expenses during the health crisis. Working-age members of these households have also lost their jobs more frequently, affecting nearly 40% of households.[9] It was households this segment of the population that most frequently reduced their expenses in food or health in order to cope with the crisis.[10] In the sphere of education, the Ministry of Education applied a World Bank tool and found that 73% of school students in the poorest quintile did not have access to remote education, while this percentage was only 11% in richest quintile.[11] In estimating the effects on the quality of learning, "in scenario A [closure for 6 months] students may lose 15% (for the richest quintile) to 50% (for the poorest quintile) of learning that takes place annually in schools. Furthermore, [...] if schools were closed for the entire school year (scenario B) the loss of learning would range from 64% to 95% depending on the income quintile."[12] Notwithstanding these impacts, the suspension of classes encouraged by mayors and not by the central government was correct. Unlike other countries, especially in Europe, the size of classrooms, the distances required to travel to schools and the use of

8 Schönsteiner et al., Baseline Study on Business and Human Rights. Key findings and recommendations, 2016, available at http://www.derechoshumanos.udp.cl/derechoshumanos/images/empresaddhh/Baseline%20Study%20 B&HR%20in%20Chile%20(English)%20FINAL.pdf.

9 See, Social Observatory, Undersecretariat of Social Evaluation, Encuesta Social Covid-19: Resumen Principales Resultados, Ministry of Social Development, PNUD and Instituto Nacional de Estadísticas.

10 Id.

11 See, Centro de Estudios Mineduc, Impacto del Covid-19 en los resultados de aprendizaje y escolaridad en Chile. Análisis con base a la herramienta de simulación proporcionada por el Banco Mundial, August 2020, p. 5.

12 Id., p. 10.

public transportation were factors of a greater risk of contagion among popular sectors where three or four generations share households, often with significant overcrowding, and persons show greater morbidity.

Structural discrimination was also apparent in the implementation of health rules. Controls and arrests due to administrative offenses, such as curfew violations or circulating during the pandemic, have affected different sectors of the population in different ways, especially after the enactment of Law 21.240 of June 20th that severely penalizes violations of health restrictions.[13] The arrests of street vendors and the subsequent charges brought against them for public health offenses, under Article 318 of the Criminal Code, have had an impact on the most economically deprived sectors.[14] Leaving home to go out to informal work in public spaces is not some random whim of people to violate lockdowns, but a vital necessity, which is why the mass charges brought against these people could well be characterized as a form of poverty criminalization.

At times, the criminal justice system has also been blind to the differentiated impacts of its actions, showing clearly absurd results: The application of suspending the criminal proceedings for people who have violated lockdowns by traveling to their second homes, for example by helicopter, by imposing fines that are demonstrably low compared to the price of actually using a helicopter, is unfair vis-à-vis those people who, living day-to-day on the money they earn selling wares on public roads, are fined similarly in a lockdown monitoring procedure, forced to pay money that they do not have.

The government's social agenda, which would in part address structural discrimination and was promised or reactivated as a reaction to the social uprising, was *de facto* put on hold once the constituent process began and then later due to the effects of the pandemic. However, international obligations require progressive advances be made in bringing domestic legislation into line with international commitments and in guaranteeing social rights, to the maximum available resources and without discrimination. In this regard, all State organs—and, consequently, all political sectors represented in them—are bound by this obligation, not only the government or the courts. This progress cannot be made conditional on the completion of the constitutional process, however important it may be for the full guarantee of human rights.

13 Mauricio Duce, "La ley penal como respuesta a la pandemia en Chile. ¿La panacea penal otra vez?", Criminal Justice Network, June 23, 2020.

14 Fernando Londoño, "El "efecto-cenicienta": la magia de una política de persecución penal contra ley expresa", Criminal Justice Network, September 2020.

3. GROWING SOCIAL VIOLENCE IN TIMES OF DEMOCRACY

The use of violence by protestors has slowly increased over the years. The appearance of violent groups in peaceful demonstrations called by students, by feminists, for the commemoration of Labor Day (May 1st) and, on a smaller scale, on International Women's Day, was known prior to October 18, 2019. Minority groups appeared that proposed the destruction of the system through forms of violence that they have normalized by placing bombs in public spaces, delivering explosive devices to different people in leadership positions, and by burning public transport buses, financial institutions or others. The latest episode that occurred at the close of this *Report*, an attack on a health center in the borough of Puente Alto by a mob of people, is a reflection of this.[15]

According to official figures, offenses of disorderly conduct, arson, theft, and receiving stolen goods committed in the two months following October 18th increased in comparison with the same period of the previous year, by 837%, 700%, 266% and 196%, respectively.[16] Ten Metro stations were reported to be burned in their entirety, 14 stations were partially burned, and 22 stations were damaged.[17] Total damages to private and public infrastructure was estimated at between USD 2 and 3 billion by private insurance companies, while the Ministry of Finance estimated it at about USD 1.4 billion.[18]

Other forms of violence have been instituted long ago and before the social unrest, creating a normality of sorts that the State has failed to effectively address. The use of firearms by gangs of drug traffickers warring over territories in different poverty-stricken sectors of the capital and in other cities in regions, increasing the number of victims of the so-called "random fire", has found no adequate reaction (preventive and reactive) by law enforcement. Violence in marginalized neighborhoods does not appear front and center in the public debate. Only when the violence spread to the social mobilizations, and geographically moved towards the center of the city, did it manage to provoke a transversal reaction, a phenomenon that should lead to an important reconsideration of the efficacy of the democratic channels of participation. The media and public debate, in turn, shows segmented concerns according to who the main victims of

15 El Mostrador.cl: "Ministro Paris, alcalde Codina e Izkia Siches se suman al repudio por el ataque al SAPU de Puente Alto", October 15, 2020.

16 PDI, Gestión Labor Operativa PDI en el marco del estado de contingencia nacional 18/ oct al 10/dic de 2019, p. 10.

17 Id., p. 8. For its part, Pauta reports 7 stations completely burned and 18 partially burned, as of November 19, 2019, see: Pauta.cl: "Las cifras del estallido social", November 19, 2019.

18 La Tercera: "Gobierno cifra en US $1.400 millones los daños a la infraestructura desde el 18 de octubre", January 14, 2020.

violence are, reporting mainly about car or bank robbery in wealthier boroughs.

Thus, it is reported that violence since the social unrest increased the control exerted by drug gangs in marginalized neighborhoods, making their inhabitants more vulnerable and leading these criminal groups to capitalize on the population's greater dependence by distributing food boxes to families that needed them during the lockdowns or who were affected by Covid-19.[19] Something similar was observed during the social unrest when food was distributed after supermarkets were looted.[20]

Violence has also been present for decades in the Mapuche territories in the South of Chile. The reaction to the social unrest was different, however. While several Mapuche organizations distanced themselves from the demonstrations arising from the social unrest, indicating that these were "Chilean problems" that were being taken to the streets,[21] some commentators underscored the mass appearance of indigenous flags (mainly, the Mapuche flag) in the protests, carried by young people who might not usually identify as Mapuche. However, it was after the peak period of the social unrest and mainly during the pandemic when a rise and change in the type of attacks was observed in the regions of La Araucanía and Bío Bío, mainly against activities and property of the logging industry in indigenous territories. These were occurring beforehand, as analyzed in different *Reports*, but during the first half of 2020 some arson attacks affected people's health and even led to several deaths, a consequence extremely rare in previous years. To date, the identity of those responsible is still unknown.

At the same time, the protest by the Mapuche peoples for their rights, for their still completely absent constitutional recognition and, in particular, for the ownership of their territories—presently occupied for the most part by logging companies—has been brutally repressed, especially when lands are occupied by activists. The most paradigmatic example is the homicide of Camilo Catrillanca[22] in November 2018, at the hands of the militarized police, and the planting of evidence against community members who were arrested during the so-called "Operation Hurricane", carried out by special forces of

19 T13.cl: "Alcaldesa de La Pintana: 'El narco llega primero que el Estado en la ayuda'", May 24, 2020.

20 El Mostrador.cl: "Narcobeneficencia: cómo el hambre y la cesantía les abren el negocio a los traficantes en comunas vulnerables", May 20, 2020; La Tercera: "Narcosaqueos: detienen a primer clan familiar con cajas de mercadería", November 17, 2019.

21 El Mostrador.cl: "La lucha indígena: los oportunistas desesperados y los privilegiados impenitentes", December 5, 2020.

22 See, Antonia Rivas, "Human Rights of the Indigenius Peoples in Chile", in Marcela Zúñiga (ed.), 2020 Report, Santiago, Universidad Diego Portales, 2020.

Carabineros that had been trained in Colombia.[23] Throughout 2020, civilians traveling on the roads and highways in the conflict zone have been attacked by unknown persons, regardless of whether or not the latter were related to the logging companies, and various people have been injured or killed. It is unclear which groups participated in these violent acts.[24] On the other hand, as we point out in the chapter on the human rights of indigenous peoples of this *Report*, social media documented violent and racist reactions against the Mapuche people who demonstrated by occupying municipalities.

Institutionalized violence, in its multiple forms, is a serious situation that undermines democracy and is more or less condemned by different political sectors. A romantic discourse by certain sectors of the left on the use of violence to achieve social transformation in a democratic context precludes one from seeing the nuances of how it is expressed, prevented or reduced. Nor does this serve to criticize effectively the harsh discourse of security, which disregards the more structural injustices at the base of these forms of violent expression. Police violence and the disproportionate use of force by State organs cannot be the answer to violence exerted by individuals.

4 . THE STATE'S RESPONSE TO VIOLENCE: INEFFICIENCY AND POLICE VIOLENCE

When confronted with violence perpetuated by individuals, the State is faced with a two-pronged obligation that calls on it to strengthen its power and at the same time, to limit it. Thus, according to international human rights treaties, it has the obligation to protect the population from violence exerted by individuals, while respecting strict limitations on the use of force, and avoiding its indiscriminate and disproportionate use.[25] It also has the obligation to investigate all violent acts,[26] whether these originate from civilians or public officials, and it must assume obligations of means vis-à-vis violence by individuals as well as (stricter) obligations of results in relation to its own forces of law and order, in order to prevent violent acts.

23 Special report by Ciper.cl: "Operación Huracán", 2018.

24 The data furnished by the Multigremial de La Araucanía in its Barometer of Conflicts with Indigenous Connotations does not define the category "with indigenous connotation." While the number of crimes included in the report increased for the Bío Bío region, it dropped considerably for the La Araucanía region. The association of these crimes with indigenous perpetrators should be defined by the courts.

25 See chapter, Eduardo Alcaíno, "Police Violence since the Social Unrest", in Marcela Zúñiga (ed.), 2020 Report, Santiago, Universidad Diego Portales, 2020.

26 See chapter, Claudio Fuentes and Ricardo Lillo, "State Response of the Justice System: Obligation to Prevent and Investigate Human Rights Violations", in Marcela Zúñiga (ed.), 2020 Report, Santiago, Universidad Diego Portales, 2020.

It is the State's obligation to protect its inhabitants from violence perpetrated by others, particularly when their lives or integrity are at risk. International human rights law has a lower standard of protection for the protection of private property than for the life and integrity of individuals. This is crystallized in the type of measures that should be taken to protect life, as opposed to those that must be taken to protect private property. Nevertheless, when it comes to subsistence property, the duty of the State to protect increases. Lastly, the State must guarantee the provision of utilities and public services that allow for the exercise of human rights, such as drinking water facilities for the population, public transportation, and electricity for households, even if these services are privatized.

Ideally, these measures are preventative, structural in nature, and timely. This means that public security policy, strategies, tactics and intervention techniques of law and order forces are not only accountable to the obligation to respect human rights at all times, but also to a prioritization with a human rights approach. If the State decides to involve the armed forces in any of these tasks, they, like the police and intelligence forces, must be subject to strictly proportional protocols for the use of force, always using the minimum force that may be "necessary in a democratic society." Communicational assertions such as the invocation of the word "war"[27] to label the social crisis do not fulfill this purpose; neither does the insinuation of external intervention in the unrest without any serious proof, stirring greater distrust of or xenophobia against the migrant population. In the chapter "Police Violence Since the Social Unrest",[28] we analyze whether the protocols on the use of force that were in place during the crisis, and their amendments that are in place today, fulfill this purpose. If this is not the case, the State must assume its responsibility for the lack of diligence by the Ministries of the Interior and Defense, respectively, which are responsible for designing and approving these protocols.

As commented above, the use of force cannot be indiscriminate; it must be directed toward those who actually exercise violence and used in a strictly proportional manner. The use of force against peaceful protests is, in this sense, prohibited.[29] A recent example of the mistreatment of protestors was the aggression by a group of Carabineros against two people in Coquimbo, on October 20, 2020, for filming street protests in that city. In addition to being kicked, punched and beaten with police sticks, one of the victims was shot with a pellet gun

27 See chapter, Cath Collins, "Will They Open Up the Large Boulevards? Justice, Memory, Non-Repetition and the Constitutional Moment", in Marcela Zúñiga (ed.), 2020 Report, Santiago, Universidad Diego Portales, 2020.

28 See chapter, Eduardo Alcaíno, "Police Violence since the Social Unrest", op. cit.

29 IACHR, Informe Protesta y Derechos Humanos, 2019, para. 104, p. 42.

by a Carabineros captain who is under investigation for accusations of torture in that city.[30] There are also groups that deserve special protection during demonstrations: human rights defenders, medical staff and first aiders, and journalists.

Situations where the use of force bars journalists from performing their work are of particular concern, and still occur. For example, during the repression of a meeting of 20 workers on the street, during the commemoration of Labor Day (May 1st) when union leaders displayed a large banner in the vicinity of the headquarters of the *Central Unitaria de Trabajadores* and the government palace. There, Carabineros arrested ten leaders and a TV press team covering the commemoration.[31] At the same time, in Valparaíso, more than 20 journalists, photographers and camerapersons were arrested,[32] an act that represents a clear transgression of the right of information. The peaceful demonstration held in September by 200 TENS—technicians in the nursing profession—demanding recognition in the Health Code, was similarly repressed.[33]

Responsibility for the use of excessive or arbitrary force—and, therefore, the obligation to investigate—is threefold: first, there is the administrative responsibility of the police officer(s) who applied excessive force; second, possible criminal liability if the excess constitutes a crime; and third, the institutional and hierarchical responsibility of the higher ranking officials, which materializes when there is a lack of effective control, specific instructions that fail to consider the proportionality of the use of force, and/or general instructions that violate this principle. The pattern of eye injuries and bodily harm to the torso, upper extremities and head suffered by several hundreds of protestors cannot be explained without the second or third hypotheses. The chapter of this *Report* entitled "Police Violence Since the Social Unrest", as well as the *amicus curiae* briefs submitted by the Center for Human Rights in trials of police officers and military, analyze the military and police protocols in force at the time of the social unrest. There is consensus that they were clearly insufficient and in violation of international human rights law. The police protocols require the approval of the Ministry of the Interior, which is why there is indeed institutional

30 Radio Uchile.cl: "Exiliados del estallido: Hostigamiento de Carabineros obliga a víctimas de violaciones a DD.HH. a pedir asilo en Canadá", October 14, 2020.

31 Biobiochile.cl: "Detienen a 57 manifestantes en Plaza Baquedano: uno era positivo de COVID-19", May 1, 2020.

32 Cooperativa.cl: "Colegio de Periodistas prepara denuncia contra Carabineros: Acusa represión a la prensa", May 2, 2020.

33 El País.cr: "Carabineros reprimen marcha de trabajadores de la salud en Chile", September 5, 2020.

responsibility for the errors in these protocols, even independently of any concrete facts that violate human rights of protesters or bystanders. We also analyzed the responses by the health sector, especially with regard to its role in verifying injuries, safeguarding evidence for possible legal proceedings to vindicate the rights of victims of police violence, and documenting the effects of the use of less lethal weapons on people's health.[34]

Considering the structural failures of the institution of *Carabineros*, the idea of reforming the police has been discussed over the span of several years, but has not yet been carried out for various reasons. As a result of the social unrest, two reform commissions were convened, one by the Senate and the other by the executive branch. The first, known as the "Commission for the Reform" brought together scholars, experts and former government authorities, as well as a mayor.[35] This Commission stems from the lapidary diagnosis that effective control by civil authorities since 1990 has been absent. At the same time, different governments have been increasing the budget of *Carabineros* without efficient spending control in place, giving way to gross financial irregularities:

> Throughout the entire post-1990 democratic period, there has been a deficit in the political leadership of the Carabineros de Chile, which resulted, on the one hand, in a lack of effective direction in matters of public policy and, on the other, in the absence of effective mechanisms for controlling, monitoring and evaluating police performance. The politicization of security-related issues—especially during election periods—and the good image of the uniformed police led to a sustained increase in both personnel and the institutional budget, without the counterbalance of a corps of specialized civilian professionals who could assume the tasks of directing, controlling and monitoring the actions and programs being instituted.[36]

Thus, despite the fact that since 2005 Carabineros has been under the authority of the Ministry of the Interior,[37] everything points to the non-existence of an effective control by the political authorities over Carabineros. President Piñera himself, in reference to the incidents of

34 See chapter of this Report, María Gabriela Valenzuela, "Health and Social Crisis in Chile: the Conduct of Public Order and Security Forces, the Reaction of the Sectorial Institutions, and the Contributions of Civil Society", in Marcela Zúñiga (ed.), 2020 Report, Santiago, Universidad Diego Portales, 2020.

35 Senate Security Commission, Propuesta de Reforma a Carabineros de Chile: Comisión para la Reforma, 2019, p. 3.

36 Id. Free translation.

37 Law No. 20,050.

October 2nd on the *Pio Nono* bridge in Santiago when a teenager fell onto the Mapocho riverbed apparently pushed by a Carabineros officer, gave a misleading message by declaring that he regrets the human rights violations, but then fully supported the institution and its director general.[38] This unconditional support for the director general of the Carabineros,[39] exempting him from his command responsibilities during the height of the violence in 2019, is clear when Piñera claimed on national television that there is no reason to hold him accountable for these events, because the director general allegedly did everything in his power "to ensure that the protocols are complied with."[40] In the *Pio Nono* bridge case, Carabineros immediately discharged the officer involved as a result of an administrative fault involving the use of his own camera (instead of an institutional camera), and yet in serious cases of torture and eyesight loss as a result of beatings, such as the case of Moisés Órdenes in *Plaza Ñuñoa*, the police officers involved were kept on active duty despite an internal investigation. As such, there is differentiated criteria regarding the individual responsibility of police officers without a clear explanation of these differences.

The report issued by the Comptroller General of the Republic on the alleged administrative responsibility of seven generals of the high command of *Carabineros* was also rejected by the executive branch, while the police institution stated that despite the context of "extreme violence", *Carabineros* had maintained "the commitment to social peace and public order."[41] As such, there is no desire to assert administrative or command responsibility, and the actions of the institution's members remain under suspicion, increasing the disrepute of *Carabineros* in the general public.

As affirmed by the Commission for the Reform of *Carabineros*, achieving a change is not a question of the "modernization of the institution" embodied in a bill submitted by the executive branch in March 2020, but rather of reforming it,[42] instead of refloating this proposal of modernization without considering the fact that it fails to provide a response to the serious situations of human rights violations

38 The exact quote was: ""Quiero expresar mi más profunda condena y lamentar los hechos ocurridos"; and at the same time adds: "nuestro más profundo respaldo a Carabineros de Chile". Radiouc.cl: "Caso puente Pio Nono: Gobierno respaldó a Carabineros y rechazó la violencia", October 6, 2020.

39 After closure of the Spanish version of this report, but before translation, the General director resigned over the disproportionate use of force by police officers in a childrens' residential home.

40 La Prensa Austral: "Piñera respalda al general Rozas: 'Ha hecho lo humanamente posible por cumplir con su deber'", December 17, 2019.

41 El Mostrador: "Sumario de Contraloría contra altos mandos por manejo de estallido social: Gobierno se cuadra con Carabineros e institución apela a contexto", September 11, 2020.

42 Commission for Reform, op. cit., p. 4.

and irregularities that the very Commission detects and recommends changing. This congressional commission also recommends to eliminate the institution's militarized character and turn it into a civilian police force under a civilian agency; to substantially improve the entry and initial education process with continuing education programs; and to encourage specialization, gender parity, and a retirement system different from the existing one that makes retirement possible after 20 years of service. All of these changes are tied to modifications of the current political structure with the creation of a Ministry of Security.[43]

Moreover, there are financial irregularities affecting everything from the high command to lower-ranking carabineros and former carabineros, including a wide array of misconducts ranging from the misuse of pensions to fraud in public procurement. Even though President Piñera requested the resignation of then director general of *Carabineros* Hermes Soto—who in turn called for the retirement of ten high commanding generals –[44] a more structural crisis of the police institution had become visible, as the Commission for the Reform of Carabineros pointed out, in the participation of several of its members in the manipulation of evidence and the concealment of police actions,[45] as occurred in the Catrillanca case and even in the latest incident on October 2nd on the *Pio Nono* bridge.

In short, the actions of the police forces have become a serious threat to the respect for the rule of law; *Carabineros* lacks social legitimacy according to different measurements that show the gradual discrediting of the institution, [46] intersected by incidents of corruption that have dragged on for many years. This situation demands that the political power be capable of reacting categorically, reviewing and reforming the current institutional conditions of *Carabineros*. This is notwithstanding any appropriate administrative and political responsibilities for which to be held accountable.

5. THREATS TO HUMAN RIGHTS DEFENDERS

For several years now, our *Reports* have reported disturbing situations concerning human rights defenders in the performance of their human rights protection and promotional work. Over the past year they have found themselves in a more vulnerable situation: they have been the subject of threats, beatings and intimidation, such as the case of a

43 Id., p. 11.
44 El Mostrador: "Hermes Soto sale por la puerta trasera: Piñera le pide la renuncia y ex director de Carabineros da de baja a 10 generales", December 20, 2018.
45 Commission for Reform, op. cit., p. 6.
46 Id., pp. 6-9.

lawyer who was fired from her job for assisting those arrested during the social protests.[47] Even prior, the deaths of two social defenders, who were at the center of mobilizations for the protection of social and environmental rights in different territories, have been investigated. We have also reported on the criminalization of the social protest of the Mapuche people, condemned even by the Inter-American Court of Human Rights, in the *Norín Catrimán* case.

In addition, leaders of communities such as Petorca have been harassed as a result of their arduous struggle for access to water, as have defenders of the Quintero-Puchuncaví sacrifice zone in retaliation for exposing the environmental contamination of their territories. There is also the case of a high school student spokesperson whose photo appeared in *Carabineros* intelligence reports hacked in October 2019, where she appeared participating in a protest organized by the *Eco Social de Quintero* organization in front of the Ministry of the Environment.[48] During the social unrest, Ana Piquer, executive director of Amnesty International in Chile, received threats and required protection. The National Institute of Human Rights (INDH) filed a criminal suit on her behalf in November 2019 and was contacted by the Human Rights Brigade only on September 8, 2020 requesting to ratify the complaint. The PDI Brigade informed having received the order to investigate as late as August 2020, despite the fact that it had been issued in January of that year.[49]

It is unclear to many who should be considered a human rights defender. The international human rights protection system, as seen in the chapter, "Threats to Human Rights and Environmental Defenders",[50] provides certain definitions. One of these, from the Inter-American Commission on Human Rights, states that "every person who in any way promotes or seeks the realization of human rights and fundamental freedoms, nationally or internationally," must be

47 One attorney from ABOFEM, the Asociación de Abogadas Feministas of the IV region, was fired from her job after Carabineros, without any legal mandate, informed her employer, the Comptroller General's Office of the Republic and the Court of Appeals of her work assisting those arrested during the social protests, claiming, among other things, that she had been disrespectful toward the police and that she had pretended to be a lawyer from the INDH, all false accusations. She managed to reach a settlement in court for her dismissal, and the Court of Appeals of La Serena granted her appeal for constitutional protection that she had lodged against Carabineros. This ruling was subsequently upheld by the Supreme Court. Court of Appeals of La Serena, Fuentes con Carabineros de Chile, case no. 3915-2019, and case no. 14922-2020 of the Supreme Court. Personal communication with the affected party, October 17, 2020.

48 Interferencia.cl: "PacoLeaks: Estos son los nombres y organizaciones que han sido vigiladas por Carabineros en los últimos meses", November 1, 2020.

49 Personal communication with Ana Piquer, October 17, 2020.

50 See chapter, Elsy Curihuinca, "Threats to Human Rights and Environmental Defenders", in Marcela Zúñiga (ed.), 2020 Report, Santiago, Universidad Diego Portales, 2020.

considered a human rights defender.[51] This definition includes private and public professionals, such as justice workers, judges, prosecutors, and defense attorneys who, through their work, contribute to the realization of access to justice, whether by investigating, litigating or judging. Some of these justice workers have also been affected by threats, prosecutors, as well as judges.[52] The most recent situation of this kind known at the close of this *Report* is the threats made against prosecutor Ximena Chong, who is leading the investigation of the case of the young man pushed into the Mapocho River by a Special Forces *Carabinero*, allegedly with intent. Ms. Chong also heads as a prosecutor—appointed to this end in the investigations of other events linked to human rights violations committed by state agents since October 18, 2019—the North Central Prosecutor's Office.[53] With respect to public officials, the quality of their work is subject to the objective evaluation of their performance and the administrative-functional responsibility that they have in exercising their work, in keeping with their mandate. Therefore, this evaluation is not permitted to be used arbitrarily to silence a critical voice. Similarly, the condition of human rights defenders that individuals have is unrelated to their competences and professional performance, which could be deficient in specific cases without affecting their condition as human rights defenders.

The obligation of the State, through all its institutions, is to ensure that defenders are protected in the performance of their work. Senator Iván Moreira has played down the seriousness of the situation by pointing out that it is normal—or it would be expected—for the prosecutor to receive threats for what he calls "politicized" work in the investigation of serious crimes.[54] This is in addition to the political interventions of Congresswoman Camila Flores regarding the aggressions suffered by staff of the National Institute of Human Rights.[55]

Also troubling have been incidents where officials and the headquarters of the National Institute of Human Rights have been subject to attacks during the protests, sometimes by individuals, after certain statements made by its director Sergio Micco that to some sectors seemed lukewarm regarding the question of whether or not human rights violations, since October 2019, had been systematic. On other

51 IACHR, Informe sobre la situación de las defensoras y defensores de derechos humanos en la sociedad democrática, OEA/Ser.L/V/II.124 Doc. 5 rev. 1, March 7, 2006, para. 13.

52 See chapter, Claudio Fuentes and Ricardo Lillo, op. cit.

53 The tasks performed in the investigation of these events can be reviewed in chapter, Claudio Fuentes and Ricardo Lillo, op. cit.

54 El Mostrador, "Moreira sigue siendo Moreira: senador UDI califica como 'muy normal' las amenazas a la fiscal Ximena Chong", October 7, 2020.

55 See chapter, Alberto Coddou, Tomás Vial, Vicente Aylwin, "The INDH and the Social Unrest", in Marcela Zúñiga (ed.), 2020 Report, Santiago, Universidad Diego Portales, 2020.

occasions, INDH officials were attacked by state agents.

This scenario reveals a profound political and social crisis in the role of human rights defenders. It is time for all political classes to realize the seriousness of the situation. It is vital that the Public Prosecutor's Office be proactive and aware in investigating threats to social leaders.

Judges also have a role in ensuring the protection of human rights defenders, on the understanding that a proper investigation should lead to sanctions and thus avoid impunity. Chile lacks specific regulation to protect defenders according to international standards.

6. HUMAN RIGHTS INSTITUTIONS

In the chapter on human rights institutions contained in this *Report*, as in prior reports, we have explained the weaknesses of the human rights institutions.[56] The creation of the *Instituto Nacional de Derechos Humanos* (INDH) or a similar institution, as suggested in the Rettig Report published in February 1991, did not take place until 2009.

The emergence of this institution is intersected by our social and political history, and therefore its existence has been resisted by certain sectors. This tension explains the system in place for appointing its 11 councilors, subject more to political criteria—affinities or party affiliations—than to the specialization and knowledge or the trajectory in the promotion or defense of human rights of its members. While according to the Paris Principles human rights institutions are required to have broad powers, our INDH has only a few.

The INDH's actions during the social unrest have coincided with its legally mandated task of helping to document and inform authorities of human rights abuses and bringing to justice those who commit human rights violations.[57] Nonetheless, the INDH's capacities were overwhelmed by the massive nature of the protests since October 18th and the ensuing human rights violations. As we report in the respective chapter, if in 2019 there were 3,800 investigations for institutional violence, in the almost 6 months that passed between October 18, 2019 and March 31, 2020 alone, 8,827 criminal investigations were opened for institutional violence. The deployment of all the INDH's officials nationally—visiting police stations or detention centers, hospitals, acting as observers on the streets—showed the importance of having an institution independent of the branches

56 See 2019 Report, pp. 449-476.

57 ACNUDH, "Instituciones nacionales de derechos humanos: antecedentes, principios, funciones y responsabilidades", HR/P/PT/4/Rev.1, 2010, p. 24.

of government that could monitor the situation and, additionally, engage in political dialogue with the executive branch, the legislature, the judiciary, and all of the bodies and agencies attached to the administration of justice.

The report issued by the INDH in March 2020 provides an account of its work, but its effectiveness in the judicial sphere is low given the limited capacity of its lawyers to act due to both mandate as well as budgetary limitations. As reported in the chapter on human rights institutions, the INDH's intervention as a complainant shows higher conviction rates and fewer alternative suspended procedures in cases of illegitimate arrests and beatings and torture.[58] However, the number of criminal complaints is such that the INDH is not equipped to follow up on all of them, despite some additional budget awarded.

Adding to this, the lack of a common vision on the scope of human rights, civil and political rights, economic, social, cultural and environmental rights has paralyzed the INDH on certain issues due to the absence of consensus within its Council. This is to be expected, if we consider that a broad academic and political sector that is now "represented" in the Council is linked to the political right that supported the military regime and whose political, economic or cultural visions reflect a limited understanding of human rights and equality, compared with international human rights law. Thus, there are councilors who openly rejected the approval of the law on the termination of pregnancy on three grounds; a law that only met the minimum standards for the protection of women's human rights and in circumstances where treaty bodies, since 1999, had been urging Chile to amend the law. However, there is also a rejection of the role that the INDH should play in relation to economic rights. For example, three councilors rejected the submission of an *amicus curiae* brief before the Constitutional Court in connection with the unconstitutionality request filed by deputies from the Unión Demócrata Independiente (UDI) and Renovación Nacional (RN) which sought to eliminate a school selection system on the grounds, among others, that it violated the freedom of education in school establishments.[59]

Disagreements within the Council and between the Council and INDH professionals have been evident for years, for example, in the absence or limited scope of certain topics in its Annual Report on the human rights situation in Chile. As we pointed out in the chapter on human rights institutions and institutional framework, the strong discrepancies have concerned the reform of *Carabineros*, the rights to

58 See chapter, Alberto Coddou et al., op. cit.

59 Instituto Nacional de Derechos Humanos, Situación de los Derechos Humanos en Chile 2016, p. 97.

peaceful demonstration, and the assessment of the conduct of companies with regard to due diligence and its impact on communities, as well as sexual and reproductive rights and sexual abuse in churches. All of this, up to the publication of the report at the end of 2019, was prepared with the collaboration of an *ad hoc* team hired by the INDH director, not by the usual staff of the Institute.[60]

If the challenge encountered by the INDH has been to play a significant role in this political and social crisis, its political-institutional design may lead it to self-destruction or irrelevance. Its weakening would eliminate a very important counterweight in a critical situation for the respect and guarantee of human rights. The dilemma of accepting the internal limitations, and the debate between its councilors over the visit by the Inter-American Commission on Human Rights, put on display the tensions that undermine the faithful fulfillment of its mandate, which is explicitly mentioned in international standards on the subject. To the INDH, the *in loco* visit by the IACHR should have been good news, as it would have allowed it to have an important ally in the regional human rights system by strengthening its work in the promotion and defense of human rights in the country.

For its part, the approval of the National Mechanism for the Prevention of Torture in April 2019, which was instituted within the INDH, has been operative since October 2019, expanding the framework for the prevention of torture. However, its slow setup and lack of empowerment in its role is evidenced by the fact that no action or public declaration by the Mechanism has been made by the four experts who have already been appointed to it. While it is understandable that its commissioning is slow, its function lies precisely on taking urgent action in the face of the serious situation the country was experiencing for months. If no action can be taken in the face of such a large crisis of serious violations, the Mechanism is clearly wanting, and this could be a worrying warning about its future effectiveness.

Against the backdrop of the pandemic and its effects on a freedom-deprived population, there is no certainty as to whether the Mechanism has actually carried out visits to penitentiary centers or conducted actions related to supervising the conditions of detained people or their transfers; however it is known that the Medical Association's Department of Human Rights has acted in that regard, visiting one of the most overcroweded prisons, the *Ex-Penitenciaría de Santiago* and issuing a report that was presented in May 2020 in the Senate Commission of Human Rights before prison ward authorities and the Undersecretary for Human Rights. There is no official page or noteworthy information on the Mechanism on the INDH's website, and even

60 See chapter, Alberto Coddou et al., op. cit.

less is known as to whether it has sufficient resources for its operation.

Finally, we observed that the Undersecretariat for Human Rights played a role that seemed subordinate to the definitions of the Ministry of the Interior and, consequently, was at times more focused on a defense of the police forces than on a discourse of human rights in the light of international law. A ministerial body is not required to have the same independence as an autonomous national human rights institution; however, it is expected to make the voice of its mandate heard in terms of responses to police violence and also in terms of reparations for damages suffered by protestors, especially in connection with eye injuries that required immediate medical attention and rehabilitation also for persons who cannot afford treatment, regardless of whether or not criminal or administrative liability is eventually determined. The issue as of the close of this *Report* has yet to be settled.[61] The Undersecretariat's subordination to the spokesperson of the Ministry of the Interior was very clear in the responses to reports on human rights violations committed during the social unrest, particularly in the reaction to Amnesty International's reports in 2019 and in October 2020. This impression was also reiterated recently in relation to the reparations program of which the former Minister of the Interior Pérez spoke, a matter that in this instance should be handled by the Undersecretariat for Human Rights. Furthermore, the State has still made no clear recognition of the human rights violations committed during the social unrest, evidenced by the fact that, in the days leading up to October 18, 2020, in a note to the foreign diplomatic missions, it failed to make any reference to them.

Certainly, it falls on the government to define how to distribute the ministerial weights and spokespersons in connection with human rights issues—international law does not impose strict rules on the matter, rather principles of truth, justice, and participation—; however, all state bodies must comply with international obligations regarding prevention, access to justice, and reparations. In this respect, strengthening the mandate and leadership of the Undersecretariat for Human Rights and aligning policies, programs, and bills with international human rights standards could contribute to fulfilling these obligations, something the government has thus far failed to do.

7. TRUTH, JUSTICE AND REPARATION VIS-À-VIS THE SOCIAL UNREST

Referring to the truth in the context of human rights violations is not

61 See chapters, Ricardo Lillo and Claudio Fuentes, op.cit., and María Gabriela Valenzuela, op. cit.

political revenge, but a necessary act for clarifying the facts, helping to prevent them from being repeated. It is also a form of redress for the victims. We have learned and are still learning this in relation to the serious and systematic violations of human rights committed during the military dictatorship, regarding which Chile has still been unable to make amends in terms of truth, justice and reparation for the victims.[62]

In the face of human rights violations, the State is obliged to provide access to justice—criminal, administrative and civil—and, *ex officio*, investigate, prosecute and sanction those responsible, in addition to ensuring full reparation for victims. The mass-scale violations, which occurred mainly between October and December 2019, have placed the criminal justice system in front of a challenge unseen since the return to democracy. As the chapter "State Response to the Justice System: The Obligation to Prevent and Investigate Human Rights Violations" of this *Report* indicates: "The time that elapsed creates a complex contrast. As an interviewee mentioned, these months have felt like an eternity to victims of human rights violations, but time passes at a different pace for the Justice System and its institutions. The investigations are still being carried out but given the pandemic (since March 2020) most of the Justice System personnel are working remotely, with limited capacities and abnormal procedures. It is therefore difficult at this time to outright evaluate the way in which state organs have acted. However, it is possible to affirm the following: the Criminal Justice System, in the context of the *social outburst* and the Covid-19 pandemic, was only able to guarantee the very minimum that was expected of it."

Although the criminal justice was not prepared for the avalanche of complaints it received after October 18th, it innovated—albeit, as this *Report* shows, more as a question of personal, not necessarily institutional, initiative—in terms of its responses to carry out detention controls, representation of defendants, and investigation of human rights violations. However, as of September 2020, only 28 of the 466 agents identified as alleged perpetrators of human rights violations have been subject to a formal investigation and charges (around 0.4%), compared to the 6,867 complaints against state agents. This underwhelming prosecution does not stem from the Judiciary, but rather from the Public Prosecutor's Office, an institution that carries out investigations, both formalized and unformalized, and which defines the timeframe for formally investigating and bringing charges against offenders.[63] The Public Prosecutor's Office's lack of resources and tools

62 See chapter: Cath Collins, op. cit.
63 See chapter, Ricardo Lillo and Claudio Fuentes, op. cit.

to respond to the massive number of offenses that bear traits of human rights violations is clearly troubling. Another concern is that, to date, no proceedings were opened regarding the alleged criminal liability of hierarchical superiors, who may have ordered certain operations, tactics or strategies of intervention or acted with negligence in their planning, or in the prevention of human rights violations.

While criminal prosecution is a key element for accessing justice as defined by international human rights law, it is not the only one. In this sense, the executive branch cannot shield itself arguing that only on the basis of court rulings can one speak of human rights violations. The government must determine and assume institutional and administrative responsibility, too. The task of the Comptroller's Office in this regard is and will be key; however, the institutional responsibility of the Ministries has not yet been sufficiently explored.

Reparations for human rights violations, especially for significant injuries that require immediate intervention, should be based on administrative or institutional responsibility, not on criminal responsibility that is slow and time-consuming to establish and seeks compensation from the police officer personally. The State should be responsible for these reparations. Until such time as the definitive responsibilities are determined, the State can consider the response as part of its offer of free health benefits; however, it would be a violation of due process if the process of determining institutional and administrative responsibilities and, therefore, the final allocation of reparations to victims of human rights violations, were delayed. In this regard, these reparations have, clearly, a legally different nature than the subsidies granted to victims of rural violence or to SMEs damaged by private persons during the social unrest.[64]

As a result of the truckers' strike who responded to increasing rural violence in the Mapuche territories, especially against logging trucks, the government activated a reparation measures plan to support families of drivers who die, or become totally or partially disabled by more than 70%, as a result of offenses that are qualified as crimes of terrorism, and to provide economic support to victims, especially the replacement of work machines, among others.[65] The package of measures bears an outline of what would be, in part, a integral reparation. The measures were quickly announced to end the strike; not so the reparations for human rights violations by state agents. The measures have been criticized by some sectors, as they precisely reflect a differentiated treatment given to victims depending on who the alleged

64 See, La Tercera: "Destinan $ 1.400 millones para apoyar a 44 víctimas de la violencia rural", August 14, 2020.

65 See chapter, Antonia Rivas, op. cit.

perpetrators are.[66]

This being said, granting disability pensions to those who suffered eye injuries—as proposed early on by the Ministry of Justice and Human Rights—might be a useful first step if they were effectively implemented, but does not live up to the standard of integral reparation to which victims are entitled. It is important to remember that eye injuries were not the only type of injuries that require reparation from the State—there were deaths at the hands of state agents, acts of torture, as well as less serious injuries—regardless of whether or not those materially responsible are found in criminal proceedings.

Certain voices—opining that the violations that occurred were systematic violations of human rights, an opinion that we do not share so far as the justice system is responding, despite the existing challenges—called for the creation of a truth commission in connection with the events that occurred. Certainly, truth is an important element of societal reparation and a key guarantee of non-repetition. Without memory, the probability of repeating wrongdoings is presumed to be high and the necessary changes required will not take place. Judicial truth, in this context, is only a part of the truth, and should be supplemented by broader visions that address the roots of what occurred, for example, structural discrimination. We believe that the State of Chile, in principle, has the institutional framework to do so, through its Instituto Nacional de Derechos Humanos, its Congress, and its insertion in the international human rights system, in addition to a civil society that can participate in the collective construction of the truth with a human rights approach. Preventing the (further) weakening of these bodies, and strengthening them, however, will be key in responding fully to the obligations of halting the violations, of guarantees of non-repetition, and of comprehensive reparation. In this regard, the State must urgently strengthen the INDH and refrain from any further action that could weaken the role, in particular, of the Inter-American Human Rights System.

8. THE PANDEMIC, FORCE MAJEURE AND THE POST-UNREST SOCIAL AGENDA

The pandemic exposes the structural problems of inequality and social injustice that were a major focus of the demonstrations post-October 18th. The increase in unemployment, poverty, and the number of people living on the streets or forced to live with relatives or close friends

66 Biobiochile.cl: "Harboe califica como 'escandaloso' acuerdo por reparación económica del Gobierno con los camioneros", September 2, 2020.

due to their economic situation,[67] shows that the progress made toward eradicating poverty in recent years is unsustainable, in that the country has failed to build a non-discriminatory social security system. Reforms to the pension system, to public and private healthcare, to quality secondary education without discrimination, to the system of water access, and to environmental regulation, especially regarding pollution, are still pending.[68] The pandemic not only lay this bare, it also is further broadening the gaps.

Certainly, the withdrawal of 1 million pesos or the equivalent of 10% of the individualized savings in Chile's private pension funds allowed for responding to the most immediate needs; however, the pension system has as of yet made no advances toward the "progressive realization" of the right to social security without discrimination. The definition of the detailed conditions of the state refund for money that pension fund contributors have withdrawn from their personal savings accounts, a definition still pending on the legislative agenda, should take into account the principle of non-discrimination and, therefore, differentiate between the varying economic situations of the system's affiliates. Refunding the money in the same proportion, using public funds, to the pension savings of people with a more favorable economic situation, instead of using these public funds for public health or education, would not comply with international standards.[69] This is a relevant point given that among the most advantaged sectors people were able to access these savings to acquire, for example, second homes, switch or purchase cars or invest the savings in more profitable savings accounts, without having to pay taxes for the income received.

The *Report* addresses some specific issues regarding the social agenda, seeking to show the progress and gaps in terms of compliance with international obligations in each area. As planned social policies were displaced or put on hold by the pandemic that immediately followed the unrest, we will address the (initial) impact on those agendas, specifically in the areas of health and non-discrimination, labor, and water.[70] We will show how the structural difficulties in guaranteeing social rights were exacerbated by the arrival of the pandemic. Hence, while the global health emergency constitutes to some extent a *force majeure* event, eventually excusing the failure to comply with international obligations, the same cannot be said in relation to the structural elements that have produced, long before the exceptional

67 See Informe SJM, Hogar de Cristo, Techo et al., 2020.

68 See Centro de Derechos Humanos UDP, Insumos para el debate sobre nuevas políticas sociales para terminar con la discriminación estructural, 2019.

69 See, e.g., Comité de los Derechos del Niño, Observación General 16, para. 27. Presupuesto con enfoque de derechos humanos.

70 See chapters of the second part of this 2020 Report.

situation, foreseeable failures of the guarantee of social rights.

In total, the Comptroller's Office reported in July that in the first seven months of the pandemic the State had spent $1.7 billion on measures to address the crisis, including spending on health, public safety and quarantine control, and benefits for families and SMEs.[71]

Since April, the government has sent to Congress several initiatives to alleviate the economic impact of the pandemic. Two lines can be distinguished: one line of support for individuals and families, and another for businesses. The first line includes the Emergency Family Income (IFE for its acronym in Spanish), the Covid-19 Bonus, the Middle Class Loan, the 10% withdrawal from pension savings in the AFPs, put forward by the legislature and initially rejected by the executive branch; the Solidarity Plan for Connectivity, and the prohibition of shutting down electricity and water (gas is not included) during the state of catastrophe pursuant to unpaid bills, as well as the payment of debt generated during this period in up to 12 subsequent installments. The IFE and the Middle Class Loan are not cumulative,[72] and according to economists, the supports offered are not commensurate with the real cost of living in Chile.[73]

The second tranche includes aid to SMEs and companies: the Covid-19 loan, the FOGAPE, the suspension of tax payments / deductible for Covid-19 investments, and the Employment Protection Law that benefits formal employees and companies. From a human rights perspective, the State must adopt all "appropriate measures" (Art. 2 of the International Covenant on Economic, Social and Cultural Rights) to guarantee the minimum standard of life for all persons, preferably those belonging to vulnerable groups. Therefore, despite the necessary considerations of budget sustainability, the State cannot exclude in advance increases of public debt or of taxes for those who have more resources from the range of measures under discussion, as is currently happening according to public statements. The State must consider, particularly, the situation of persons belonging to vulnerable groups, for example homeless people or people living in shanty towns. This would exclude that, as has been reported, certain municipalities are not delivering a minimum amount of drinking water to shanty towns because these were built after illegal land occupations.[74]

71 See, e.g., Biobiochile.cl: "Sólo detrás del Minsal, Contraloría revela que Carabineros y Gendarmería lideran gasto Covid", September 29, 2020.

72 Ciper.cl: "Bono de $500 mil: los 'detalles' de la ley que impiden a muchas personas cobrar el medio millón prometido a la clase media", August 12, 2020.

73 See, Ciper.cl: Column of Marco Kremermann, "Cuarentena con 100 'lucas' y la dignidad de los hogares chilenos", May 12, 2020.

74 See chapter, Javiera Calisto and Pía Weber, "The Social Crisis Is Environmental: a View from the Conflict of Waters", in Marcela Zúñiga (ed.), 2020 Report, Santiago, Universidad Diego Portales, 2020.

This *Report* analyzes the right to health from two perspectives: first, the health system's response to the social unrest[75] and, second, its response to the pandemic, especially in relation to certain vulnerable groups.[76] The chapters must be viewed against the backdrop of the general challenges facing the health system: the privatization of the profitable segment of healthcare, the ineffectiveness of the public system and its constant need to refer to the private sector—with deficient price regulation—in order to reduce waiting lists; and the vertical integration of the sector that brings about problems of collusion and data protection. Draft bills on the reform of Fonasa, of January 2020, and on the reform of the *isapres* (private health insurance companies), of April 2019, do not change the basic structure of this system or its funding.

In response to the pandemic, after lengthy discussions, the private sector was forced to provide respirators, to accept centralized bed allocation (for the private and public sectors) and to apply a cap on Covid-19-related care,[77] and the automatic activation of the Law on Catastrophic Diseases for Covid was put into effect.[78] Due to the emergency, nevertheless, the waiting list for essential, state-guaranteed treatment and operations (AUGE-GES) tripled in three months (March-April-May 2020),[79] and the excess mortality rate caused by other diseases or diseases not caused by the coronavirus is as of yet unclear. The proposals of the private sector of eliminating the waiting list[80] must be assessed with a human rights approach, in that Chile has yet, for example, to regulate maximum tariffs per healthcare service and define the services considered necessary/covered for each type of disease, in order to make an efficient use of the public budget.

Finally, in the context of the high cost of drugs and future access to the Covid-19 vaccine(s), it is essential not to lose sight of intellectual property regulation and its inclusion in free trade agreements. As such, the Center for Human Rights, like others, has cautioned that new free trade agreements such as the TPP-11 or its amendment, or the Modernization of the Trade Agreement between Chile and the EU,

75 See chapter, María Gabriela Valenzuela, op. cit.

76 See chapter, María Belén Saavedra, "Right to Health and the Pandemic in Chile", in Marcela Zúñiga (ed.), 2020 Report, Santiago, Universidad Diego Portales, 2020.

77 See, Ministry of Health: "Minsal fija precio máximo que pagará fonasa por derivación a clínicas privadas", April 15, 2020.

78 Superintendency of Health: "Gobierno anuncia que Isapres deberán activar en forma automática la Cobertura Adicional para Enfermedades Catastróficas durante la Alerta Sanitaria", July 5, 2020.

79 See, e.g., Biobiochile.cl: "Por pandemia: Se mantiene lista de espera de casi 70 mil personas para prestaciones ges", September 22, 2020.

80 El Mercurio: "La fórmula de la ACHS para reducir la lista de espera de operaciones no GES en el sistema público de salud", February 16, 2020.

must preserve the State's capacity to freely acquire the generic drugs and bioequivalents necessary to guarantee the right to health without discrimination. Otherwise, laws such as the Cenabast Law of 2019 that managed to lower and regulate the cost of certain drugs also in pharmacies (Law 21.198), or the future law on generic drugs (Bulletin 9914-11, non-urgent since January 22, 2020), would most likely lose their possible positive impact.

From the perspective of some experts, the pandemic and the social unrest place us in what they call a *syndemic*, referring to "the interaction of multiple causal agents: social conditions (poverty, inequality, injustice, social conflict, unemployment), environmental processes (climate change, socio-natural and ecological disasters) and pathological states (comorbidities between diseases such as depression, diabetes and hypertension that affect many Chileans) that enhance their negative effects on the lives of individuals and exacerbate the burden of disease in certain groups of the population."[81] In this respect, mental health has been severely affected by the loss of employment, feelings of insecurity, fear of illness and uncertainty regarding the health, social and political context, all of which are exacerbated by the specific conditions of groups that find themselves in more vulnerable situations. The population in Chile has important indicators of stress and depression, therefore measures aimed at protecting mental health cannot be dissociated from improving living conditions for the population.[82] Put differently, psychologists or psychiatrists are important, but much like antidepressants they are not enough to solve the deteriorated mental health of citizens. This description embodies a violation of the right to physical and mental health.

For the vast majority of the population of working age, it is work—freelance, salaried, precarious, informal—not savings that makes it possible to satisfy basic needs, including access to the enjoyment of social rights such as housing, water, health, education and, of course, a pension at the end of one's working life. In this sense, as regards work, the impact of the social unrest– such as in the case of SMEs that have had to suspend their activities or have gone bankrupt—or the impact of the pandemic, has been very high. In the chapter on the right to work we refer to the model of labor relations circumscribed by its precariousness and an easy dismissal system. Temporary contracts do not require any just cause for dismissal and can be used even for permanently required work, and subcontracting can even be applied, without limit, to the company's main activity or line of business. Companies' needs as grounds to terminate

81 Ciper.cl: "Sindemia, la triple crisis social, sanitaria y económica; y su efecto en la salud mental", June 26, 2020.

82 Id.

employment is the manifestation of a free dismissal system.

In our *2019 Report*, we referred to forms of precarious work under new contracting modalities: the informality of "collaborating" workers in home delivery services which experienced an explosive increase during the pandemic as a form of sustenance.[83] The costs of labor are handed down to the workers who, without job security measures or occupational accident insurance, have made the lives of many others safer during the pandemic, but at the cost of placing these precarious workers in a vulnerable situation. These workers have also made public statements and several decisions are expected from the labor courts on whether to recognize these workers as salaried employees[84] and not as "collaborators-entrepreneurs". As of the close of this *Report*, the Civil Court of Concepción had declared there existed an employment relationship, ruling against the company *Pedidos Ya Chile* for dismissal without cause.[85] This would be the first ruling on the matter. Meanwhile, the mayors of Providencia, Las Condes, Vitacura and Lo Barnechea (the wealthiests municipalities of Santiago) are putting forward an initiative to make these workers pay for a commercial license. Some argue that this is a security measure to the benefit of the residents of these boroughs, where delivery workers would be registered, and others, that it would be a benefit for the workers themselves;[86] however, no mayor has referred to the precariousness of the work itself as motivation for regulating this activity.

Another group that has been hard hit by the dismissals resulting from Covid-19 have been domestic workers in private homes, who are subject to a special hiring and social security regimes and cannot access the same conditions as the rest of salaried employees. In fact, according to estimates by one union, 60% of self-employed persons do not have a formal contract, explaining why they were not even able to access the compensation fund under any circumstances.[87]

The discussion of a new Political Constitution opens up the possibility of reconfiguring new foundations for the relationship between

83 At the onset of the pandemic, the data indicate that in Chile there were more than 200,000 workers rendering services to digital platforms. Macarena Bonhomme, Arturo Arriagada and Francisco Ibáñez, "La otra primera línea: COVID-19 y trabajadores de plataformas digitales", Ciper Chile, April 2, 2020.

84 Biobiochile.cl: "Situación laboral de trabajadores de delivery en Chile se abre a debate tras sentencia en España", September 27, 2020.

85 Labor Court of Concepción, Arredondo Montoya v. Pedidos Ya Chile SPA, M-724-2020, October 5, 2020.

86 CNNChile: "Iniciativa busca que repartidores de delivery paguen patente municipal en comunas de la zona oriente de Santiago", October 10, 2020.

87 El Mostrador: "CuidaAQuienTeCuida: la compleja situación que enfrentan las trabajadoras de casa particular en tiempos de pandemia", June 19, 2020.

work and the protection of the workers' human rights.

9. THE CONSTITUTIONAL PROCESS

The resounding social mobilization that took place after the explosion of the social unrest opened the door to the possibility of constitutional change. Without the social unrest, we believe that there would be no discussion this year and in the coming months of a constitutional change, since the previous process was abandoned after having held citizens' meetings in 2016.[88] The current process, for the first time in Chile's history, will be carried out with citizen participation, guaranteeing gender equality in the constituent organ, and is meant to include, for the first time, seats reserved for indigenous peoples. Only days after this *Report* was closed, we learned of the overwhelming victory of the approving vote in the Constitutional Referendum and of the option of a "Constituent Assembly", conformed of 50% of directly elected representatives and 50% of Congress representatives. Votes by borough in the city of Santiago graphically showed a demand for change by citizens according to their socioeconomic status, the richer they were, the less necessary they considered a new Constitution.

Chile is experiencing historic times, and the broad demands for constitutional change are being raised by different sectors that ask, for example, that constitutional change should be projected from a gender justice perspective.[89] In this *Report* we only highlight the role of international human rights law in a new Constitution and how, in our opinion, international human rights treaties should be embedded in it.

Human rights are recognized in international human rights treaties that Chile has ratified. Accordingly, there is an international commitment that a new Constitution cannot ignore. In fact, the November 2019 Agreement recognized existing international treaties as expressly limiting the "blank page."

The current Constitution incorporates international human rights law through its Article 5, paragraph 2, but the interpretation of this article has been controversial in relation to the hierarchy afforded to international treaties; in relation to the self-enforceability of the norms that would be necessary to be able to invoke a treaty norm in a Chilean court; and in relation to a crucial problem: how to interpret "the international treaties in force," especially in terms of whether this interpretation is made with or without reference to case-law and

88 See, "Síntesis de resultados de la etapa participativa del proceso constituyente abierto a la ciudadanía", 2015.

89 El Mostrador: "#ConstituciónConGénero: 18 connotadas profesoras lanzan libro gratuito para pensar en una Constitución con perspectiva de género", October 5, 2020.

the authoritative interpretation of international human rights bodies. Lastly, the current Constitution says nothing about the relationship between constitutional law and *jus cogens* norms or customary international law protecting human rights.

These gaps have direct effects on the protection of human rights that our current constitutional system manages to provide. First, based on the Constitutional Court's theory of the infra-constitutional hierarchy of human rights treaties, constitutional norms can subsist even if they are contrary to a State commitment in an international human rights treaty. In matters such as the economy (free trade treaties, for example), the subordination of these specific norms to constitutional ones is warranted because they involve matters that are effectively regulated by laws in the domestic system. However, this is not the case for matters considered to be of constitutional importance, such as, in this area, the rights of natural persons. Thus, in a coherent system, the rights enshrined in international human rights treaties should be incorporated with constitutional hierarchy.

Second, the theory of the self-enforceability of norms comes from a monistic system where the recognition of international laws occurs without the need for the incorporation of the international law by Congress. Chile, however, is a dualist system where all ratification of international treaties depends on the approval of Congress, as does the respective incorporation of international laws into domestic ones. In this sense, if a norm is not sufficiently detailed to be taken up and applied by the country's courts, the relevant regulations should be created during this point of incorporation to allow for the full applicability of the norm and not a subsequent limitation of the international commitment that is contrary to the customary law, as recognized in Article 27 of the Vienna Convention on the Law of Treaties. The new Constitution should provide mechanisms that are consistent with the dualist system and dispense with the import of theories that are not consistent with it.

Third, for the protection and guarantee of human rights as recognized by Chile at the international level, it is key to interpret these rights in accordance with the interpretation afforded to them in the international context. Otherwise, an artificial gap is created between the international guarantee that Chile has assumed and its implementation domestically, which could result in a high number of complaints to international human rights bodies. The current Constitution makes no reference to interpretation of international norms—neither to constitutional interpretation—and Chilean legal tradition has focused on a formalistic interpretation of the law that is in clear contrast to the rules of interpretation of public international law enshrined in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, and, in

particular, the rules and principles of interpretation of international human rights law, recognized, for example, in Article 29 of the American Convention on Human Rights. This interpretation uses as an "ancillary means" the case law of the relevant international bodies, such as the Inter-American Court of Human Rights or the Committee on Economic, Social, and Cultural Rights, contrary to what the majority of the current Constitutional Court considers to be the correct way to interpret human rights treaties (they incorporate these without the rules of interpretation of international law).

To alleviate this problem, a number of countries recognize interpretations in conformity with international law or international human rights law in their constitutions, thus reducing the dissonance between international and domestic readings of international human rights law. This also allows for resolving possible conflicts of interpretation between different norms ratified in accordance with the same international law.

Finally, the silence of the Constitution on such crucial norms as *jus cogens* norms—of the highest order in international law, so that no agreement can persist against them—does not reflect the diplomatic commitment that Chile has had toward these norms since the return to democracy.

These problems must be solved, but their solution alone will prove insufficient for the Constitution to fully protect human rights, especially social rights. We could not consider that an incorporation clause—considering the idiosyncrasies of Chilean legal and judicial culture—to be "decoupled" from the definition of the catalogue of human rights, nor from the determinations of the economic Constitution that can, to a great extent, facilitate or impede the enjoyment of human rights in particular. Thus, the constituent process gives the country an opportunity to finally afford human rights—particularly social rights that have not been recognized until now, such as the human right to water and sanitation, the right to housing, but also rights that have so far only been partially recognized, such as the right to education, the right to social security, or the right to health—the importance they deserve. At least the core of these rights, defined internationally, must be justiciable.

International law does not stipulate what economic model States should adopt; nor does it prescribe whether States should define this model constitutionally or legally. However, the model that is adopted must be compatible with human rights and, certainly, facilitate their protection. In this regard, the Constitution must empower and compel the State to regulate the private and public economic activity respecting and guaranteeing human rights. It has been demonstrated in numerous studies that the current economic Constitution with its definition of the subsidiary State has failed to achieve this purpose,

especially in connection with social rights and the privatization (discriminatory and insufficiently regulated) of their guarantee. Amid the fear that changes to the economic model might bring about violations of the free trade treaties, there is a reassuring argument: these same free trade agreements are ratified by countries that have opted for economic models with much higher rates of redistribution and regulation, without them having been violated.

Finally, if a new Constitution did not recognize explicitly the prohibition of discrimination, including the prohibited categories defined in international law and Law 20.609—*in addition to* the principle of equality—and, therefore, the possibility of taking affirmative action for the benefit of historically discriminated groups, the protection of these rights would encounter additional difficulties and could fall short of the international commitments that Chile has made. In this regard, Chile would be unable to eliminate the structural discrimination and inequality that, as we have argued, is at the root of the social unrest and makes the pandemic all the more difficult for some to bear than for others, depending on their economic situation.

Santiago, October 26, 2020

"¿ABRIRÁN LAS GRANDES ALAMEDAS?"[1] JUSTICE, MEMORY, NON-REPETITION AND THE CONSTITUTIONAL MOMENT[2*]

1 The first part of the chapter's title alludes to the final public broadcast of Chile's deposed president Salvador Allende, shortly before his death during the 1973 military coup, in which he expressed his faith in a future which 'the grand avenues will re-open, and free men (sic.) will travel them' ("se abrirán las grandes alamedas por donde pase el hombre libre")

2* This chapter represents the tenth time annual chapter on transitional justice in Chile, produced by the Observatorio de Justicia Transicional de la Universidad Diego Portales for the University's annual Human Rights Report, Informe Anual Sobre Derechos Humanos en Chile Santiago, Universidad Diego Portales. The full text, year on year or chapter by chapter, of all previous Reports (in Spanish) is available to download free of charge at: http://www.derechoshumanos.udp.cl/derechoshumanos/index.php/informe-anual. For chapters prepared by the Observatorio, including translations to English of the chapters for 2013 and 2019, and to access the rest of the Observatorio's substantial production of electronic publications, see: http://www.derechoshumanos.udp.cl/derechoshumanos/index.php/observatorio-justicia-transicional , especially the section 'Publications in English'

PREFACE[3]

The year 2020 will likely go down in history as one of the most sombre and difficult periods of recent world history. It also happens to mark the tenth time that this chapter on truth, justice, reparations and guarantees of non-repetition, the only thematic chapter to appear in the UDP's Human Rights Report every year since its inception, has been prepared by the UDP's dedicated Transitional Justice Observatory, Observatorio. This year has been difficult for everyone, and the Observatorio team is no exception. We therefore extend an even larger vote of thanks than usual to our core team and expert contributors for their generosity in continuing to take part, *ad honorem,* in this endeavour even in these difficult times. Although it seems at times as though the whole world is presently 'in transition', towards an uncertain destination, we continue to in the importance of keeping the justice horizon in view even in the face of these new challenges. If anything, over the decade in which the Observatory has been in operation, we have seen an expansion of the reach and ambition of transitional justice whether as theory or praxis. Transformative schools of thought have opened up the traditional truth and justice agenda, placing structural,

3 Chapter prepared by Cath Collins, the core team of the Universidad Diego Portales Observatorio de Justicia Transicional, invited experts, and research assistants from the UDP Law School. The Observatorio has carried out continuous interdisciplinary monitoring and analysis since 2008 of developments in truth, justice, reparations and guarantees of non-repetition for mass human rights violations committed by the Chilean civico-military dictatorship of 1973-1990. Contributors to the present chapter were: Daniela Accatino, Rodrigo Bustos, Juan Pablo Mañalich, Tomas Pascual, and Pietro Sferrazza (invited experts); Francisco Bustos, Boris Hau, Loreto López, Andrea Ordóñez, and Francisco Ugás (Observatorio researchers and associates); and Romanet Atenas, Nadia Marchant, and Ayleen Valencia (research assistants). The lead author, coordinator, editor and translator was Cath Collins, Professor of Transitional Justice, Ulster University, Northern Ireland and Director of the Observatorio. We are grateful to all individuals, organisations and institutions who supplied information, and to the Open Society Foundations, who support the line of research that informs the section on enforced disappearance. This edition is dedicated to Roberto Garretón, emblematic Chilean human rights defender, well-deserved recipient in 2020 of the National Human Rights Prize, awarded by the state Human Rights Institute, INDH.

economic, ethnic and gender justice at the heart of any serious call for a 'Never Again' regarding atrocity crimes. These more radical currents in transitional justice thinking have not made as much headway in Chile as in other parts of the global South. It is nonetheless noticeable how the vocabulary and preoccupations of transitional justice – particularly historical memory - have become much more visible, at least in academic circles, since the Observatory was founded. Few would deny, however, that Chile's social irruption of October 2019 has been the key detonator of the dawning realisation that today's injustices are the continuation of yesterday's, or at least, that the two are intimately connected. The whole experience of the social irruption and its aftermath has left part of the population in a state of euphoria, feeling part once again of a people in motion toward a common objective. Others were left dismayed by the sudden turning upside down of everyday life and everything they held dear. All of us should meanwhile be left sobered by what this episode exposed: myriad lessons as yet apparently unlearned, about the costs of unrestrained use of violence by the authorities.

INTRODUCTION

Official reaction to the protest movement that erupted in Chile in October 2019 is the most eloquent testament possible to the fragility, if not the downright failure, of guarantees of non-repetition of grave human rights violations. The bellicose language employed by the country's President, the decreeing of states of emergency and of constitutional exception, and the subsequent invocation of the State Internal Security Law (Ley de Seguridad Interior del Estado) gave rise to scenes not seen since the dictatorship. Troops and tanks patrolled the streets, and dozens of people were detained for supposed infractions of curfew. Scenes of extreme violence ensued, much of it carried out by state agents against people who were clearly bystanders or peaceful protesters with no connection to the acts of violence committed by some under cover of the protests. The harms inflicted include hundreds of reports of sexual assault, forced nudity, and other actions constitutive of torture, committed by police officers. At time of going to press, one year on from the beginning of the protests, the National Human Rights Institute, INDH, had registered over 3,000 victims of human rights violations, including 163 people with eye injuries, various either fully or partially blinded by projectiles fired by uniformed police (Carabineros). The INDH had initiated more than 2,500 legal complaints.[4] Each complaint represents the denunciation of a human rights violation committed by State agents, including murder, attempted murder, sexual violence, and torture.

INDH team members also reported having been themselves physically mistreated and injured by police officers, and denied access to police stations and hospital A&E units while carrying out official field

4 INDH Statistical Report (Reporte de Estadísticas), www.indh.cl, accessed 19 October 2020. The date of validity of the figures is given as 5 October 2020, although the document suggests that the figures refer to events taking place between 18 October 2019 and 18 March 2020. See also INDH, "Informe Anual: Sobre la situación de los Derechos Humanos en Chile en el contexto de la crisis social, 17 octubre a 30 de noviembre de 2019", INDH, 2019.

monitoring duties. A fact-finding delegation from the Inter-American Commission on Human Rights, IACHR, reported indiscriminate use of force, the routine use of tear gas, water cannon, and pepper spray in public spaces, and flagrant disregard for protocols that supposedly authorise the use of force only in situations of risk to life or physical integrity.[5] During a special session convened by the IACHR in November 2019, one of the Commissioners questioned the fact that "the [Chilean] government's response to violations of citizens' human rights is to list damage to property". The reply from a spokesperson from the Ministry of the Interior and Public Security ran unrepentantly along the same lines, insisting that what had to be discussed was "the human rights of people who were vandalised (sic.)" This notion referred not to those mutilated, injured, blinded or beaten by police, but to businesspeople and shop owners who had goods stolen or damaged.[6] The comment also exposed a lack of understanding of the basic notion of human rights, as proper to the relationship between society and the state.

These are both sad and revealing times for the nation, exposing longstanding social tensions produced by inequality, active exclusion, and the neglect of economic, social and cultural rights.[7] An already dramatic situation was made even worse by the irruption of the Covid-19 pandemic. From a transitional justice perspective, there are various motives for concern. It is unrealistic to expect that guarantees of non-repetition can or should mean that a post-transitional society will never again experience some level of human rights violations, with the corresponding shortfall or failure of state duties to promote and guarantee rights. It is, however, reasonable to expect that its institutions will learn from recent history, acting with particular and explicit concern for human rights. Measured against that yardstick we must conclude that both the police response to ongoing public protest, and state inaction in the face of this renewed institutional violence, suggest that the legacies of authoritarianism and impunity are alive and well in the command culture and everyday practice of Chile's forces of law and order. The lack of explicit support and protection extended by the authorities to the INDH in carrying out its official mandate was an early warning sign. So too were the views of the chief of police.[8]

5 See, inter alia, press release N° 270/19 of the IACHR, 23 October 2019, "CIDH condena excesivo uso de la fuerza y rechaza toda forma de violencia en el marco de las protestas sociales en Chile".

6 See Observatorio Justicia Transicional, Boletín 55, September and October 2019.

7 See the 2019 version of this Report, section 1.1.2.

8 General Rozas, head of the uniformed police, notoriously declared, to an audience of serving police officers, that "no-one will be demoted for their actions"; and later claimed that there had been no human rights violations, only "errors", on a scale "within acceptable bounds". See, also, elsewhere in this Report, the chapter by Eduardo Alcaíno, "Violencia policial desde el estallido social".

The drawing up of a new Constitution, whatever its content, will never repair the grave damage to the social contract that was wrought by these actions. Neither will it be enough by itself to instil in police ranks, the awareness that its professional and human or human rights responsibilities in fact pull in the same direction. This will require much greater, more focused, and specific effort, perhaps including the kind of drastic restructuring and redesign that many transitional societies undertake early on, but Chile repeatedly put off. It is meanwhile to be hoped that the justice system will respond more quickly and efficiently than it ever did in the past, to this new set of human rights violations. Of course states' human rights duties do not consist solely of post hoc responsibilities to prosecute and punish: they also speak to promotion and prevention. The failings in that regard are plain for all to see.

1. MAJOR THEMES FROM THE YEAR

1.1 Transitional Justice Issues in the News

1.1.1 The Constitutional Plebiscite as a 'transitional moment'

This edition went to press shortly after the most significant political event of the year: the 25 October 2020 plebiscite, in which an overwhelming majority of those who took part, voted in favour of beginning a process to design a new Constitution. For the first time since the beginning of the return to democracy in 1990, the country now has the opportunity to replace the inherited constitution with one that is the product of a democratic process. This offers a chance to eliminate the current authoritarian content and provisions, that have persisted despite successive post-1990 reforms. Does this constitution-making process, set in train by the October 2019 protests, have any potential impact on transitional justice? Might it have repercussions for the way in which Chile as a political community deals with that other part of the dictatorship-era legacy: the part that saw over 3,000 people killed or disappeared, submitted tens of thousands more to torture and political imprisonment, repressed countless protesters, raided homes, threatened and blacklisted workers, and sent hundreds of thousands into internal displacement and exile?

Since the 1980 Constitution is the epitome of the refoundational project that the dictatorship imposed with fire and the sword, any serious discussion about the need to abrogate and replace it has the potential to stimulate reflection on the political meaning of the violence

unleashed in 1973.[9] This matters because a glance at the truth, justice and memory measures and policies adopted since 1990 reveals that the dominant representation has been of state terror as fundamentally a problem of individual suffering. The collective dimension of victimisation has been downplayed. Chile's two truth commission reports made strides in acknowledging the existence a systematic state policy of extermination and torture, helping to resist the false narrative of 'excesses' or 'abuses' by individual state agents. They also, however, created an atomised image of victims, not least because their tasks included the drawing up of lists of individual victims for the purposes of reparations. This same individualised representation of political violence has been reinforced by the way in which late justice has been practised in Chile.[10] On the one hand, initiating cases and seeing them through has largely fallen to relatives, survivors, and the associations and lawyers that represent them. On the other, the written procedures of the inquisitorial criminal justice system, which does not hold public trials, has impeded wider political deliberation around the cases.

Missing from the processing of past violence has been the awareness that harm was deliberately visited on the political community as a whole, as well as on the individuals who suffered it in person. State terror was employed to crush 'the people', as Mañalich (2016) has also argued.[11] It heralded the installation of a project deliberately designed to radically inhibit popular political agency. Highlighting this collective and political meaning of dictatorial repression becomes possible if we observe the internal relationship between the dictatorship's political violence and the 1980 Constitution. The point is not simply to underline the authoritarian origins of a Constitution that was drawn up behind closed doors and imposed by a spurious, and fraudulent, plebiscite. It is not, either, simply a case of noting the temporal coincidence between the approval of the Constitution, and acts of repression. The term 'internal relationship' is used to draw attention to the fact that both the text and the crimes were expressions of a single project: the neutralisation of popular political agency. Physical elimination, fear, and authoritarian institutional mechanisms were all to be deployed to that end.

Those mechanisms have been aptly described as 'traps' or 'padlocks', designed to "achieve what the dictatorship's political project deemed

9 The exploration that follows draws on ideas developed in Daniela Accatino, "Justicia de transición y nueva Constitución", in Fernando Muñoz and Viviana Ponce de Léon (eds.), Conceptos para una nueva Constitución, DER, Santiago, 2020.

10 For discussion of 'late justice' see Collins, C. 'The End of Impunity? Late Justice and Post-transitional Prosecutions in Latin America' pp 399-424 in Clark, Granville and Palmer (eds.) Critical Perspectives in Transitional Justice, Intersentia Press 2012

11 Juan Pablo Mañalich, "Terror, memoria y archivos", in Claudia Iriarte (ed.), Anuario de Derecho Humanos (12), Santiago, Universidad de Chile, 2016, pp. 173-189.

important – to make it almost impossible for that project to be affected by democratic political decisions. The only exceptions were reforms or modifications that were to the liking of the dictatorship's [civilian] inheritors".[12] Thus we see the introduction, in the 1980 Constitution, of designated senators, a binominal electoral system that overrepresents the minority in the legislature, organic constitutional laws that require supermajorities – therefore blocking effective reform – and a Constitutional Tribunal with exceptionally broad powers of preventive review. All of these dispositions were, and in some cases still are, designed to insulate the dictatorial political project from popular democracy. This was moreover openly acknowledged by the ideologues and architects of the dictatorship-era constitution, who referred unashamedly to a model of what they called "protected democracy": that is, one that protected the Constitution from the political will of the people.

Those same institutional mechanisms have carried political neutralisation forward into the present, in a manner less openly cruel, but no less effective, than when the dictatorship chose to torture, eliminate and 'disappear' its adversaries. Political terror replaced and updated the violent crushing of the people that had begun with the coup. Making the internal connection between the 'constitutional problem' and the 'human rights problem' creates an opportunity, at a time when the sovereign political agency of the people is being invoked to justify demand for a new Constitution, without traps or padlocks. This offers a chance to politically re-signify victims' suffering via a recovery of sovereign political agency that has also not been cost-free. It has instead brought with it new and painful lived experiences of grave human rights violations, above all during confrontations between protesters and soldiers, but above all, with the police.

The re-emergence of large-scale repression raises numerous questions about the efficacy of measures to prevent recurrence, as about how well the justice system will handle these new violations (See Introduction, above, and section 1.1.2, below). Another striking feature is how social movements themselves have handled this new cycle of human rights violations. They have been comprehended not only as a problem for individual, named victims but as violence directed against the whole of the mobilised population. This identification of 'one and all' with the specific victims of police repression is more than mere solidarity or empathy: it speaks to an awareness of the collective and political dimensions of the violence. It is also noticeable how the memory of resistance to the dictatorship has been evoked, represented, and alluded to in present-day protests. This offers at least the

12 Fernando Atria, La Constitución Tramposa. Santiago, LOM Ediciones, 2013, author's translation.

possibility that the new-found identification with present-day victims will also be extended to victims of the dictatorship. This would help us to see our way to interpreting the recovery of popular political agency, via a democratic constitutional process, as a manner of doing justice for collective as well as individual suffering.

1.1.2 "Plus ça change" – Will there be Justice for Human Rights Violations Committed during the Recent Protests?

A year on from the beginning of the 2019 unrest, thousands of criminal investigations were in theory ongoing in response to denunciations of human rights violations committed by state agents while 'policing' protest. This represents a major challenge for the justice system. Whatever the exact final number of cases, and whether or not it is finally determined that the violations can be considered systematic and/or widespread, it is clear that this is the most serious episode of clustered human rights violations since the end of the dictatorship.[13] This being so, it is particularly disappointing to see the persistence or resurgence of the same institutional weaknesses, omissions and attitudes that continue to impede justice for dictatorship-era crimes.

Structural weaknesses in the justice system that negatively affect current investigation of all state violence, both pre- and post-1990, were already plain to see even before the protests. This despite the fact that, as we have previously highlighted, the investigation of dictatorship-era crimes has produced a certain amount of positive learning in auxiliary justice system entities, albeit usually triggered by commitment and leadership on the part of exceptional individuals. Some investigative magistrates assigned to human rights cases have also taken it upon themselves to, for example, adopt the international Istanbul

13 The issue of whether the violations were generalised and/or widespread affects whether they fall under the terms of Law 20.357, on crimes against humanity (in force since 18 July 2019). The issue caused public controversy during the first few weeks of the protests, after Sergio Micco, Director of the National Human Rights Institute, INDH, made an ambiguous public statement and various criminal complaints invoking the statute were lodged against president Sebastián Piñera and other authorities. In legal terms the discussion turned on whether it is sufficient, for the purposes of triggering Law 20.357, to find that there was a generalized attack against the civilian population (in this case, the protesters), amounting to a discernible policy on the part of the public security forces, tolerated or with the passive consent of the government. This is the thesis that was put forward by jurist Juan Pablo Mañalich. Antonio Bascuñán, on the other hand, argued that for the figure of crimes against humanity as set down in Law 20.357 to be applicable, there would also need to be a finding that government inaction was deliberate. See Juan Pablo Mañalich, "Crímenes de lesa humanidad y responsabilidad del superior bajo la ley chilena y el Estatuto de Roma", CIPER Académico, 5 December 2019; Antonio Bascuñán, "Crímenes de lesa humanidad", CIPER Académico, 2 December 2019. See also the report of the international judge and legal expert Kai Ambos, "Informe jurídico sobre la cuestión de la existencia del elemento de contexto de Crímenes contra la Humanidad con respecto a los eventos en Chile entre el 17 y el 28 de octubre de 2019 (…)", 18 November 2019.

Protocol standard for investigating torture, or broaden investigation of disappearances to take account of multiple aspects of the complex crime of enforced disappearance.[14] Notwithstanding these welcome improvements, exceptional individual efforts cannot fully compensate for structural deficiencies which require resource investment or other institutional-level solutions. These deficiencies include the notorious backlog of reports pending before the state forensic service, Servicio Médico Legal, SML. The backlog, caused by a chronic shortage of specialised staff, had produced waiting times of up to six months even before the irruption of the protests (see last year's version of this chapter).[15] The specialised Human Rights Brigade of the Detective Police, Policía de Investigaciones, PDI, is similarly overstretched. The Brigade, created in the 1990s to investigate dictatorship-era crimes, was subsequently pressed into service to also work on contemporaneous episodes involving violence by state agents. However, it does not operate directly outside the nation's capital. Chile's dictatorship-era crimes are moreover investigated under the old, inquisitorial, criminal justice system, which limits the opportunities for transmission of learning and expertise from those cases to newer ones, whatever the institution.

All of this means that many or most justice system operators completely lack the specialist knowledge and experience needed for a moment such as this one. There appears to be generalised ignorance even over such basic matters as the correct classification, and criminal charge(s) applicable to, actions constitutive of mistreatment, and/or the delineation between torture and other more minor crimes. This suggests grave deficiencies across state institutions in the transmission of institutional learning and the implementation of human rights training and awareness, both of which should be a priority for any post-authoritarian society. While it is true that the investigation of crimes constitutive of repression and/or of human rights violations is challenging, Chile has sadly had a wealth of opportunities for learning in this field. The slow progress even of cases or denunciations that the public prosecutor's office has itself seen fit to categorise under the labels of torture, ill-treatment, crimes against humanity, and even 'genocide' is extremely worrying.[16]

Clear duties obtain on states to prevent such crimes, and where

14 See previous years' versions of this report, and see Cath Collins, 2019 'Transitional Justice from Within: Police, Forensic and Legal Actors Searching for Chile's Disappeared', Journal of Human Rights Practice 10 (1): 19-39 .

15 Available in English from http://www.derechoshumanos.udp.cl/derechoshumanos/index.php/observatorio/Observatorio-de-Justicia-Transicional/Publicaciones/Informes-Anuales/

16 For source and up to date statistics see www.fiscaliadechile.cl

prevention has failed, to investigate them, resolve them, and apply due sanctions. The passage of time increases the probability of incurring international responsibility for a failure to comply with the relevant duties. It is accordingly disappointing that the government has not to date acted to increase the justice system's investigative capacity in response to protest-related cases. Nor does it appear to have taken any policy action that might suggest transitional justice-related learning over, for example, the need to ensure dignified and reparatory treatment for survivors. By way of example, the effects of the current pandemic have included suspension of application of the Istanbul Protocol for investigation of allegations of torture, thus compromising the physical and psychological wellbeing of complainants. State responses need to be both better and swifter if the promise of non-repetition is to be kept. This promise, an integral part of states' transitional justice duties, received special mention in recent high-level interactions between Chile and the universal human rights system to which it is a party.[17]

1.2 Enforced Disappearance

1.2.1 The Right to Truth and Chile's Disappeared

The right to truth in contexts of human rights violation has been developed by the Inter-American human rights system, IAHRS, and by the special procedures of the universal UN system, despite not being explicitly codified in the founding texts of these systems (ie the American Convention on Human Rights, and the International Covenant on Civil and Political Rights). The case of the IAHRS is particularly interesting: the Inter-American Court, IACtHR, has declared that the violation of this right by a state incurs international responsibility, based on a dynamic or evolving interpretation of a series of dispositions contained in the American Convention, beginning with the first substantive Court ruling in a case of contentious jurisdiction linked to enforced disappearance.[18]

The particular expression of the right to truth that arises in cases of enforced disappearance comes about, according to the Court, due to the need that the victim's loved ones have to know the circumstances that surrounded their disappearance.[19] This implies, of course, determining the methods employed, individual identification of those involved, and discovery of the fate and whereabouts of the person who was forcibly disappeared. The normative development of this right

17 Inter alia, Chile's Universal Periodic Review before the UN Human Rights Committee in January 2019, and the Thematic Report presented in August 2018 before the UN Committee Against Torture, CAT (see section 1.1.1 of last year's report).

18 IACtHR, Velásquez Rodríguez vs. Honduras, sentence of 29 July1988.

19 IACtHR, Myrna Mack Chang vs. Guatemala, para. 273.

has allowed the IAHRS to maintain that States where enforced disappearances occurred have obligations which include: provision of an effective remedy; guarantee of protection, family life, and due process; carrying out of an effective investigation; and allowing those affected to be heard by a competent, independent and impartial tribunal, to obtain reparation, to be free from torture and other mistreatment, and to seek and receive information.[20] Lastly, this right has a collective dimension: it is in the interests of society for the truth to be made known, as a measure of reparation.[21]

The present state response in Chile to the situation of the approximately 1,200 people known to have been forcibly disappeared during the dictatorship is far from satisfactory, when measured against the criteria that international human rights law sets down regarding the right to truth. Even when Chile's courts give special attention to investigating cases for summary execution and enforced disappearance, the search for the location of the disappeared, and the collective dimension of the right to truth, remain subject to the outcome of judicial investigations. We must moreover factor in persistent attempts to avoid or cut short the serving of sentences imposed on perpetrators, via the concession of non-custodial sentences and/or using presidential pardons. Co-operation by perpetrators with justice or search has also been virtually non-existent, something which also militates against the right to seek information. If criminal investigation is to continue to be treated as a de facto substitute for conscious state action to satisfy the right to truth, it will be extremely difficult for Chile to comply with its obligations in this area. Courts, and the criminal process, operate according to a different logic, one that can moreover be inimical to the taking of the necessary steps. As an example, although the criminal process does contemplate certain minor incentives for a suspect to collaborate in clearing up the crime for which he or she is being investigated, once a person has been charged, they also have the fundamental right not to provide information. Nor has the collective co-operation of the state institutions or agencies directly responsible for the commission

20 Report of the UN Office of the High Commissioner on Human Rights, Study on the Right to Truth, 2009, para. 42.

21 IACtHR, Myrna Mack Chang vs. Guatemala, para. 274. For a detailed study of the development of the right to truth in international law see Antonia Urrejola and Tomás Pascual, "La incorporación del derecho a la verdad en el Sistema Interamericano de Derechos Humanos como derecho autónomo a partir de la desaparición forzada de personas", in Juana María Ibáñez Rivas et. al. (eds.), Desaparición forzada en el Sistema Interamericano de derechos Humanos: balance, impacto y desafíos, México, Instituto de Estudios Constitucionales del Estado de Querétaro and Instituto Interamericano de Derechos Humanos, 2020.

of disappearances been obtained, whether by persuasion or by obligation. [22]

Chile has to date chosen not to follow the example of other Latin American states, which have created dedicated state programmes to search for, recover and identify forcibly disappeared persons. Programme refers here to a suitably resourced official structure, capable of requiring action and information from other state bodies which have, or ought to produce, relevant information. Although Chile's state coroners' and forensic service (SML, after its Spanish acronym) has, like the judicial branch, recently made interesting and praiseworthy efforts to create and sustain channels of inter-agency co-ordination, these efforts can only bring together agencies who act as auxiliaries to criminal investigation. The justice system clearly cannot, and should not be expected to, address the issue with all of the required systematicity and interdisciplinarity, and it does not have the necessary power over military archives. Moreover, and for sometimes legitimate reasons, efforts that are co-ordinated from within the judicial branch have not always been able or willing to admit the type, level and depth of participation that according to international standards should be afforded to relatives or others directly affected by disappearance. This means that the burden of advances toward finding the more than 1,000 recognised victims who are still disappeared continues to fall disproportionately on relatives. Otherwise, finds happen mainly or only via chance, or as a result of a (rare) crisis of conscience on the part of a perpetrator.

It has been suggested that an initiative in late 2020 may finally move toward production of a single, accumulated, definitive state list of individuals today recognised by Chile as victims of dictatorship-era disappearance. This long overdue measure, should it happen, can and ought to serve as a springboard for deliberate measures aimed at creating a cultural shift whereby search and recovery of the disappeared is taken on board by society as a collective problem, as has largely occurred in Argentina. It is essential to create a shared awareness of the threat that is presented to all members of any society, when state structures are allowed to deny first the legal and then the physical existence of any individual or group of individuals within it. Only when this collective danger is recognised can we really speak of the existence of

22 See previous versions of this annual report, and other Observatorio publications, on the inability of the Mesa de Diálogo, or any other measure proposed in the subsequent two decades, to break through the code of secrecy surrounding the Armed Forces about removal and secret reburial of remains, propaganda operations, and the destruction of information, all carried out to prevent the truth coming to light. For evidence that this dissimulation continued into the post-dictatorship period see section 2.2, below, detailing the bringing of charges against high-ranking Army officials over the deliberate incineration of archives containing relevant information – an act which moreover took place during the period when the Mesa was in session.

the personal, social and institutional cultural predispositions that help assure guarantees of non-repetition.

1.2.2 Developments in search, identification and restitution of victims of enforced disappearance[23]

Over the main chronological period covered by this report (July 2019-June 2020 inclusive), the remains of at least four victims of enforced disappearance were returned to their families, allowing relatives to carry out appropriate funeral rites. In mid-July 2019, partial remains belonging to Abelardo de Jesús Quinteros Miranda were identified. Abelardo, better known as "Jecho", was a Youth Communist League activist from the La Legua district of Santiago. Abelardo and two other young men, Celedonio Sepúlveda and Raúl San Martín, were illegally detained by police detectives on 6 October 1973. Abelardo's brother, Eduardo, was killed during the same incident, and was later acknowledged by the state to have been a victim of extrajudicial execution. Abelardo, Eduardo, Celedonio and Raúl had volunteered to accompany Samuel Riquelme, who had been deputy detective police commander before the coup. Riquelme, who was being hunted by the de facto post-coup regime, was heading to the Argentine Embassy to seek refuge when the group was intercepted. A wake was held for Abelardo on 20 July 2019 at a community centre in La Legua. Celedonio, whose remains were also recently identified, was buried with due ceremony in late November 2019 at the Memorial to victims of enforced disappearance and extrajudicial execution in Santiago's General Cemetery. A funeral was held in August 2019 for Arturo Villegas Villagrán, a union leader and Socialist Party activist, forcibly disappeared from the town of Penco in the Bío Bío region by uniformed police a week after the 1973 coup. His remains were found unexpectedly in a grave belonging to Mario Ávila, also a trade union leader, extrajudicially executed in Penco. Nelson Villegas, Arturo's nephew, told the press that the ceremony had allowed them to finally attain some closure and move on with their lives, after years of suffering. In early September 2019, Communist party parliamentarian and human rights lawyer Carmen Hertz received more fragmentary remains belonging to her husband Carlos Berger, extrajudicially executed by the Caravana de la Muerte in 1973 and later disappeared.

In December 2019, Argentine forensic anthropology team the Equipo Argentino de Antropología Forense, EAAF, identified, in Argentina, the remains of Jorge Sagauter Herrera, forcibly disappeared in Argentina in 1977 as part of the clandestine Plan Condor network of repression. Jorge, a Chilean former marine and ex-aerospace engineer,

23 For cumulative historical data on the same subject see section 3.4 below.

had gone into exile with his family in Argentina after the coup. His remains were exhumed at some point between 2004 and 2010 from an anonymous grave on the outskirts of Buenos Aires, and were identified in 2019 on the basis of comparison with samples provided by his children. Jorge's case brings the total number of Chilean nationals whose remains have been found and identified in Argentina by the EAAF to nine. Two more Chilean nationals had their birth identities restored to them as adults in Argentina, decades after having been victims of the practice of child abduction.[24] Of this total of eleven people, six are currently recognised by the Chilean state as victims of enforced disappearance, while the remaining five are recognised as victims only in Argentina.

Field activities such as search and exhumation normally carried out by Chile's state coroner's and forensic service (in Spanish, SML) were severely affected in 2020 by the pandemic. The SML's Human Rights Unit's third periodic public report mentions only 15 operations in the field between January and September 2020, compared to 51 in the equivalent time period for 2019.[25] The report nonetheless details ongoing and renewed efforts in laboratory work and the production of expert reports used by the courts to officially identify victims, corroborate or establish cause of death, etc. Between January and September 2020 a total of 61 such reports were supplied at court request. The Unit also continues to co-ordinate the sending of samples of DNA and other genetic material to international laboratories for analysis, and to the International Committee of the Red Cross, ICRC, for safekeeping. The SML is also continuing its efforts to achieve the full international technical accreditation that would enable it to carry out these analyses in situ: in September 2020, an external audit that forms a necessary part of the accreditation process was commissioned.

The samples sent for storage and analysis include what are known as 'reference samples': blood, bone or dental samples provided voluntarily by relatives of victims of enforced disappearance or extrajudicial execution. These play a vital role in the identification, by comparison, of samples recovered from human remains found in circumstances that suggest they may belong to victims of dictatorship-era repressive violence. The Service aims to gather a minimum of three such reference

24 Enforced disappearance of infants or new-born babies belonging to adult victims of disappearance or political imprisonment, followed by the imposition of a false identity on the child, who was often brought up by those responsible for the abduction and disappearance of the child's biological family. The practice is particularly identified with the Argentinian dictatorship of 1976-1983, although it also took place in other countries including Guatemala and El Salvador. Translator's note.

25 Unidad de Derechos Humanos del Servicio Médico Legal, Informe de Gestión N° 3, "Situación en Materia de Derechos Humanos y Políticas Públicas en el Servicio Médico Legal", July -Sep 2020.

samples for each person currently on the register of acknowledged victims, to facilitate future identification and/or corroboration of existing identification. Reference samples are missing or incomplete for 205 of the total of just over 3,200 presently acknowledged absent victims of dictatorship-era violations: in mid-2020 the SML initiated a joint programme with the Human Rights Unit (Unidad Programa de DDHH) of the Ministry of Justice and Human Rights, aimed at tracing and making contact with family members of those individuals.

2. TRUTH

A whole host of measures, actions, discussions, claims and counterclaims that arise in the courts, media, and in public and cultural life in general potentially contribute to the establishment and dissemination of the truth about the dictatorship's crimes. These actions and events do not, however, automatically 'count' toward satisfaction of the right to truth, in the terms understood by transitional justice. For this to occur, such actions must contribute, in good faith, to the delineation of accepted and established facts, verifiable narratives, and versions of events that have a high level of plausibility. These must moreover be unequivocally and consistently acknowledged and underwritten by public authorities, avoiding both the appearance and the reality of contradictions, gaps, or double standards hiding behind a poorly-conceived notion of 'neutrality'. Transitional justice duties incumbent on states include actively promoting the triumph of truth, over previous official falsehoods as well as over present-day uncertainties, uncomfortable silences, and outbreaks of denialism.

As far as timelines are concerned, it is on balance positive that the courts today offer at least one route by which relatives and survivors – including those who were spuriously 'convicted' of criminal offences – can attempt to establish the truth. However, the inexorable passage of time means that a growing number of criminal cases are falling victim to 'biological impunity', whereby some or even all of those accused or charged die before the investigation reaches a final conclusion. If there is no civil claim appended, this leads to the definitive suspension (*sobreseimento defintivo)* of the case, meaning that the production of 'judicial truths' to complement or complete historical truth is incomplete. Moreover, repeated examples of obstruction, delay or resistance by state entities faced with requests made under access to information legislation suggest active attempts at obfuscation. At the very least, they signal a lack of understanding of the co-responsibility of all sectors, areas and branches of state to produce and actively disseminate the truth about past atrocity crimes. Also, as we will see below, the

position of the state legal agency the Consejo de Defensa del Estado, CDE, with regard to the lists produced by Chile's two official truth commissions betrays an at best inconsistent attitude toward truths supposedly previously established through official administrative channels.

2.1 The Courts as a Source of Rectification of Spurious Past Headlines and Criminal Records

In September 2019 the Supreme Court confirmed a petition ordering national newspaper *La Tercera* to publish an official retraction of its 1973 publication of a piece of regime propaganda. The entirely false news item was an attempt to cover up the extrajudicial execution of three people in a public street, by attributing criminal behaviour to the victims. A similar petition, lodged against newspaper *La Segunda* over its lack of response to another such request, was however rejected at Appeals Court level in August 2020 (see section 2.4 below). Over the course of the twelve-month period covered by this report, the Supreme Court annulled numerous spurious verdicts emitted by dictatorship-era Courts Martial (see section 3.2.3 for details). These Courts Martial operated as another source of coverups. They drew on 'confessions' forced under torture, or simply fabricated, to impose spurious criminal convictions giving a veneer of supposed legality to the political persecution, political imprisonment, internal relegation and/or exile of thousands of opponents of the regime.

A steady stream of requests for annulment of these spurious convictions has been brought before the Supreme Court by survivors or relatives, ever since the Inter-American Court of Human Rights verdict of 2 September 2015 in the case *Omar Humberto Maldonado Vargas and others v. Republic of Chile*. The verdict found Chile in breach of its duties under the American Convention on Human Rights (Pact of San José) in both the original violation of the right to physical and psychological integrity, and the lack of subsequent provision of a timely, effective mechanism for remedy. The sentence ordered Chile to establish such a mechanism not only for the casebringers but for all persons in a similar situation. The Supreme Court later determined that a motion for protection (*recurso de protección*) was the most appropriate mechanism, giving rise to the ongoing stream of requests, at least 15 of which were granted in the twelve-month period between July 2019 and June 2020.

A representative sample of the reasoning typically offered by the Supreme Court in granting the petitions is reproduced below. In terms of the resulting contribution to state transitional justice duties, the cumulative effect of the granting of these petitions is undoubtedly positive, insofar as they represent a rectification by the State of

its previous spurious criminalisation of victims, now acknowledging them correctly as victims of crimes against humanity. It is also positive that the same branch of state that previously produced the spurious convictions, is the one that is today dismantling past judicial lies. On the other hand, as we have remarked in previous editions of this report, the principles of reparation suggest that the state should take proactive responsibility for collective rectification, rather than leaving it to individual survivors or relatives to take the initiative. Both from this point of view, and in any hard-headed assessment of the need to make the most of scarce court time and resources, it would be preferable to establish an administrative or legislative mechanism for rectifying the entire corpus of spurious convictions 'at one go'. It should also be possible for some entity within the human rights infrastructure that the Chilean state today possesses to take on the task of definitively reviewing the outcomes of dictatorship-era Courts Martial, allowing the production of a register of cases and persons to whom the State owes a debt in this area of symbolic reparation. Once again here we see an example of the absence of adequate provision for the rights of survivors. They, like victims of disappearance and extrajudicial execution, may well find themselves still subject to, and affected by, shameful legal fictions that were created decades ago by authoritarian structures of dubious legality and have simply never been dismantled.

The 15 petitions that the Observatorio is aware of as having been granted by the Supreme Court between July 2019 and June 2020 include seven relating to the region of Ñuble, and three connected to the former Pisagua concentration camp. The remaining five correspond variously to the cities of Santiago, Concepción, Valdivia and La Serena. For a sample of the judicial reasoning applied in the majority of the cases, we cite here a case from Pisagua, in which the panel of judges reached a unanimous verdict

> "The evidence demonstrates the existence of a method, pattern or general system of physical and mental degradation, and affronts to dignity, to which those brought before Courts Martial were subjected. These [crimes] were committed by their interrogators, jailors or others who formed part of the process during which those charged were kept detained for the purposes of obtaining an admission or confession […] and to induce them to implicate or incriminate other detainees" … "the participation of the [present plaintiffs in supposed past criminal acts] is constructed solely on the basis of their confessions, which can no longer be relied upon … Therefore … there is no remaining evidentiary basis which would permit the Court Martial to arrive at a conviction conducive to a finding of guilt in the case at hand. Accordingly, the

> circumstances that have now been brought to light allow the innocence of those previously convicted to be clearly established. In these circumstances, the interests of justice which are invoked in the petition require that this be granted, such that the entirety of the questioned [past] case is hereby annulled".[26]

On 11 May 2020, the Santiago Appeals Court also awarded civil damages in the original case that gave rise to the current wave of applications for rectification. The sentence orders the state to make payments to 50 people unjustly convicted by a 1974 Air Force Court Martial.[27] The verdict acknowledges the moral harm caused by the long-term consequences as well as immediate impact of torture, spurious convictions, and other crimes perpetrated against the aviators (who were singled out for having refused to join the military coup, staying loyal to the previous constitutional order). The verdict makes mention of the fact that in this case, as distinct from others analysed in this chapter, the legal representative appearing on behalf of the State did not dare to question the veracity of the underlying facts – doubtless since these had already been fully recognised and endorsed by the Inter-American Court of Human Rights as well as by the domestic criminal justice system. Nor did the state challenge the description of the facts as constitutive of grave human rights violations, as it has in many other civil cases. It did, however, request that the amount of damages to be awarded be reduced, as well as (unsuccessfully) attempting to insist that the subgroup of plaintiffs who had also been involved in a related Inter-American Court case should have their damages awards reduced or annulled altogether.[28] The verdict rejected this argument, remarking that the Inter-American Court-awarded damages were specifically for due process violations, distinct from the harms in respect of which the claim at issue had been made and adjudicated.

26 Supreme Court, Rol 29.937-2019, 6 January 2020, our translation here and throughout. The original texts of verdicts quoted here can be found in the original, Spanish-language edition of this report and in full via the Chilean judicial branch website at www.pjud.cl .

27 Santiago Appeals Court, Rol 13.962-2018, 11 May 2020.

28 The contention was that monies already received – in this instance, due to the Inter-American Court verdict – satisfied the claim. This amounted to an attempt to invoke the principle of claim preclusion. A version of the same argument is also frequently attempted where the civil claimants (relatives or survivors) have previously made use not of the courts, but of domestic administrative reparations entitlements. To date, the higher courts have generally rejected the alleged equivalence, as they did here. (Note for readers from common-law systems: civil law systems such as the Chilean, generally contain a much narrower conception of claim preclusion than is found in the common law. Translator's note).

2.2.1 The Courts as an Antidote to Continuing Armed Forces Secrecy

Two incidents that took place during the main time period covered by the present report (July 2019-June 2020) offer examples of continuing obstruction and secrecy within the Armed Forces, whether over historical offences or present-day crimes committed by their members. The incidents also once again highlight the negative role played by the CDE, the legal entity that represents state interests before the courts, including in the civil claims discussed in the previous section. The CDE is seen here actively combating efforts to have the state of which it forms part, comply more fully with its international obligations over truth, justice, reparations and guarantees of non-repetition. In both of the incidents here described, the Supreme Court was forced to intervene in cases that had already been resolved by the state Council for Transparency (Consejo para la Transparencia, CPLT). In both, the CPLT's actions and decisions were upheld. The first incident dates back to 2015, when two soldiers in active service vandalised the memorial to victims of enforced disappearance located in the northern city of Iquique. The CPLT had ordered the Army to hand over information identifying the two and specifying what internal disciplinary measures, if any, had been taken over the incident. The Army refused to comply, and brought the matter before the Court. In a divided verdict, the Constitutional Bench of the Supreme Court rejected the CDE's uncompromising effort to defend the anonymity of the guilty parties. According to the verdict: "the Chilean Army may oppose the handover of the information that is requested [only] insofar as it appears in protection of institutional interests, which must in turn be related to one of the issues heretofore specified [national security or public security], a condition which is not met in this case". [29]

The second occurrence concerns a Supreme Court verdict in mid-December 2019, confirming that part of a request for access to minutes from historical meetings of the (now-defunct) National Security Council (Consejo de Seguridad Nacional, COSENA) must be met.[30] The request was made under the access to information law. The issue was taken to the Supreme Court by the Armed Forces Joint Command (Estado Mayor Conjunto del Ejército), in defiance of both the initial request and a subsequent order from the CPLT. The reasons offered by the institution provide yet more evidence of the culture of secrecy and self-governance that still pervades the armed forces and security services, who continue to appear to regard themselves as unaccountable: in their submission, the Joint Command alleged that "COSENA is not part of the state administration, and the CPLT therefore has no jurisdiction whatsoever over it".

29 Supreme Court, Rol 4.242-2019, 22 August 2019.
30 Supreme Court Rol 19.163-2019, 16 December 2019.

A third disturbing incident within the time frame of this year's report has to do with yet another crime committed after the end of the dictatorship by military personnel – this time, by high-ranking officials. The timing of the incident moreover calls into serious question the sincerity of the institution's participation in the 2000-01 Roundtable (Mesa de Diálogo) that was supposed to bring to light information about the whereabouts of the disappeared. On 7 February 2020, judge Mario Carroza preferred charges against three former Army officers for the removal and destruction, between 2000 and 2001, of microfilmed archives previously belonging to the now-defunct dictatorship-era intelligence service the CNI (Central Nacional de Informaciones).[31] The incident gives the lie yet again to military denials about the existence of archives containing potentially compromising information about the dictatorship-era actions of repressive agencies. The bringing of charges also represents one of the few instances in which crimes directed toward withholding of the truth have been directly and actively prosecuted. Given that the Armed Forces repeatedly declares itself willing to finally fully co-operate with investigations into dictatorship-era violations, it is both revealing and disconcerting that this particular crime took place in the precincts of the Army Intelligence School, and was committed by high-ranking officers who claim to have acted with the full knowledge and acquiescence of their superiors. According to the charge sheet, the investigation to date has revealed that: "the [former] CNI archives were taken to the Army Intelligence School (Escuela de Inteligencia del Ejército) … where they were incinerated without following the correct documentation procedures, an irregular act of which the then-commander of the Armed Forces Joint Command, Carlos Patricio Chacón Guerrero, had apparently been duly notified". Chacón is one of the three former officers against whom charges were brought. It is particularly surprising that these crimes of coverup and the destruction of possible evidence took place during the exact same time period in which the Roundtable was operating. The coincidence suggests at best incompetence, and at worst, cynicism on the part of the Army, as during the Roundtable, representatives of the armed forces promised to operate in good faith as a channel for possible information about the whereabouts of still-unlocated victims of enforced disappearance. They also restated the official line that the institution per se did not possess any relevant data or documentation.

31 Judge Carroza, Rol 1.775-2017, 7 February 2020.

2.2.2 The Courts as a Partial Antidote to Secrecy about the Prison Population: Punta Peuco and the Right to Anonymity

On 26 February the Constitutional Bench of the Supreme Court approved the release of information about the ages of perpetrators currently imprisoned in the Punta Peuco facility, including the cases in which they had been sentenced, but ordered that their names be kept reserved.[32] The issue dates back to 2018, when Erika Hennings, director of the memory site Londres 38, requested an official list of the prison population of Punta Peuco, to include detail of the cases in which each had been sentenced, their ages, and any post-sentencing benefits that they had received. This information is essential for independent monitoring of the effective serving of the sentences handed down by the courts, making it an important part of the transparency necessary to create and maintain confidence in the justice process. The availability of this data is particularly important given controversies that have arisen in the past over the secret concession of benefits, including parole and release on licence, to perpetrators of crimes against humanity. The Observatorio has made numerous similar requests to a range of state agencies, most of which have been routinely denied. It must be emphasised that the criminal justice process is not a private transaction, but should be understood as the imposition of sanctions in the name of the entire community, for conduct that has been declared socially unacceptable and criminalised under the applicable laws.

In that spirit the CPLT supported the petition, with an order in March 2019 for the prison service (Gendarmería) to supplying data withheld in an initial release (the censored data included names, ages and case reference codes).[33] Gendarmería opposed the order, on grounds including the argument that prisoners had been asked their opinion and did not want the information to be released. The Santiago Appeals Court rejected that argument in September 2019. In the present, definitive, ruling of February 2020 (Rol 26.276-2019) judges Sergio Muñoz, María Eugenia Sandoval, Carlos Aránguiz and Ángela Vivanco, and temporary bench member Diego Munita, lifted the embargo on prisoners' ages and case references, but found partially in favour of Gendarmería. They determined that prisoners' names constituted 'personal data' to be classified as 'moral characteristics' in the terms that render them eligible to be withheld from access to information releases. The sentence justified the order to release ages and case references on the grounds that "without indications of prisoners'

32 Supreme Court Rol 26.276-2019, 26 February 2020.

33 Extraordinary Recourse (Amparo) Decision C4086-18, adopted by the Board of Directors of the Council for Transparency, Consejo para la Transparencia, in its 28 March 2019 session.

names, this information becomes data disassociated from the moral characteristics of identifiable individuals".

From a layperson's perspective the underlying logic is difficult to comprehend, since the provision of case reference codes allows the user to locate the texts of case verdicts, which are by definition public documents. Verdicts contain, as a matter of course, the full names of all those sentenced or absolved in the proceedings. The outcome is disappointing from the perspective of the right to truth as well as the right to justice, given that justice needs both to be done, and to be seen to be done. The issue is moreover extremely dated, as the information in dispute is only valid to July 2018. The ruling does not by any means provide a definitive resolution of the matter of provision of proactive, regular and up to date information about the serving of sentences for crimes against humanity. The Observatorio has argued in numerous previous editions of this report that this is a job for the Human Rights Programme of the Ministry of Justice and Human Rights, which in its previous incarnation (under the Ministry of the Interior) did at one time publish this data.

2.3 Omission, normalisation or 'denialism'? The Coup Commemoration that (Almost) Never Was

The government headed by Sebastián Piñera had initially intended not to hold any of the usual official events to commemorate the 46th anniversary of the coup, in September 2019. Then-Minister of the Interior Andrés Chadwick announced that 11 September would be a "[working] day like any other", breaking with a three-decades-long tradition. The announcement was met with a chorus of criticism from opposition parties, who accused the administration of 'denialism'. The criticism forced a change of plans, culminating in a press conference at which president Piñera read a short statement, without taking questions. The curt tone was a world away from the one he had adopted on the occasion of the fortieth anniversary of the coup, which fell during his first presidency. On that occasion (in 2013), the President roundly condemned the violations of the past, criticising, for good measure, the "passive accomplices" of the dictatorship.[34] In his 2019 statement, by contrast, he used the neutral term "military regime"; insisted that Chilean democracy was already sick ("*enferma*") before the coup, and restricted himself to calling on Chileans to reflect on the "causes and consequences of the 11 September [1973]", and leave behind the errors of the past.

34 An allusion widely understood as referring to business interests and other private actors close to Piñera's own right-wing political coalition. Translator's note.

Senator Isabel Allende, daughter of deposed president Salvador Allende (1970-73), declared the attitude of the presidency to be "in a sense, a manifestation of denialism". According to Socialist Party president Álvaro Elizalde, the government "doesn't want (…) to recognise what we all know: a significant proportion of its support base is made up of people who supported the coup and the dictatorship; people who even President Piñera at one time denounced as passive accomplices of [the regime's] systematic human rights violations".[35] Meanwhile, a noticeable feature of 2019's multiple grassroots coup commemorations was the appearance of the collective "Historias Disobedientes" ('Disobedient Histories'), the Chilean chapter of a group which also exists in Argentina. The movement is made up of daughters, sons and other relatives of perpetrators, who repudiate their family member's crimes and support the cause of truth and justice.[36]

2.4 The Media and the Publication of Falsehoods

A disturbing tradition that has arisen in recent years is for right wing groups to take out full page paid adverts in the conservative broadsheet *El Mercurio* each 11 September. The adverts present false and distorted versions of the past, in keeping with the newspaper's chequered history as the principal media supporter of the dictatorship. In 2019, the paid insert carried the title "On 11/9/1973 Chile was saved from becoming what Venezuela is today". It contained numerous falsehoods and calumnies, amongst them the repeated use of the epithet 'dictator' to refer, not to Pinochet but to his constitutionally elected, and violently deposed, predecessor Salvador Allende (1970-73). A group of the newspaper's employees rejected the insert in their own subsequent public and social media declarations. Days later, the Association of Relatives of the Disappeared published a reply and refutation in the same paper. [37]

In last year's edition of this report we described how the *La Tercera* national newspaper had been ordered to rectify a false news item, published in 1973, which covered up the extrajudicial execution of three people by falsely describing them as the authors of a fictitious armed assault. A recent criminal investigation into the incident, also mentioned above, determined that the three had been victims of a crime against humanity. *La Tercera* nonetheless failed to respond to a request

35 Emol.cl: "PS y PPD critican ausencia de actos en La Moneda por el 11 de septiembre: 'No es un día normal'", 11 September 2019.

36 www.historiasdesobedienteschile.org . The group describes itself as "the Chilean arm of the Argentine movement with the same name".

37 Observatorio de Justicia Transicional, Bulletin 55, September and October 2019.

from relatives of two of the three victims (Jorge Oyarzún Escobar and Juan Escobar Camus), for the paper to publish a retraction. The families went to the courts and obtained an order, granted in April 2019 and confirmed on 24 September 2019 by the Constitutional Bench of the Supreme Court, presided over by judge Sergio Muñoz. Citing the dispositions laid down in Art. 19, subsection 12 of the Constitution, the Supreme Court ordered the paper to rectify what it described as an "unjust" and "offensive" news item.[38]

Over the course of 2020 the Bench was called on to rule on a similar issue, this time in relation to what was perhaps the most repugnant headline of the entire dictatorship period. In it, the newspaper *La Segunda* openly celebrated, in 1975, the deaths of 59 activists of the Left-Wing Revolutionary Movement (Movimiento de Izquierda Revolucionaria, MIR). The headline attempted to disguise what was in reality 'Operación Colombo', a clandestine repressive operation to exterminate and disappear regime opponents, as an internecine confrontation in which left-wing activists had supposedly confronted and killed one another in (non-existent) guerrilla training camps over the border in Argentina. The decision to publish this headline was one of the episodes included in the allegations that led to a 2013 criminal investigation against Agustín Edwards, then-proprietor of *El Mercurio* and of the holding that controls *La Segunda.* Edwards, an enthusiastic promoter of the coup and supporter of the dictatorship, has since died, without charges being brought (though he was expelled from the national Journalists' Association, on the grounds that these actions constituted violations of the profession's code of ethics). In October 2019 Viviana Uribe, sister of Bárbara Uribe (one of the victims of the Colombo coverup) wrote formally to the paper asking for a retraction. In partial response, the paper published an item in its middle pages. Since the request had however been for a retraction of equal prominence to the original front page headline, Viviana decided to appeal to the Court. The appeal was seen by the Sixth Bench of the Santiago Appeals Court on 10 August 2020. Although one of the three judges voted in favour of the request, the majority took the view that the retraction as published should be judged sufficient.[39]

In the 2019 iteration of this report we stated that the cultural dimension of guarantees of non-repetition, like all the other dimensions of transitional justice, requires powerful social actors of all types (state and non) to adopt a responsible stance including a minimum

38 Supreme Court Rol 11.044-2019, 24 September 2019.

39 Santiago Court of Appeal, Recourse of Protection (Protección) Rol 183.699-2019. This decision was ratified by the Supreme Court on 9 October 2020 (Supreme Court Rol 112/391-2020).

commitment to veracity. Chile's media still fall short of that standard, as can be seen in the examples already given above. Additionally, on 29 November 2019, Hermógenes Pérez de Arce was an invited guest on the Channel 13 TV chat programme "Bienvenidos". Pérez de Arce is a notorious defender of Pinochet and supporter of the dictatorship and its crimes. On the programme, he repeatedly insisted that there had been no systematic violation of human rights during the dictatorship. The programme's anchor, Tonka Tomicic, took the apparently spontaneous decision to expel Pérez de Arce from the panel, with the comment that "we cannot allow history to be denied". In the 2019 version of this report chapter we commented on and called into question the apparently deliberate trend for creating such situations on TV. Pérez de Arce's entirely unacceptable 'post-truth' position on this issue is a matter of public record. If television and production companies genuinely wished to deny airtime to post-truth denialist views, they could therefore simply abstain from inviting him to appear. It is difficult to reach any conclusion other than that the companies deliberately create these episodes in search of ratings.

2.5 Cultural production by and about women survivors, resisters and protagonists

A host of cultural products, actions and artefacts that appeared during the period covered by this report offered a positive contribution to historical memory. Here we make mention of three that celebrate the experiences and central role of women in resistance to the dictatorship.

On 9 July 2019, the foundation 'Institute for Women' (Instituto de la Mujer) launched the book 'Women in the Changing Rooms: Memories of Women Prisoners in the National Stadium' (*Camarines de Mujeres: memorias de prisioneras políticas del Estadio Nacional*), in which seven women narrate their lived experiences as detainees in the concentration camp that was created in the National Stadium in the first weeks after the 1973 coup.[40] The seven were, at the time, a mixture of workers, students, activists and housewives of a range of ages and social classes. On 13 August 2019 a book launch was held for 'Social Workers of the Vicaria de la Solidaridad' (*Las asistentes sociales de la Vicaría de la Solidaridad*) by historian María Soledad del Villar Tagle. The volume recalls how the all-female social work team of the Vicaría became perhaps the most visible face of the Catholic Church's efforts to offer a response to dictatorship-era repression. This account serves as a necessary complement and corrective to previous accounts

40 The book can be downloaded free of charge (in Spanish) at: www.insmujer.cl

focused on the Vicaría's clerical leadership or on its legal team where, despite the presence of emblematic human rights lawyers such as Carmen Hertz and Rosemarie Bornand, formal leadership was mostly kept in the hands of men.

Finally, the world premiere of the film 'Haydee and the Flying Fish' was held on 20 August 2019, during the SanFic 2019 documentary film festival. The film, distributed on general release from mid-2020, tells the story of Haydée Oberreuter, a former political prisoner, and her ongoing struggle to obtain truth and justice for herself and others after she lost the child she was expecting at the hands of Navy officers who tortured her. Haydee was four months pregnant when she was illegally detained, together with her mother and one-and-a-half-year-old daughter, after the coup. The former student leader, whose mother and grandmother had both been union leaders, continues her activism today, as a member of a national umbrella organisation of former political prisoners' groups and as a leader of the Association of Relatives of Deceased former Political Prisoners. The documentary film, directed by Pachi Bustos, was set for wider release in 2019 and early 2020.

3. JUSTICE

3.1 Chile and the Inter-American Human Rights System, IAHRS

3.1.1 Relations between Chile and the IAHRS

In early September 2019 the Chilean foreign ministry hosted a ceremony to commemorate the 60th anniversary of the Inter-American Commission for Human Rights. The IACHR, together with the Court, constitute the principal intergovernmental infrastructure for the promotion and protection of human rights in the region. The holding of the event seems indicative of a change of position on the part of the government, since last April Chile joined four other right wing administrations from the region in sending a controversial official letter to the Organisation of American States. The missive strongly criticised the IAHRS in general, and the role of the IACHR in particular. The government was represented at the ceremony by Minister of Justice and Human Rights Hernán Larraín, and by subsecretary of Human Rights Lorena Recabarren. The Commission delegation included Chilean commissioner Antonia Urrejola and Paulo Abrão, then-executive secretary of the Commission. The itinerary included a meeting with president Piñera. Toward the middle of 2020 the IACtHR and Inter-American Institute of Human Rights produced some publications highly relevant to Chile's national agenda of unmet transitional justice obligations. In May the Court presented an updated version

of dossier number 15 in its series "Dossiers of Jurisprudence", dealing with transitional justice.[41] The dossiers each compile information on how relevant international standards around a particular theme have been interpreted and applied by the Inter-American Court. In July 2020 the Institute co-published a book on the theme of enforced disappearance and the IAHRS (*Desaparición forzada en el Sistema Interamericano de Derechos Humanos. Balance, impacto y desafíos).*[42]

3.1.2 Controversies, cases and friendly settlements

As in previous editions, we have to report that the majority of adverse IACtHR verdicts against Chile in transitional justice related matters remain pending in at least some elements (ie the state has not yet complied with everything ordered by the Court). The judicial branch has done most to apply and comply with the Court's recommendations or requirements. In the period corresponding to the present report, at least one more case has entered the IAHRS. One friendly settlement was also reached before the Commission (meaning the case will not now pass to the Court for adjudication). Both were in relation to the right to reparations.

The friendly settlement, which was concluded in April 2020, originated in a petition lodged in 2004, and expanded in 2008, by the family of Juan Luis Rivera Matus, forcibly disappeared since 1975. The petition in its expanded form has two elements. The first, over the outcome of the domestic criminal investigation into Juan Luis's disappearance, objected to the concession of sentencing benefits, in 2007, to drastically reduce the sentence tariffs given to the perpetrators. That aspect remains pending before the Commission, under petition number 1275-04 B. The reparations aspect, denominated 1275-04 A, produced a friendly settlement that was signed with the Chilean state in January 2020 and received final Commission approval on 18 May.[43] The agreement includes a clause setting out financial reparations to be paid within six months. This brings to an end the part of the petition that alleged lack of reparation based on the denial, by the Constitutional Bench of the Supreme Court, of a civil claim lodged by the family. The Bench's reasoning at the time was that the statute of limitation on civil actions had expired, a criterion which the court has since set aside. The petitioners alleged in applying this criterion, the state had been in breach of articles 1.1, 4, 5, 7, 8 and 25 of the American

41 Inter-American Court of Human Rights, "Cuadernillo de jurisprudencia de la Corte Interamericana de Derechos Humanos", N°15, Justicia Transicional.

42 The volume can be downloaded free of charge at: https://www.iidh.ed.cr/iidh/media/8508/29-ibanez_desaparicion_forzada.pdf

43 Inter-American Commission on Human Rights, "Informe No. 23/20, Caso 1275-04 A, Informe de Solución Amistosa", OEA/Ser. L/V/II. Doc. 33, 13 April 2020.

Convention on Human Rights (Pact of San José). The reaching of a friendly settlement signals a certain level of acceptance by the state of its error, and prevents the issue from coming before the contentious jurisdiction of the IACtHR. In substance, the agreement takes a similar line to that taken in *Ordenes Guerra and others vs. Chile*,[44] in which the Inter-American Court acknowledged and welcomed the change in criteria that the Chilean Supreme Court had adopted after the date of the events that formed the substance of the two petitions. The reference is to the fact that in late 2014 the Supreme Court decided to transfer any necessary review of such cases to its Criminal, not Constitutional, bench: the Criminal bench having ever since taken the majority view that statutes of limitation are ruled out for civil as well as criminal action over crimes against humanity.

In its April 2020 report on the Ordenes Guerra case, the Inter-American Court called on the authorities to move toward full compliance with the settlement.[45] Unfortunately, all the indications are that any such compliance will be limited to the case at hand, and will not lead to the rectification of similar injustices committed against other families before the change of criteria. This prognosis is made on the basis of the negative outcome of a recent civil case brought by another family (relatives of Francisco Baltazar Godoy Román, forcibly disappeared in Paine in 1973). In 2013, a first attempted civil claim was rejected by the Constitutional Bench of the Supreme Court for reasons similar to those described above. In 2017 the family decided to incorporate a fresh civil claim to a criminal complaint for Francisco's kidnap. The decision draws attention to the relative injustice suffered by those whose entirely justified civil claims were denied before the change of criteria, since everything indicates that the same claims if submitted today would prosper. Notwithstanding, and despite the content of the Ordenes Guerra judgment, the civil aspect of the new case was resolved against the Godoy Román family in November 2019, this time on the grounds that the previous, failed application from 2008 constituted *res iudicata*.[46] The family lodged a petition with the Inter-American Commission on 12 May 2020. If declared admissible, this promises to reinforce both the current position as represented in the friendly agreement, and the precedent set down in the Ordenes Guerra judgment.

From a transitional justice perspective, while the repeated interventions of the IAHRS send welcome signals, and the tendency in higher

44 Inter-American Court of Human Rights, case Órdenes Guerra and Others v. Chile, Judgment on Merits, Reparations and Costs, 29 November 2018.

45 Inter-American Commission on Human Rights, "Informe No. 23/20", op.cit.

46 A version of claim preclusion, as already discussed. Supreme Court Rol. 20.520-2018, 14 November 2019.

courts in recent years has been to accept and apply, at least by majority verdict, a version of the IAHRs's position, it is worrying that so many families and relatives are forced to take the long and tortuous road of submitting a petition. The rights that they are obliged to appeal to the regional system to enforce could and should be guaranteed proactively by the Chilean state, applying legislation, public policy, and administrative or legal solutions to favour all those affected by situations similar to those over which petitions are lodged and judgments handed down.

3.2 Activity in Domestic Courts

Figure 1. Total number of judgments handed down by the Criminal Bench of the Supreme Court between July 2010 and June 2020 in cases for dictatorship-era human rights violations, broken down into ten statistical periods

Time Period	Number of Cases Finalised Before the Criminal Bench of the Supreme Court
July 2010 - June 2011	**23**
July 2011 - June 2012	**18**
July 2012 - June 2013	**4**
July 2013 - June 2014	**12***
July 2014 - June 2015	**44****
July 2015 - June 2016	**58°**
July 2016 - June 2017	**55[x]**
July 2017 - June 2018	**37[x]**
July 2018 - June 2019	**44°**
July 2019 - June 2020	**47*****

Source: Authors' own production, using data obtained from judicial verdicts.

* One of these dealing solely with civil liability
** Four of these dealing solely with civil liability
° 16 of these dealing solely with civil liability
[x] Six of these dealing solely with civil liability
*** 15 of these dealing solely with civil liability

Figure 2. Detail of the 47 final verdicts handed down by the criminal bench of the Supreme Court between July 2019 and June 2020, inclusive, in cases for dictatorship-era human rights violations

Case	Date	Case code ref.
Aggravated kidnap of Luis Ángel Cornejo Fernández.	19.07.2019	Rol 6550-2018
Aggravated kidnap of Miguel Ángel Acuña Castillo (episode Operación Colombo)	26.07.2019	Rol 2458-2018
Aggravated kidnap of Domingo Huenul Huaquil.	27.08.2019	Rol 6177-2018
Civil claim Agneo José Osses Beltrán, former political prisoner (survivor)	3.09.2019	Rol 29448-2019
Civil claim Juan Alejandro Vargas Contreras, victim of enforced disappearance	4.09.2019	Rol 31272-2018
Caso Operación Colombo: Aggravated kidnap of Bárbara Uribe Tamblay and Edwin van Yurick Altamirano (episode Operación Colombo)	17.09.2019	Rol 7406-2018
Aggravated homicide of Gustavo Martínez Vera (episode Paine)	27.09.2019	Rol 15048-2018
Aggravated homicide of José Gumercindo González Sepúlveda (episode Paine)	27.09.2019	Rol 17001-2018
Aggravated homicide of Luis Díaz Manríquez (episode Paine).	27.09.2019	Rol 17094-2018

Aggravated kidnap of brothers Hernán Fernando and Juan Humberto Albornoz Prado (episode Paine)	27.09.2019	Rol 18620-2018
Aggravated kidnap of Pedro Vargas Barrientos (episode Paine)	27.09.2019	Rol 20526-2018
Aggravated kidnap of Jorge Valenzuela Valenzuela (episode Paine)	27.09.2019	Rol 20548-2018
'Illicit torments' [torture] of Guillermo Torrealba Pastén, former political prisoner (survivor)	30.09.2019	Rol 8318-2018
Civil claim caso 18 former political prisoners (survivors)	1.10.2019	Rol 6853-2019
Aggravated kidnap of Héctor Zúñiga Tapia. (episode Operación Colombo)	7.10.2019	Rol 1030-2018
Aggravated kidnap of Bernardo de Castro López. (episode Operación Colombo)	7.10.2019	Rol 3322-2018
Civil claim José Enrique Cárcamo Barría, former political prisoner (survivor)	15.10.2019	Rol 17842-2019
Aggravated homicide of Domingo Obreque Obreque y apremios ilegítimos de Hilda Francisca Gana Mardones, former political prisoner (survivor)	22.10.2019	Rol 5235-2018
Aggravated kidnap of Vicente Segundo Palomino Benítez. (episode Operación Colombo)	28.10.2019	Rol 3524-2018

Civil claim Fernando Sergio Coulon Larrañaga, former political prisoner (survivor)	29.10.2019	Rol 17710-2019
Caso Paine: Aggravated kidnap of Francisco Baltazar Godoy Román.	15.11.2019	Rol 20520-2018
Aggravated kidnap of Etienne Marie Pesle de Menil.	18.11.2019	Rol 3525-2018
Aggravated kidnap of Antonio Sergio Cabezas Quijada. (episode Operación Colombo)	18.11.2019	Rol 4227-2016
Civil claim Armando Jiménez Machuca, ejecutado político.	4.12.2019	Rol 3432-2018
'illicit torments' [torture] leading to the death of Manuel Elías Jana Santibáñez, victim of extrajudicial execution	5.12.2019	Rol 8390-2018
Civil claim Guillermo Torres Gaona, former political prisoner (survivor)	9.12.2019	Rol 18179-2019
Civil claim Adela Calderón García, former political prisoner (survivor).	16.12.2019	Rol 16950-2019
Aggravated kidnap of María Angélica Andreoli Bravo. (episode Operación Colombo)	23.12.2019	Rol 2661-2018
Aggravated homicide of Jean Eduardo Rojas Arce.	27.12.2019	Rol 20444 -2018
Homicide of Marcos Hernán Montecinos San Martín.	27.01.2020	Rol 12707-2019
Civil claim José Lino Mardones Mardones, former political prisoner (survivor)	27.01.2020	Rol 23094-2019

Civil claim Leandro Antonio Jarpa Ortiz, former political prisoner (survivor)	30.01.2020	Rol 23093-2019
Aggravated homicide of Sergio Osvaldo Alvarado Vargas.	5.02.2020	Rol 8065-2018
Homicide of Luis Humberto Ferrada Piña.	26.02.2020	Rol 8647-2018
Civil claim eight former political prisoners (survivors): María Navarrete Muñoz, Jimena Fuenzalida Navarrete, Marisol San Martín Chávez, Edgardo Campos Muñoz, Clodomiro Cea Torres, Rolando Rodríguez Carrasco, José San Martín Bustos, Moisés Fuentealba Rivas.	2.03.2020	Rol 29167-2019
Aggravated kidnap of Luis Humberto Piñones Vega.	12.03.2020	Rol 8398-2018
Homicide of Manuel Vicente González Muñoz.	13.03.2020	Rol 12283-2018
Homicide of Mercedes Luzmira Polden Pehuén.	16.03.2020	Rol 12196-2018
Civil claim Pablo Raúl Leiva Pasten, former political prisoner (survivor).	17.03.2020	Rol 26023-2019
Aggravated kidnap of Gabriela Arredondo Andrade.	23.03.2020	Rol 28138-2018
Aggravated homicide of Onofre Peña Castro	25.03.2020	Rol 18650-2018
Civil claim, Moisés Marilao Pichún, victim of extrajudicial execution	21.04.2020	Rol 31965-2019

Delito de aplicación de tormentos a Beatriz Aurora Castedo Mira, former political prisoner (survivor)	15.06.2020	Rol 8948-2018
Caso población Lintz Puerto Montt: Aggravated homicides of Pedro Antonio Bahamondes Rogel, José Santiago Soto Muñoz, Héctor Hugo Maldonado Ulloa and José Mañao Ampuero.	16.06.2020	Rol 8914-2018
Civil claim, Manuel González Vargas, victim of extrajudicial execution	22.06.2020	Rol 36905-2019
Civil claim, 24 former political prisoners (survivors)	23.06.2020	Rol 34111-2019
Kidnap of Eduardo Guillermo Cancino Alcaíno, victim of extrajudicial execution	24.06.2020	Rol 15186-2018

Source: Authors' own production, using data obtained from judicial verdicts

3.2.1. Investigative Magistrates and Coordination of Dictatorship-era Human Rights Cases

On 2 August 2019, the Supreme Court laid down a series of measures to speed the passage of cases for dictatorship-era human rights violations through the country's Courts of Appeal. It is common for bottlenecks at the appeals stage to add to the already considerable delay in investigation and initial resolution of cases by specially designated magistrates. The measures were approved by a full sitting of the Supreme Court on the basis of a report presented by judge Ricardo Blanco, coordinator of human rights cases for the Supreme Court. The measures include flagging human rights cases in the court's IT system, allowing for separate monitoring and tracking. Court rapporteurs (*relatores)*, whose role includes creating the week on week case dockets for each Court of Appeal, are also to be exhorted to ensure that the relevant norms are followed for determining the order of priority of cases. An early warning system is to be established to ensure that delays caused by one or more members of the Appeals Court bench recusing themselves from a case, do not exceed a week in length. The presiding judge of each court is to take special care that dictatorship-era cases

are seen within the maximum time periods established in law, and is to keep the human rights case co-ordinator informed. Human rights case lawyers consulted by the Observatorio generally welcomed the measures.

The measures proceed from the work of the judicial branch's Office for National Co-ordination in Human Rights [Cases] 1973-1990, which was reorganised and strengthened in May 2019. The Office's new structure contemplates four full-time posts – including for data analysts – overseen by the office's director, lawyer Cristián Sánchez. The office's recent activities have included the preparation of detailed statistical reports in response to queries from the Observatorio. The results have informed the data presented in this chapter. The Observatorio takes the opportunity to acknowledge this significant contribution to the right to truth, which also represents a step forward in transparency and openness about the results of the justice process. The Office is also producing annual statistical reports detailing [dictatorship-era] human rights cases received and completed, publishing the results on the web page of the Supreme Court Research Unit (Dirección de Estudios).[47] Another valuable initiative by the Office took the form of two face to face meetings, in November and December 2019, bringing together legal secretaries, actuaries and other staff who assist specially-designated human rights case judges. The initiative led to the creation of channels for exchange of relevant information, contacts and etc. It is hoped that similar exchanges can take place in virtual formats in late 2020. In a similar initiative, specially-designated human rights case judge Marianela Cifuentes, of the San Miguel Appeals Court, organised virtual training sessions for actuaries attached to a range of different Courts of Appeal, on aspects of working with expert witnesses.[48]

According to information received from the Office, as of 30 June 2020 a total of 13 specially-designated judges, attached to eight of the country's Courts of Appeal, were overseeing the investigation of dictatorship-era human rights cases.[49] Their duties include supplying bimonthly reports to the Office, which processes the data received and passes on the results to other state offices and to interested parties

47 Dirección de Estudios Corte Suprema, Boletín Estadístico en materia de DDHH, 2018. The 2019 bulletin suffered delays due to the pandemic, and was due to be published in late 2020.

48 All the aforementioned details, plus the statistics cited below, are taken from the Office's 2019-June 2020 report "Informe Consolidado: Estadísticas de Estado de Causas en materia de DD.HH. Periodo 2019 – junio 2020", Oficina de Coordinación Nacional Causas Derechos Humanos, 25 September 2020, prepared at the request of the Observatorio, plus associated electronic correspondence.

49 La Serena, Valparaíso, Santiago (four judges), San Miguel (two judges, Talca, Concepción (two judges), Temuco, and Punta Arenas.

from civil society, including relatives' and survivors' associations. In this section we provide detail on initial case outcomes (first instance judgments). For detail of outcomes at subsequent levels of appeal see section 3.2.6, below. Owing to the way in which the official data as sent to us is produced and presented, we report here on the full calendar year of 2019, then on the first six months of 2020. Over the course of 2019, specially-designated judges opened a total of 468 new investigations for dictatorship-era crimes. Of these, 52% were still ongoing at the end of 2019. Thirty-four (7%) had been resolved (in first instance), with the remainder having been archived or accumulated to existing investigations.

The 245 new cases that were still ongoing as of December 2019, added to those previously outstanding, gave a sum total of 1,504 dictatorship-era human rights cases still open (with no first instance verdict yet delivered) as of 31 December 2019. Of these, 77% were still at the investigative stage (*sumario*). The largest single influx of new cases came from the Punta Arenas region of the country, where judge Marta Punto opened 119 new investigations in 2019.[50] Of the newly-admitted cases, 78% alleged some form of illegal privation of liberty including kidnap. Other crimes alleged, and which have to date appeared relatively infrequently on the charge sheet in dictatorship-era cases, include illegal abduction or appropriation of children (11 cases), and threats and the occasioning of actual bodily harm. A further 43 new cases were registered in the first half of 2020, 37 of which remained open as of 30 June 2020. The crimes alleged in these cases again included abduction of children (two cases). Torture in some form was mentioned in 36 of the 43 cases. Most of this set of new cases were registered in Valparaiso, followed by Santiago. Only one of the 2020 new cases was registered in Punta Arenas.

The combined effect of these new cases plus the resolution of some already in course gave a total of 1,471 cases under active first-instance investigation as of 30 June 2020. Of these, 1,131 (77%) were at investigative stage, with 6% awaiting initial verdicts ('*en plenario*') and 17% awaiting Court of Appeal or other higher court resolutions after an initial verdict. Overall, the activity of the 13 specially designated magistrates over the 18-month period (2019 plus the first six months of 2020) included the formulation of accusations against 204 individuals, and the bringing of charges against 201.[51] Active investigation stages were concluded in 117 cases (22

50 The next highest number was registered in Valparaíso, followed by Santiago.

51 Due to the way in which the figures are presented, it is not possible to deduce the total number of separate individuals involved- any one person may appear multiple times within each category or across the two categories.

of them in the first half of 2020), and a total of 80 first-instance verdicts were handed down in the 18 month period (26 of them between January and June 2020). Those verdicts involved 297 convictions and 87 absolutions (94 and 13 of those, respectively, in the first half of 2020).[52] These figures show signs of a possible, and probably inevitable, slowdown in justice activity in the first half of 2020, most likely connected to the public health emergency created by the Covid-19 virus from March 2020.[53] This situation triggered the introduction of numerous emergency measures to allow the work of the courts to continue, including the holding of virtual hearings. Judge Jaime Arancibia, designated human rights case judge attached to the Valparaiso Appeals Court, was amongst those who showed particular concern about the impact of these measures on relatives, survivors and witnesses. In May 2020 he held a meeting with the regional team of the state health reparations programme PRAIS (Programa de Reparación y Atención Integral en Salud) to explore ways to mitigate the negative impact.[54]

3.2.2 Other Relevant Judicial Changes: Composition of the Supreme Court and the Failed Nomination of Judge Mera

At the end of 2019, a full sitting of the Supreme Court approved changes in the internal assignation of judges among the Court's benches and committees. From 6 January 2020, the (rotating) presidency of the Court passed to Judge Guillermo Silva. Outgoing president Haroldo Brito rejoined the Criminal Bench, filling the vacancy produced by the retirement of Judge Hugo Dolmestch. As of 1 April 2020 Judge Leopoldo Llanos, a relatively recent (December 2019) appointee to the Supreme Court, also moved to the Criminal Bench (filling the vacancy left by Judge Lamberto

52 For the same reasons as in the preceding footnote, it is not possible to deduce how many separate individuals were sentenced.

53 Although it should also be noted that not all the relevant figures fr the first half of 2020 show a downward trend, whether in relative or absolute terms. For example, 109 people were charged in the first half of 2020, compared to only 92 in the whole of 2019. And whereas 95 case files were closed in 2019 compared to only 22 in the first half of 2020, the number of final verdicts delivered corresponds almost exactly (54 in 12 months, followed by 26, in six). It is also possible that any downward trend is unrelated to the pandemic: the total numbers of convictions reported in each period shows a steady decline from 382, in 2017, to 252 (2018) then 193 (2019). In this regard, if the pattern from the first half of 2020 were to be repeated in the second six months of the year, the downward tendency would actually be reversed (the figures as supplied show that 94 convictions were handed down between January and June 2020). While it was not possible to clarify in time for going to press, whether these figures count each of multiple convictions against a single individual, this is likely: in which case the number of individuals affected by these convictions is probably somewhat lower than the reported figure, for all periods.

54 Observatorio de Justicia Transicional, Boletín 59, May-June 2020.

Cisternas). Sources close to the Court were of the view that the changes would on the whole be favourable to the advance of human rights cases. Judges Brito and Llanos both have relevant recent experience, with Judge Llanos having been a specially designated human rights case judge between 2012 and 2017, and both have in the past voted in accordance with the principles of international human rights law in these cases. Outgoing judge Dolmestch, on the other hand, was known for consistently voting to reduce sentences and/or concede post-sentencing benefits. He was one of the architects of the notorious 'Supremazo' verdict of 2018 (see the 2019 iteration of this report).

The procedure for nominating a judge to fill the vacant place on the Supreme Court left by the retirement of Judge Dolmetsch caused controversy in mid-2020, when president Sebastián Piñera selected the name of Judge Raúl Mera, of the Valparaíso Appeals Court, from the list of five possible nominees presented to him by the Supreme Court. Although the selection was initially ratified by the relevant Senate Commission, the ratification was not unanimous, with two commission members expressing reservations about the judge's past record in a number of high profile cases, including cases over environmental protection and dictatorship-era human rights cases. Judge Mera's performance in the case of the extrajudicial executions of Cecilia Magni and Raúl Pellegrin came in for particular criticism. Mera was assigned the case in 2003, and spent seven years investigating the October 1988 incident in which two members of the armed left-wing opposition movement FPMR (Frente Patriótico Manuel Rodríguez) were killed, in the course of a massive military operation that had all the characteristics of a manhunt. After repeatedly temporarily suspending the investigation, Mera finally absolved all the former police officers who had at one time or another been charged, giving credence to an extremely dubious 'expert witness' report, introduced by the defence, that claimed the deaths could have been accidental.[55] Appearing before the Senate ratification commission, the judge defended his verdict in the case by recalling that the absolutions had been upheld in subsequent higher court rulings on the matter. In so doing, he omitted to mention the highly unusual course of action adopted by the Supreme Court in this case: while the Court did indeed confirm the absolutions, it made a point of categorising the deaths as homicides. This is in accordance with the narrative presented in the relevant state truth commission report, and the findings of the two mainstream expert witness reports presented in the case, all of

55 Ministro en Visita Extraordinaria Raúl Mera Muñoz, Rol 5004-1988, 18 October 2010.

which portray the deaths as deliberate killings subsequent to the capture and torture of the two guerrilla fighters by state agents.[56]

Minister of Justice and Human Rights Hernán Larraín attempted to intervene in support of Mera's candidacy, and the BíoBío radio station also reported that a supporting letter was also sent from the president's office to the Senate.[57] In it, reference was apparently made to the Magni and Pellegrin case, and to another four human rights cases or verdicts in which, according to the letter, judge Mera had supposedly shown himself willing to dispense justice for dictatorship-era crimes. One concerns the detention of 16 protesters in the 1984 incident known as the 'Puntarenazo', whereby for the first time in public, Pinochet was confronted by a hostile crowd chanting 'Assassin!' at him. Mera was assigned the case against the protesters, but went on to suspend the investigation without any convictions. Another of the cases invoked was that of the teacher Luis Almonacid Arellano, shot dead by state agents on the doorstep of his house, in the presence of his pregnant wife, in 1973. The letter praised Judge Mera for abiding by the terms of an Inter-American Court of Human Rights verdict in the Almonacid case – something which, while correct, seems hardly remarkable since the Court's rulings create binding obligations on the Chilean state. Mera's participation was moreover limited to having formed part of the three-person Appeals Court bench that in 2013, ratified a non-custodial sentence for the killer of Luis Almonacid.[58] Most notably, the letter attempted to cite in Mera's favour, his actions as part of a bench that heard an appeal over the extrajudicial execution of Jean Rojas Arce. Judge Mera was indeed responsible for the drafting of the Appeals Court verdict that imposed a sentence of 10 years and 1 day on the (now deceased) state agent responsible for the killing. What the letter, at least in the version cited in the press, however fails to mention is that the first instance verdict that formed the substance of the appeal had imposed a higher sentence, of 15 years and 1 day.[59] On the same date, the same bench produced a second sentence, also drafted by

56 Supreme Court, Rol 6373-13, 4 August 2014, and see the 2015 iteration of this report chapter (Spanish only). It is almost unprecedented (and indeed is legally questionable) that the Supreme Court should choose to rewrite a lower court's finding of fact in this way, suggesting an extremely strong animus in the higher court that Mera's version of judicial truth could not be allowed to stand even if his verdict could not be changed. See below, this section.

57 Reportajes Bío Bío.cl: "Raúl Mera: la carta a la suprema de Piñera se defiende de los cuestionamientos en materia de DDHH", 7 July 2020.

58 Rancagua Appeals Court, 14 January 2013, cited in Supreme Court Rol 1260-13, 29 July 2013. The Rancagua court reversed the concession of gradual prescription, but refused to augment the sentencing tariff. It also rejected the petition of the then Human Rights Programme of the Ministry of the Interior, who wanted the charge upgraded to aggravated homicide.

59 Ministro Arancibia, sentence Rol 51.272-2011, 16 November 2017.

Mera, annulling a conviction and nine year sentence against the same agent for the kidnapping and torture of two young children.[60]

Amidst the resulting controversy, Mera's nomination failed to prosper, by the slenderest possible margin. In a full sitting of the Senate, on 5 August 2020, a total of 28 Senators voted in favour, with 14 against. The result fell short by only one vote of the necessary two thirds plus one margin required to ratify the nomination. The absence of Senator Manuel Ossandon, of the government coalition, was decisive: he was the only one of the cohort of 43 senators not to cast a vote on the matter. Beyond the specifics of the case, the incident lays bare the fact that it is widely considered not only relevant, but decisive, which judges are assigned to human rights cases and/or who makes up the higher court benches that review initial case verdicts. Mention of the Supreme Court verdict in the Magni and Pellegrin case also prompts reflection as to what is, or ought to be, the role of criminal investigations in fulfilment of the right to truth. Both issues force consideration of the 'margin of appreciation' – in the sense of the space allowed for reasonable discrepancy – that the law allows; as well as of the frontiers between the law and other socially and/or institutionally mandated instances for the production of truth: inter alia, the truth commission.[61] The right to truth is today generally considered to be one of the established pillars of transitional justice. The Inter-American Human Rights System considers society as a whole – not just direct victims, or their immediate family or social circle – to be a holder of that right; and has also ruled that a judicial process is required for its full satisfaction. Accordingly, the narrative produced by a truth commission or similar administrative body would not be considered sufficient.[62]

Jurist Daniela Accatino combines these principles with general principles of (Chilean) criminal law, to analyse the Magni and Pellegrin case from the point of view of transitional justice and the right to truth.[63] In her case commentary, she points out that amongst the many and varied reasons that have been adduced for considering criminal investigation as a necessary and irreplaceable component of

60 Valparaíso Court of Appeal, Rol 260-2017, 20 July 2018. Also see below, section 3.3.5.

61 See also the discussion in section 3.2.7, infra, about the contradictory position of the Consejo de Defensa del Estado regarding the status of the truth(s) represented in the official victim lists produced by the Rettig and Valech truth commissions.

62 Inter-American Commission on Human Rights, The Right to Truth in the Americas, OAS Document OEA/Ser.L/V/II.152, Doc. 2, 13 August 2014; Daniela Accatino and Cath Collins, "Truth, evidence, truth: The deployment of testimony, archives and technical data in domestic human rights trials", Journal of Human Rights Practice 8(1), 2016, pp. 81-100.

63 Daniela Accatino, "Prueba, verdad y justicia de transición. El caso de Cecilia Magni y Raúl Pellegrin (Corte Suprema)", Revista de Derecho (Valdivia) vol. 29 N°1, 2016.

transitional justice, its function as a determinant of truth is almost invariably invoked. She observes that we must nonetheless bear in mind the particular category of truth that the criminal process can provide: juridical truth(s), necessarily and for good reason circumscribed in their reach and hemmed in by stringent probatory requirements and thresholds that are not applicable in other areas of social, public, or private life. Accatino's analysis shows that the keenly-fought majority decision in the Magni and Pellegrin case is much more complex than a simple declaration that the case was a homicide, but the wrong culprits had been charged. Rather, the verdict holds that a different type and level of conviction (in the sense of certainty) is necessary for one and for the other effect. This raises the important question of the limits of what criminal justice can and cannot offer in determining, firstly, facts; and secondly, responsibilities. For quite legitimate reasons, to do with the relative distribution of the costs of error, and the particular care to limit the possibilities that an innocent person may be convicted, it is eminently possible for the threshold of proof of criminal culpability not to be met even where the truth of a particular matter can reasonably be accepted as a given or established fact, according to some other socially validated yardstick.

Some version of this gap between different kinds and modes of social truth is perhaps a given in any society with a criminal justice system minimally protective of defendant's rights. The Chilean system however adds a particular element in the extremely ample margin that is conceded to the presence or absence of personal conviction on the part of the decisionmaker. As Accatino remarks: "Judge Juica's minority vote [in the Supreme Court verdict in the Magni and Pellegrin case] leads us to question how it is even possible for an error of law to be found proven, given that the prevailing interpretation of art. 45(b) of the Criminal Procedural Code [is that it authorises] the judge to rule according to his or her personal conviction. This allows the judge to find the facts on the basis of which charges are being preferred, to be 'not proven', if he or she is not personally persuaded that they happened [as stated]." That is, the apparent absence in the Chilean criminal justice tradition of "a standard of proof articulated in terms that do not in the end defer to the purely subjective conviction of the arbiter"[64] gives a particular weight and charge to the widespread tendency on the part of commentators to assume that certain judges are sure to rule in one or other way, based largely on perceptions about their personal predisposition. In one sense, of course, the personal position or views of any judge should be of only secondary relevance, since what is being asked of them is that they interpret and/or apply

64 Ibid.

the law in good faith, and according to the relevant legal and constitutional principles. However, the margin of (legitimate) discrepancy that is inherent to any act of interpretation, added to the particularly generous formulation contained in the Chilean procedural code as cited, can be understood as conceding a particularly untrammelled *carte blanche* to Chilean judges, free to adopt almost any position with no need for any foundation or referent beyond their own inner conviction. The fact that previous jurisprudence, including of higher courts, is not an obligatory point of reference accentuates even further this tendency for the personality and track record of Chilean judges to be taken as a particularly reliable indicator of how they are likely to rule in particular issue areas.

All things considered, although the rules of evidence plus this provision in the criminal procedural code introduce a significant source of variation in the verdicts that it is possible to expect when faced with a single set of facts, another quota of diversity may proceed from the content of the laws at issue. See, for example, discussion below and in the 2019 version of this report, on the absolutely anachronistic content of Decree Law 321, on concession of parole or early release. The Supreme Court itself has frequently drawn attention to this problem in recent years. Herein lies the importance of the contention, frequently stated in previous iterations of the present report, that the legislative and executive branches, as co-legislators, must take on their share of responsibility for creating a domestic norm environment that is equal to the demands of modern day state responsibilities in transitional justice matters.

3.2.3.1 Overall Trends in Supreme Court *verdicts* in human rights cases

Table A: Dictatorship-era human rights cases definitively resolved by Chile's domestic higher courts between 1995 and 30 June 2020

Total number of cases, breakdown by type	**476 cases**
Civil claims	76
Criminal cases	400

Table B: Types of victimhood addressed by criminal cases definitively resolved by Chile's domestic higher courts between 1995 and 30 June 2020

Total number of criminal cases	**400 cases**
Cases involving victims of enforced disappearance*	179
Cases involving victims of extrajudicial execution*	175
Combined cases involving victims of extrajudicial execution, victims of enforced disappearance and/or survivors	23
Cases for torture and other crimes committed against survivors	20
Cases solely for illicit association (*asociación ilícita*)**	1
Cases solely for illegal disposal of human remains (*exhumación ilegal*)**	1
Cases solely for infractions of weapons laws**	1

* For purposes of this classification, the categories assigned to each victim in the truth Commission reports Rettig/ CNRR and Valech II are used.

** The cases mentioned in the other rows of the table may also include this charge alongside others. For the purposes of the table, cases are classified according to the most serious offence included in the charge sheet

Table C: Numbers of absent (dead or disappeared) victims and survivors represented in criminal cases for dictatorship-era violations resolved between 1995 and 30 June 2020

Total number of absent victims, followed by breakdown by type	**787**
Victims of enforced disappearance.	386
Victims of extrajudicial execution	401
Total number of survivors	**224**

Table D: Percentages of women represented in criminal cases completed between 1995 and 30 June 2020, by type of case

Total number of persons, followed by number of whom are women	Percentage of the total made up by women
Total of absent victims (disappeared or executed): 787 people, 61 of them, women	7.7% of the total of absent victims in whose case a final criminal verdict has been handed down
Subtotal of disappeared victims: 386 people, 34 of them women	8.8% of the total of disappeared persons in whose case a final criminal verdict has been handed down
Subtotal of absent victims, executed: 401 people, 27 of them women	6.7% of the total of extrajudicially executed persons in whose case a final criminal verdict has been handed down
Survivors: 224 people in whose case a final criminal verdict has been handed down, 75 of them, women	33 % of torture survivors in whose case a final criminal verdict has been handed down

Sources for Tables A to D: Authors' own production, using data obtained from Truth Commission reports, judicial verdicts, Observatorio records, and the Judicial Branch[65]

According to the Observatorio's current records, between 1995 and 30 June 2020 a total of 476 final verdicts have been handed down in cases for crimes against humanity committed during the dictatorship: 400 in criminal cases (which may or may not have a civil claim component), and 76 in cases of solely civil suits.[66] These 476 verdicts have principally been handed down by the criminal bench of the Supreme Court. Nonetheless, they also include a few civil claims which culminated before the Constitutional Bench of the Supreme Court; as well as a smaller number of criminal cases which were not elevated to the Supreme Court, thereby concluding with the relevant appeals court

65 Fe de errata: All tables have been adjusted to reflect, as well as the changes proper to the statistical period: (i) reclassification as victims of enforced disappearance of two people erroneously classed in the 2019 tables; (ii) incorporation of five more people, all victims of extrajudicial execution, whose cases were completed at Appeals Court level in previous statistical periods. These cases have only recently been added to the accumulated register of cases completed since 1995.

66 i.e. civil claims without an associated criminal investigation. The detail of most of the criminal verdicts can be seen on www.expedientesdelarepresion.cl.

sentence.[67] A breakdown of the universe of criminal cases by type of acknowledged victimhood reveals that 179 of the 400 completed criminal cases registered since 1995 deal with crimes committed against victims of enforced disappearance; 175, victims of extrajudicial execution; 23 to combined cases (cases involving disappearance, execution, and surviving political prisoners), and 20 to cases in which only surviving political prisoners feature as victims.[68] These correspond in turn to a total of 787 absent victims (386 disappeared persons, DD, and 401 victims of extrajudicial execution, EP); plus a total of 224 survivors.

If we consider these totals as a proportion of the universes of absent victims and survivors currently officially recognised by the Chilean state, final criminal verdicts have been issued for crimes committed against approximately 24.5% of those the state currently recognises as having been forcibly disappeared or executed.[69] This represents an increase of 13% when compared with the same dates in 2019, an increase consistent with the total of 35 victims of disappearance execution represented in the criminal cases completed in the 2019-20 period. By contrast, only 0.59% of the 38,254 survivors acknowledged by 'Valech I' and 'Valech II' have seen final sentences in their criminal and/or civil cases.[70] The significant gap in levels of satisfaction of the right to criminal justice between absent victims and survivors therefore

67 There may be some omissions or data loss in respect of the latter two categories, a margin of error that we are constantly seeking to reduce through access to historical records. The cases completed before the Constitutional Bench of the Supreme Court are the ones that were resolved before 21 December 2014. After that date, by decision of a full sitting of the Court, they were redirected to the Criminal Bench.

68 The three completed criminal cases not included in this breakdown represent cases without named victims associated to them (cases for criminal conspiracy; illegal disposal of remains, and weapons offences).

69 Calculated on the basis of a total of disappeared and executed persons of 3,216 (Observatorio's calculation based on Rettig (1991) CNRR (1996) and Valech II (2011), with subsequent adjustments). Simple addition of the figures given in the official registers mentioned here, without any adjustments, would give a total of 3,225 people. In either case, the percentage with concluded cases does not fall below 24% nor rise above 24.47%. See the 2018 iteration of this report for more detail of the basis on which these calculations have been done.

70 Representing virtually the same figure as in last year's edition of this report: the increase of only three people in the current period is insufficient to produce a detectable change in the proportion.

persists.[71] There has been no sign of state action to reverse this inequality, for example by complying with the state's duty to prosecute torture that was signalled by the Inter-American Court in the García Lucero case. The Human Rights Programme Unit's mandate has still not been broadened to include torture and other crimes committed against survivors. At the same time, we can observe an increased tendency on the part of survivors to exercise their right to reparation by judicial means, in a group: of the 15 civil claims resolved in the current period, 11 were brought by a total of 58 survivors. This does not include the use of the courts by survivors to reverse spurious convictions imposed by dictatorship-era Courts Martial, a phenomenon analysed elsewhere in this report, and which is also increasingly frequent.

A breakdown by gender reveals that 34 female victims of disappearance are represented in the criminal verdicts currently concluded for a total of 386 disappeared persons; and 27 female victims of extrajudicial execution are represented in the criminal cases concluded for 401 such victims. Thus in total 61 women feature among the total of 747 'absent victims' for whom criminal cases have been concluded, making up 7.7% of the total of absent victims (victims of disappearance or execution). This proportion is relatively consistent with the gender breakdown of victimisation reported by the respective truth commissions.[72] Meanwhile, 75 women survivors of torture and other crimes have seen criminal verdicts brought against perpetrators, constituting 33% of a total of 224 survivors in this situation. This proportion is clearly higher than those represented in the two relevant truth commission iterations: approximately 12.5% of those acknowledged by Valech I survivors were women, approximately 16.1%, in Valech II.[73] These observations suggest that women survivors are more likely than their male peers to initiate criminal cases, something which goes hand-in-hand with a particular emphasis on making visible the sexual violence there was committed disproportionately, although not exclu-

71 Civil claims are for the time being excluded from this calculation to minimise distortion produced by double counting, since a high proportion of the first wave of civil claims come after an initial criminal verdict in an investigation of the same incident. This is particularly true for cases of disappearance and extrajudicial execution, in which there is a growing tendency for different relatives to place civil claims at different times. For survivors it is more common to see civil claims without a previous, concluded, criminal investigation; and for claims to have been brought by a group of plaintiffs. For both reasons, the proportion of recognised survivors with some kind of concluded legal action (criminal or civil) would undoubtedly rise if civil claims were included in the calculation.

72 Rettig (1991), for example, reported that the universe of victims who were acknowledged was composed of 94% men, 6% women.

73 Source: 'Valech II' report on recognised survivors, breakdown by gender. The approximation is due to the fact that official figures appearing at different points in the publication are inconsistent one with another.

sively, against women political prisoners. It is clear that much more sophisticated analytical attention needs to be paid to the question of gender than is represented by these initial calculations by biological sex. Ideally, such attention should form part of a broader gender perspective, something that is increasingly emphasised in international norms but has been notoriously absent in official transitional justice policy in Chile.

3.2.3.2 Jurisprudential Trends in Recent Supreme Court Verdicts

In the statistical period corresponding to the present report (July 2019 to June 2020 inclusive) Supreme Court activity in relation to grave dictatorship-era human rights violations includes the 32 criminal cases set out in figure 2, above, and analysed in more depth below. Its activity also included resolution of the 15 exclusively civil claims discussed in section 3.2.7 below. If we also consider its growing role in the rectification of various types of official dictatorship-era lies and propaganda, as discussed in section 2.1, above, it is clear that the Supreme Court's transitional justice activity now stretches well beyond criminal justice only. Another area of legal activity observed in this period relates to symbolic reparation and guarantees of non-repetition, as represented in the Supreme Court's decision to confirm a Santiago Appeals Court sentence ordering the Army to remove a plaque in homage to now deceased perpetrator Manuel Contreras, from the Air Force Academy and the Tejas Verdes regimental headquarters (see below).[74] It is regrettable that the Armed Forces persists in adopting positions that defend and celebrate notorious perpetrators of crimes against humanity, who represent the antithesis of the values that the institution should seek to celebrate. The contrast with the case reported in section 2.1 is instructive: there, a young subofficial was unjustly condemned by a court martial for refusing to take part in the 1973 coup.[75]

In regard to decisions over civil liability for harm suffered by victims and their families, the Court maintained the tendency, established since around 2015, to recognise the inapplicability of statutes of limitation to civil claims, as well as the compatibility of the latter with takeup of administrative reparations programmes. As far as criminal justice was concerned, the period saw a cluster of submissions associated with two large scale cases, that is, mass atrocity crimes involving a large number of victims that have given rise to multiple subsequent

74 Although it should be noted that the Army appeal which saw the case elevated to the Supreme Court was rejected for entirely formal reasons: it was argued that the Army did not have the capacity to appear on its own behalf, but should have acted through state legal representative the Consejo de Defensa del Estado. Supreme Court Rol 14.720-2020, 6 March 2020.

75 Supreme Court Rol 12.504-2019, 25 October 2019.

investigations or episodes. The first, Operation Colombo, was the backdrop in seven of the final verdicts emitted or ratified by the Supreme Court in the period. The seven verdicts included a total of 47 absolutions, most confirming Appeals Court decisions. This phenomenon has become common in relation to Operation Colombo, due to an Appeals Court tendency to revert the sentencing policy of the initial investigating magistrate, who chose to charge and convict large numbers of agents in each episode and in regard to each victim. See previous iterations of this report for details. These same seven sentences imposed or ratified 73 convictions, almost all of them to effective jail time of between 10 and 13 years. Many of the sentences were however repeat sentences issued against a small group of agents, often already in prison for similar aberrant crimes. Similar considerations apply to the second cluster of seven sentences, all over the Paine episode, where one single agent (former police officer Nelson Bravo was convicted in each of the seven verdicts. All were issued between September and December 2019, and each was for a different victim or group of victims, see figure 2. In general terms a wide range of sentence tariffs was deployed over the period, from only 200 days suspended sentence, in a case for survived torture ('application of torments'), to a maximum of 20 years, in a case for enforced disappearance ('aggravated kidnap'). The by now common practice of applying lower sentences and/or conceding non-custodial alternatives in cases involving survivors continued, with the least lenient sentences imposed against perpetrators of enforced disappearance, prosecuted as aggravated kidnap. Although extrajudicial execution tends to receive relatively substantial sentences when it is prosecuted as aggravated homicide, low tariffs were seen in various cases where the offence was classified as ordinary homicide and in one case for torture resulting in death.

It should be noted that sentencing tariffs seem to have diminished in the period between January and June 2020, with an increase in the concession of parole and/or non-custodial alternatives. In practice, almost half of the sentences handed down or ratified by the Supreme Court in the first half of 2020 (11 of 24) were accompanied by benefits that rendered them non-custodial. Even where custodial sentences were handed down, only three of these were over the minimum duration for such sentences (5 years 1 day). The claiming or concession of gradual or 'half' prescription also affects sentencing tariffs and proportionality. Although for the present the dominant tendency on the five-person Criminal Bench is to recognise that this institution, like full prescription, is inapplicable to crimes against humanity, judges Cisternas, Dolmetsch and, on occasion, Künsemuller maintained their minority dissenting position. (For the differences between the position of judge Künsemuller and that of his colleagues, see the 2019 iteration

of this report chapter). On occasion, senior lawyers standing in for permanent members of the bench have shored up this minority vote. This makes apparent the fragility of the majority position among permanent Bench members, as seen in one case where due to the temporary composition of the bench, gradual prescription was conceded.[76]

Finally, it should be noted that the characterisation of crime against humanity was disputed, and finally denied, over a 1979 homicide case recognised by the truth commission back in 1996 as a state crime.[77] The initial verdict in the recent criminal case found that Mercedes Polden Pehuén, aged 17, had been with friends at a football pitch in the Pablo de Rokha working class housing district when a group of armed police officers, some out of uniform, approached them. When Mercedes attempted to resist being searched by the officers, one of them shot her. The perpetrators tried to hide the crime by simulating a rape. Mercedes's body was left abandoned on the site, partially naked and with her remaining clothing torn. The initial verdict by judge Marianela Cifuentes recognised the case as a crime against humanity, reasoning correctly that the actions, having taken place "in the context of an abusive police stop and search", "must be classified as a crime against humanity, taking into account the public order policy in place at that time, that is, a policy that set aside all due consideration for the human person and, in this particular case, had an irrevocable effect on the most important legally protected good of all, a person's life. [These] de facto conditions without a doubt allow us to assert that a brutal crime was committed, one that did not respect the most basic standard of rules of coexistence".[78] In 2018 the San Miguel Appeals Court nonetheless revoked the initial convictions, denying that the crime was a crime against humanity and applying the statute of limitation.[79] The Court's view was that it had not been proven that the facts "are demonstrative of activity by the police or state agents, aimed at the

76 Supreme Court, Rol 8.065-2018, 5 February 2020. As a result the case, for the aggra vated homicide of Sergio Alvarado Vargas, produced only one custodial sentence of minimum length (five years 1 day) plus one suspended sentence. The bench moreover did not ratify a concession already made by the respective Appeals Court: rather, it voted by the slimmest possible majority that lower courts had erred in not conceding the benefit. Judge Valderrrama and temporary member, lawyer Diego Munita, voted against. In grounding their majority position, judges Kunsemuller and Cisternas, and temporary member, lawyer Antonio Barra, had to make extremely selective reference to previous Supreme Court verdicts. They were forced to reach as far back as the 2010 Prats case for a precedent, as since 2013 the Bench has generally rejected the applicability of half prescription.

77 Chile's first truth commission, the Rettig commission, reported initially in 1991, but left a set of cases to be determined by a followup entity, the National Reparation and Reconciliation Corporation, which reported in 1996.

78 Ministra en Visita Extraordinaria Marianela Cifuentes, Rol 157-2011, 26 October 2017.

79 San Miguel Appeals Court Rol 236-2017, 7 May 2018.

destruction of the members of a specific enemy or outgroup", nor that "the victim was persecuted for political, racial or religious motives".[80] The Supreme Court, for its part, rejected further appeals in March 2020 on purely formal grounds (errors of formulation and submission). The Appeals Court's application of the statute of limitation was therefore allowed to stand.[81] It is unfortunate that the Criminal Bench of the Supreme Court did not instead invalidate the verdict ex officio – as it is expressly empowered to do by art. 535 of the Code of Criminal Procedure and art. 785 of the Code of Civil Procedure. This given that the criteria adopted by the San Miguel Appeals Court contradicts multiple other decisions by the Bench. In these it has been considered decisive, for the purposes of classifying crimes against humanity, that the events under consideration had taken place in a political and institutional context that favoured impunity, abuse, and a situation of helplessness on the part of victims (see the 2019 iteration of this report).

3.2.4. Notable verdicts in domestic courts

The Observatorio does not follow the widespread social practice of using the term 'emblematic' to refer to certain cases or victims: it is our contention that every case, absent victim, and survivor has equal moral importance. However, it has been our practice to single out in this annual report cases, verdicts or other judicial actions that carry particular weight in terms of their potential to alter the trajectory of transitional justice in Chile. We also compile and publish a separate document keeping track of such tipping points on an ongoing, rolling basis. In June 2020 we published a bilingual (English and Spanish) version of this document containing 50 such significant actions, occurring over the three decades from 1990.[82] In this section we make mention of those that fall into the statistical period of the current report.

On 9 April 2020, the Eighth Bench of the Santiago Appeals Court handed down a verdict partially allowing the appeals lodged by the defence of some of the perpetrators convicted by judge Leopoldo Llanos on 21 July 2017. The part of the verdict that deals with establishing the facts can be divided into five parts, the first four of which refer to problems related to the application of substantive criminal law. These are: the refusal to apply the aggravating circumstance of premeditation; the reversal of the convictions of six of the perpetrators as accomplices to

80 Ibid.

81 Supreme Court, Rol 12.196-18, 13 March 2020.

82 Observatorio de Justicia Transicional, "Jurisprudential milestones in human rights cases: Chile 1990-2020" Facultad de Derecho Universidad Diego Portales, 2020. The latest version of this document is always available to download for free via the website: http://www.derechoshumanos.udp.cl/derechoshumanos/index.php/observatorio-justicia-transicional

some or all of the multiple murders and kidnappings; the reversal of the convictions of two of them as authors, and the recognition of the figure of 'gradual prescription' as a highly mitigating factor. A fifth section deals with the placing of a monetary value on moral harm, in response to civil demands lodged as part of the case. This brief commentary will focus on the first and fourth of these five sections.[83]

The Court started by considering the treatment that the lower tribunal had afforded to the homicide of Eduardo Canteros Prado – a Communist Party activist, like the other 16 victims in the case, who were treated as victims of kidnapping. The death of Eduardo Canteros had however been classified as assassination, ie as a homicide with the added aggravating factor of premeditation (*alevosía*) in the sense set down in art. 391 of the applicable Criminal Code. The Court rejected the lower tribunal's finding of assassination, with the observation that "in no part of its description [of the facts] does the [lower tribunal] describe premeditated conduct" (consideration no. 5 of the Appeals Court's verdict). In order to make this observation the Court took on board the standard formulation that treats premeditation as having two forms, one denominated as "treason" (*traición*), the other, as taking advantage of the victim's defencelessness (*obrar sobre seguro*) (consideration no. 6). On this basis, and having ruled out (in consideration no.7) the presence of treason, the Court held that: "It is a more complex task to determine whether the perpetrators acted taking advantage of defencelessness. To act in such a manner means, following Novoa, either the use of guile or trickery, or the taking advantage of circumstances that render inevitable the harm suffered by the offended party. Accordingly, for [this figure] to exist it is necessary that the surrounding circumstances should have been deliberately sought by the agent, which is not the case in the incident under consideration, as the facts established in the initial verdict do not state or show that the authors of these crimes created or sought the situation of defencelessness in which their victims found themselves" (consideration no. 8, our translation, emphasis in the original).

This consideration has no grounds in doctrine, since the affirmation that *alevosía* can only exist where "the circumstances have been deliberately sought by the agent" is not valid. There appears to be a doctrinal consensus that *alevosía* requires only that the victim's objective state of defencelessness is taken advantage of, with some authors adding that "the taking of advantage of this state must be sought

83 For a more detailed commentary on the verdict, see Juan Pablo Mañalich, "Homicidio alevoso, intervención delictiva y prescripción gradual: Comentario a la sentencia de la Corte de Apelaciones de Santiago en el caso 'Villa Grimaldi' (rol 1734-2017)", Revista de Estudios de la Justicia (32), 2020, pp. 209-227.

deliberately by the criminal".[84] This latter position is notably close to the position subscribed to by Novoa, whose authority the Court shamelessly invokes in supposed support of its own interpretive proposal. According to Novoa, the existence of *alevosía* requires only that "the criminal should be aware of the defencelessness of the victim and absence of risk to [him or her]self, and should act with the desire of taking advantage of those favourable circumstances", from which it can be deduced that someone acts with *alevosía* when they "without preordained will, take advantage of the victim being in a state of absolute incapacity to defend [him or her]self to consummate the attack".[85]

The authentic fallacy into which the Court strays when presenting its supposedly decisive argument for rejecting the [lower tribunal's] classification of the homicide as an assassination can be recognised in the following: the Court suggests that the fact that "the agents who caused the death of the victims in this case did not personally seek out the situation of superior firepower that their identity as soldiers gave them" constitutes a reason for dismissing the possibility of *alevosía* in the killing of Eduardo Canteros (consideration no. 8). But such a thing could only be affirmed, even *prima facie*, if the understanding of acting 'in the face of defencelessness' actually required that the perpetrators should have intentionally set out to procure the situation of defenceless: which in the case at hand proceeds from the perpetrator's 'situation of superior firepower'. Such an understanding is erroneous.

Moreover, the Court simultaneously wishes to equate the situation of superiority that produces the victims' defencelessness, with the perpetrators' "status as soldiers". This appears to be the premise on which the Court bases the stratagem of *reductio ad absurdum* in which it indulges, when it claims that to classify the killing of Eduardo Canteros as involving *alevosía* is tantamount to "concluding that every homicide committed by personnel of the Administration on or after [the coup of] 11 September 1973 includes *alevosía* by sole virtue [sic] of its perpetrators being members of the Armed Forces". The fallacy here should be simple enough to identify: the conclusion to which the Court's absurd logic tends can only follow if the defencelessness of the victim before his or her captors were no more than the consequence of the formal status of the latter as 'personnel of the Administration'. In fact, it is (was) a consequence of the untrammelled margin of action accruing [to perpetrators] as a consequence of belonging to an organisation such as the DINA [secret police], whose operations were overseen and

84 Sergio Politoff et al, Derecho Penal Chileno. Parte Especial, 2nd ed., Santiago, Editorial Jurídica de Chile, 1993, p. 117; Mario Garrido, Derecho Penal Parte Especial, vol. III, 4th ed., Santiago, Editorial Jurídica de Chile, 2010, pp. 58 ff.

85 Eduardo Novoa, Curso de Derecho Penal Chileno, vol. II, 3rd ed., Santiago, Editorial Jurídica de Chile, 2005, p. 44.

directed by the selfsame regime that had set the DINA up a couple of years earlier.

This last is reflected in the way in which the Court allowed the highly mitigating circumstance known as 'gradual prescription' (art. 103 of the Criminal Code) to be conceded to all of those accused whose first instance convictions were allowed to stand. Many and varied objections have been put forward to the thesis known as the "Dolmestch doctrine."[86] This doctrine holds that the inapplicability of the statute of limitations ('prescription') to crimes which constitute crimes against humanity under international law, does not rule out the application of art. 103 of the Chilean criminal code [which defines a mitigating circumstance known as 'gradual' or 'half' prescription]. These objections have to do with the fact that whether prescription, which exempts its beneficiary from criminal responsibility, does or does not share the same 'juridical nature' as gradual prescription, treated as a 'mere' mitigating factor, is not actually relevant for deciding whether gradual prescription can be admitted and allowed where its 'full prescription' counterpart would not.87 In its verdict in this case, the Court nonetheless perpetuates the juridical aberration that is the Dolmestch thesis, and goes even further. It presents us with a genuine oxymoron, bordering on perversity, when it declares that: "The passage of time is never indifferent to law, including criminal law, even in crimes of this nature, since it can never be the same to judge a recently committed crime as to judge one that, like those in the present case, took place over 44 years ago" (consideration no. 21, bold in original). In saying this, the Court is in essence contradicting its own earlier statement. Its previous admission that criminal action does not prescribe in cases of crimes against humanity cannot but signify that here at least, 'the passage of time' actually is 'a matter of indifference to the law'. But what is most intolerable of all is that in the same place from which the quotation above is taken, the Court goes on to confess that it has made this acknowledgement reluctantly, through gritted teeth. Apparently the Court, left to its own devices, would be more than happy to allow a veil of forgetfulness to fall over the crimes committed by DINA agents.

Various episodes of the 'Caravan of Death' case showed movement during the period of this report, including verdicts from two different

86 After the (now retired) Supreme Court judge credited with its development and enthusiastic promotion among his colleagues. Translator's note.

87 See Juan Pablo Mañalich, "El procesamiento transicional del terrorismo de Estado a veinte años del caso Pinochet", Anales de la Universidad de Chile, Vol. 15, 2018, pp. 78 ff.

benches of the Santiago Appeals Court.[88] The first of them, in May 2020, produced one absolution, but eight other agents were convicted and sentenced to significant prison terms, ranging from 12 years to life imprisonment. The case was for the aggravated homicide of 26 victims of the Caravan, in the region around the northern town of Calama.[89] Although the sentence tariffs display a certain proportionality with the seriousness of the crime, it is problematic that the Bench opted to absolve the perpetrators of the specific additional charge of aggravated kidnap in respect of those victims who remain forcibly disappeared. The Court decided that although three of the victims have still not been found, the formal identification of remains belonging to two other victims from the total of 26 – which occurred between the date of the initial sentence and its confirmation on appeal – was sufficient to allow the "indisputable" conclusion that all 26 had been killed. The precedent of decreeing the death of victims of enforced disappearance on the basis of presumptions and circumstantial evidence is worrying for various reasons. It installs or lends credibility to a more general administrative presumption of death regarding the disappeared, something that has long and with good reason been resisted by relatives and activists in Chile and throughout the region. It may also serve to disincentivise or even de-activate the proactive search for proof of the final fate of the disappeared, and the location of the person or their remains. This is particularly so while Chile persists in not creating an entity charged with ongoing, administrative, search in parallel to the actions of justice. Absent such an entity, all search actions currently must occur as the result of a specific judicial order emitted in the course of an ongoing criminal investigation. In the Caravan Calama case, this investigation has now ceased due to the emission of a final verdict, meaning that search is no longer ongoing for the three victims still disappeared.

On 7 August 2020 another Santiago Appeals Court verdict confirmed sentences against four former soldiers, three of them (Emilio de la Mahotiere, Juan Chiminelli and Pedro Espinoza) also convicted in the May 2020 verdict reported above.[90] The August verdict also reversed the lower court absolution of a fourth perpetrator, Santiago Sinclair, whose participation in the Caravan of Death's visit to Valdivia was found to be proven. The Caravan, which travelled the country in the first weeks after the coup, selected and summarily killed political prisoners on Pinochet's personal orders. Twelve people were assassi-

88 Chile's Appeals Court benches, unlike Supreme Court ones, are not thematically specialised. Human rights related cases may therefore be seen by any bench.

89 Santiago Appeals Court, Rol 3720-2018, 18 May 2020.

90 Santiago Appeals Court, Rol de ingreso 2070-2018-PEN, 6 August 2020.

nated during its time in Valdivia, in October 1973. Sinclair was later promoted and ended his career as second in command of the Army, going on to become a designated senator for eight years after the end of the dictatorship. His connections in circles of power served to protect him for almost half a century, impeding the operation of justice to the point that at least four other Caravan perpetrators died of old age during the course of the investigation. Eventually, at the age of 92, Sinclair became one of the oldest perpetrators to finally be convicted. In any case, the five year 1 day custodial sentence imposed is still subject to possible representations before the Supreme Court, and is the lowest possible threshold tariff for custodial sentencing despite the gravity and reiterated nature of the crimes involved.

The same sentence saw three more perpetrators (de la Mahotiere, Chiminelli and Espinoza) sentenced to three, five, and 10-year terms respectively. The latter two sentences were custodial. Despite the fact that the Court took a firmer line than the initial sentence – which it dismissed as "incoherent" (*farragoso),* (consideration no. 1) – the overall result appears somewhat meagre when we bear in mind that the case dealt with the killing of twelve people by way of what the Court itself described as "a previously conceived plan" (consideration no. 6). The relatively low tariff of the sentences is the result of the concession of two separate mitigating circumstances to each of the perpetrators – including 'irreproachable prior conduct', despite the reiterative nature of the Caravan's crimes - plus the refusal of the Court to recognise the existence of any aggravating factor. This latter phenomenon, common in human rights cases, is generally the result of the Chilean courts' extremely limited conception of the notions of perpetration and participation. In the same paragraph in which the verdict recognises that the perpetrators operated according to a "plan … to put people to death", it goes on to determine that they are however not judicially responsible for the situation of defencelessness in which the victims found themselves, on the grounds that this situation had been the product of arbitrary detentions physically carried out by other individuals. The Chilean courts thus show themselves generally behind the times as regards prevailing modern interpretations of figures such as perpetration by means, joint enterprise, and other figures applicable to criminal association (see also the discussion above regarding the Canteros case).

In the 'Lintz district episode' (*episodio población Lintz*) case, concluded on 16 June 2020, the Supreme Court was forced to rebut an apparent attempt on the part of one perpetrator to, in effect, purchase a reduction in sentence (by appealing to the fact that, during the course of the investigation, he had made payments to victims' relatives). The Valdivia Appeals Court had seemingly accepted the attempt, conceding the mitigating circumstance of 'active reparation of the harm caused'

(*reparación celosa del daño causado*) to reduce the initial sentence tariff for one of four individuals convicted for the 1974 shooting of a group of men in a working class neighbourhood of the southern city of Puerto Montt.[91] The Supreme Court, while ratifying non-custodial sentences against three of the perpetrators, however increased the tariff of Ronald Peake de Ferari Beltrán's sentence to 10 years 1 day, making it custodial. In so doing, the Criminal Bench rejected by majority vote the notion that having made monetary transfers to the families of some of the victims entitled de Ferari to a reduced sentence. The Court reasoned that the concession of the mitigating circumstance in question requires "an action 'actively [seeking to] repair the harm caused', i.e., that produces in the accused an attitude, conduct, and decision after the fact, of repentance and of a sure and effective purpose [leading him] to procure the maximum amount of reparation that is rationally possible" … "while it is true that Ronald Peake de Ferari carried out, during the period that this case was ongoing [in fact, between 2014 and 2015] three disbursements (…) to a sum total of [CLP] $4.000.000 [approx. USD 5,600], these disbursements do not convey a genuine desire to attempt reparation, they appear as unilateral acts of will, not explicitly linked to the harm caused, given that moreover they only materialised 40 years after the commission of the crimes and four years after the initiation of this criminal investigation (…)".[92]

The verdict contained a minority concurring opinion from judge Carlos Künsemuller, who while concurring with the rejection of the mitigating circumstance, wanted to clarify that in his view its conditions of validity and applicability do not include the demand for "repentance or other special spiritual attitudes", but solely "a demonstrable material manifestation of [action] in favour of the victim of the crime". He also drew a differentiation between 'opportune' reparation (a term used in the initial appeal as granted) and 'active' reparation (the term used in the relevant norms), questioning, moreover, that the defendant's actions could in any sense be considered 'opportune' given the time that had elapsed since the commission of the crime.[93] It is difficult to imagine what the Valdivia Appeals Court could have had in mind when deciding that the payment of sums of money by a perpetrator, at an advanced stage of a criminal investigation and after having previously denied and concealed the crime for

91 Supreme Court Rol. 8.914-2018, 16 June 2020. See also Francisco Bustos, "¿Reparación celosa del mal causado? Comentarios de la sentencia de la Corte Suprema en el Episodio Población Lintz", Observatorio de Justicia Transicional, Bulletin 59, 2020.

92 Supreme Court Rol 8.914-2018, op. cit.

93 Ibíd., minority concurring opinion by judge Künsemüller.

40 years, could constitute a reasonable effort to repair the harm caused (this without even entering into the question of the sums involved). As a general reflection on the mitigating circumstance involved (set out in Art 11, subsection 7 of the Criminal Code) we might say that in the case of crimes against humanity the threshold for 'active' efforts to repair the harm caused must surely be particularly high, given that international standards and obligations talk of the need to avoid both impunity and the appearance of impunity, *inter alia* by imposing sanctions proportional to the gravity of the offence. It is moreover highly questionable whether the reparation that this clause contemplates is analogous in any way to the reparation required by transitional justice standards. This latter contains various components, is intended to be provided by the transgressing state, and in any case bears no resemblance to a monetary transaction carried out by an individual in pursuit of personal gain (in the form of a sentence reduction). In this regard the Criminal Bench's mention of repentance as one possible manifestation or precondition at least adds greater rigour to what is required, although judge Künsemüller is right to signal the problems of operationalising such a requisite, since it is intimately bound up with personal conscience and the perpetrator's inner state of mind. Contribution to clarifying the full truth could perhaps be held to constitute a better example of individual efforts to procure reparation of harm caused, such as for example in cases of enforced disappearance where the final destination of victims is still unknown. In the case at hand, however, the crimes were related to extrajudicial execution and the verdict makes clear that the version of events offered by the perpetrator was patently false.[94]

3.2.5 The Constitutional Tribunal and Human Rights Cases

The Constitutional Tribunal's intervention in human rights cases between July 2019 and June 2020, analysed below, reaffirms the twin tendency already announced in the 2019 iteration of this report: defendants have become less eager to resort to the tribunal, and it has become a less reliable underwriter of impunity, than it was when covered in our reports for 2016, 2017 and 2018.[95] The criticisms made there were particularly focused on the period during which Tribunal member Iván Aróstica was serving as its president. From June 2018 Aróstica, together with tribunal colleagues Vásquez and Romero, saw

94 Moreover, any such interpretation of the mitigating circumstance of 'active reparation' risks overlapping with the separate mitigating factor denominated 'substantial collaboration toward the clearing up of the crime' (colaboración sustancial para el esclarecimiento del delito).

95 Francisco Bustos, "El 'caso cerro Moreno' ante el Tribunal Constitucional (…) La paralización de una sentencia firme por crímenes de lesa humanidad", Unpublished paper, available online.

virtually all the human rights cases that entered the tribunal, and dictated the interim suspension – often of indefinite duration – of the respective criminal cases in the ordinary courts. This period came to an end in August 2019 when the presidency was taken over by María Luisa Brahm, selected by a vote of the full tribunal. Judge Brahm, whose voting record consistently rejected perpetrators' representations before the tribunal, has stamped her own distinctive style on the presidency in general. She ordered the creation of a specific section of the tribunal's web page that records how many dictatorship-era human rights cases are before it at any one time, their status, and current progress through the systems. In public she remarked upon, and took distance from, the practice of using the Constitutional Tribunal as a mechanism for suspending ongoing proceedings.[96]

In an April 2020 interview Judge Brahm made reference to "inexplicable" delays; instrumental use of the tribunal to stall ongoing criminal investigations, and situations "bordering on corruption".[97] She also echoed criticisms levelled by then Supreme Court president judge Haroldo Brito: "[These practices also affected] the judicial branch as a whole; hence the quite understandable complaint by the then president of the Supreme Court [in his annual address], focused on what was happening to human rights cases. Imagine: these are cases that have already been in the system for years and years, and go through the old, inquisitorial, criminal procedure …. What [judge] Brito said was hard, but it was completely deserved."[98] In the aftermath of these declarations, some of which ratify many of the denunciations realised in our 2017, 2018 and 2019 editions of this chapter, parliamentarian Carmen Hertz presented a criminal complaint for prevarication and bribery, over the tribunal's internal handling of processes related to cases for crimes against humanity. The National Human Rights Institute, INDH, supported the call for an investigation. The seriousness of the situation led national prosecutor-general (Fiscal Nacional) Jorge Abbott to announce the opening of an investigation, to be overseen by one of the capital's specialised Complex Cases prosecutorial offices.

On 2 June 2020, newspaper *La Tercera* reported that the designated prosecutorial office had requested information from a range of public organisms on the negative effects of delay in cases that had been affected by the presentation of a claim before the Constitutional Tribunal.[99]

96 La Tercera: "Brahm: 'Ir al Tribunal Constitucional para buscar tiempo ya no es negocio'", 21 February 2020.

97 La Tercera: "María Luisa Brahm, presidenta del TC: 'Antes de que yo llegara había causas detenidas en el TC por mucho tiempo, al límite de la corrupción'", 18 April 2020.

98 Ibíd.

99 La Tercera: "Caso TC: Suprema indica que causas por DD.HH. se paralizaron en promedio 251 días y después se rechazaron", 2 June 2020.

According to the report, the Supreme Court replied with particular reference to human rights cases, enclosing a copy of an official missive sent by the Court to the Constitutional Tribunal in 2017, expressing concern.[100] The Court also supplied the prosecutor with a copy of a report produced by the Supreme Court's research department, Dirección de Estudios de la Corte Suprema, DECS. The report documents an average delay of 251 days (maximum delay 662 days) occasioned to 21 of a group of 36 dictatorship-era human rights criminal cases in respect of which a petition was placed before the Tribunal between 2015 and the end of 2018. According to the press report, the prosecution service also required the Tribunal to supply information about casting votes, minutes, abstentions, self-recusals and conflicts of interest registered by the Tribunal's members, as well as copies of *amicus curiae* briefs supplied by one particular litigating lawyer. According to an appendix contained in a report supplied directly by the Tribunal to the National Human Rights Institute, the Tribunal itself considered the situation to have improved in more recent periods given that in 2018, for the first time since 2015, no single case had been suspended for more than 200 days as a result of Tribunal action (the average period of suspension had dropped to 144 days). This seems consistent with the qualitative and quantitative analysis produced by the Observatorio. The prosecution service's investigation into the Tribunal is ongoing, against the backdrop of broader public and legislative branch debate about the need to reform or even abolish the Tribunal.[101]

Over the statistical period of the 2019 report, 15 human rights cases were submitted to the Tribunal for the first time. All of these had been resolved at time of writing.[102] During the same period (July 2019 to June 2020) a further 13 cases had been introduced.[103] Twelve of these had been resolved at time of writing, six via a declaration of inadmissibility.[104] Three more were discounted (treated as not having

100 Supreme Court document AD 1212-2017, produced at the instigation of a full sitting of the Court, 4 October 2017.

101 Grupo de Estudio de Reforma al Tribunal Constitucional, Informe Final, 25 Propuestas para un Tribunal Constitucional del Siglo XXI, 28 June 2019, p.3; Colegio de Abogados de Chile.cl: "La tormenta perfecta del TC: la fractura expuesta que pone en jaque el futuro de la entidad", 24 April 2020.

102 The relevant case codes are: Roles 5189-18-INA; 5192-18-INA; 5193-18-INA; 5194-18-INA; 5195-18-INA; 5436-18-INA; 5438-18-INA; 5439-18-INA; 5440-18-INA; 5504-18-INA; 5765-18-INA; 5812-18-INA, 5952-19-INA; 6447-19-INA and 6805-19-INA.

103 Cases 6985-19-INA; 7102-19-INA; 7103-19-CAA: 7104-19-CAA; 7142-19-INA; 7432-19-INA; 7859-19-INA; 7992-19-INA; 8108-20-INA; 8442-20-INA; 8454-20-INA; 8558-20-INA and 8872-20-INA (Caso Boinas Negras).

104 Cases 7102-19-INA; 7103-19-CAA; 7104-19-CAA; 7859-19-INA; 8442-20-INA, and 8558-20-INA were declared inadmissible.

been presented), and one is awaiting a resolution as to its substance.[105] Two of the cases that were discounted had been presented by the same suspect, Óscar Alfonso Podlech Michaud. The first, case code 7142, dealt with four investigations against him for crimes against humanity. [106] In it, Podlech disputed the constitutionality of: the continued validity of the Criminal Code; the Organic Code of Tribunals; "all the dispositions of the Criminal Procedural Code"; Law 20.357 typifying crimes against humanity, war crimes and crimes against humanity (save one article); the norms of Law 20.96, typifying torture, and rules about the competence of the military courts. This first case was unanimously discounted.[107] The second case, code 7992, dealt with just one of the aforementioned criminal cases (case code 113.969, over the aggravated homicides of Hernán Henríquez and Alejandro Flores, together with the use of torture against former political prisoners). The case was once again unanimously declared discounted, due to its not complying with various formal prerequisites.[108] The third case that was discounted was presented by the defence of Patricio Castro Muñoz in a triple homicide case which is being presided over by judge Carlos Aldana, attached to the Concepción Appeals Court: again, the case was rejected because the presentation did not meet the formal prerequisites.[109]

The first full sentence worthy of comment here dealt with early release (*libertad condicional*), a theme extensively discussed in the 2019 version of this report. In January 2020, the Constitutional Tribunal handed down a sentence of non-applicability over articles 3 and 9 of Decree Law 321, on early release. The articles in their current form date from January 2019, when the Decree Law was modified to strengthen the prerequisites demanded for concession of the benefit of early release, in certain circumstances including the commission of crimes against humanity. The Tribunal's sentence declared the changes to be inapplicable to the case at hand, on the grounds that in the tribunal's view they violate the principle of equality, by placing new applicants at a disadvantage compared to those who had already been conceded early release before the change was made. The sentence found in favour of former CNI (secret police) agent Rodrigo Pérez Martínez, convicted of the final known case of enforced disappearance committed during the dictatorship: the September 1987 detention and

105 Cases 7142-19-INA; 7432-19-INA, and 7992-19-INA were discounted, and case 8872-20-INA is awaiting resolution.

106 Roles 114.969, 113.089, 1113.975 y 114.017, sustanciadas por el ministro Álvaro Mesa, ministro en visita de la Corte de Apelaciones de Temuco.

107 Rol 7142 (5-0).

108 Rol 7992 (5-0). The plaintiff appealed against the decision but was rejected, this time by 4 votes to 1.

109 Rol 7432 (5-0).

disappearance of five members of the armed resistance movement the Frente Patriótico Manuel Rodríguez. The verdict was by a majority of 5 to 4: the votes in favour were from judges Aróstica, Romero, Letelier, Vásquez and Fernández; with judges Brahm, García, Hernández and Pozo voting against.

The new requirements mentioned above include that the applicant must have completed at least two thirds of their original sentence before applying (art. 3 bis). They also stipulate that the formal validity of any application (its compliance with each of the existing and new requisites) must be determined at the point at which the application is made (art 9). In declaring these two articles inapplicable due to unconstitutionality of their effects, the Tribunal contradicted itself with regard to a parallel decision in a similar case: in December 2019, the Tribunal decided to reject a similar petition brought by someone convicted of a common crime. This creates the paradox of apparently favourable or more benign treatment being given to perpetrators of crimes against humanity.[110] In the event, the decision did not lead to Pérez Martinez regaining his freedom, since the criminal bench of the Supreme Court subsequently denied his initial appeal.[111] The episode is nonetheless important for two reasons. First, whereas other applications by perpetrators of crimes against humanity have been basically frivolous, this one appears to present a genuine conundrum of criminal justice, in respect of which diverse, and divergent, plausible interpretations exist. Although international norms exhort states to apply proportionate sanctions and to avoid both the practice and the appearance of impunity, they say little about the concession of post-sentencing benefits of this sort in cases of crimes against humanity.[112] Second, this is the first resolution on this matter in a case of crimes against humanity by the Constitutional Tribunal since the modifications to the law were introduced. In practice, the outcome, with its slender majority, has not been repeated since. In one subsequent example, in January 2020, Pablo Marcelo Rodríguez Márquez presented an identical request for a declaration of inapplicability against the same articles of law 321,

110 Rol 6717-19-INA, 26 December 2019.

111 Supreme Court Rol 11159-2020, sentence of 3 February 2020, confirming the rejection of the appeal. Pérez Martínez lost another petition, in March 2020, but in late September launched yet another attempt, in similar terms, this time together with other perpetrators of the same crime (Rol 9406).

112 See Francisco Bustos, "Libertad condicional y crímenes de lesa humanidad. Comentario a una sentencia del Tribunal Constitucional (…)", Bulletin N°57, Observatorio de Justicia Transicional, 2020, pp. 2-7.

but lost his petition by a 6-3 majority vote.[113] Judges Brahm, Silva, García, Pozo, Fernández and Pica voted against; Aróstica, Romero and Letelier, in favour.

Two of the cases declared inadmissible are worthy of mention. One was presented by Jaime Lepe Orellana, ex general secretary of the Army and former DINA agent (cases 7102-19-INA and 7103), and another by former military prosecutor Sergio Cea Cienfuegos (case 7104). Both relate to the criminal investigation of the homicide of UN staff member Carmelo Soria Espinoza. The first requirement impugned articles 456 bis and 457 of the Criminal Procedural Code; certain terms contained in arts. 2 and 25(2) of the American Convention on Human Rights; art. 53 of the Vienna Convention (regarding ius cogens), and arts. 7(1) and 7(2) of the Rome Statute of the International Criminal Court. The requirement, Rol 7102, was declared inadmissible by majority vote, reasoning that it did not indicate in what ways the precepts objected to, produced a violation of constitutionally protected rights. The declaration also pointed out that the impugned articles of the procedural code refer to probatory evidence and the requirement for the judge to have formed a conviction on the basis of legally accredited sources of evidence: both rules are designed to protect the rights of the accused, and therefore their absence (rather than their presence) could be held to create a situation of inconstitutionality.[114] The Court expressed similar views in regard to the international treaty articles that had been challenged, given their programmatic and rights-guaranteeing intent. A minority vote by judges Aróstica and Vásquez attempted to declare the requirement partially admissible, as regards arts. 456 bis and 457, the Procedural Code, the Vienna Convention, and the Rome Statute, holding that these "may have decisive sway in the pending case, and constitute legal precepts" against which orders of inapplicability can be made. Judges Hernández and Silva, for their part, wanted to declare the whole requirement inadmissible given that the treaties that it impugned were "international treaties, celebrated between states and regulated by general principles of international law, which cannot be derogated, modified or suspended save in the terms they themselves expressly lay down, or in accordance with the general norms of international law, in the spirit of art.54.1(5) of the Chilean Constitution." [115]

The remaining requirements, 7103 and 7104, sought to impugn the validity of the Supreme Court internal agreement (*auto acordado)* of

113 Rol 8108 (6-3). Rodríguez Márquez was convicted of kidnap and criminal association in the Berríos case.
114 Rol 7102 (3-2).
115 Rol 7102 (3-2), our translation.

3 October 1991. This agreement regulated the naming of a Supreme Court justice to act as a unipersonal tribunal, in cases of crimes falling under domestic criminal jurisdiction that might have repercussions for international relations between Chile and another state (see the Organic Code of Tribunals art 52(2)). The First Bench of the Constitutional Tribunal decided unanimously to declare these requirements inadmissible on the grounds that the plaintiff had not specified in what way(s) the content of the Court agreement had affected the exercise of his constitutional rights.[116] In case Rol 7859, the plaintiff sought to question the naming of judges in relation to a case being investigated by judge Alvaro Mesa, for the aggravated homicide of four people and the torture of five survivors. The requested suspension of the criminal investigation was not granted, and the requirement was declared inadmissible with reference to prior Tribunal jurisprudence in cases 4807, 5192 (regarding the same incident), 5193, 5194 y 5195.[117] In case 8442, which relates to the criminal investigation of the killing of Arnoldo Camú Veloso, art 527 of the criminal procedural code was impugned without specifying precisely the nature of the alleged constitutional breach. The requirement was therefore declared inadmissible, by a 3-2 majority vote. [118]

Amongst the cases newly received in the present period and not yet resolved, the 'Black Berets' (Boinas Negras) case (Rol 8872) is of note, since the plaintiff is the same Jaime Lepe Orellana mentioned above (perpetrator of the Carmelo Soria assassination). Lepa is also under charges for the aggravated kidnap of Mario Melo Pradenas and Jorge Piérola, and the kidnap and homicide of other victims. This time his defence alleged the inapplicability of arts. 485, 486 and 487 of the Criminal Procedural Code, regarding judicial presumptions *(presunciones judiciales*) and of arts 7 Nº1, Nº2, and 29 of the Rome Statute. We dealt extensively with the matter of judicial presumption and its regulation in the 2019 iteration of this report. As far as the attacks on treaty law and the Rome statute are concerned, it is generally held that treaties are not fit subject matter for requirements of inapplicability, since this ignores the obligation to comply with their terms as well as the fact that internal norms cannot be invoked as reasons for non-compliance with a treaty.[119] Even if this were not so, the imprescriptibility of crimes against humanity, and the obligation to criminally prosecute

116 Rol 7103 (5-0), and Rol 7104 (5-0).

117 Rol 7859 (4-1). The dissenting vote was by judge Letelier.

118 Rol 8442 (3-2) . The dissenting votes were from judges Letelier and Fernández.

119 From this perspective, the Constitutional Tribunal does not have competence to declare the inapplicability of a treaty, much less, its inconstitutionality (see art. 93 Nº6 and 7 of the Constitution), but does have other faculties including ex ante review of constitutionality (art. 93 nos. 1 and 3 of the Constitution).

them, are *ius cogens* obligations according to the Inter-American Court in – inter alia- *Almonacid Arellano and others v. Chile*. Lepe's second requirement nonetheless made it into the Tribunal on 26 June 2020, being declared admissible by majority (3-2) due to the assenting votes of judges Aróstica, Vásquez and Romero.[120] The related criminal case was not ordered to be suspended. The Tribunal's resolution remained pending at time of writing.[121]

3.2.6. Other notable events in criminal justice

In December 2019, two survivors of the 'Santa Lucia Clinic' presented the first criminal complaint specifically directed against civilian collaborators – doctors and dentists – who carried out torture on the site. The Clinic, situated in a building opposite the Huelén (Santa Lucia) hill in central Santiago, was used by the DINA between 1974 and 1977 as a clandestine medical centre. The case, if it prospers, would be potentially the first time that civil collaborators with the regime have been specifically called to account before the justice system over for their participation in the regime's torture machine. The clinic's functions could not have been further from the services of assistance and protection of life that the Hippocratic oath demands. Instead, health professionals made use of their knowledge to keep torture victims alive, for the sole purpose of enabling further torture. Survivors moreover single out some of the health professionals as having taken direct part in their torture. The complaint is the product of research carried out by the legal team of the 'Ex Clinic Memory Site Association'. Today, the place is a memory site and also houses the offices of the Comisión Chilena de Derechos Humanos, a civil society organisation founded during the dictatorship to defend human rights. The site, like others, has recently suffered from repeated thefts and acts of serious vandalism.[122]

120 Rol 8872 (3-2). The dissenting votes were by judges Silva and Pica.

121 Although the hearings on the substance of the matter took place on 8 September 2020.

122 El Mostrador.cl: "Denuncian violento asalto a sitio de memoria Ex Clínica Santa Lucía, sede de la Comisión Chilena de DDHH", 14 March 2020.

3.2.6.1 Statistics, types of criminal charge, and case progress in Courts of Appeal and the Supreme Court.[123]

According to the same official statistical information cited above, in section 3.2.1, a total of 1.471 criminal cases were open and ongoing as of 30 June 2020, for dictatorship-era human rights violations. The 1.471 cases, 83% of which were in investigation stage or awaiting an initial verdict, represent 3,102 instances of victimisation.[124] The work done during the period by specially designated first instance investigative judges has been summed up above (section 3.2). Here, we focus on statistical data relating to the work of the Courts of Appeal and the Supreme Court.

On 30 June 2020, the judicial branch reported 61 appeals pending before the country's Courts of Appeal in human rights cases. Most were concentrated in four of the eight Appeals Court districts where human rights cases are seen: Concepción (9 appeals), San Miguel (6), Santiago (45) and Valparaíso (1). Almost half of the appeals (48%) were against final verdicts. The Supreme Court reported 111 appeals pending at the same date, with 50 of these 111 having been presented in 2019. Although 30 of the remainder had been received only in 2020, a total of 31 have been in train before the Supreme Court since 2018. Sixty per cent of the total of 111 were referred from the Santiago Appeal Court. The largest single total (56 of 111) cited issues of substance, with 53 citing issues of both form and substance. The range and diversity of criminal charges that appear in cases before the Court is, as would be expected, reduced when compared to cases recently received or ongoing: the cases before the Supreme Court can be subdivided into around a dozen recognisable subcategories of crime, whereas a total of 49 are enumerated in the universe of cases still in train before the lower courts.

3.2.6.2 Lack of invocation of aggravating factors in Chilean courts sentencing practices for crimes against humanity

In previous editions of this report we have expressed concern over the low sentence tariffs applied to perpetrators of crimes against humanity in Chile. When sanctions are so lenient as to be out of all proportion with the seriousness of the crime, state obligations to investigate, prosecute and punish are affected and the state can incur infractions of its international responsibilities. The various explanations for this practice of lenient sentencing in Chile include, without a doubt, the

123 This section, like section 3.2, uses information supplied by the Judicial Branch in the report already cited.

124 Although 'instances', here, refers to harm committed against persons, this figure does not directly translate into 3,102 separate victims, since due to the way the statistics are compiled, a single individual can appear more than once in the count.

concession of 'gradual' or 'half' prescription, as analysed in previous editions of this report. The issue is however more complex, with the failure by judges to invoke applicable aggravating factors also playing a part. Recent research shows that between 1993 and 2018 inclusive, the aggravating circumstances set down in the penal code have been virtually ignored in judicial treatment of crimes against humanity.[125] Of over 350 final sentences analysed, aggravating circumstances were recognised in only eight. In four of those instances, the aggravating factor acknowledged was 'taking advantage of the perpetrator's public status' (Criminal Code (Código Penal) art. 12 no. 8). The study also reveals that in almost 70% of the cases analysed, the question of the applicability of aggravating circumstances was not even discussed in the verdict.[126] In only 1.1% of the cases was the perpetrators' identity as public officials explicitly considered. That 1.1% moreover does not include a single case in which DINA agents or agents of any other intelligence service were convicted, despite the fact that these are the cases in which the use of the state apparatus to allow, facilitate, or create impunity for crimes is most evident. This omission is particularly serious when we consider that the status of being a public official is not one of the constituent elements of crimes against humanity, nor of the domestic figures that in Chile are most commonly used for conviction and sentencing (homicide and kidnap). Therefore there is no legal argument for excluding consideration of this characteristic for the purpose of acknowledging aggravating circumstances. This is not, however, being done, an omission which contributes to the lack of proportionality in sentencing that can presently be observed.

3.2.7 Legal arguments adduced in civil demands

In recent editions we have dedicated a specific section to the rights of survivors. While this edition omits this practice, this is not because the situation has improved. Every incoming administration since 1990 has refused either to create a specific office dedicated to survivors' transitional justice rights, or to assign responsibility for them, to newly created elements of human rights infrastructure (such as the Human Rights Subsecretariat of the Ministry of Justice and Human Rights, or the National Human Rights Institute). Faced with this situation survivors have mobilised to carve out for themselves the spaces of participation and protagonism that the state is supposed to guarantee.

125 Francisco Bustos, "La circunstancia agravante del artículo 12 No 8 del Código Penal y su (in)aplicación en causas sobre crímenes contra el Derecho internacional. Un análisis de la jurisprudencia chilena (1993-2018)". Unpublished Masters' thesis, Universidad de Chile, 2019.

126 Bustos, op. cit.

The numerous channels pursued by survivors include the use of the criminal courts to attempt to activate the right to seek reparation via the judicial route. Survivors have added civil demands to criminal cases and/or have lodged civil claims independently of criminal investigations, as have relatives in cases over absent (dead or disappeared) victims. The courts have recently begun to respond in a manner that more closely reflects relevant domestic and international legal precepts supportive of their demands. This new response has meant, firstly, recognising the inapplicability of ordinary civil law statutes of limitation, and secondly, underlining the absolute compatibility of reparation via the judicial route, with the administrative measures and programmes to which some civil claimants also have entitlement. With regard to the first, the courts have emphasised that the principles laid down by international law on the inapplicability of statutes of limitation to crimes against humanity, apply to civil as well as criminal law.[127] In relation to the compatibility with public policy entitlements, the courts have clearly signalled that the harm that civil claims attempt to partially remedy is moral harm, different in substance and purpose to the ends pursued by the somewhat patchy administrative programmes that the state has established at various points in time. The higher courts also seem to have arrived at a greater understanding that the harm produced by grave human rights violations or crimes against humanity is broad and deep, producing shock waves that reach to the entirety of the affective community around the most direct victim. In expressing this recognition, the courts are more in tune with the relevant international standards and understandings of victimization than are many administrative reparations programmes and their accompanying regulations. These latter stipulate, for example, that reparations pensions entitlements for former political prisoners can be inherited by surviving widows, but not widowers; or that siblings of absent victims are excluded from entitlements that extend to their parents.[128]

Two new tendencies have become visible in the recent period regarding civil claims. In the first, which affects survivors and relatives equally, the civil component of cases is allowed to go forward to its final conclusion even if associated criminal proceedings have to be suspended due to the death of perpetrators. The second has to do with the contrasting ways in which the courts and the state legal agency the CDE treat survivors whose cases have not been acknowledged by the respective truth commission. Each tendency is explored in more

127 As one example, the text of a civil claim placed on 10 December 2018 in the case currently coded as RoI 6.813-90 (Santiago Appeals Court), lists a total of 117 final verdicts in which the Supreme Court has recognised that statutes of limitation cannot apply to civil claims relating to dictatorship-era crimes against humanity.

128 See the "Barrio Franklin" case, discussed below.

depth below. The death of agents before their specific criminal responsibilities can be determined, or before a sentence already handed down can be confirmed and activated, is increasingly common. In recent times one variant of it has become more noticeable: in certain cases the entirety of the group of agents accused or convicted, die before the case reaches its very final stage. The impact on the determination of judicial and social truths, and on the truncation of the right to justice, are explored in section 3.3.5, below. Here, we instead focus on how some justice system operators have interpreted the need to ensure that biological impunity of individuals does not lead to neglect of other aspects of the institutional responsibility of the state that committed, promoted and covered up dictatorship-era state terror crimes. In this regard, on 3 August 2020, the Supreme Court acknowledged that while "the principal objective of a criminal case is to investigate and judge conduct that has been deemed by law to be illicit", this does not preclude the consideration in a single case of both criminal and civil aspects of conduct.[129] The Court therefore specifically rejected the efforts of (subsequently deceased) Judge Pfeiffer of the Santiago Appeals Court to annul all advances in a case whose sole accused party had died. Pfeiffer had attempted to argue that if the family still wished to pursue their right to reparation via the judicial route, they would have to apply for a second time, this time to the ordinary civil courts.[130] The plaintiff argued successfully that the civil claim had always been directed against the State, as the civilly liable third party, not against the direct perpetrator in person. The Supreme Court recognised that in accordance with the principle of extension, "the complainants have lodged their demand before the competent tribunal, pursuing the civil liability of the State for acts committed by one of its agents", and acknowledged that the action was compatible with all the relevant domestic codes and legislation.[131]

In this and similar rulings the higher courts are acting in keeping with the multidimensional nature of transitional justice, by implicitly or explicitly recognising that the work of the courts in these matters goes beyond a narrow interpretation of justice as solely comprising retributivist criminal sanctions against individuals. Justice is instead being viewed as having additional functions: not limited solely to its already well-established civil law dimension, but including the production or underwriting of important social truths – in this instance, the fact that the State was indeed the entity responsible

129 Supreme Court, Rol 16.908-2018, 3 August 2020, consideration no. 4.
130 Santiago Court of Appeal, Rol 592-2017, 25 June 2018. See especially Consideration no.6.
131 Supreme Court Rol 16.908-2018, 3 August 2020, Consideration no. 7.

for the crime for whose effects partial restitution was being sought. Similarly, the courts recognised that it falls to the justice system to assign a measure of reparation that is not only pecuniary but also symbolic, and above all moral, in nature. The Criminal Bench of the Supreme Court, in particular, has taken care in its recent rulings on the matter to make explicit reference to sources of the duty of reparations in both domestic and international norms; the moral character of the harm whose partial remedy is sought, and the inadmissibility of any attempt to declare civil claim making and the exercise of administrative reparations entitlements to be mutually exclusive. In a fairly representative verdict, handed down on 22 June 2020, the Bench states that:

> "Summing up: since the State's obligation to provide reparations to the victim's relatives is enshrined in international human rights norms, domestic statute cannot stand as an obstacle to compliance with this duty. [Moreover], this duty is also to be found enshrined in domestic law"…. "the responsibility of the State is derived additionally from art. 3 of Law 18.575, the Constitutional Organic Law of General Bases for the Administration of the State (Orgánica Constitucional de Bases Generales de la Administración del Estado), which sets down that the administration of the state is at the service of the human person, that its purpose is to serve the common good, and that responsibility forms one of the principles to which its actions are always subject. In consequence, article 4 of the same law stipulates that 'the State shall be responsible for harms caused by organs of state administration in the exercise of their functions, without prejudice to the responsibility that may accrue to the state employee who occasioned that harm'. This being so, we cannot but conclude that moral harm occasioned by the illicit conduct of the state employees or state agents, who perpetrated the offences against humanity that form the basis of the present action, must be compensated by the state".

The verdict continues:

> "… it is important to bear in mind that the process of codification [of these norms] in the country, occurred temporally prior to the events that led to the emergence of international human rights law in the form of international treaty law, resolutions, and other international sources. Accordingly, it is improper to attempt to apply norms from the Civil Code, *qua* ordinary law supplementary to the entire domestic legal edifice, to the civil liability that arises from crimes against humanity – which can only be committed through the active collaboration of the state. …

> [T]he evolution of legal science has allowed the establishment of specific principles and norms for certain issues, in particular, an updated system of rights protection that is based on postulates that diverge from and are sometimes in conflict with, those that apply to private law (…) This emerging branch of law holds the dignity of the person who is to be served, to be supreme, from which proceeds the orientation of international law toward the defence of human rights, and the punishment of transgression of these by state agents in the form of crimes against humanity must [therefore] prevail over earlier precepts, developed in an age when this evolution had not yet occurred. This being so, the argument made by the State that compensation is not required in the present case because the plaintiffs received reparations pensions under the terms of Law 19.123 [a law on reparations for dictatorship-era violations] and its later modifications cannot be accepted, because it contradicts the content of the aforementioned international norms, and because ordinary domestic law is applicable only insofar as it does not contradict those precepts (…) therefore the responsibility of the State for this class of crime will always be subject to rules of international law, which cannot be ignored on the basis of precepts from domestic law…
>
> The norms invoked by the State – which only establish a system of welfare payments – in no sense create incompatibility with the compensation that is here sought. On the contrary, the mutual compatibility [of the two routes] is expressly signalled in art. 24 [of Law 19.123], which prescribes that 'The reparations pension will be compatible with any other, of whatever character, that the beneficiary may hold or may be entitled to. It shall similarly be compatible with any other social security measure established by law'. Seen from this point of view, it is not appropriate to suppose that this law was passed in order to repair the totality of the moral harm inflicted on victims of human rights violations, since these are distinct types of reparation, and [the fact that] the State should voluntarily undertake them does not imply that one or other part is renounced, nor that the jurisdictional system is prohibited from declaring that they should proceed, by the means authorised by law. This as previously held by this Court."[132]

Another case concluded during this period, whose criminal aspect will unfortunately remain subject to impunity, concerns the survivor

132 Supreme Court Rol 39.905-2018, 22 June 2020. The specific previous ruling referred to by the Court is Supreme Court Rol 20.288-14, 13 April 2015, although there are numerous similar examples, which can be found in section E of bimonthly bulletins numbers 54 to 59, inclusive, produced by the Observatorio and available (in Spanish only) at http://www.derechoshumanos.udp.cl/derechoshumanos/index.php/observatorio/Observatorio-de-Justicia-Transicional/Publicaciones/Boletines/

Adriana Bruna. The Valparaíso Court of Appeal confirmed a civil claim for torture suffered at the hands of Aníbal Schaffhauser, who died on 4 November 2019 before he could be made begin serving the sentences already imposed on him in this and other similar cases.[133] Adriana's case also displays a characteristic that we wish to highlight in this section: it was initiated by a survivor who is not listed in either of the registers of acknowledged victims compiled by the two iterations (2004-5, and 2011) of Chile's second truth commission, popularly referred to as the 'Valech Commission'. The attitude of the courts to plaintiffs who do not appear on these lists – who we will refer to henceforth as 'non-acknowledged survivors') – has been uneven to date. The principle obstacle has been the manifestly contradictory and apparently ill-informed attitude of the CDE.

The CDE appears in representation of 'fiscal interests' in almost all civil claims seen before the courts, and has historically argued consistently for the non-recognition and non-satisfaction of rights to reparation via the judicial route, whether for relatives of absent victims, acknowledged survivors, or non-acknowledged survivors. In regard to the first two categories of person, the CDE tries to argue exemption on the grounds that payment has already been made (*excepción de pago*). For this purpose it contends that existing administrative reparations measures are sufficient, generous or even over-generous. In regard to non-acknowledged survivors the CDE insists on 'making known' to the court that the plaintiff does not feature on truth commission lists. While stopping carefully just short of explicitly claiming or alleging that this absence means a civil claim cannot prosper, this is clearly the reading that the court is invited to infer. This line of argument falls into evident contradiction, bordering on the cynical: declaring, on the one hand, that those who according to the CDE's precepts are entitled to make claims - because they appear on the relevant lists - do not 'need' or 'deserve' "more" reparation; whereas those who have not received administrative reparation – because they do not feature on the lists – are, for this very reason, to be considered excluded from claim making. The central fallacy here has to do with the lack of understanding or appreciation that the individual victim or survivor lists produced by the truth commissions are a long way from constituting a sole or exhaustive register of all the crimes against humanity or other grave violations committed over the course of 17 years of dictatorship. Nor is there any basis for the insistence that having appeared before one or other commission, and moreover having had one's testimony

133 Valparaíso Court of Appeal, Rol 1805-2019, 4 December 2019. Since the case was not presented before the Supreme Court, this verdict was the definitive outcome of the case.

'validated' in the narrow terms of the specific mandate of each commission, should be transformed *ex post* into a prerequisite for the acquisition or exercise of rights by victims or survivors.

Similarly exaggerated, and selective, respect for administrative decisionmaking with an often questionable basis is shown when the CDE argues what is known as the *'excepción de preterición'*, claiming that the courts should recognise and emulate the arbitrary exclusions made in the texts of certain reparations laws to exclude siblings from entitlements, while including parents and children. A recent example occurred in the case that culminated in Supreme Court verdict Rol 16.908-2018, 3 August 2020. In its sentence, the Supreme Court ratified the first instance decision of judge Mario Carroza (rol 196-2011, 27 December 2016, 'Barrio Franklin' case) in an episode involving the extrajudicial execution of three men and the enforced disappearance of another. The final verdict's Consideration no. 9 rejected the argument of the CDE, which wanted the claims of four siblings of the victim of disappearance to be rejected out of hand. According to the CDE, the fact that the drafters of Law 19.123 had determined, back in 1992, to exclude siblings from the economic reparations programme that the law set up was sufficient grounds to continue denying their right to reparation almost three decades later. It is to be welcomed that the investigative magistrate and the Supreme Court alike found against the CDE.

Taking three examples of civil claims seen during this period, presented by survivors who do not feature on truth commission lists, the CDE moreover committed a series of basic factual errors that call into question the elementary knowledge that its personnel possess about transitional justice in Chile. In the first case, the CDE alleged *excepción de pago* in the case of a non-acknowledged survivor (who therefore does not, and cannot, receive the payment that the CDE argued disqualified her from suing the state).[134] In the second, the CDE tried to block indemnization on the grounds that a survivor was not listed by the 'CNVR or CNRR'. The reference is to the wrong commission, since the acronyms denote the primary iteration, and followup list, of the Rettig commission, which was not mandated to acknowledge survivors but only listed victims of death or disappearance.[135]

In the third case, the CDE made an entirely incoherent allusion to the 'Rettig or Valech Truth and Reconciliation Commissions' (sic), mangling the official titles before going on to offer an absolutely imprecise

134 The Adriana Bruna case, discussed above.

135 The case of René Melo Lago, whose civil claim (without a criminal investigation attached) was rejected by the Supreme Court, ratifying a verdict by the Concepción Appeals Court, on the grounds that the underlying events were found not proven. Supreme Court Rol 21.123.2020, 15 July 2020.

characterisation of the scope and mandate of each instance.[136] This characterisation was clearly prejudicial to the plaintiff, suggesting as it did that their non-inclusion in the named lists could be considered a motive for doubting the events they narrated, disputing their characterisation as crimes against humanity, or denying the State's responsibility for them. In the case at hand, there is no doubt whatsoever about the facts of the matter: a criminal investigation carried out at the time established them with sufficient certainty that the principal protagonist was even convicted, something almost unprecedented given the widespread impunity that prevailed at the time. The perpetrator shot an anti-riot gun at the plaintiff, with no more provocation than a simple verbal altercation in a public street, after a demonstration in favour of the 'No' vote in the 1988 plebiscite. The victim, who was hospitalised for months, still suffers serious consequences. Despite the fact that the principal aggressor and his three accomplices were all Army captains or lieutenants at the time, the CDE was yet again key in having the 29th Civil Court of Santiago turn down the claim, in November 2019, on the basis of the statute of limitation. The CDE's argument was that the events, which it did not deny, are "only" constitutive of ordinary attempted homicide, despite the military identity of the perpetrators, "not related to the professional duties of the state employee nor identifiably the result of state policy".[137] This argument, extremely regressive in comparison with recent higher court verdicts, transmits the dangerous message that a violation of human rights only acquires that character if every part of it was explicitly thought out, considered and ordered in advance; and that uniformed state officials who commit repressive acts in their free time do so as ordinary citizens. This reasoning completely ignores the fact that both the impunity to commit the violation and, in this case, possession of the means used, proceeded directly and irreplaceably from the perpetrator's identity as agent of a repressive entity. The reasoning also chooses to overlook the defenceless position of the victim faced with an actor armed, and backed, by the very state charged with enforcing the law. Such an at-

136 The formulation used by the CDE alleged that the two commissions were carried out "precisely [so that] people who believed themselves to have been affected by political violence could attend […] to be acknowledged as victims of violence, political imprisonment, and torture". "Victims of violence", without further qualification, is not a category of person that appears in the mandate of either Commission. The Rettig Commission could only recognise cases of political violence resulting in death or disappearance. The mandate of the Valech Commission was limited from the outset to cases of violence provably exercised by agents of the state, and further excluded, deliberately, numerous types of context in which both politically motivated detention and treatment clearly constitutive of torture took place, such as irregular detentions of short duration, mass arrests in the context of protests, etc.

137 Rol C-37028-2018, 11 November 2019.

titude also creates a clear incentive for the outsourcing of repression, "privatising" the illegal behaviour of state employees as though anyone who commits a crime, does so automatically outwith their condition as a state agent - *a motu proprio* and without creating any institutional responsibility whatsoever. The dangerous implications of such logic in the present climate are clear, when we consider that criminal and institutional responsibilities for the multiple acts of extreme violence committed by police officers against protesters in 2019 and 2020 are still to be determined. In the case at hand, the first instance verdict was ratified in a single line by the Santiago Court of Appeal in early July 2020.[138] Review before the Supreme Court remained pending at time of writing.

A final aspect of the use of civil law that is worthy of comment has to do with the courts' change of criteria over the statute of limitation, commented on in earlier iterations of this report and also relevant to the representations made by the Rivera Matus and Godoy Román families before the Inter-American human rights system (see above, section 3.1). The higher courts have still not found a way to guarantee in an even-handed manner the rights of all victims or survivors, to reparation via the judicial route. As discussed in section 3.1, a friendly settlement was reached before the Inter-American Commission in early 2020 in a petition submitted by relatives of Juan Luis Rivera Matus. The petition was over the denial, by the Constitutional Bench of the Supreme Court, of a civil claim submitted by the family. The grounds for the refusal were the supposed expiry of the statute of limitation applicable under ordinary civil law. The agreement reached in 2020, like an earlier (2018) final sentence by the Inter-American Court (Ordenes Guerra case) acknowledged and valued a later change in criteria by the Supreme Court, one which occurred after the date of the outcomes that motivated each petition.[139] Nevertheless, as we have seen in section 3.1, the opportunity for rectification that arose when the Godoy Román family lodged a second civil claim was wasted. As also reported above, the family has once again resorted to the Inter-American human rights system.

138 Santiago Appeals Court, Rol 15633-2019, 3 July 2020.

139 The change in criteria came about not due to a change of heart by the Constitutional Bench but because an agreement in late 2014 transferred future consideration of civil claims related to dictatorship-era human rights violations to the Criminal Bench. According to sources close to the Court, the change was proposed and driven forward by judge Sergio Muñoz, then-President of the Court, who has always demonstrated special concern for the progress of justice over dictatorship-era human rights crimes.

3.2.8 Cases with an international dimension

On 7 October 2019 the Criminal Bench of the Supreme Court approved an extradition request to be submitted to Italy for the extradition of Walther Klug Rivera, a fugitive from justice who was convicted in Chile for rape, homicide and kidnap of a total of 23 people. In addition to the universal dispositions that apply to crimes of such gravity, the request is founded on a longstanding specific bilateral extradition treaty between the two countries.

3.3 Agents (perpetrators)

3.3.1 Prisoners: numbers and conditions of detention

The matter of a reliable, consolidated, official public source that provides information on the serving of sentences handed down to perpetrators of crimes against humanity remains unresolved. In just over a decade of functioning, the Observatorio has come up against conflicting, contradictory and vacillatory positions on this matter between one state office and the next, and even from the same state office or entity over time. Although sources from outside and within the judicial branch have agreed that the effective serving of sentences ought to be in the public domain, therefore susceptible of being independently monitored (see the 2019 iteration of this report) a recent Supreme Court sentence appears to contradict those perceptions (see section 2.2.2, anonymity and prisoners in Punta Peuco). It is difficult for the public to have confidence in the justice process, or for civil society to carry out its proper vertical accountability functions in monitoring – for example – the correct concession of post-sentencing benefits, sentence reductions, presidential pardons and the like, unless reliable information is published consistently and updated periodically.

On 10 January 2020, former DINA agent Ricardo Lawrence Mires was due to be transferred to the Colina I prison to begin serving various sentences for crimes against humanity. Lawrence, a former police officer, had been on the run since 2015 after being convicted of multiple offences including the enforced disappearance of Alfonso Chanfreau. A ruling in January 2020 ordered his incarceration to begin serving 10 years for the aggravated kidnap (disappearance) of Miguel Acuña Castillo, a victim of Operation Colombo. While in custody Lawrence was also formally notified of other convictions for his part in the disappearance, extrajudicial execution and/or torture of a total of over 100 people, many from the clandestine detention and torture centre Villa Grimaldi. Lawrence had featured for years on the detective police's most wanted list when he unexpectedly gave himself up, in January 2020.

In mid-June 2020, judge Mario Carroza ordered the transfer of eight inmates from the Colina I prison to institutional Armed Forces medical facilities. Three of the prisoners had been diagnosed with Covid-19, while the other five had shown possible symptoms. The judge also sent a requirement to the directors of the Punta Peuco and Buen Pastor prisons – the main other facilities housing perpetrators convicted of crimes against humanity – ordering that any such perpetrator suspected of having Covid-19 should be sent to Armed Forces facilities instead of to prison service hospitals, as would be usual.

3.3.2 Guilty verdicts and sentences

Figure 3: Verdicts and numbers of persons convicted or absolved in Supreme Court final verdicts in dictatorship-era human rights cases between July 2010 and June 2020 inclusive, by twelve-month period

	July 2010 – June 2011	July 2011 – June 2012	July 2012 – June 2013	July 2013 – June 2014	July 2014 – June 2015	July 2015 – June 2016	July 2016 – June 2017	July 2017 – June 2018	July 2018 – June 2019	July 2019 – June 2020
Number of cases completed before the Supreme Court	23	18	4	12*	44**	**58°**	**55x**	**37x**	**44°**	**47±**
Number of times charges or initial convictions were suspended due to death of the agent										19
Number of cases suspended definitively due to the death of all agents involved +										1
Total absolutions	**12**	**12**	**0**	**10**	**26**	**10**	**44**	**4**	**154**	**196**
Total convictions	**84**	**49**	**11**	**49**	**159**	**122**	**212**	**102**	**128**	**125**

Number of custodial sentences	34	13	5	18	132	81	179	67	113	107
Number of non-custodial sentences	50	36	6	31	27	41	33	35	15	18
Total number of discrete individuals affected by convictions and/or absolutions	64	48	11	53	**103**	**98**	**155**	**78**	---	**144**
Number of those agents convicted in at least one case	52	40	11	43	73	88	127	68	**77**	81[!]
Number of those agents whose cases were suspended due to their deaths										14[ϕ]

* One of these dealing solely with civil liability
** Four of these dealing solely with civil liability
° 16 of these dealing solely with civil liability
[x] Six of these dealing solely with civil liability
± 15 of these dealing solely with civil liability
[+] The civil dimension of such cases is sometimes completed regardless, but in this particular case no civil claim was appended
--- Figure under review
[!] For the first time in the decade (with the possible exception of 2018) the number of individuals receiving one or more absolutions (82) exceeded the number receiving one or more convictions (81). 55 individuals only received convictions; 56 only received absolutions, and 26 received a mixture of convictions and absolutions, across different cases.
[ϕ] Seven of these also received absolutions during the period, with one also receiving a conviction.

Source: Authors' own production, using data obtained from judicial verdicts

Over the course of the period, one of relatively few custodial sentences against female perpetrators was confirmed. Former DINA agent María Gabriela ***Órdenes*** Montecinos was one of three agents convicted for the disappearance, from Villa Grimaldi, of Luis Humberto Piñones Vega. ***Órdenes*** was sentenced to five years and 1 day.

3.3.3 Presidential pardons and pardons on medical and public health grounds

Three different types of pardon were discussed over the period. The first came about due to emergency legislation in response to the pandemic, which saw various groups of prisoners released. The second had to do with a longstanding draft bill proposing to commute custodial sentences to house arrest for prisoners of advanced age and/or suffering from certain medical conditions. The third type, presidential pardon, was granted during the period to free three perpetrators of crimes against humanity.

The 'Covid-19' pardon that took effect on 17 April 2020 was initiated by a draft bill, presented in March, to substitute custodial sentences by house arrest for some older people, pregnant women, and mothers of children under two years of age residing in prison mother and baby units. This type of pardon does not dissolve the conviction or the sentence, it simply allows the person to serve the remainder of their sentence under supervision outside of a prison environment. The draft bill, Boletín 13358-070, excluded those responsible for serious crimes, perpetrators of crimes against humanity amongst them. On 31 March, Senators from right-wing parties presented a requirement before the Constitutional Tribunal that basically sought to ensure that those convicted of human rights violations would receive the benefit. The Tribunal called public hearings as part of the process of determining its verdict. On the same day as the hearings were due to be held, right wing members of the lower legislative chamber tried to present a second requirement (later withdrawn). The effect of both requirements was unnecessary delay of a self-evidently urgent piece of legislation. The Tribunal in the end rejected the Senators' requirement by a 7-3 majority, and Law 21.228 came into effect on 17 April, with the initial categories of exclusion intact. One of the Tribunal's concurring judges stated: "It is notable that this requirement is being presented at a critical moment during a lethal national and international pandemic…. Its effect has been to suspend, during a matter of days and potentially even weeks, the entry into force and application of a pardon. Days that were necessary to save lives have been sacrificed to an exercise in litigation that could best be summed up as 'if my people aren't going to be released then let nobody be released', utilising the pandemic and the delay in pardons for common criminals as an instrument to try and pressure the State into abandoning the effective sanction of perpetrators of grave human rights violations".[140]

140 Constitutional Tribunal, Rol 8574-20 CPT, observations (prevenciones) by judge Rodrigo Pica Flores, Consideration no. 66.

On 22 April 2020 the Inter-American Commission on Human Rights, IACHR, expressed approval of the measure at the same time as expressing concern over another bill, still at draft stage, that seeks to expedite the concession of house arrest to other categories of prisoner. In its statement, the IACHR reminded the Chilean state of its international obligation to apply adequate sanctions to those responsible for grave human rights violations, and to avoid such sanctions becoming essentially illusory due to the subsequent concession of post-sentencing benefits that create the perception of impunity. At the same time, the IACHR commended the exclusion of perpetrators of grave violations from the recently approved Law 21.228, remarking that the exclusion was in accordance with the content of the IACHR's Resolution on the Pandemic and Human Rights, Resolution 01-20, published on 10 April. Paragraph 46 of the Resolution, relating to persons deprived of liberty, emphasises the need to apply "closer analysis and more stringent requirements" to requests for prison privileges and alternatives emanating from persons at risk for the pandemic in prison for serious human rights violations or crimes against humanity. These special considerations are motivated by the need to consider the "legal interest at stake, the seriousness of the facts of the case, and the State's obligation to punish those responsible for such violations". It should be pointed out that Law 21.228 does not confer a form of ordinary sentencing or post-sentencing benefits: it is an emergency public health measure aimed at reducing the overall risks of contagion. Those risks are at their height in conditions of overcrowding, which are endemic in all of the country's ordinary prison facilities but do not obtain in the privileged conditions in which Chile's convicted perpetrators of crimes against humanity almost invariably serve their sentences (the purpose built Punta Peuco facility and a specially-equipped section of the high security prison Colina I).

The IACHR's declaration also made reference to draft bill Boletín 12.345-07, which aims to regulate the concession of non-custodial alternatives to custodial sentences for humanitarian reasons, and whose scope does potentially extend to perpetrators of crimes against humanity. The IACHR expressed concern over the eventual parameters of the bill, known as 'the [draft] law on humanitarian pardons', whose debate was reactivated in the Senate on 8 April 2020. Its proposals include the release of prisoners with terminal illness and/or of prisoners 75 years of age or more, who have served over half their initial sentence (or 20 years, in the case of those sentenced to life imprisonment). The Senate legislative committee on Human Rights, Nationality and Citizenship (Comisión de Derechos Humanos, Nacionalidad y Ciudadanía) rejected the proposal to legislate, referring the draft to another House committee, the Commission on the Constitution, Legislation,

Justice and Regulations (Comisión de Constitución, Legislación, Justicia y Reglamento) on 13 April 2020 (three days before the promulgation of the 'Covid-19 pardon' described above). In June 2020 the memory space Londres 38 published a report with its analysis of the present content of Bulletin 12.345-07, accusing it of constituting "yet another attempt to perpetuate and accentuate impunity".[141] The report compiles observations made by Londres before a session of the relevant Senate committee in May 2020, in which other human rights organisations also took part. Londres's criticisms of the project highlight a clause that would make it compulsory for judges to seek medical reports before deciding on an application for release, and would establish the national forensic and coroner's service, the Servicio Médico Legal, SML as the only authority mandated to emit such reports, evaluating the medical condition of those who apply for a pardon on grounds of terminal illness or incapacity which they allege cannot be suitably managed within the prison environment. Londres questioned the viability of these requirements given that the SML is already visibly overwhelmed by the volume of pre-sentencing reports and other requests already pending in human rights cases (see the 2019 version of this report). The Supreme Court pointed out the same question mark over capacity in its official remarks on the draft project. The question of how the pardon would operate in case of subsequent additional convictions against someone already pardoned was also raised. This question is particularly pertinent in dictatorship-era human rights cases as many of the former agents currently in prison are awaiting sentencing for multiple other similar offences.

In early May 2020 a presidential pardon was conceded to Demóstenes Cárdenas, who was serving a sentence of 10 years and a day for the aggravated kidnap of the Communist party activist Stalin Aguilera Peñaloza, forcibly disappeared as part of 'Operation Colombo'. The former DINA agent was not in prison at the time but in the Air Force Hospital, being treated for cancer. His family requested the pardon on health grounds, and it was conceded by president Piñera for 'humanitarian reasons'. On 31 July another two such pardons were conceded, this time with notable efforts at secrecy. The beneficiaries were Raúl Rojas Nieto and Víctor Mattig Guzmán, convicted perpetrators of crimes against humanity who had been held in Punta Peuco. The pardon produced a public statement signed by almost 40 human rights lawyers, rejecting the move and reminding the government of its duties in truth, justice, and guarantees of non-repetition.

141 "Informe de Londres 38 sobre proyecto de ley que regula la sustitución de penas privativas de libertad por razones humanitarias", 9 June 2020, our translation.

3.3.4 Deceased agents

The failure to release or produce information referred to above means that we do not have reliable official figures of the numbers of agents charged, sentenced and/or in prison, who died over the course of the period. Moreover, for reasons which are unclear, the death of one perpetrator in prison, on 21 June 2020, was announced while attempting to keep his name secret (his identity was later released by non-official sources). The register that follows is therefore unavoidably incomplete.

In August and October 2019 two agents involved in killings, torture and disappearances perpetrated by the Caravan of Death as it passed through the city of Valdivia died, having been convicted by a first instance judge but at liberty pending appeal. Similarly, Aníbal Schaffhauser died on 4 de noviembre de 2019 under numerous charges and having been sentenced, but not yet sent to prison (see below). On 17 June former police officer Félix Sagredo died in the Hospital Dipreca. Sagredo, supposedly serving a 15-year sentence in Colina I for the mass killings at the Hornos de Lonquén, had actually been hospitalised for several months and according to his lawyer contracted coronavirus during his stay at the police service hospital. On 21 June, Juan Bautista González died in the Air Force hospital after having been imprisoned in late 2018, in Punta Peuco, for his part in the illegal detention, torture and disappearance of former comrades in arms and other victims in the Air Force Academy (Academia de Guerra Aérea) after the coup. For some unknown reason, the prison service refused to release his name, but it was announced a day later by the denialist organisation CREN, which defends perpetrators of crimes against humanity and claims they are 'political prisoners'. In late July 2020, Patricio Martínez died. Martínez was serving a sentence in Punta Peuco for his part in the killing or disappearance of 23 workers in the 'El Toro y El Abanico' case.

3.3.5 Biological impunity at case level

As mentioned above, the death of suspects and proven perpetrators while awaiting final case resolution or appeal, has come to be termed 'biological impunity', given its negative implications for the possibility of full criminal justice for individual perpetrators. Not only is the full satisfaction of the right/ duty of justice thereby imperilled – so too is the contribution that establishment of judicial truth and, potentially, economic and symbolic reparation can make to justice. Increasingly, over time, there is an increasing risk that such deaths do not only remove certain individuals from a criminal case but derail the case altogether, due to the death of all suspects and/or parties convicted. In such instances the negative impact is particularly severe, since the entire crime or episode goes unresolved or unpunished as a result. This

phenomenon, which we are calling 'case-level biological impunity', has become visible over the period covered by this report. Accordingly we offer here an initial description and analysis of it, highlighting a handful of cases in which this new form of impunity has come to the fore.[142]

The earliest occurrence of case-level biological impunity that we have identified to date took place in 2016, after the death of notorious DINA agent Marcelo Moren Brito, the only person sentenced for the disappearance of Isidro Arias Matamala, professional musician and MIR activist, who went by the name "Ciro". Moren Brito died in the Military Hospital on 11 September 2015. At the date of his death he had been sentenced to a total of over 300 years of confirmed prison terms, although the confirmation of the initial sentence for the disappearance of Isidro was still pending. On 6 January 2016, the Santiago Appeals Court decreed the definitive part suspension of the investigation of Isidro's disappearance. In the civil claim aspect of the case, the Court had to first confirm that a sibling could bring a civil claim – something that the state, as represented by the CDE, had attempted to dispute – before it was able to ratify the indemnization awarded by the first instance judge.[143]

The second case in which we identified this phenomenon has already been mentioned (section 3.2.2, above) as judge Raúl Mera features in it, as part of the bench that reduced the sentence tariff of the only one of the two named perpetrators who lived long enough to be convicted. The case is over the killing of Jean Rojas, victim of extrajudicial execution. Jaime Bachler, one of two agents charged, died before the initial sentence could be passed in 2017. Aníbal Schaffhauser, the other agent, was the only one definitively convicted. His initial sentence of 15 years 1 day was reduced by the Valparaíso Appeals Court, on 20 July 2018, to just 10 years 1 day.[144] Schaffhauser died on 4 November 2019, occasioning the definitive suspension (closure) of the case, ratified by the Supreme Court in December of the same year.[145] As no civil claim dimension is mentioned in any of the sentences, an extrajudicial killing by state agents, the belated investigation of which managed to identify two of them, ended with no discernible concrete outcome.

The third example of case-level biological impunity is one of two where the right to reparation via civil indemnization was also placed under threat. The only agent charged for the death of three men and

142 We will be conducting ongoing monitoring of this issue and would invite anyone with information about additional historical instances to contact the Observatorio in order to reconstruct the fullest possible record.

143 Santiago Appeals Court Rol 767-2015, 6 January 2016.

144 Valparaíso Appeals Court, Rol 364-2018, 20 July 2018.

145 Supreme Court Rol 20.444-18, 27 December 2019.

the disappearance of another in the 'Barrio Franklin' case, was former police officer Benjamín Videla Muñoz. Videla died on 1 June 2016 before he could be notified of the preferment of formal charges against him. The case was accordingly partially suspended (in the criminal aspect) with the civil aspect resolved in favour of the family's civil claim. Two years later, due to the CDE's opposition to the order for the state to pay compensation, the case went before the Santiago Court of Appeal. A bench presided over by the conservative judge Pfeiffer produced an extremely sui generis sentence asserting that the death of Videla should be held to annul everything done to date in the case, including the first instance sentence. According to the ruling, this would not be tantamount to a denial of the family's right to pursue reparations via the judicial route as they would supposedly be free to start the whole process again, bringing a claim before an ordinary civil tribunal.[146] The peculiar logic of the ruling went on to assert that otherwise – that is, if the Bench acceded to ratify the award made in the civil part of the case, the only part that was still in course– Videla would be "criminally convicted" (sic) "without having had the opportunity to defend himself".[147] Fortunately, the Supreme Court accepted the arguments of the plaintiff, recognising that the civil claim had always been directed not against the now-deceased agent as an individual, but against the public purse (Fisco) as the civilly liable third party. The Supreme Court also clearly stated that the truncation of the criminal dimension of a case in this way is no reason why its civil aspect should also be abandoned: while it is true that "[the] principal objective of a criminal trial is to study and judge conduct that the law considers to be criminal", this does not rule out determination, in a single trial, of civil liability aspects alongside criminal responsibilities where the law so allows.[148]

In a fourth case detected, in August 2020, the Supreme Court again confirmed that it is licit to issue indemnization for moral harm occasioned by state agents even when, as here, the only named agent specifically held criminally responsible in the case died before the Supreme Court could review that aspect of the case. The agent involved is once again Aníbal Schaffhauser, convicted over the killing of Jean Rojas at the time of his death in November 2019. This time the case at issue was for the kidnap and torture of two survivors, children at the time, which were held prisoner alongside their mother in their own home for a period of weeks, during which their father was arbitrarily detained. The nine-year sentence passed on Schaffhauser by the first

146 Santiago Court of Appeal, Rol 592-2017, 25 June 2018, Consideration no. 6.
147 Ibid., Consideration no. 5.
148 Supreme Court, Rol 16.908-2018, 3 August 2020, Consideration no. 4.

instance judge was overturned by the Valparaíso Appeals Court, in a ruling drafted by judge Raúl Mera contesting the notion that being held prisoner in one's own home could be considered constitutive of kidnap. The ruling even went so far as to insinuate that the fact that the children were obliged to attend school during the period – taken there and back, and supervised throughout, by heavily armed guards – and were also removed from the house in order to be made to watch their mother being interrogated, meant that they had not even been truly deprived of liberty.[149] The ruling used these and other extremely dubious pieces of logic to absolve the agent, before going on to claim that "having not arrived at a criminal conviction, the civil claim cannot be accepted (…) as it is based not only upon the existence of the crime but the participation in it, as author, of a specific person who was an agent of the state at the time it took place".[150] This reasoning is moreover in clear contradiction with the findings of the Santiago Court of Appeal just a few days previously, in the Barrio Franklin case, see above. The Valparaíso ruling also betrays a privatising and atomising line of reasoning that attempts to deny or overlook the institutional and collective responsibility of the state for events that it planned, ordered, and authorised. Once again, the Supreme Court had to step in to restore the legitimate pretensions of relatives and survivors to exercise their right to reparation via the judicial route. Worryingly, however, the Supreme Court bench rejected the specious arguments of the Court of Appeal by the narrowest possible 3-2 margin.[151]

3.4 Key transitional justice actors and institutions

The new Human Rights Unit (Unidad de Derechos Humanos) of the SML presented its first annual report on 10 December 2019, International Human Rights Day. The Unit was created in January 2019, bringing together previous initiatives and expertise across the Service in forensic identification and public policy with implications for human rights including gender equality. The aim is to equip the SML with a specific human rights infrastructure able to continue to respond to national and international demands in its capacity as an auxiliary justice system institution, and in accordance with Chile's National Human Rights plan. The previous instances whose work the Unit

149 Valparaíso Court of Appeal, Rol 260-2017, 20 July 2018, teniéndose presente no. 7.

150 Valparaíso Court of Appeal, Rol 260-2017, op.cit., teniéndose presente no. 12.

151 Supreme Court, Rol 20.631-2018, 18 August 2020. Judges Brito, Llanos and Dahm voted to replace the lower court's ruling ex officio, in its civil claim aspect. Judges Künsemüller and Valderrama emitted a dissenting minority vote. In the criminal aspect, the Appeals Court ruling was allowed to stand, for basically formal reasons (the Supreme Court found that the arguments adduced for elevating the matter to its attention were not correctly grounded). Op. cit., Considerations nos. 8 to 10.

brings together and continues include the Special Forensic Identification Unit, Unidad Especial de Identificación Forense, a significant part of whose work includes cases for dictatorship-era crimes, as well as new thematic work and emphases related to children and young people, women, and prevention and response to torture and human trafficking. Amongst the main events of 2019, the Unit's head took part in Chile's first ever presentation before the Committee Against Enforced Disappearance, in Geneva. The visit to Switzerland was also the occasion for the handover of an additional 369 blood samples related to dictatorship-era human rights violations in Chile, most of them donated by relatives of the disappeared. The samples were handed over for safekeeping to the International Committee of the Red Cross, a process which constitutes one of the agreements made in 2006 between relatives' associations, international experts and the SML to deal with and correct historical errors in identification of remains, associated particularly with the Patio 29 case.

In its third progress report, published in September 2020, the Unit includes information on the cumulative historical detail of its work in taking samples, as well as describing its field and laboratory activities, preparation of expert reports, and work in the promotion and protection of human rights in relation to its three main areas of activity: dictatorship-era violations, recent complex criminal cases, and response to natural disasters. [152] The report details the accumulation since 2007 of 5,761 blood samples, and 1,933 dental or bone samples, collected (180 of them posthumously) from relatives of victims of dictatorship-era enforced disappearance. The samples were taken in a dozen countries, with Sweden and France the most common places of origin after Chile itself. Within the region, Argentina and Uruguay also feature. The list is representative of common destinations of exile of those thousands of people forced to leave or flee the country during the dictatorship to avoid political persecution. The first half of 2020 is to date the first year since 2007 when no samples are registered as having been taken outside of Chile, although a total of 27 bone or dental samples taken inside the country were able to be sent to external laboratories for processing.

The Unit also reports a total of 174 identifications carried out in Chile since 2007, using nuclear DNA (currently considered the most scientifically accurate technique available), of persons presently acknowledged by the Chilean state, via its truth commission lists, as victims of enforced disappearance or extrajudicial execution. Adding to this total, identifications carried out prior to 2007 with other techniques that are still considered reliable, plus four victims lister in Chile

152 Unidad de Derechos Humanos del SML, Informe de Gestión No. 3, op.cit.

but physically identified in Argentina, gives a total of 309 individuals classified by Chilean commissions who have subsequently been identified. The lack of detailed breakdown of the pre-2007 figures prevents calculation of exactly what proportion of these individuals were originally classed as detained-disappeared. Meanwhile, the 174 identifications carried out in Chile since 2007 relate to 123 people initially classed as detained-disappeared, and 51 initially classed as victims of extrajudicial execution "whose remains were not handed over" (*sin entrega de restos*). 170 of these 174 people were Chilean nationals, while three of them had double nationality (Chilean-Argentinian; Franco-Chilean, and Romano-Uruguayan), and one was a Czech national. The detail of the criminal cases or episodes in the context of which the identifications were carried out can be consulted on the SML's web page, where it can also be seen that the largest single number of identifications relates to victims buried in Patio 29 of the Santiago general cemetery.[153]

4. GUARANTEES OF NON-REPETITION

The introductory section of this chapter makes reference to guarantees of non-repetition, the fourth pillar of transitional justice, in the context of the social uprising of 2019 and the repressive response to it. Here we add some considerations about the National Human Rights Institute, which together with the Human Rights Subsecretariat of the Justice Ministry, forms the component of the post-dictatorship state infrastructure whose work is most directly related to State duties in this area. The reader is also directed to a separate chapter of the current edition of this report, 'The INDH and the social uprising' (*el INDH y el estallido social*), where the issue is extensively dealt with.[154]

At the end of July 2019, the INDH's council chose Sergio Micco as Director for the period 2019-22. This designation has occasioned a range of controversies, including one caused by Micco's December 2019 remarks calling into question the systematic character of the

153 This case registers 73 genetic identifications since 2007 of acknowledged victims. 57 of the identifications are of individuals classified as detained-disappeared. This information is available in: http://www.sml.gob.cl/index.php/unidad-de-derechos-humanos/. In the Patio 29 case three additional individuals have been identified. Although these people have not yet been officially acknowledged by the Chilean state, the circumstances of their death or burial strongly suggest that they were victims of state repression: Ricardo de la Jara Frez, 26 years old when he died; Ricardo San Martín Fuentealba (27 years old), and Oscar Vivanco Castro (aged 21). SML Human Rights Unit, Informe de gestión No. 3, op.cit., pp.37-38.

154 Alberto Coddou, Tomás Vial and Vicente Aylwin, "El INDH y el estallido social", in Marcela Zúñiga (ed.), Informe Anual Sobre Derechos Humanos en Chile 2020, Santiago, Universidad Diego Portales, 2020.

human rights violations that took place during the social uprising of October 2019 (while not denying that these were the "most serious" violations seen since the dictatorship).[155] In remarks later classed as personal opinion, Micco suggested that one should talk to the younger generation in terms of "duties" rather than solely rights. Later, two Institute heads of area were sacked amidst disagreements about the content and tone of, and editorial control over, the INDH's 2019 annual report. Overall, given the tense atmosphere that still prevails in the country over protests, the pandemic, and the Constitutional plebiscite, it is important to defend and strengthen the consensual place in national life of one of the main organisms charged with upholding guarantees of non-repetition.

5. REPARATIONS AND MEMORY

The 2019 version of this report placed particular emphasis on the issue of reparation, highlighting two issues. On the one hand, that this is a much deeper and more demanding challenge than simple economic reductionism. On the other, that the collective and social dimensions of the physical, cultural and psychological harm occasioned by the dictatorship must be attended to, given its character as a project that was as explicitly refoundational and anti-popular, as it was repressive. It should be noted that there is no sign of these characteristics being recognised or addressed by the current authorities. The perception is accentuated by the essentially reductive reaction to the widespread economic privation occasioned by the Covid-19 pandemic. In the narrowest possible terms, seeing reparations only as those measures specifically denoted as such, for people who have been acknowledged as victims of particular classes of dictatorship-era human rights violations, no sign has been seen either, of the improvements, reforms, or additional support repeatedly demanded and even promised by the Chilean state before the universal human rights system.

The significant and often overlooked efforts of personnel who work in relevant programmes such as PRAIS, or the social and memorialisation areas of the Human Rights Programme of the Ministry of Justice and Human Rights, must be recognised and valued. It is however far too frequent that these initiatives, and their success, owe much to superhuman effort by particular individuals. In times of social, political and public health crisis, and anticipating the acute economic crisis that seems almost certain to ensue, there is a serious risk that swingeing

155 CNNChile.com: "Sergio Micco, director del INDH: 'No se puede equiparar violencia con violaciones a los derechos humanos'", 23 December 2019.

cuts to these programmes will take place under cover of generalised cuts or austerity. This is particularly likely given that they have for so long been treated as secondary priorities, not politically rewarding for any administration. Against this unpromising backdrop it may be useful to recall that reparation is neither a privilege nor the result of discretionary political and ideological decisions. It is rather a right of individuals and communities, and a corresponding duty on the part of the State.

5.1 The judicialisation of memory

As mentioned above (section 3.2.7), given the lack of initiative in administrative circles it has yet again fallen to the courts to be the most visible scenario of movement in the issue of memory. This is in itself an unsatisfactory state of affairs, since it reflects the fact that relatives and survivors are obliged to make use of complaints and other elements of the adversarial repertoire, to attempt to exercise rights that the State should proactively satisfy by administrative means (ie via broad, participatory, and fully resourced public policy). When the State moreover actively opposes efforts to exercise rights in this way – attempting to argue as the CDE has in related cases, as detailed above – the offence is multiplied (see section 3.2.7).

In the area of symbolic reparation, in particular, it must also be considered that measures of rectification such as those mentioned in section 2.1 have limits. These are sometimes set by the very nature of the judicial route, as an essentially individual recourse. However they are sometimes due to a certain timidity, or even conservatism, on the part of justice system operators when it comes to interpreting and deploying their own competences in the issue. As an example, we have analysed in previous iterations of this report, occasions on which the judiciary has refused to order reparation or memorialisation measures that go beyond the simple ordering of monetary payments. This is so even when the non-monetary measures promise greater social benefit, in return for a smaller or even non-existent cost to the public purse. In the current period various apparently contradictory events of this sort have happened in what we might call the area of public or symbolic memory. In response to the perceived deficiencies of one or other verdict, some might recommend that the courts be more creative or more daring in the scope or content of their rulings on this issue. It must however be borne in mind that international norms regarding truth, reparation, guarantees of non-repetition and memory are binding on all the branches of State, and therefore on all its organs. It is not the sole responsibility of the judicial branch to resolve every aspect of state transitional justice duties. When controversies that end up being taken before the courts appear moreover to arise from omission,

neglect, disregard or bad faith by other state parties, it is also of course imperative that these parties should desist from such practices and shoulder their responsibilities. These duties have a marked political, administrative and ethical character, and must be approached as such, reserving for judicial action the space which belongs to it alone.

5.1.1 Honours afforded to Merino and Contreras: arguments presented by the Armed Forces and CDE before the courts

Below we consider the two examples of issues resolved by the Supreme Court within a fortnight of one another (between 19 February and 6 March 2020 inclusive). As we will see, the verdicts that the Constitutional Bench finally handed down reveal underlying attitudes and actions on the part of the Ministry of Defence and the Armed Forces that are highly questionable, for all that they are highly normalised. These attitudes are moreover reproduced and apparently enthusiastically defended by the CDE. The verdicts are as follows: on 19 February, the Constitutional Bench of the Supreme Court ratified the rejection of an order to remove the statue of the deceased former admiral Merino, ex member of the military Junta, from the place of honour reserved for it in the gardens of the Naval Museum in Valparaíso.[156] Meanwhile, on 5 March, the same bench ratified an order obliging the Army to remove plaques and photographs paying homage to the deceased former DINA director Manuel Contreras.[157] Both resolutions originated in legal initiatives taken by the lawyer Luis Rendón, also a former political prisoner. In the latter capacity, Mr. Rendón took action in 2019, for the second time, against the Navy and Ministry of Defence demanding the removal of the statue. It was also a complaint of his that gave rise to an order for the removal of the plaques in homage to Contreras, an order that the Army decided to appeal before the Supreme Court.[158] Both actions were grounded on constitutional and international norms that include the explicit recognition of rights to reparation, which includes guarantees of non-repetition.[159] Invoking these rights, in his capacity as a survivor, Mr. Rendón testified to the psychological harm caused to him and other victims, as well as to society in general, caused by the continued presence of such elements in public space – particularly, in spaces dedicated to military formation and education.

156 Supreme Court Rol 15.310-2020, 19 February 2020.

157 Supreme Court, Rol 14.720-2020, 5 March 2020. In between times, the same bench had resolved the partial reserve of information about the prisoners of Punta Peuco (see above, section on Truth).

158 The order that the Army objected to was handed down by the Santiago Court of Appeal, Rol 79.631-2019, 26 December 2019.

159 Resolución 60/47, Asamblea General de la ONU, 16 de diciembre de 2005.

The objective of the two actions was in essence to contribute to the 'de-Pinochetización' of public life, seeking to ensure that public spaces and places where the new generations of the Armed Forces are trained, do not pay tribute to high ranking representatives of the authoritarian government. Contreras, moreover, was a key creator and operator of the machinery of state terror, who by the time of his death had been convicted and sentenced for dozens of homicides and other serious and appalling crimes. The initiative to remove these tributes is therefore highly consonant with the civic and democratic values proclaimed by all post-1990 government administrations, as well as with the explicit recommendations and implicit promises contained in the Rettig truth commission report, and reiterated since in official documents. These include, as we will see, the National Human Rights Plan, whose existence and contents were cited by the government before the UN in 2019 as evidence of the active efforts Chile has supposedly made and plans to continue making, to overcome its recent past by promoting social and institutional awareness of it. Notwithstanding these powerful arguments, although the Court found in favour of the removal of the plaques to Contreras, it refused to order the removal of the statue of Merino. To understand this apparently contradictory outcome we could point to the fact that in both cases the Supreme Court opted to ratify what the appeals court had done. However this simply displaces the problem of understanding, to analysis of the Appeals Court's rulings. It also risks insufficient attention being paid to a second important fact: the State – legally represented by the CDE – appeared in active opposition to both changes. That is, the same entity that is bound by duties of reparation and guarantees of non-repetition, and has declared itself not only aware of this but determined to act on it, defended the continued presence of the statue of Merino and the plaques commemorating Contreras, probably the worst perpetrator of crimes against humanity in the nation's history.

A closer look at the specific arguments offered in each case shows, firstly, that in the case of the Merino statue, the Constitutional bench limited itself to affirming the position of the lower court. In this case, that was the eighth bench of the Santiago Court of Appeal, presided over by Juan Cristóbal Mera, brother of Raúl Mera of the Valparaiso Court of Appeal. The Navy's arguments before the Santiago Appeals Court included the affirmation that the place where the statue is located, despite its acknowledged character as a state asset (*bien fiscal*), "is also a military installation". In the Navy's view, this annuls the place's identity as a public place and further means the statue is not

to be classed as a public monument.[160] The defence went on to assert that the statue was created by a private corporation and that the Law of National Monuments, which creates a requirement to apply for permission, is not applicable since it was passed after the erection of the statue. For good measure, the choice of Merino as a person deserving of such a public and prominent honour was defended on the grounds that he "has never (…) been convicted of a crime such as would merit refraining from recognising him".[161] The reductionism of the argument is striking: it seems to hold that not being a proven and convicted criminal is all that is needed in order to justify the awarding of an honour.

5.1.2 Fact or version? Historical and juridical truths

The Appeals Court legitimates the Navy's logic when it states that while "for the plaintiff" – that is, according to Mr. Rendón – Merino is a person who "formed part of an elite group who took control of the country in …. 1973 and imposed a policy of systematic human rights violations", "for the Navy" he is rather "a Commander in Chief (… who) retired without ever having been convicted of a crime".[162] In choosing this form of words, the ruling appears to treat proven historical facts as a mere version, put forward by the plaintiff. It goes on to juxtapose these facts with an 'alternative' characterisation which is not only non-exclusive of the former, but is in fact a necessary condition for the factual events initially described: Merino's role in the coup, the Junta, and the repressive machinery that the dictatorship subsequently created owed themselves precisely to his position at the head of the navy. The CDE, in representation of the Ministry of Defence, meanwhile argued on the basis of form – asserting that the requirement had been presented after the relevant deadline – and also on substance, arguing that the organic law applicable to the Ministry does not contain any "positive norm" that obliges or allows it to consider requests of the sort made by Mr. Rendón.[163] By using arguments of this sort the CDE, and by extension the state, ignores the fact that all of the international norms cited in the two requirements, as well as all the duties that positive and customary international law establish, oblige the state as a whole, ie all of its organs. Any other position amounts to the admission that Chile continues to contain a 'state within a state', an enclave that considers itself exempt from becoming a subject of international law.

160 Cited in the Santiago Court of Appeal, No. Protección 79183-2019, Vistos y teniéndose presentes No. 2, 22 January 2020.
161 Ibid., our translation.
162 Ibid., Vistos y teniéndose presentes no. 14.
163 Ibid., Vistos y teniéndose presentes no. 3.

5.1.3 Anti-values and defending the indefensible: the Army, Contreras and Carrera

Not content with having declared Mr. Rendón's recourse to be a "judgement of reproach of the political function that [Merino] had in the nation's past", the Appeals Court sentence declares in its resolutive section that the legal controversy turns on "a question of merit that is proper to the [state] Administration", and therefore "falls outside the boundaries of the jurisdictional control that corresponds to this type of action".[164] As stated at the outset of this section, while we consider that it is proper for the courts to supervise compliance with the duties of reparation and guarantees of non-repetition that the recourse appeals to, we also welcome the allusion to the administrative responsibility of the state and even to the essentially political nature of the decision to honour, or not, a member of the dictatorship-era military Junta. Guarantees of non-repetition presuppose the construction in all state institutions of a culture that respects human rights and accordingly energetically repudiates their violation, from a democratic perspective that also rejects the use of force to take and exercise political power. It is therefore doubly worrying that the Navy should choose to defend its celebration of anti-values, and that the Ministry of Defence should attempt to wash its hands of the matter.

From this perspective, even the verdict that apparently accepted the principles of reparation and guarantees of non-repetition is not exempt from worrying elements. The ruling ordered the removal of plaques and photographs of convicted criminal Manuel Contreras from the War Academy and from the Army Engineering School at Tejas Verdes (the latter moreover the site of a clandestine torture and extermination centre overseen personally by Contreras). However, yet again the Armed Forces, in this case the Army, proved themselves to be either absolutely unaware, or deliberately careless, of the anti-ethical nature of their desire to keep the memory of a person convicted of multiple crimes of the cruellest sort, permanently in the gaze of new generations of cadets. In December 2019, the Army made direct representations in the case in the form of a report signed by its Commander in Chief, sent to the Santiago Court of Appeal. In it, the Army maintained that in its capacity as "part of the centralised administration of the State" – now that it suited them to acknowledge this – for the purposes of trying to argue that the recourse should have been directed against the CDE and not against the Army directly. Immediately afterward, in an echo of the Naval logic we have already commented and critiqued, the report claimed that both of the sites in dispute were "state properties that also constitute military installations", without making

164 Ibid., Vistos y teniéndose presentes no. 14.

explicit why, in their view, such a statement, if correct, would exempt them from the scope of legal recourses that invoke constitutional principles. The report tries to contend that the presence of photographs and plaques of Contreras does not constitute a homage, and that in any case they are counterbalanced by "contents of a humanitarian nature" that are today included in military instruction in accordance with the National Human Rights Plan.

In an even more extraordinary passage, the Army report holds that as military installations are not open to the public, this means the kind of psychological harm to victims and survivors that Mr. Rendón alleges, cannot possibly exist. Finally, it asserts – without evidence or grounds of any sort – that the exhibition of the photographs and plaques is "a fully legitimate act".[165] Taken together, the tenor of these arguments seems to betray a sense of absolute sovereign autonomy, by which the Army sees itself as the only necessary and a sufficient authority to determine what is and is not appropriate for it to do or transmit, behind closed doors. This betrays the apparent belief that neither victims, nor the country as a whole, has any legitimate interest whatsoever that would entitle them to presume to interfere. It should also ring warning bells that the Army, not content solely with claiming such an absolute right to decide what to do within "its" installations, should moreover choose to use this supposed freedom to honour a person who embodies the worst antivalues of disloyalty, betrayal of the Constitution, and the deployment of extreme violence against the self-same civilians and fellow Chileans who professional soldiers are sworn to protect. The Santiago Court of Appeal did not accept the Army's line, considering instead that an order for the removal of the material was necessary in order to "re-assert the rule of law".[166]

When the Army chose to directly appeal the order for removal, it implicitly contradicted its own stated position with regard to the role that the CDE should play in regard to the issue. This contributed to the downfall of its pretensions, with the Constitutional Bench of the Supreme Court declaring the appeal inadmissible on the grounds that the appellant did not have the necessary legal status. This is the reason why the Bench – which included judge Raúl Mera, in a temporary replacement position – did not enter into analysis of the substance of the appeal, limiting itself to ratifying the order for removal already

165 Santiago Appeals Court, Rol 79.631-2019, Vistos without ennumeration (pp. 2 - 4 inclusive), 26 December 2019.

166 Santiago Court of Appeal, Rol 79.631-2019, op. cit., Consideration 12. In the text of the ruling, the Court also reaffirms that Contreras's criminal convictions are a matter of public record; that the UN Resolution invoked by Mr. Rendón has the status of customary law, and that economic payments are absolutely insufficient to be considered the sole necessary form of reparation.

handed down by the Santiago Court of Appeal. The time limit established for the removal was summary: three days. However it was not until a month later that the Army duly notified the carrying out of the judicial order.[167] The less than oppoe decision to attempt a forced analogy between Contreras and José Miguel Carrera in the original appeal also backfired, producing a strongly worded statement from the national Institute for Historical Research. The Institute is dedicated to the legacy of Carrera, Chile's first ever army commander in chief and considered a hero of the Chilean independence struggle of the C19th. It published an open letter calling the comparison "absurd and inadmissible", and pointed out that Carrera acted openly, "never hiding behind sinister front organisations such as those headed by the notorious former general Contreras".[168]

5.2 Memory sites and memorials: neglect, lack of finance, and threats

The number and rhythm of deliberate physical attacks on memorials and memory sites related to dictatorship-era violations appears to continue to grow. In March 2020 the memory site network Red de Sitios de Memoria reported 26 attacks country-wide, a number which has since been augmented. In August 2020, for example, signposts on the Neltume memorial route were destroyed. In total there have now been over 30 serious episodes of vandalism, with no-one identified or held responsible.[169] The physical destruction, like related troll campaigns and abuse on social media, contains a worrying quota of explicit death threats and references to the practice of new enforced disappearances.[170] There is still an urgent need for a protocol for memory site protection, and/or a law that regulates and provides resources for maintenance and upkeep of sites, and protection for the groups and persons associated with them. It is also long overdue for the state to vocally and unequivocally underwrite the pedagogical importance of such sites for the establishment of truth, the promotion of participa-

167 Ejército de Chile, Comandancia en Jefe, Memorándum, "Informa cumplimiento de fallo en Recurso de Protección que indica", dated 9 April 2020, signed by Grl. Ricardo Martínez Menanteau, Commander in Chief.

168 Cooperativa.cl: "Instituto José Miguel Carrera: Comparación del Ejército con Contreras es ignorancia y un agravio", 4 January 2020.

169 Open letter published by the memory association 'Grupo de Memoria Renca a Pie', 17 August 2020.

170 Multiple examples include the former secondary school student leader Víctor Chanfreau, grandson of survivor and activist Erika Hennings and forcibly disappeared activist Alfonso Chanfreau. Victor was threatened on social networks with disappearance. Graffiti sprayed on the memorial to victims of disappearance and political execution in the city of Osorno in December 2019 read "there should have been more" and "more are coming soon" Observatorio de Justicia Transicional, Boletín 56, November-December 2019.

tion, and contribution to the cultural and interpersonal dimensions of guarantees of non-repetition.

July 2020 saw a significant setback in the form of the cancellation of the 2020 version of the annual funding competition administered by the Historical Memory area (previously, projects and memorials area) of the Human Rights Program Unit of the Ministry of Justice and Human Rights. A letter sent by subsecretary of human rights Lorena Recabarren to relevant civil society organisations explained the measure with reference to the limitations created by the Covid-19 pandemic. Delays in adjudicating the competition would, it was argued, have led to an unduly short time frame for the execution of the relevant projects, since regulations would require the fiscal resources assigned to be spent before the end of the calendar year. Already, in June 2020, the only six sites that receive rather more stable year on year core finance had been notified by the National Directorate for Patrimony of a reduction in their budget assignations for 2021. According to the Red de Sitios de Memoria, the principal civil society entity that brings together sites and associations countrywide, the decision "ignores and flouts the international human rights standards and obligations to which the Chilean state is subject in truth, justice, memory and reparation", and "seeks to push back against the advances achieved by the human rights movement (…) as various national and international experiences show, memory sites are fundamental to the reconstruction of historical memory and the right to truth of countries and communities that have suffered grave and systematic human rights violations".[171]

6. CONCLUSIONS

2020 will surely be remembered above all for the pandemic, as well as for the continuation of social protest and the beginning of the end of the 1980 Constitution, the most visible longstanding institutional legacy of the dictatorship. It will certainly not be remembered as a period of advances in transitional justice. The courts have ruled on an ever-broader range of related issues, from criminal responsibility to symbolic reparation and the right to anonymity of imprisoned perpetrators. Their activity has once again laid bare the extremely divergent criteria applied across different courts and benches, and sometimes also within them. Certain individuals, and the Constitutional Tribunal, are once again under scrutiny for their extremely conservative and retrograde rulings. In the case of the Tribunal, the concern now stretches beyond its action over dictatorship-era human rights cases, and has triggered a

171 Observatorio de Justicia Transicional, Boletín 59, May and June 2020.

criminal investigation. Meanwhile the Santiago Court of Appeal also turned the clock back to its old position over gradual prescription, with a notorious verdict that left expert jurists perplexed over more than one aspect of its underlying reasoning. The courts also had to pronounce over the dissolution of spurious dictatorship-era convictions of victims, and over the need to give satisfaction to victims by retracting lies, attitudes and symbols that continue to cause offence. Once more it is disappointing to see that immediate victims are still obliged to resort to adversarial processes to try and force gestures whose necessity and appropriateness are socially and morally self-evident. It is also striking that victims' efforts do not call forth apologies, nor even minimal gestures of empathy, from the entities that are addressed (principally the press and the Armed Forces). Challenges directed to those who the President once referred to as 'passive accomplices' – those who came out on top after, and because of, the dictatorship – seemed to metamorphose into a more urgent and inchoate collective questioning of their contribution to the deliberate construction of a radically exclusionary social, educational, political and environmental model that now appears definitively to have passed its sell-by date.

The disappeared however remain disappeared; the responsibility for reverting this state of affairs remains diffuse; and first-generation relatives continue to pass away, dignified by decades of struggle but betrayed by a litany of unfulfilled promises. We can only hope that the country finally appreciates, before it is too late, that the justice for which relatives and survivors yearn is the only possible route to the national re-encounter that the whole country needs and deserves. The year 2020 drew to a close with the announcement of a constitutional process that can with some propriety be considered a potential 'transitional justice moment'. The reformulation that this will entail of the limits of the possible, and the requisites of a fair, dignified and harmonious living together, is both urgent and long overdue. The agenda in truth, justice, reparations, guarantees of non-repetition and memory that is sketched out here is nothing more or less than the bedrock of such a process, as we have maintained for over a decade now. The same message has of course been continually and more eloquently transmitted by thousands of survivors, relatives, activists and others with long memories, who paved the way and still point out the route that can lead us to the fuller justice that is needed in human rights matters. We owe it to them, as well as to those who are no longer with us, to dedicate our best efforts to making 2021 a year for celebrations rather than commemoration.

7. RECOMMENDATIONS

For the second time in the ten iterations of this chapter that have been authored by the Observatorio de Justicia Transicional, not a single one of the recommendations made at the end of last year's report can be considered to have been fully complied with. Given their importance and continued validity we reproduce them here in summary form, after introducing others that particularly reflect events from the current report period.

For the purposes of improving its compliance with its transitional justice duties regarding the grave human rights violations committed during the 1973-1990 civic-military dictatorship, the Chilean state could:

1. Design and execute, with due attention to rights of participation and satisfaction, proactive, differential and holistic answers to enforced disappearance, extrajudicial execution, torture, survived political imprisonment, and other grave and systematic human rights violations committed during the 1973-1990 dictatorship. Ensure specific and sustained attention is paid to the truth, justice, reparation and guarantees of non-repetition dimensions of each one of the issues, formulating detailed measures and timeframes to meet state obligations and guarantee the corresponding rights, all with due reference to prevailing international norms and practice as interpreted and collated in the pronouncements of relevant international organisations.
2. Activate, reactivate or initiate draft bills and other necessary measures to ensure full compliance with the still unfulfilled aspects of Inter-American Court of Human Rights verdicts and recommendations formulated to the Chilean state by competent international organisations over the legacy of the dictatorship's crimes. Ensure the necessary followup to each piece of legislation once passed and introduced, monitoring its implementation on an ongoing basis and making public to the nation periodic evaluations of the status of Chile's compliance and the plans and deadlines for improving it.
3. Ensure the learning of lessons derived from the late resolution of criminal and civil cases for grave human rights violations, providing auxiliary justice system agencies such as the SML and PDI, and the public prosecutor's service, Fiscalía, with the resources and training needed to undertake effective investigations that reach a conclusion without being truncated by 'biological impunity'. Seek to ensure that these cases produce, where the evidence so dictates, effective sanction of the state agents responsible, in the terms set down by law, by omission and/or commission, for repressive violence and other grave human

rights violations committed during the dictatorship and/or during the social protests unleashed after October 2019.

4.Promote the 'de-Pinochetisation' of the civic landscape, effecting and encouraging the removal and conscious elimination from public and state-owned places, as well as from physical, virtual and cultural spaces where public servants are trained or educated, of images, names and discourse alluding to or associated with the glorification or defence of the dictatorship and its crimes. Do so on the grounds that such attitudes contravene the letter and/or the spirit of international norms associated with symbolic reparation, truth, and prevention of secondary victimisation of relatives and survivors.

5. Restore to memory sites and projects the resources that they were denied by the suspension of 2020's competitive funding cycle. Provide greater financial, political, discursive and judicial support to those who concern themselves with the maintenance of historical memory about the crimes of the dictatorship in the face of lies, insults and verbal and physical aggression emanating from antisocial and denialist sources. Ensure rapid and exhaustive investigation of such acts of aggression, leading where appropriate to effective sanctions that send a clear signal that the harm caused is to society as a whole, as well as to victims, survivors and their families.

6. Take on board and put into practice recent UN documents CED/C/7 and A/HRC/45/13/Add.3, on the question of enforced disappearance. Launch a consistent, intersectorial, public awareness campaign that seeks to eliminate all repetition and echoes of the practice at any level in the actions of the present-day armed forces, security services and prison service. Turn the recuperation and commemoration of more than 1,000 men and women still missing after being forcibly disappeared after 1973, into a whole-country priority and a source of state and civic action and commitment.

7. Implement, as part of such a campaign, a National Search Plan for the Disappeared, whose functions should include the production and maintenance of a dynamic (regularly updated) permanent public register of persons detained-disappeared in Chile acknowledged by the state; found and yet to be found, as a measure of symbolic reparation and commitment to action. Develop services for accompaniment and legal advice for relatives and survivors who wish to find out about and activate their right to full reparation, including the bringing of civil claims for indemnization. Exhort and instruct the CDE such that its words and actions are brought into compliance with the duties and obligations of the state of which it forms a part, particularly as regards the right to holistic reparation.

8. Respect and safeguard the formal, financial and operational autonomy of the National Human Rights Institute, making explicit

that all state agencies and entities support its work and are subject to its scrutiny, and actively equipping its personnel with the protection, means, and co-operation necessary for the effective carrying out of its mission.

9. Ensure that laws on conditional release (*libertad condicional*), the commutation or substitution of custodial sentences, and any other relevant legal disposition that exists or may be introduced, are formulated, interpreted and applied in such a manner that they respect the state's duty to provide effective and proportional sanction for grave human rights violations in whatever era these may have taken place.

10. Affirm, protect and deepen the measures implemented in 2019 on the recommendation of the National Human Rights Co-ordination Office of the Supreme Court, to expedite the work of justice and promote full public knowledge and awareness of the results of this work. As part of this deepening, provide access to information about the serving of sentences and the concession of post-sentencing benefits to convicted perpetrators.

STATE RESPONSE TO THE JUSTICE SYSTEM: THE OBLIGATION TO PREVENT AND INVESTIGATE HUMAN RIGHTS VIOLATIONS

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ABSTRACT

The goal of this chapter is to identify, describe, and analyze the State Criminal Justice System's (the Judicial Branch, the Public Prosecutor's Office, and the Public Defender's Office) response to the actions and events that took place in our country during and after October 18th, 2019. The analysis is based on the international standards regarding the obligation to prevent, investigate, and punish human rights violations. We have thus specifically considered the international standards developed within the Inter-American Human Rights System, in order to analyze the extent to which the institutions involved have geared their work towards complying with these standards. In addition to the impact of the pandemic on the Justice System in general, and regarding these cases in particular, we have identified some critical points that will be relevant when evaluating the international responsibility of the State in this matter.

KEYWORDS: Duty to prevent, investigate, and punish; criminal justice; human rights violations by State actors

INTRODUCTION

On October 20th, Romario Veloz Cortés, a 26-year-old Ecuadorian citizen, died in La Serena by gunfire near a shopping mall that was being looted, after military personnel fired several shots at a group of demonstrators in confusing circumstances. Romario Veloz suffered gunshot wounds to the neck and was taken to the hospital, where he died shortly thereafter. Two other people were also seriously injured as a result of lethal ammunition fired by army personnel at other demonstrators.[3]

The next day, 23-year-old Manuel Rebolledo Navarrete was run over by a Chilean Navy truck. The vehicle was patrolling near a fishing village in Talcahuano after curfew when the victim was shot in the leg and then hit by the truck. He died immediately of head injuries.[4]

Alex Andrés Núñez Sandoval, 39 years old, died in Maipú on October 22nd as a result of a head injury related to beatings and abuse by police officers. On October 21st Alex Núñez had allegedly participated in an evening demonstration in that district of the Metropolitan Region. Witnesses claim he was beaten with police batons and kicked by three police officers on his legs, head and chest. Medical information also demonstrates that he had pellet-shot injuries, as well as a closed cranial brain injury (CBI) and skull fracture.[5]

These three cases are part of the 26 investigations for arbitrary deprivation of life and illegal deaths involving State actors, according to the report that the OHCHR prepared on the Chilean situation after the *social outburst*.[6]

Additionally, the UN report states that several thousand people were injured in various ways. More than 300 of them suffered eye injuries from the use of pellets or chemical irritants and, in some cases,

3 OHOCHR, Report on his mission to Chile. October 30th – November 22nd, 2019, p. 12.
4 Ibid.
5 Ibid.
6 Ibid., p. 11.

from the impacts of tear gas cartridges. More than 130 torture and ill-treatment acts were recorded as well, most of them allegedly committed by members of *Carabineros de Chile* (the largest Chilean law enforcement agency, hereinafter *Carabineros* or 'the police'). At least 24 cases of sexual violence have been reported – mostly against women but also against men, children and adolescents – including rape, threats of rape, degrading treatments (such as being forced to undress), homophobic or misogynistic comments, beatings or performing painful acts to victim's genitals and groping.[7]

According to the OHCHR, *Carabineros* and the Armed Forces did not act according to international human rights laws and standards regarding the use of force and the management of assemblies. Thus, a series of violations were recorded - including excessive or unnecessary use of force – which led to arbitrary deprivation of life, injuries, torture and ill-treatment, sexual violence and arbitrary detentions. All in all, a significant number of people were killed, injured and/or had their fundamental rights violated in some way by State actors.[8]

Clearly, human rights violations during the *social outburst* took place in the context of police actions aimed at repressing and arresting demonstrators. It can therefore be argued that the response to the *outburst* has been to criminalize the phenomenon and the Criminal Justice System has become the main forum where – to a large extent – social protest and human rights violations are at stake.

Not only are the abuses against human rights committed by State actors prosecuted by the Justice System if they constitute criminal offenses, the System also acts in cases of people who were protesting and were arrested by the police that considered they had committed a crime. Thus, the legality of their deprivation of liberty is controlled by that same system.

The international responsibility of the State is not only linked to acts directly committed by police officers, but also to its obligation to prevent, investigate, judge and, when applicable, punish the ones who are responsible for violations. This duty falls directly to the Criminal Procedural System.

In fact, as we shall later explain, the due diligence required in the duties of prevention, investigation, and punishment set forth in Article 1.1 and 2 of the American Convention on Human Rights falls largely on the Public Prosecutor's Office, as it must investigate and prove the crimes, as well as determine the policy on crime. Likewise, the role of the judges is to ensure that the fundamental rights of all those involved –including the victim– are protected throughout the

7 Ibid., p. 19.
8 Ibid., pp. 9 and 31.

investigation. The Public Defender's Office (*Defensoría Penal Pública* or "DPP"), on the other hand, ensures the due defense of the defendant. In other words, both the actions of the judiciary and the Public Defender's Office must be analyzed, as these institutions are fundamental when it comes to prevention of and protection against massive human rights violations.

Thus, the question is whether or not, and to what extent, public institutions – which are part of the criminal justice system - have met their obligations that derive from the American Convention on Human Rights.[9] In other words, how have these institutions responded since the *social outburst* when becoming aware of this type of complaints or criminal acts when committed by State actors?

In view of the above, and after reviewing the international standards developed especially within the framework of the Inter-American system – regarding the duty to prevent, investigate, and punish human rights violations – in the second part of this chapter we will describe how the main institutions of the justice system – Public Prosecutor's Office, Judicial branch, and Public Defender's Office – responded to these cases. We will also consider the context of the Covid-19 pandemic. Finally, we will reflect on the contrast between the standards developed and the practices described, as well as suggest some recommendations based on certain shortcomings, we have become aware of.

1. INTERNATIONAL HUMAN RIGHTS LAW STANDARDS

The obligation to prevent, investigate, and punish stems from Article 1(1) of the American Convention on Human Rights (hereinafter the Convention), which says that "The States Parties (...) undertake to respect the rights and freedoms recognized therein and to ensure to all persons subject to their jurisdiction the free and full exercise thereof, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition".

In this first section, we must give an account of the international standards on the duty to investigate and punish human rights violations, and of the obligations of the State arising therefrom. For this purpose, we have primarily relied on the case-law developed by the Inter-American Court of Human Rights (hereinafter, the Court) based on the applicable international instruments in this matter towards the various actors in the justice sector.

9 IACtHR, Castillo González case et al. v. Venezuela, November 27th, 2012, par. 160; IACtHR, case Luna López v. Honduras, October 10th, 2013, par. 157.

From the very first adversarial cases the Court began to delimit the content of the duty to prevent, investigate, and punish violations of human rights, as is established in several instruments of the Inter-American system. Thus, in the *Velasquez Rodriguez* case, the Court pointed out that based on the obligation to "ensure" the rights contained in the Convention, the States parties must "... organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation."[10]

It hence follows that the duty of a State is not restricted to create a legal order that recognizes these rights, but it also includes the need for positive action that guarantees their proper exercise in reality as well.[11] The obligation to investigate, judge and, if necessary, punish those responsible for violations of human rights, is therefore precisely one of those positive measures that must be taken.[12]

One of the foundations of this duty of the State is the fight against impunity,[13] given that the lack – as a whole – of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention "…fosters chronic recidivism of human rights violations, and total defenselessness of victims and their relatives".[14]

The main requirement for complying with this obligation of the state is that investigation procedures, which are done in order to clarify facts, must be fulfilled seriously. This has resulted in a "due diligence" analysis,[15] implying that the investigation and trial must be carried out with all the means available to the organ prosecuting those committed violations in order to identify those responsible, to punish appropriately, and to ensure adequate reparation for the victim.[16] Consequently, and although the obligation to investigate is one of means and not one of results, this implies that it must be carried out with due

10 IACtHR, Velásquez Rodríguez v. Honduras case, July 29th, 1988, par. 166.
11 Ibid. Par. 167.
12 IACtHR, Comunidad Garífuna de Punta Piedra y sus miembros v. Honduras case, October 8th, 2015, par. 285.
13 IACtHR, González et al. ("Campo Algodonero") v. México case, November 16th, 2009, par. 289.
14 IACtHR, "Panel Blanca" (Paniagua Morales et al.) v. Guatemala case, March 8th, 1998, par. 173.
15 IACtHR, Castillo González et al.v. Venezuela case, November 27th, 2012, par. 160; IACtHR, case Luna López v. Honduras, October 10th, 2013, par. 157.
16 IACtHR, Velásquez Rodríguez v. Honduras case, July 29th, 1988, par. 174.

seriousness and not "...as a simple formality condemned in advance to be fruitless, or simply as managing private interests, which depend on the procedural initiative of the victims or their relatives or on the private provision of evidence. The investigation must be serious, objective, and effective, and must be geared toward determining the truth and the prosecution, capture, and eventual trial and punishment of the perpetrators."[17]

However, the Court has pointed out that, when fulfilling the duty of "due diligence" it has no obligation to specifically identify which investigative activities should have been carried out. On the contrary, they must be evaluated as a whole in order to determine whether there were flaws or omissions impairing the clarification of the truth in the specific case. This, under objective or reasonable criteria, based on the particular circumstances of the case and the arguments presented by the parties. [18] In this sense, the prosecuting agency – in our case, the Public Prosecutor's Office – shall be considered a responsible party, whose lack of due diligence could result in the international responsibility of the State.[19]

As a result, it is key to identify the entity that must conduct the prosecution in order to meet the standard of due diligence. Thus, in cases where the entity entrusted to clarify the facts is the same institution to which the perpetrators belong, the seriousness of the investigation is seriously affected.[20] For example, in *Durand and Ugarte v. Peru*, the Court considered that, due to the nature of the facts, the military forum that conducted the investigation and dismissed the officers involved did not offer the required guarantees of independence and impartiality.[21]

In the *Velásquez Rodríguez case*, the Court considered that the State is responsible for any human rights violation committed when complying with an act of public power or by persons acting in an official capacity.[22] In this regard, it has been established that in order to determine the intention or specific motivation of the agent involved in the violation is not relevant, but rather "...if a given violation has taken place with the support or tolerance of the public power or if the latter acted in such a way that the breach has been carried out without

17 IACtHR, Gómez Virula et al.v. Guatemala case, November 21st, 2019, par. 64.
18 IACtHR, Coc Max et al.(Masacre de Xamán) v. Guatemala case, August 22nd, 2018, par. 81.
19 IACtHR, Luna López v. Honduras case, October 10th, 2013, par. 157. See also: IACtHR, case Velásquez Paiz et al. v. Guatemala, November 19th, 2015, par. 169.
20 IACtHR, Velásquez Rodríguez v. Hondura case s, July 29th, 1988, par. 180.
21 Daniel O'Donnell, Derecho Internacional de los Derechos Humanos: normativa, jurisprudencia, y doctrina de los sistemas universal e interamericano, México F.D., Superior Court of the Federal District, 2012, p. 524.
22 IACtHR, Velásquez Rodríguez v. Hondura case s, July 29th, 1988, par. 172.

any prevention or with impunity". [23] In addition, crimes committed by public officials always imply international state responsibility, even if according to criminal standards, no individual officer can be convicted. In that case, the determination of administrative and hierarchical responsibilities of the police and the ministries that carry out civil oversight are part of State obligations under article 1.1 ACHR, too.[24]

The responsibility to push the investigation lies with the prosecuting body. Thus, in *Valencia Hinojosa and others v. Ecuador*, the Court ruled that "[I]n the domestic jurisdiction, it is incumbent upon the competent organs to conduct the investigation and to do so according to the strategies or lines of investigation they determine in order to clarify the facts and, in any event, the investigation must be carried out ex officio. Therefore, the victims or their relatives must not undertake such initiative, which is the responsibility of the State". [25]

However, the duty to investigate is not exclusively focused on the prosecuting entity, but also involves a duty of cooperation on behalf of every State authority, which has the responsibility to support the clarification of the facts within its competences. [26] Thus, for example, in *García Ibarra et al. v. Ecuador*, the Court decided that this duty extends "...to every State institution, both, judicial and non-judicial. Thus, the due diligence is also extended to the non-judicial organs that - where appropriate - are responsible for the pre-trial investigation conducted to determine the circumstances of a death and the existence of sufficient evidence to bring criminal proceedings". [27] On the other hand, in *Myrna Mack Chang v. Guatemala*, the Court points out that "[...T]he public authorities cannot hide secret or confidentiality of information under the cover of the State or on grounds of public interest or national security, to avoid or hinder the investigation of offenses attributed to the members of their own organs". [28]

The way in which the judicial processes are carried out is also relevant when considering the fulfillment of these obligations. For example; victims must be provided with effective judicial remedies, which must be carried out according to the guarantees of the right to due process.[29] Consequently, cases involving the violation of judicial guarantees and protection – recognized in articles 8 and 25 of the Convention – will be analyzed as part of the State's obligation to investigate potential human rights violations. [30]

23 Ibid. par. 173.
24 Casas, Lidia / Schönsteiner, Judith, Violence and Structural Discrimination: Social Unrest and the Pandemic from a Human Rights Approach, Introduction, in: Zúñiga, Marcela (eds.), Informe Anual sobre Derechos Humanos en Chile, Ediciones UDP 2020. Translation precedes this Chapter.
25 IACtHR, Valencia Hinojosa et al. v. Ecuador case, November 29th, 2016, par. 24.
26 IACtHR, Masacres de Río Negro v. Guatemala case, September 4th, 2012, par. 210.
27 IACtHR, García Ibarra et al. v. Ecuador case, November 17th, 2015, par. 135.
28 IACtHR, Myrna Mack Chang v. Guatemala case, November 25th, 2003, par. 181.
29 IACtHR, Gómez Virula et al. v. Guatemala case, November 21st, 2019, par. 65.
30 IACtHR, Ríos et al. v. Venezuela case, January 28th, 2009, par. 76.

The obligation to investigate and punish has therefore been linked to a judicial process, that observes the due process guarantees, and to the need for it to be *effective* from the victim's and their relatives' point of view. Moreover, this right does not end with the remedies promoted "...by the victim itself or their rightful claimants, but also includes a right for the State to investigate human rights violations and, in as much as it is possible, criminally punish the perpetrators".[31]

In turn, the duty to investigate human rights violations is linked to the "right to the truth" developed within the framework of the Inter-American system and, particularly, in *Bámaca Velásquez v. Guatemala*. This case pointed out that it is "...the right of the society to access to information that is essential for developing democratic systems, and it is, from a particular perspective, the right of the victim's relatives to know what happened to their loved ones".[32] In this way, a subjective right for the victims and their relatives arises "...to obtain clarification of the acts of violation and the relevant responsibilities from the competent State entities through the investigation and prosecution provided for in articles 8 and 25 of the Convention".[33]

Thus, by means of the right to truth, the Court has coupled the right of access to justice with the duty to investigate, which means that the determination of the investigated facts must be effective and, if appropriate, the relevant criminal liabilities shall be established in a reasonable time.[34] From another standpoint, in *Quispialaya Vilcapoma v. Peru* the Court pointed out that "... access to justice is not limited to the possibility to bring the facts to the attention of the authorities. Effective systems used to denounce and lead a real and serious investigation are equally necessary; otherwise they would be useless".[35] In *Cruz Sánchez et al. v. Peru*, the Court stated that "[T]o fulfil the obligation to undertake a serious, impartial, and effective investigation of what happened - within the framework of the right to due process – involved analyzing the time frame of such an investigation, as well as the legal means available to the relatives of the deceased victim, in order to ensure that they are heard and they can participate during the investigation process".[36]

The obligation to investigate, prosecute and punish arises not only from Article 1.1. of the Convention. For instance, in torture crime cases the Inter-American Convention to Prevent and Punish Torture

31 Daniel O'Donnell, op. cit.
32 IACtHR, Bámaca Velásquez v. Guatemala case, November 25th, 2000, par. 197.
33 Ibid., par. 201.
34 IACtHR, Ibsen Cárdenas e Ibsen Peña v. Bolivia case, September 1st, 2010, par. 152.
35 IACtHR, Quispialaya Vilcapoma v. Perú case, November 23rd, 2015, par. 207.
36 IACtHR, Cruz Sánchez et al.v. Perú case, April 17th, 2015, par. 352.

has also been used as a source.[37] Regarding to the duty to investigate in these cases, the Court has pointed out that: "In interviews conducted with a person who claims to have been subjected to acts of torture: i) the person is allowed to freely express what he or she considers relevant; ii) no one should be required to speak of any form of torture if he or she feels uncomfortable doing so; iii) the psychosocial history, and, if applicable, prior to the arrest of the alleged victim, the summary of the facts recounted by the victim relating to the time of the initial detention, the circumstances, the place and conditions in which he or she was held in State custody, the ill-treatment or acts of torture allegedly suffered, and the methods allegedly used for that purpose shall be documented during the interview as well; and iv) the detailed statement should be recorded and transcribed."[38] In this case, the Court added that when investigating acts that constitute torture, it is the duty of the State authorities to take the measures deemed reasonable to reveal whether or not there are possible discriminatory grounds for committing such acts of violence. As part of this obligation, "...the State must do what is deemed reasonable under the circumstances to collect and secure the evidence, explore all practical means to discover the truth and issue fully reasoned, impartial, and objective decisions, without omitting suspicious facts that may indicate discrimination motivated violence". [39]

The provisions of the Istanbul Protocol are fundamental regarding the interpretation of the obligations related to crimes of torture and other cruel, inhuman, and degrading treatment, given that it was created within the framework of the universal system of protection of human rights and establishes a manual with specific guidelines for the investigation of these crimes.

In addition to these general aspects, the case law developed by the Court has created more specific standards on the prosecution of these acts. In this sense – for the Court – the investigations of these crimes must incorporate "...a comprehensive vision of the facts, considering the background and context where they took place and must seek to reveal the participation structures".[40] For example, in *Acosta et al. v. Nicaragua*, concerning attacks against human rights defenders, the Court noted that "...the States have the obligation to ensure impartial, timely, and efficient justice. This implies searching exhaustively for all the information in order to design and execute an investigation that leads to a proper analysis of the authorship hypothesis, by action

37 IACtHR, Quispialaya Vilcapoma v. Perú case, November 23rd, 2015, par. 132.
38 IACtHR, Azul Rojas Marín y otra v. Perú case, March 12th, 2020, par. 182.
39 Ibid., par. 196.
40 IACtHR, Comunidad Campesina de Santa Bárbara v. Perú case, September 1st, 2015, par. 258.

or omission, at different levels, and exploring all the relevant lines of investigation in order to identify the perpetrators". [41] The importance of preliminary steps is particularly relevant for evidence collection, and this importance has been reinforced in its use in the proper preservation of evidence.[42] Thus, in the context of medical-legal proceedings in cases that result in death - for example - it has been noted that the standard of due diligence implies maintaining the chain of custody of every forensic evidence.[43]

In turn, when it comes to violence against women, the Court has pointed out how these general standards are reinforced and complemented by the obligations arising from specific inter-American treaties, i.e. the Inter-American Convention to Prevent and Punish Torture and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, also known as the Convention of Belém do Pará. [44] The latter enshrines, in article 7(b), the States parties' obligation to adopt the use of "due diligence to prevent, investigate and impose penalties for violence against women" by all appropriate means and without delay, as well as in article 7(c), it obliges States parties to include the necessary regulations to investigate and punish violence against women.

In *Veliz Franco and others v. Guatemala*, the Court stated that, in the case of violence against women, "the State authorities must initiate *ex officio* and without delay, a serious, impartial and effective investigation once they become aware of the facts constituting violence against women, including sexual violence. Thus, when faced with an act of violence against a woman, it is particularly important that the authorities leading the investigation carry it out with determination and effectiveness, considering it the duty of society to reject violence against women and the obligation of the State to eradicate it and provide reassurance to the victims in State institutions for their protection." [45]

These criteria, which reinforce the duty of due diligence, are very necessary given that in practice it is often complex to prove that a murder or violent assault against a woman has been perpetrated on account of her gender. This sometimes results in the lack of a thorough and effective investigation by the authorities into the violent incident and particularly into its causes. Hence, "State authorities have an obligation

41 IACtHR, Acosta et al. v. Nicaragua case, March 25th, 2017, par. 143.
42 IACtHR, Garibaldi v. Brasi case l, September 23rd, 2009, par. 126; IACtHR, Cruz Sánchez et al. v. Perú case, April 17th, 2015, par. 373.
43 IACtHR, Pacheco León et al. v. Honduras case, November 15th, 2017, par. 81.
44 IACtHR, Fernández Ortega et al. v. México case, August 30th, 2010, par. 193; IACtHR, case Mujeres víctimas de tortura sexual en Atenco v. México case, November 28th, 2018, par. 270.
45 IACtHR, Véliz Franco et al. v. Guatemala case, May 19th, 2014, par. 185.

to investigate ex officio possible gender discriminatory connotations in an act of violence committed against a woman, especially when there are concrete indications of any kind of sexual violence or evidence of abuse against the woman's body (e.g., mutilation), or when such an act is framed within a context of violence against women that occurs in a given country or region." [46]

When facing criminal investigations of sexual violence, the Court requires particular measures to be taken, such as "(i) the statement of the victim is made in a comfortable and safe environment that provides him/her privacy and confidence; (ii) the statement of the victim is recorded in a way that its repetition is avoided or limited; (iii) medical, health, and psychological care is provided to the victim, both in cases of emergency and continuously if required, through a care protocol that aims to reduce the consequences of the rape; (iv) a full and detailed medical and psychological examination conducted immediately by suitable and trained personnel – if possible by a person of the gender chosen by the victim – offering the victim to be accompanied by someone she trusts if she wishes; v) the investigative acts are documented and coordinated, and the evidence shall be handled diligently, taking sufficient samples, carrying out studies to determine the possible authorship of the act, ensuring other evidence (such as the victim's clothes), investigating the scene of the acts and guaranteeing the correct chain of custody immediately; and vi) access to free legal assistance is provided to the victim during all stages of the process." [47]

Another important issue in the investigation of these cases is the stereotypical stigmatization experienced by sexual violence victims. In *Women of Atenco v. Mexico*, the Court observed how, after the violence suffered by the victims at the hands of state actors, high state officials in that country questioned the credibility of their accounts, publicly stigmatized them as guerrillas, and blamed them for the absence of complaints or medical examinations. In short, the authorities insisted on denying the accusations when an investigation had not even been initiated.[48] These acts are not only discriminatory and stereotyped treatment, but they also re-victimize the victim and affect the care that judicial officials approach the investigation with. This effect becomes particularly serious in the early stages of the investigation, when authorities are required to exercise the greatest speed and diligence in

46 IACtHR, Véliz Franco et al.v. Guatemala case, May 19th, 2014, par. 187. About experts report, see: IACtHR, case V.R.P. and V.P.C. et al. v. Nicaragua case, March 8th, 2018.

47 IACtHR, Fernández Ortega et al. v. México, August 30th, 2010, par. 194; IACtHR, case Mujeres víctimas de tortura sexual en Atenco v. México, November 28th, 2018, par. 272.

48 IACtHR, Mujeres víctimas de tortura sexual en Atenco v. México case, November 28th, 2018, par. 219.

order to, inter alia: obtain evidence, protect, examine, and preserve the site of the events, and collect any witness accounts that may exist.[49]

Finally, the Court insisted that one of the effects of judicial ineffectiveness in both the investigation and punishment of cases of violence against women is that it "fosters an environment of impunity, facilitating and promoting the repetition of acts of violence overall, and sends a message that violence against women can be tolerated and accepted. This, in turn, favors its perpetuation and the social acceptance of the phenomenon, the feeling and sense of insecurity of women, as well as a persistent mistrust of them in the justice system."[50] All in all, the above constitutes discrimination on the basis of gender in relation to the right of access to justice.

2. DESCRIPTION OF THE RESPONSE GIVEN BY CRIMINAL JUSTICE SYSTEM INSTITUTIONS

This second section describes the actions of the main institutions of the Criminal Justice System – the Public Prosecutor, the Judicial branch, and the Public Defender's Office – and how they acted in the face of an avalanche of reports of human rights violations committed by state actors, particularly in the light of international standards outlined above. Additionally, it also describes some particular difficulties that these institutions have had to face when fulfilling their obligations.

For this purpose, we have consulted official documents from the Criminal Justice System institutions themselves (statistical reports, press releases, general instructions), as well as publicly available materials (reports prepared by the National Human Rights Institute INDH, OHCHR, amongst others). We have also extensively reviewed traditional and informal press from October 18th, 2019 to March 31st, 2020. Finally, we have conducted eight in-depth interviews with actors in the Criminal Justice System from several of its institutions (human rights defenders, prosecutors, judges and officials of the INDH), who work at different levels (national, regional and local) in the Metropolitan Region and the Bío Bío Region. All of these interviews were conducted with the prior informed consent of the interviewees, approved by the Research Committee of the Law School of the Universidad Diego Portales. [51]

Before starting the in-depth analysis, we deem it is necessary to

49 Ibid., par. 312.

50 IACtHR, Veliz Franco case et al. v. Guatemala, May19th, 2014, par. 208.

51 As part of the rights of the persons interviewed, they were given the option of anonymity. Given the above, only some interviewees are individualized in this chapter, while others are only mentioned with their respective affiliation (judge, public prosecutor, defense lawyer or lawyer of the INDH) and the date of the interview.

mention that, almost a year after the beginning of the *social outburst*, these last months have been severely affected by the Covid-19 pandemic –affecting the Justice System as a whole, as well as all other public bodies. Consequently, it is probably too early to draw any categorical or final conclusions regarding compliance with international standards. Therefore, our reflections are aimed at drawing attention to some critical or problematic issues that we have detected, and that will allow for a more complete assessment in the future.

a. Public Prosecutor's Office

The Public Prosecutor's Office has the legal obligation to carry out criminal prosecution after it becomes aware of acts that may constitute a crime.[52]

In Chile the crime of torture, as such, was incorporated in article 150 A of the Criminal Code in 2016 through Law 20.968. This article defines it as "… every act by which a person is intentionally inflicted with any kind of serious physical, sexual or psychological pain or suffering, with the goal of gaining – from them or a third party – information, a declaration or a confession, punishing for an act he or she has committed, or to intimidate or coerce, or due to discrimination based on the victim's ideology, political opinions, religions or beliefs; his or her nation, race, ethnic or social group; sex, sexual orientation, gender identity, age, ancestry, personal appearance, state of health or disability… Torture is also understood as the intentional use of methods geared to nullify the victim's personality, or diminish their free will or ability to discern and make choices, with any of the aforementioned aims…". Until the 2016 reform, this crime was investigated under other legal figures, such as illegitimate punishment –regulated in article 150 E – or abuse committed by State authorities against private persons – sanctioned in article 255, both of the Criminal Code.

In 2015, the Public Prosecutor's Office issued a general instructive which was modified in January and October of 2019, that defines the criteria for acting upon this type of crimes, aiming specifically to uphold with the standards laid down by the Istanbul Protocol. Thus, for example, prosecutors have the obligation to instruct that the investigative work done for these cases should be carried out by an State institution different to the one the allegedly involved State agent belongs to, as well as the obligation to include prosecutors who have specific knowledge of human rights law, and – additionally – that a series of minimum inquiries are carried out for an appropriate investigation.[53]

52 Article 166, Criminal Procedural Code.

53 Chilean Public Prosecutor's Office, Document Nº 932/2015, November 25th, 2015. Available at: http://www.fiscaliadechile.cl/Fiscalia/instructivos/index.do

From an institutional standpoint, a relevant milestone occurred in 2017 with the creation of a special department for human rights, gender-biased violence and sex offences within the National Prosecutor's Office. According to its director, Ymay Ortiz – who was interviewed for this investigation – the role of this department, as well as other specialized units, is to advise the National Prosecutor about crimes within their competence, and also counsel Regional and Deputy Prosecutors in specific cases by way of direct queries or through a variety of work processes established by this specialized department. It also aims to ensure compliance of criteria for action set by the National Prosecutor, such as the one mentioned previously. Additionally, it provides training and links with international treaty bodies, amongst other duties.

Normally, the investigation of these crimes is initiated ex officio by the Public Prosecutor's Office and/or after a public or private criminal action or report has been made.[54] In normal times, these reports would arrive at the Public Prosecutor's Office after being made to the police forces; but – for obvious reasons – this access channel was lost in the context of the *social outburst*.[55] During the social crisis, one of the main access channels for these matters was through reports by other actors of the Criminal Justice System – principally, by public prosecutors and defenders – when becoming aware of the aggressions taken place during custody of demonstrators.[56] Additionally, the National Human Rights Institute INDH filed criminal actions to the Courts after receiving information from victims and other parties. This was corroborated by our interviewees from the Judicial branch, the Public Defender's Office and the National Human Rights Institute. There was also communication between the INDH and the Specialized Human Rights Unit in order to ensure the correct classification of the crimes and efficient filing of criminal actions.

According to the last available data from the INDH, one year after the *social outburst* there have been 2,520 criminal charges nationwide, out of which 2,384 are against *Carabineros*, 112 against the Armed Forces, 41 against the Investigative Police PDI, and 25 against Chilean

54 A report is the communication done by any person to the Public Prosecutor's Office about the perpetration of an act constituting a criminal offence. This can be done directly to the institution or to the Carabineros, Investigative Police, the Chilean Gendarmerie or to any court with criminal competence. See article 173, Criminal Procedural Code. A complaint or lawsuit, on the other hand, means the use of a criminal action in order to prosecute a crime when it is launched by the victim or the individuals or institutions with the power to do so. Article 53 and 111, Criminal Procedural Code.

55 Interview from August 11th, 2020. In the same sense the Bío Bío Regional Prosecutor, interview from October 6th, 2020.

56 Interview from August 11th, 2020.

Gendarmería, the prison ward institution.[57] Regarding reported crimes, 11.730 criminal actions were for acts deemed illegitimate punishment, 116 for unnecessary violence, 6 for homicide, 471 for torture, 81 for abuse, 14 for severe injuries, 7 for serious injuries, 35 for attempted murder, just to name the most relevant.[58] Three of the six criminal actions for homicide of individual victims (for acts that ocurred on October 20th and 22th, and November 15th) were against Army personnel, two against *Carabineros* officers and one against a member of the Navy.[59]

Other civil society institutions have also filed criminal actions for acts that took place during the social crisis. The Chilean Commission of Human Rights – an NGO – for example, has filed at least 29 actions for severe injuries (15), torture (7), attempted murder (2), amongst others.[60]

The report from the Public Prosecutor's Office, issued in June 2020, stated that they have received cases regarding a total of 8,510 victims, 18% of whom are female, 15% children and adolescents, 0.3% identify as members of an indigenous people, whilst 1.2% were foreigners. [61] It is interesting that, according to this report, 66% were started by claims at the Public Prosecutor's Office or *Carabineros*, whilst only 21.1% were filed during a custody hearing, 9.4% were initiated by criminal actions (*querellas*), 2% initiated ex officio by the Public Prosecutor's Office, and 1.5% had no information on how the investigation was initiated.[62] As Ymay Ortiz indicated in the aforementioned interview, it was to be expected that filing reports through Carabineros would not be an accessible channel, given that the accused person was part of this institution. It is therefore possible that this figure (66%) comes from the complaints presented directly to the Prosecutor's Office by institutions such as the INDH. No disaggregated data is available on how many complaints were actually transmitted by *Carabineros*.

According to this same report, regarding the reported acts, 1,026 victims suffered serious injuries, 411 of these were eye injuries (40%); whereas 3,219 victims reported gunfire wounds. Regarding victims of sexual violence (364), most cases were unclothing (or stripping)

57 National Human Rights Institute, NHRI Balance: a year after the social crisis, 2020, p. 3. available at: https://www.indh.cl/bb/wp-content/uploads/2020/10/Balance-INDH-18-octubre-Prensa.pdf

58 Ibid., p. 4.

59 National Human Rights Institute, Annual Report about the human rights situation in Chile within the context of the social crisis, 2019, pp. 23-27.

60 Information provided by the same NGO, document archived with the authors.

61 Public Prosecutor's Office, Institutional Violence Numbers 18th October 2019 to 31ist of March 2020. Report from the Human Rights, Gender-biased Violence and Sexual Crimes Specialized Unit

62 Ibid.

(71%), denounced in a similar way by the INDH, and other acts considered sexual abuse with physical contact (18.4%). There were 12 recorded cases of rape or aggravated sexual abuse (3.3%).[63]

Out of the total acts that constitute criminal offenses, the Public Prosecutor's Office classified the majority as crimes of illegitimate punishment (69%) and abuse of private individuals (21%). 2.2% of these were deemed torture, where at least one of these cases resulted in the death of the affected person, according to an interviewee of the Public Prosecutor's Office.[64] In cases where the an institution was denounced (6,867 cases), 93% were claims against *Carabineros*. Similarly, when the subject sued was an individualized person (466), 97% of them were members of said institution.[65] As we shall see, this refers to one of the problematic aspects that the Public Prosecutor's Office has had to face during the investigation of these acts: the personal identification of the officials responsible for these crimes, beyond the determination of the institution they belong to.

Almost a year after the social outburst the results of these investigations are still pending, and the investigation periods have been extended. In fact, according the latest balance given by the INDH, out of all the criminal reports that were filed, by September 15th only 28 had formalized investigations nation-wide and 68 people had been charged[66]: 64 members of *Carabineros* and 4 of the Armed Forces (three members of the Military and one member of the Navy). This meager result was recognized by one of our interviewees from the Public Prosecutor's Office, who states that due to a series of complexities these investigations have advanced at a very slow pace compared to cases that are usually investigated in the Criminal Procedural System, and especially at a different pace then what victims expect.[67] What are the reasons for this? In this chapter we have been able to identify various obstacles and problematic factors that hinder the progress of these investigations.

The first aspect is the lack of experience with this particular kind of offenses in the criminal procedural system framework, which exists in the country since the year 2000. According to most of the people we interviewed, the *social outburst* created an extraordinary rise in reports of criminal acts, as the ones previously described, and took all the

63 Ibid.
64 Interview from August 11th, 2020.
65 Public Ministry, op. cit.
66 According to rule 229 of Chile's Criminal procedure code a "formalization" is "the communication made by the prosecutor to the defendant, in front of the juez de garantía [pretrial judge], that currently an investigation against him/her is taking place concerning one or more specific offenses". Although not conceptually the same, a formalization is equivalent to formally charge a person.
67 Interview from August 11th, 2020

institutions of the Justice System by surprise, as they were not prepared to receive the huge number of cases that came to their knowledge.[68] This of course meant that said institutions either did not have the necessary human or material resources, or had important limitations to adequately manage the existing resources, to deal with that volume of cases in such a short time period.[69]

According to Ymay Ortiz, the Public Prosecutor's Office was not completely unprepared by the *social outburst* when it comes to knowledge and work methodology. This was because the Human Rights Unit had already been created, instructions about the investigation of institutional violence acts had been issued, and there had been training in human rights matters.[70] This helped to organize the workload that the avalanche of cases created by the *social outburst* of October 18th brought about. In that sense, the unit created guidelines to unify criteria, provide useful material for prosecutors, etc.

According to the information obtained from our interviews, the nation-wide number of cases of institutional violence, prior to October 18th, was around 2000 cases a year. Between October 18th 2019 and March 31st 2020 only, there have been approximately 8,800 victims. This meant designing a different strategy, beginning with an important effort to systematize and record the reported acts, which were filed in different Prosecutors' Offices with different initial definitions. For example, cases with gunfire or pellet injuries or wounds in victim's eyes or head were entered, in different Prosecutor's offices, as a general injury report or illegitimate punishment, respectively, due to the fact that the specific crime for eye injury does not exist. Therefore, each and every injury case had to be revisited so as to determine the actual criminal scope of this particular phenomenon. This meant that some units within the Public Prosecutor's Office had to significantly adapt their routines in order to manage this massive rise in cases.

In a seminar organized by the Law School of Universidad de Chile, Ximena Chong, the Assistant Prosecutor in charge of High Complexity Cases of the Centre-North Metropolitan Region Prosecutor's Office (one of the main regional units of the Public Prosecutor's Office that has dealt with cases related to the *social outburst* and who received

68 Interview from August 11th and 12th, 2020. In the same way, the Bío Bío Regional Office stated that "it was unprecedented for everyone".

69 For example, the Bío Bío Regional Prosecutor reported that the district measures taken in this sense had been taken two or three weeks after the social outburst. At first there the number of cases, types of crimes, their frequency and locations, amongst other factors, was unclear.

70 Interview from August 11th, 2020. Likewise, it has been reported that – fortunately – some prosecutors in the Bío Bío Region were trained in human rights matters. Bío Bío Regional Prosecutor Interview, October 16th, 2020.

death threats in 2020),[71] described how the scenario changed with these crimes. She indicated that between 2000 (when enforcement of the criminal procedural reform began) and 2008, there are practically no records of judgments on crimes equivalent to torture or illegitimate punishment, and there are only 46 judgments on such cases between 2008 and 2015. Based on these figures, she concluded that in general, although this kind of crimes was not inexistent within the new criminal procedural system, torture-related crimes were isolated or anecdotal, lacking systemic appearance, except in certain problematic enclaves.[72] However, as of October 18th – especially during the months of November and December post *social outburst* – according to Chong, there was an explosion of cases with acts related to institutional violence. There were so many that in February 2020, the Public Prosecutor's Office had seen and opened approximately 5,558 cases, out of which 1,457 belonged to the Center-North Regional Prosecutor. By September 2020, that office counted 3,384 cases, which today correspond to 2,500 active cases (as, for example, some have been merged and are tried jointly when they involve the same acts).[73] Given the former, Ximena Chong stated that in her High Complexity Unit – which has seven prosecutors, and usually manage somewhere between 70 and 80 cases each – there now is a much larger universe of cases. This required the implementation of a different work system where certain investigations were given priority, either because they involved vulnerable groups or because they entailed more severe injuries.[74]

In a similar vein, an interviewee from the INDH referred to this rise in cases pointing out that between 2010 and October 2019 the institution had filed approximately 900 criminal actions for institutional violence, while today, only the cases regarding acts related to the *social outburst* are more than 2,500.[75]

The second factor of complexity is connected to the circumstances in which these human rights violations occurred, and the specific facts that constitute these violations. Both elements make the investigation particularly complex, for example, regarding the identification of the person or persons responsible. This difficulty is aligned with the number reports previously mentioned that identified an "unknown" defendant, or where the defendant was institution, not a specific official.

71 Casas / Schönsteiner, note 24.

72 Lecture given by Ximena Chong in the Seminar "The investigation of the reports of police brutality after October 18th. The difficulties and effects of the pandemic in the investigations.", organized by the University of Chile Law Faculty, September 14th, 2020. Available at: https://www.youtube.com/watch?v=9pbUjCOR6xY

73 Ibid.

74 Ibid.

75 Interview from September 28th, 2020.

In this sense, one of our interviewees highlighted that contrary to the usual request to *Carabineros* to carry out the investigation, in most of these cases, they were now the very ones under investigation, which evidently challenged the investigation process.[76]

Another difficulty pertaining to these acts related to the weapons that were used. For example, it is harder to trace the origin of pellet shots than that of gunfire shots.[77]

The third factor of complexity is related to the division of the Prosecutor's Office at a national level. Its structure's main feature is decentralization. This means that Regional Prosecutors are the ones in control of cases and, therefore, have internal work procedures that vary from one regional office to the other. This, of course, also happens within the Metropolitan Region, which is divided in four different regional offices (Center-North Office, South Office, East Office and West Office). In this sense, Ymay Ortiz explains how – on top of keeping a national record – the Specialized Human Rights Department of the National Prosecutor's Office created support material for prosecutors, such as briefs on firearm and tear gas use by public security forces, command responsibility, etc.[78] In addition, on a nationwide level, instructive 932/2015 was modified (after being reformed in January of 2019) in order to align the work methodology with regard to the *social outburst*, and also provide a work proposal various regional prosecutors.

These guidelines, however, are not always followed, and some Prosecutors' Offices have created their own provisions. This undoubtedly has effects, as it means that there is a variety of criteria and organization structures to tackle investigative work in an extremely complex area. These internal differences are also perceived by other organs that intervene in these cases. One of the interviewees from the INDH mentioned that the investigation pertaining to institutional violence issues in Chile has always been somewhat slow, in part due to the territorial divisions of the Prosecutor's Office which lead to differences regarding the criteria applied and different degrees of institutional collaboration.[79]

76 For example, it was informed that in Concepción, due to this factor, one of the first measures adopted by the Regional Prosecutor's Office was give the Regional Victims and Witnesses Attention Unit (URAVIT by its Spanish acronym) the task of reach out to potential victims immediately: "we must find these people quickly so as to keep them connected to the case". Bío Bío Regional Prosecutor, October 16th, 2020.

77 Pellets are "non-lethal" or "less lethal" projectiles used in riot control rifles. Every cartridge shot has approximately ten of these elements. See: Patricio Jorquera and Rodrigo Palma, Estudio del Perdigón. Final Report, Mechanical Engineering Department, University of Chile, November 2019.

78 Interview from August 11th, 2020 and interview to the Bío Bío Regional Prosecutor, October 16th, 2020.

79 Interview from September 28th, 2020.

As previously mentioned, one of the main Regional Prosecutors' Offices is the Center-North Metropolitan Region Office, where Ximena Chong was put in charge of the High Complexity Crimes Division. According to her statement, in the planning of the investigative procedures aimed at clarifying the acts of the *social outburst,* her unit focusses especially on the respect of the due diligence standard. This meant carrying out a serious investigation, with proceedings geared towards elucidating and laying out the circumstances in which the acts took place, identifying and sanctioning those responsible for these acts, as well as ensuring adequate reparation for the victim.[80]

With this goal in mind, the High Complexity Crimes Unit made early contact with various institutions that would be able to provide information (for example, Ministry of the Interior, *Carabineros*, the Investigative Police and the Army).[81]

In order to carry out the investigation proceedings, the Center-North Prosecutors' Office worked directly with the Investigative Police, as this institution has a Human Rights Unit that specializes in these issues and is located in the Metropolitan Region.[82] On one hand, it is an advantage to have the specialized work done by this unit, but at the same time it poses a problem regarding the investigations of acts that took place outside of the Metropolitan Region. According to the Bío Bío Regional Prosecutor, this situation was partially solved by the good will of the Investigative Police in this region that reassigned its staff from the Homicide Brigade to work with the prosecutor in charge of these cases, even though these officers did not initially have the necessary expertise in the matter.[83]

Another significant measure, according to Ximena Chong's statement, was the setup of a "Chinese wall" between the unit in charge of the investigation of these crimes and the prosecutors who investigated other acts, such as public disorder, taken place during the *social outburst*. This was done to ensure, in some way, that the information provided by victims of institutional violence would not be used in other investigations that could, eventually, be directed against them as suspects of creating public disorder.[84] These decisions are directly related

80 Lecture given by Ximena Chong in the Seminar "The investigation of the reports of police brutality after the 18th of October. The difficulties and effects of the pandemic in the investigations.", organized by the University of Chile Law Faculty, September 14th, 2020.

81 Ibid.

82 Ibid.

83 Interview to the Bío Bío Regional Prosecutor, October 16th, 2020.

84 Lecture given by Ximena Chong in the Seminar "The investigation of the reports of police brutality after the 18th of October. The difficulties and effects of the pandemic in the investigations.", organized by the University of Chile Law Faculty, September 14th, 2020. Available at: https://www.youtube.com/watch?v=9pbUjCOR6xY

with upholding the objectivity and impartiality standard described in the previous section.

It was also necessary to determine primary and secondary goals in these investigations. This because, in general, these crimes are committed by members of hierarchical institutions where there is command responsibility. In fact, the penal legislation on this matter establishes special duties that allow the sanctioning of those who do not avoid detrimental consequences of the acts of their subordinates.[85]

Given the complexity of the circumstances in which these crimes were committed, normally within the context of massive demonstrations, it was very important to use criminal analysis tools. Therefore, given the large volume of cases, it has been possible to establish certain common elements based on, for example, georeferenced information. This allowed the optimization of requests for information from different institutions and was also an investigation tool used to identify and establish common or reciprocal means of evidence. Additionally, this tool has permitted the determination of certain patterns of conduct by officials in charge of public order.[86]

The fourth factor, which is especially complex, is the impact caused by the Covid-19 pandemic on the Justice System as a whole, starting with the internal difficulties within the Public Prosecutor's Office. In the same seminar organized by the Universidad de Chile Law School, Ymay Ortiz stated how human resources have dropped on an institutional level, and how they have had to adapt their systems in order to work remotely. She also commented on how difficult it is to decide on prioritization between these cases and other cases of great importance, such as gender-biased violence cases which spiked during the lockdown imposed because of the pandemic.[87]

Both representatives of the judicial system laid out the external factors that have slowed down the investigation of these acts. Among other reasons that have hindered the investigation proceedings of the Investigative Police are the lack of human resources, which – according to an interview – were scarce even before the pandemic. Indeed, many investigative proceedings are carried out by the Human Rights Brigade of the Investigative Police, but a large part of their staff is overwhelmed with human rights causes left by the dictatorship, which are processed by Visiting Judges under Chile's old Criminal Procedure. In addition, the staff numbers drop as some members contracted Covid-19, and due to the destination of human resources to other pandemic-related work.

85 Ibid.

86 Ibid.

87 Lecture by Ymay Ortiz in the Seminar "The investigation of the reports of police brutality after the 18th of October. The difficulties and effects of the pandemic in the investigations.", organized by the University of Chile Law Faculty, September 14th, 2020.

Moreover, there were also problems with the Medical Legal Service, as they were unable to carry out their expertise due to technical reasons, given the difficulty of completing psychological or mental health reports according to the standards of the Istanbul Protocol. There were also problems in the courts' scheduling of formalization hearings, given the social distancing needs that Penal Tribunals have had to implement.[88]

b. Judicial Branch

The various members of the criminal justice system who were interviewed for this chapter agree that the Criminal Procedural System was not prepared for a situation with massive human rights violations. Indeed, the procedures were not designed to manage them. This was due to the fact that it was designed to function during normal times, not in the middle of a monumental social and political conflict that puts pressure on all the country's institutions, including the Justice System. This meant that the system was caught by surprise and without adequate response protocols.

This explains the proactive reaction on behalf of many judges, individually considered, who coordinated among themselves and acted *motu proprio*, rather than responding to a centralized reaction from the upper authorities. This created an uneven response to the *social outburst,* which is illustrated by the reaction Haroldo Brito – the President of the Supreme Court President – displayed in relation to the social crisis.

One of our interviewees reported that Brito – who was away – brought his return trip forward to October19th to meet with the guarantee judges (pretrial judges) on duty at the Santiago Justice Center in order to obtain information as to how they were managing situation of the detainees, the measures they had adopted, as well as provide his support. The interviewee mentions that the former President of the Supreme Court "(…) gave us his full support (…). Explicit support of the Supreme Court to the job we were doing in such a hierarchical institution is significant"[89]; they felt backed-up in their role as judges during the crisis. This support can also be observed in Justice Brito's multiple press statements in the days and months that followed the *outburst*,[90]

88 Ibid.

89 Also see, La Tercera: "Supreme Court President leads meeting with guarantee judges given massive arrests in Santiago", October 19th, 2019.

90 In at interview, after meeting with the OHCHR, the Supreme Court President indicated: "There is a feeling that (the judges) acted with great professionalism, without tensions or inappropriate requirements and with great respect with the work that has been done and that, in my opinion, is very encouraging and just. ". La Tercera: "Supreme Court President meets with UN High Commissioner for Human Rights.", November 4th, 2019.

where he asserted the independence of the courts and highlighted their role as guardians or guarantors of fundamental rights. These principles were reiterated during his final account at the end of his term.[91]

Indeed, the same interviewed judge indicated that the Supreme Courte did not do any major centralized coordination arrangements, which meant that guarantee judges' responses were subject to their own proactivity and arranged measures.

In case of the Santiago Justice Center, the lack of central coordination does not seem to have caused major problems regarding its basic human rights protection role. This center, – given that it physically concentrates the majority of courts in the Metropolitan Region and due to the fact that it already had a previously established capacity of coordination of cases of arrest control – was able to make efforts to face the massive number of arrests in the first few months of the *social outburst*.[92]

In effect, these arrangements guaranteed an impartial and timely revision of the legality of the detention of every person who was arrested and taken to court.[93] The former was only possible because the system's capacity was amplified for this purpose by increasing the number of arrests rooms, the number of available judges and other Judicial Branch employees.[94]

Regarding the effectiveness of arrest control – and, indirectly, of police activity – it is possible to say that according to the available statistics this worked effectively: arrests that were declared illegal rose immensely when compared to the same period of the previous year: between November 2018 and January 2019 a total of 1,285 arrests had been declared illegal, whereas between November 2019 and January 2020 the figure rose to 1,928. The majority of these arrests (1288) took place between the October 18th and November 11th.[95] In conclusion,

91 Radio Agricultura: "Supreme Court President highlights the role of judges in the social outburst", January 4th, 2020.

92 A similar situation was described by the Bío Bío Regional Defender. In an interview for this chapter he stated that the main actors in the Criminal Procedural System of this district have been known since 2003, which includes the judges. Thanks to the experience gained after the 2010 earthquake "we learnt to communicate right away, nobody waits for a formal invitation to meet". This was also stated by the Regional Prosecutor, who mentioned that it had been a "great learning experience".

93 A different problem, which will be addressed in another chapter of this Report, relates to Carabineros and the military practice to temporarily arrest people until the end of the local curfew and then set them free without registering their detention. The legality of this practice is questionable and left the people who had been arrested in a very vulnerable situation as they could not be subjected to arrest control by the judicial authority.

94 This was also determined in the Bío Bío Region; interview of the Regional Defender, October 9th, 2020.

95 La Tercera: "57% of concluded cases after 18-O never started investigations," February 19th, 2020.

there was substantial increment in the number of illegal arrests, given that in one month of the period reported the number was equivalent to that of the previous year's trimester during the same time period.

Similarly, in the case of Santiago's Guarantee Judges, the coordination allowed some courts to double the number of judges on duty. Thus, a guarantee judge was always available to see to calls made by the Prosecutor's Office, the Defender's Office or other actors that by way of the *recurso de amparo* (a petition pertaining to constitutional protections on the right to personal liberty, equivalent to *habeas corpus*) of article 95 of the Criminal Procedure Code, whilst another judge could visit the places or custody rooms where the presence of judges was necessary.[96]

It is also important to highlight that, in spite of the clarity of the message that guarantee judges were sending to the Ministry of the Interior and Police Forces about not lowering their standards or tolerating police brutality, they were not as emphatic or aligned regarding the application of an increased standard of review due to the country's current state of emergency. Therefore, while some courts were outwardly showing their higher standards and proactivity in the protection of human rights, there were others that did not change the way they acted at all, or barely did so compared to their actuation prior to the *social outburst*. From another perspective, it is possible that certain practices that predated the *social outburst* were abandoned in some courts but not in others.[97]

Thus, it was made clear that some Guarantee Courts were not limiting their activity to arrest controls, but also developed a series of activities to prevent human rights violations that constituted proof of complying with their duty to cooperate and protect.[98]

We can identify various Guarantee Courts across the country whose judges personally went to different detention centers to evaluate the detainees' condition and state of the arrest, as well as how it had been carried out, in the context of *recurso de amparo* cases (Art 95 CPP).

For example, a few days after the *social outburst*, there was massive media coverage of the judges from the 7º Guarantee Court of Santiago visiting a police station near the Baquedano Metro Station. This was because they had reportedly received *amparo* phone calls that indicated that the arrested people had suffered torture. The judges visited the police station a few hours after the phone call and after they had gone over the facts and records, proceeding to then personally inspect the

96 Judicial Branch Chile.cl: "7º Guarantee Court of Santiago judges set up in police station at Baquedano Metro", October 19th, 2019.
97 Interviews from August 14th and September 4th, 2020.
98 Interview from August 12th, 2020.

premises and the police station in search of detained people and evidence of torture.[99] This measure did not allow to verify the presence of arrested people or any signs that torture had occurred, so the judges referred the file to the corresponding prosecutor's office so it could carry on with the investigation.

In the same way – and especially at the end of October and during the month of November – guarantee judges from all over the country would show up unannounced –on different days and at different times of day– at police stations to inspect the conditions of the arrests,[100] whether the cameras of these premises were working and whether the list of detainees was available – information which undoubtedly has to be considered public information. They also did it in order to guarantee access to these police stations by lawyers from the INDH and any lawyer or paralegal and that their interactions with the detainees were not hindered in any way.[101] All in all, the interviews and other sources of information give faith that these activities were carried out at the discretion of each court.

In this regard, an ongoing empirical research whose results were summarized at Ciper Chile and which observed 70 arrest control hearings in the guarantee courts of Santiago and La Araucanía, showed that – between October 21st and December 5th 2019, the "judges were not inspecting the cases or fulfilling their duty to provide information to the people who had been arrested", nor did they check the conditions in which the arrest had been made. Therefore, the authors of this investigation (Reformed Justice and Access to Justice in Chile, Fondecyt 1180038) which is still unpublished, mentioned in a column written in February 2020 that in 46 of the 72 observed hearings "no one asked the defendant or the accused about the conditions of

99 CNN Chile: "Daniel Urrutia, Guarantee judge in Santiago: 'At this time, a great part of the population's human rights are being violated", October 24th, 2019.

100 There are records of these kinds of visits on behalf of the 6º Guarantee Court of Santiago (https://www.youtube.com/watch?v=0h4STPohSK0), the 2º Guarantee Court of Santiago (https://www.youtube.com/watch?v=ui5-FDwtgYI), the Guarantee Court of Lota (https://www.youtube.com/watch?v=s1tOc6gn73o), the Guarantee Court of Ovalle (https://www.youtube.com/watch?v=XNIz9e-4Ndc) and the Guarantee Court of Temuco (https://uatv.cl/2019/10/25/presidente-del-juzgado-de-garantia-de-temuco-estamos-llamados-constitucionalmente-a-resguardar-los-derechos-de-todas-las-personas/)

101 See Vania Boutad's, Guarantee Judge, statement, available at https://www.youtube.com/watch?v=0h4STPohSK0

their arrest".[102] In the same period it was possible to identify guarantee courts that were much more proactive and created different instances to coordinate or generate information.

Firstly, we can mention the situation of the Second Guarantee Court, which – given the explosion of *recursos de amparo* – arranged a meeting with *Carabineros*, the Prosecutors and other actors to "(…) create an Alliance with Carabineros and the Investigative Police, to coordinate and reflect as to whether they were ready for a contingency of this nature", and thus get all the possible information and collaboration from the police. In this sense, Judge Alberto Amiot mentioned the different circumstances that had taken place during the first few days of the State of Emergency and the need to "raise control standards".[103]

A second example linked to the duty to cooperate, as well as the duty to protect human rights, can be observed in the Protocol on the Reception of Claims created by a committee of judges from the Seventh Guarantee Court of Santiago. This protocol, according to an interviewee, is based on the idea that people who are subject to arrest control could have had their fundamental rights violated, and that "the sooner the information on human rights violations can be collected, the easier it would be to investigate the case."[104]

This protocol states that pursuant to each arrest control that comes with a human rights claim, a court case is immediately initiated. This means that the judges have to record the statement facts in great detail, make note of all and any information they can obtain, as well as take photographs of the victims' injuries. In more serious cases they have the power to refer the Medical Legal Service and summon the intervention of the INDH and the Children's Defender's Office, organisms considered collaborators in this matter. These proceedings led to the immediate creation of a case that had to be investigated by the Prosecutor's Office. All in all, however, as the interviews with public defenders show, this was not a well-known or massively used protocol.

102 Ciper Chile.cl: "The grey zone in the arrest control hearings in the context of the social outburst, February 12th, 2020. The descriptions told by the interviews done to the Metropolitan Region defenders are consistent with the information in this article. One of them outlined the guarantee judges' behaviour in the following way: "There are two kinds of judge, the ones who ask the defendant if they suffered violence and record this in the report, and the ones who simply ask if they want to file a report – and don't ask in a particularly encouraging way. Someone who has been arrested and handcuffed for 12 hours, is desperate to go home and forget everything." The second defender, in the same manner, stated that the message given by some judges was: "it is best if you file your report on your way out", so as to not have to take it during a hearing. Interviews from September 4th and August 4th, respectively.

103 Judicial Branch Chile.cl: "Santiago Guarantee Judge held coordination meeting with Police Representatives", October 28th, 2019.

104 Interview from August 12th, 2020.

Although the judiciary's intervention regarding the protection of human rights focussed mainly on guarantee courts, they did not only take place in this forum. Thus, since October 2019, at least 73 motions have been filed to the country's superior tribunals regarding the use of pellets, firearms and tear gas by Carabineros.[105] This was verified through a succession of decisions on the matter by different Courts of Appeal on *recursos de protección*[106] and *recursos de amparo*. These courts include the ones located in Antofagasta, Concepción, Rancagua, Santiago and also, the Supreme Court.[107]

Initially some of the Courts ordered injunctions, which limited or conditioned the use of arms during demonstrations. Some rulings stated that: "The authorities must strictly abide by the protocol provided by the Ministry of the Interior for the current situation, that is, to refrain from the use lethal weapons, as well as pellets, on people who are protesting peacefully, limiting the use of tear gas or any other measure that affects a person's physical integrity to extreme situations that justify their use".[108-109]

Similarly, in December 2019, the Concepción Court of Appeals granted a *recurso de amparo* against the Carabineros, ordering them to avoid using chemical substances until the Public Health Authority approved a procedure for their use.[110] This judgment was confirmed by the Supreme Court on December 26th, 2019.[111]

All in all, it is possible to observe that, as thesepassed, the immense majority of these petitions were finally dismissed by the courts. This is the conclusion reached by the report made by *Observatorio Judicial*, which indicated that out of 73 petitions, 68 were eventually dismissed. The dismissals were confirmed by the Supreme Court.[112]

One of the relevant exceptions in this matter was a resolution issued by the Valparaiso Appeals Court, which granted 15 *recursos de*

105 For an overall description that includes statistics, refer to Observatorio Judicial, Public force and the illegitimacy of violence, September 2020.

106 Recurso de protección is the constitutional action that protects certain human rights established in the constitution from violations through illegal o arbitrary acts or omissions, Art. 20 Political Constitution.

107 Antofagasta Appeals Court, Rulings 8013-2019 and 8428-2019; Concepción Appeals Court Rulings 53475-2019; Rancagua Appeals Court, Rulings 19877-2019, 19992-2019, 20068-2019, 20022-2019; Santiago Appeals Court, Rulings 173780-2019, 174181-2019, 174330-2019, 173961-2019, 174413-2019, 175431-2019, 174967-2019, 173904-2019, 175725-2019, 175539-2019, 176652-2019, 177077-2019 and 174994-2019.

108 La Tercera: "Antofagasta Court limits Carabineros' action during demonstrations", November 12th, 2019.

109 Antofagasta Appeals Court (12th of November); Rancagua Appeals Court (18th of November).

110 ADN Radio.cl: "Concepción Court order the Police to not use chemical substances to re-establish public order", December 13th, 2019.

111 La Tercera: "Supreme Court confirms ruling that orders Carabineros to limit use of chemicals in demonstrations", 26th of December 26th, 2019.

112 Observatorio Judicial, op. cit., p. 4.

amparo against the use of pellet rifles, forbidding their use under any circumstances.[113] This case was appealed to the Supreme Court, and is still pending.

This high percentage of petition dismissals makes us wonder what is the cause of these decisions which – in fact – have translated into an important limitation of the applicable constitutional action (the so called acción or recurso de protección) to effectively protect citizens who protest peacefully against human rights violations. Although each constitutional petition is different regarding the alleged rights, the people affected and the specific situations, it is possible to identify a group of considerations that explain this situation and are frequently repeated in these Courts' *ratio decidendi*.[114]

Firstly, the petitions were initially made to argue the existence of behaviour by *Carabineros* violating human rights in specific situations that had already occurred. Given the former, most Courts opted to understand the reported conduct as individual behaviour by specific officials, which – given that they were considered crimes – should not be resolved in this jurisdiction.[115] Therefore, the Courts and – in most cases – the lawyers of *Carabineros* and the Ministry of the Interior had the litigation strategy to indicate that the petition was not the correct remedy needed to resolve these situations, claiming that it they referred to conducts that had already taken place and had been carried out individually by the officials, not in a concerted way by the institution they work for.[116] Therefore, only criminal cases were considered appropriate. In fact, a good number of the Ministry of the Interior's petitions argued that they had not dictated any instruction that authorized police officials to act in that way or had coordinated them to do so.

113 Biobiochile.cl: "Valparaíso Court orders Police to completely stop using pellet guns", June 19th, 2020.

114 Some of the common elements are equally identified in the Observatorio Judicial's report, although this entity portrays them in a positive light. See Observatorio Judicial, op. cit., pp. 8-12.

115 Antofagasta Appeals Court, 12th of December, 2019, Ruling 8013-2019 and 8030-2019, Consideration 5º and 7º. Talca Appeals Court: "If the events claimed by the action are true, that is, that Police used non-lethal weapons against the regulatory standards that define them, causing discomfort or injuries to people, these acts would involve the perpetration of crimes, and would merit an investigation and sanction according to the available legislative channels and upholding the procedural norms involved. Thus, the amparo petition is not always suitable in order to achieve this goal." Talca Appeals Court, Ruling 246-2019.

116 An argument that represents the declarations of the Ministry of Internal Affairs is the following: "Having specified the former, we cannot but conclude that, the situations presented and reported in the present petition, they can be framed within the personal responsibility of each official that incurred in these acts; but the Ministry of Internal Affairs and the Ministry of Health is in no way responsible for the personal conduct displayed by an employee of the Carabineros in his task to guarantee and keep the public order and inner security in the Republic's territory." Valparaíso Appeals Court, June 19th, 2020, Ruling 37406-2019.

Secondly, the Courts claimed there was a constant problem of evidence at the time that these reports were filed,[117] namely that these claims, as well as alluding to individual violations situations that tried to justify the danger caused by Carabineros, alleged that this abusive behaviour was "a public and known fact". This argument was often quickly dismissed due to the absence of a Ministerial directive on this matter or because the Courts kept the strict criteria of individual liability of the official involved. An example was the verdict from the Temuco Appeals Court that pointed out that these acts were "isolated and specific acts and were not the general rule".[118]

There were writs of protection that had different arguments, in which they claimed that given the acts that had taken place during previous demonstrations and the consequences these had for many people, there was fear and threat for citizens who could potentially want to attend demonstrations in the future, as their human rights could be violated.[119] These writs, like the ones filed in Temuco, based this risk on the reports issued by international organizations and medical institutions. These cases were also dismissed by the Courts, reiterating the individual responsibility of the officials – who were being investigated in other cases, and that the respective protocols already had been issued by Carabineros.[120] In these particular cases, the courts never explicitly addressed the threat posed to people's right to protest as a consequence of risking to be hurt or injured by Carabineros[121]

The general conclusion that emerges from reviewing the judgments – and which might explain the large number of dismissed petitions – is that the majority of the Courts were not willing to accept that there was a systematic violation of human rights by *Carabineros* in the context of social

117 See, as an example, Arica Appeals Court, December 12th, 2019, Ruling 1565-2019, consideration 5º. La Serena Appeals Court, December 13th, narrative section.

118 In a similar sense, Antofagasta Appeals Court, December 12th, 2019, ruling 8013-2019 and 8030-2019, Consideration 2º and Santiago Appeals Court, Ruling 176052-2019, "In certain and unfortunate events, an unreasonable reaction (7º consideration).

119 Temuco Appeals Court, June 10th, 2020, ruling 17653-2019, narrative section and Santiago Appeals Court, Ruling 176052-2019, narrative section.

120 Temuco Appeals Court, June 10th, 2020, Ruling 17653-2019, consideration 7º.

121 Santiago Appeals Court, Ruling 176052-2019, consideration 8º.

demonstrations.[122] Indeed, it seems as though some Courts – notwithstanding the information provided by international organizations about police behaviour – were only open to accept this scenario if there was irrefutable evidence of a direct order from the Ministry of the Interior or in the chain of command responsibility. Thus, the view that reduces the problem to the individual behaviour of certain officials who committed "abuses" or "isolated" acts persisted.

The rationale followed in the Valparaiso Appeals Court's ruling contrasts with this view. Clauses 20 to 24 of the judgment provides a detailed account regarding the sources mentioned by the plaintiff. One of these were reports from the INDH, Carlos Van Buren Hospital, the Regional Health Authority and Gustavo Fricke Hospital, as well as the Valparaiso University, all of which mentioned the massive number of injuries and the consequences they created. It was on account of this information that this Court abandoned the notion or narrative of the individual responsibility of officials and released a general declaration about Carabineros' behaviour as a whole entity: "(…) the public force that acted during demonstrations (…) has unheeded the essential principle that guides their action, which is that of graduality and proportionality in their use of force, which is shown, in some cases, by a defiant attitude in the containment of masses and, in others, by immediately repressing these demonstrations through violent means (…)".[123]

The consequence of this line of case-law, which is quite settled in the higher courts, was that the Courts have not adopted any measure that unequivocally and definitely granted citizens, as a group or a collective, the possibility to protest without the fear of being harmed by police personnel. It is very difficult for these measures to be adopted if the higher courts are unwilling to accept that there is a practice of massive human rights violations, regardless of whether it has been instructed or coordinated by high-ranking officials or not.

122 The Santiago Appeals Court has been categorical: "However, none of these illicit acts directly affected the petitioners, therefore claiming that these isolated events represent systematic police behaviour that, could eventually affect them, is a statement that is not explained at all in this petition as there is no evidence of an attack of this nature to their detriment." (highlighting is ours). Santiago Appeals Court, Ruling 176052-2019, consideration 8º.

The contrast of judicial officer Normabuena's dissenting vote is interesting, it starts stating: "Given the facts that this petition is based on, it is , the arbitrary and illegal act objected has been proved by the described context, the accompanied evidence, the last memo from the NHRI and the multiplicity of studies, news articles and reviews that cite them (…)".

123 Valparaíso Appeals Court, June 19th, 2020, Ruling 37406-2019, consideration 25º.

c. Public Defender's Office

In the criminal procedural system, the defense has a very specific and important role; that is, to provide legal representation to people who are being criminally prosecuted. Within the context of the *social outburst* this translated in a proactive role to protect their clients' human rights.

Generally speaking, the behaviour of the Public Defender's Office fully carried out its job, assuring prompt and timely representation to anyone and everyone who was detained or arrested. In this sense, there is no information that the defenders refrained from doing their duty during the *social outburst,* or that the Defender's Office – in spite of its lack of institutional autonomy – received pressure or instructions from the Ministry of Justice.

However, as with the other institutions, the Defender's Office was also unprepared to deal with the unusually high number of detained persons, especially at the start of the *social outburst*. Although they were able to provide the necessary coverage in this situation, it was not due to a centralized effort from the National Defender's Office or an increment of resources. In effect, according to an interviewed defender, this avalanche of cases was controlled thanks to the "(…) voluntary collaboration of future lawyers in their professional internship, volunteers, and people who were doing job replacements. They all flocked to cooperate, filling out forms, doing interviews, etc., as on some days there were 800 arrested people, a number that would otherwise have been unmanageable".[124]

That was due to the fact that for the large number of arrests there were not sufficient defenders on duty to interview each person, verify the circumstances of their arrest, instruct them in their rights, amongst other tasks. They were able to navigate this high demand only due to the help of volunteers, especially during the first days of the *social outburst.*

In fact, guaranteeing a reasonable time to talk with their clients led various Defenders Offices to take shifts at the police stations, which started out informally and later became institutionalized, so as to check on the people arrested and have more time to interview them. Defenders from the Metropolitan and Bío Bío Region have stated that they stayed until very late at night waiting for the detainees to arrive at the police stations, given than many of them were showing signs of being injured.[125]

Moreover, some Regional Defenders carried out various measures to guarantee appropriate conditions for the interview and arrest of people

124 Interview from September 4th, 2020.

125 Interview from September 4th, 2020 mentioned: "Volunteer groups were created to tour the police stations outside out jurisdictions in our own cars".

in the police stations. The Bío Bío Regional Defender states that he coordinated with the First Police Precinct of Concepción, where the majority of detainees were taken, so he could have a temporary office for the defenders, as well as reasonable arrest conditions for each type of detainees, considering various vulnerable minorities. All in all, these initiatives were not arranged by the National Defenders Office, but depended upon the decisions made by each Regional Defenders Office.

In this regard the interviewed defenders say that the only instruction they got from the National Office was that they should take reports of human rights violation victims and inform them to the INDH. There is no record as to the existence of specific instructions that detail how to treat, investigate or litigate the cases that arose from the *social outburst*.

3. REFLECTIONS AND RECOMMENDATIONS

This chapter was finalized just under a year after the events of October 18th, 2019 took place. The time that elapsed creates a complex contrast. As an interviewee mentioned, these months have felt like an eternity to victims of human rights violations, but time passes at a different pace for the Justice System and its institutions. The investigations are still being carried out but given the pandemic (since March 2020) most of the Justice System personnel are working remotely, with limited capacities and abnormal procedures. It is therefore difficult at this time to outright evaluate the way in which state organs have acted. However, it is possible to affirm the following: the Criminal Justice System, in the context of the *social outburst* and the Covid-19 pandemic, was only able to guarantee the very minimum that was expected of it.

As some interviewees mentioned, the Chilean criminal justice system was unprepared for this situation of massive human rights violations. There were no protocols on the matter, they were not used to this increased workload, no adequate work routines or organization designed to deal with such a scenario.

The information shows that during the first few weeks after the *social outburst* the Criminal Justice System made important efforts to "absorb" an unprecedented workload. They created new work routines, they doubled the number of guarantee judges, the Human Rights Unit of the Prosecutor's Office created a new registry in order to clarify the different complaints, some Regional Offices grouped their investigations, public defenders created a shift system at police stations, amongst many other efforts.

The former is evidenced, for example, in that the relevant– although improvised – efforts to record the human rights violations reports, as

well as the creation of statistics published in various statements made by institutions such as the Public Prosecutor's Office or the INDH. These, unfortunately, do not coincide as they lack a common criteria. However, thanks to the work done by some institutions and mostly by people, there is a baseline of information they can work with and, in the future, assess the results.

From a Rule of Law and human rights perspective, we can reaffirm that the system did the bare minimum of what was it was expected to do: it was able to guarantee a timely response to the cases caused by *the social outburst*, upholding the 24 hour time frame of arrest control; the autonomy and independence of the Prosecutor's Office, the Defense Office and the judiciary in regards of the Executive Power was never under question. Additionally, the horizontal control between institutions continued to function, courts had their doors open and, overall, the gathered information shows that the human rights protection standards were not compromised. There was a significant rise in the number of arrests that were declared illegal, the claims made against *Carabineros* personnel are investigated by objective Prosecutors, the Appeals Courts analysed over 70 *acciones de protección* and *amparo*, and to date there are no signs of the massive use of alternatives to trial for police officials involved in human rights violations. All the people who were arrested were represented by the Public Defense Office. We can thus affirm that the Criminal Justice System was able to fulfill its duties during the *social outburst* and the pandemic, assuring the operation standards that were in effect prior to the political and sanitary crisis.

But is this enough? It is clear that the actions considered human rights violations that took place during and after October 18th, some mentioned in the introduction of this document, do not correspond to common criminality characteristics or are typical or routine events. These are crimes committed in massively and repetitively ways by State actors, that seriously affected the physical and psychological integrity, and sometimes even the life, of people. The crimes reported in the petitions made by the INDH mention lost eyes, penetration of genitals carried out with objects, stripping (or unclothing) at police centers, illegitimate punishments and torture, carried out mostly by Carabineros. In this context, it is to be expected and required that the human rights protection standards are not only upheld but also elevated taking into consideration the special vulnerable situation of these victims, and considering the alleged authors of said crimes. Given the information gathered, we are able to assert that – from this perspective – the actions displayed by the Criminal Justice System to date have not been sufficient, and that human rights standards have not been upheld in a clear and consistent way.

In general, any initiative that elevated the human rights protection standards in the context of massive violations took place due to the decision made by people who were part of these institutions, rather than being arranged by the institution as a whole. What we know for sure is that the judges' behaviour during the *social outburst* in their role as guarantee judges – either due to their education in human rights matters or in the way they approach their job – was defined by the individual or collective decision made by the parties, but not organized or directed from an institutional level. For example, not all the guarantee judges visited detention centers, only a few created special protocols to ease the collection of reports, information and evidence from people who were arrested. Likewise, regarding the Public Prosecutor, each Regional Office determined how it should be organized and how it would rank the investigation of these crimes, so there was privileged treatment in some cases and not in others. Regarding the Defender's Office, one of the interviewees mentioned that "they did not receive anything from the National Office" and that the reaction to the social outburst was "based on the staff's determination".

We can observe that for various reasons – some due to the design of the institutions, others due to organizational culture and bureaucratization that was set-in before the pandemic – there was no centralized or coordinated response from the System's institutions in order to guarantee the observation of the highest human rights standards in all the cases that arose from this situation.

Therefore, and in light of the due diligence duty, this chapter closes by manifesting a serious concern. From the available information we can verify a total of 6,867 reports in which a State agent performed acts that violated human rights. Out of these, 466 cases have a clearly identified person as a defendant. Finally, by September 2020, only 28 cases have been formalized, which means 0,4% have reached a superior procedural stage.

Although this may respond to a strategic choice made by the Prosecutor's Office, such a low number is striking, given that it has been over year since the *social outburst* and should be considered a warning sign regarding the progress of these investigations.

This concern is based on the question as to what extent the Public Prosecutor's Office and the Regional Prosecutors may have prioritized the investigation and persecution of human rights violations that arose from the *social outburst*. Indeed, as mentioned when discussing the situation of the North-Center Office, although this office grouped the cases for the High Complexity Unit its director mentioned that this has not meant that her workload has diminished compared to other

cases that do not involve human rights violations, which are still pending.[126] Similarly, we were told that just before the pandemic they had a few more economic resources, but these ended when March began.

The question, and the accompanying concern, is consequently, to what extent the Public Prosecutor's Office has duly prioritized the investigation of human rights violations.

Considering all the above, we suggest:

1. It is the State's duty to guarantee that the institutions in charge of investigations regarding human rights violations have sufficient human and material resources to uphold the due diligence standards. In this sense, the Public Prosecutor's Office should be equipped with additional human and material resources in order to manage these cases and prioritize the investigation of these acts.
2. Guarantee that the investigation is done by units that do not compromise the impartiality and objectivity required for the clarification of the acts deemed human rights violations done by State actors.
3. Particularly, the Investigative Police should be granted the necessary resources to strengthen its Human Rights Brigade and decentralize its structure. This in order to prioritize the necessary procedures to clarify the human rights violations done by State actors within *social outburst* context, in the Metropolitan Region as well as in the other regions that have recorded violations.
4. The National Prosecutor's Office must collaborate with the management of internal resources and coordinate common acting criteria in the various Regional Prosecutors' offices. This so as to allocate the resources to prioritize the investigation of these acts and thus secure a uniform response.
5. The Criminal Justice System's institutions, through organisms such as the Criminal Justice System Coordination Committee, must tend to establish an protocol that fosters alignment within these institutions when dealing with acts taken place during the *social outburst*. This type of instrument must contain the basic conditions that enable the registration, referral, prioritization of the preliminary investigative procedures, information

126 The figure of naming a preferential prosecutor was also adopted in the Bío Bío Region, but as the Regional Prosecutor mentioned "I cannot give him exclusivity, because the numbers don't allow it. The cases of this prosecutor cannot be given to anyone else", and tried to compensate by providing additional support to URAVIT and establishing better connections with the Medical Legal Service. All in all, it means reengineering petitions not creating more or exclusive petitions. Interview from October 16th, 2020.

injunction, as well as other measures that allow compliance of the Istanbul Protocol.

6. Adopt the necessary measures so that the pending investigative procedures can be carried out as soon as possible. Some of these include the skills of the Forensic Service within the framework of the Istanbul Protocol, but also those carried out by the police forces.
7. Find a way, within the framework of the regulatory modifications currently discussed in parliament, to prioritize the litigation of the investigations of human rights violations by State actors. This must incorporate these reforms to the Justice System and thus deal with the high workload predicted to arrive after the pandemic ends.