



## Memory in Times of Cholera: Truth, Justice, Reparations and Guarantees of Non-Repetition for the Crimes of the Chilean Dictatorship .

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# Memory in Times of Cholera: Truth, Justice, Reparations and Guarantees of Non-Repetition for the Crimes of the Chilean Dictatorship

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**Observatorio de Justicia Transicional**

[www.derechoshumanos.udp.cl](http://www.derechoshumanos.udp.cl)  
[observatorioddhh@mail.udp.cl](mailto:observatorioddhh@mail.udp.cl)

## **“MEMORY IN TIMES OF CHOLERA”: TRUTH, JUSTICE, REPARATIONS, AND GUARANTEES OF NON-REPETITION FOR THE CRIMES OF THE CHILEAN DICTATORSHIP**

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### **PREFACE**

For the ninth consecutive year, this transitional justice-themed opening chapter of the annual human rights report of the Universidad Diego Portales, Santiago de Chile, has been prepared by the Transitional Justice Observatory, Observatorio de Justicia Transicional.<sup>1</sup> Founded in 2008, the Observatorio publishes regular e-bulletins, studies, and reports drawing on its ongoing research and engagement with trials and other transitional justice developments in Chile and around Latin America. This chapter covers developments related to truth, justice, reparations and guarantees of non-repetition in Chile, with a particular focus on measuring progress or backsliding with regard to Chile’s international human rights commitments. The detailed tracking and comparative statistical analysis in the report covers the twelve months from July 2018 to June 2019, inclusive. Later developments are covered qualitatively up to and including late August or early September 2019 (the report is published in late October or early November each year).

### **INTRODUCTION**

In recent years, the transitional justice field has tended to expand both the time horizons and the thematic focus of its concerns. Today, it is more likely than previously to address the mid and long-term impacts of the human, social and environmental catastrophes left behind by political violence, human rights violations, and infractions of international humanitarian law. Post-authoritarian Chile has always tended to downplay its truth and justice concerns, or even attempt to declare them a thing of the past. They nonetheless re-irrupt time and again into national public life. The impact of the 1973-90 dictatorship era and its violence is not, moreover, limited to the generations who most visibly or most directly lived through it: it also explains many of today’s social, political and economic faultlines. This year’s report accordingly focuses on the economic, social and cultural rights legacies of the dictatorship, and on the unfinished business of reparations. It does so at a time when national life is demonstrably under strain, suffering the negative and dangerous consequences of belligerent public discourse that cares little for the truth, and tends toward selective amnesia about the recent past.

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<sup>1</sup> Chapter co-authored by Cath Collins, Professor of Transitional Justice at Ulster University, Northern Ireland and founding director of the Observatorio; and a team consisting of: Observatorio associates Daniela Accatino, Francisco Bustos, Boris Hau, Andrea Ordóñez, Francisco Ugás, and Loreto López; invited experts Karen Cea, Bernadita García, Karinna Fernández, María José Jorquera, Natalia Labbé, and Daniela Méndez; and UDP research assistants Felipe Álvarez, Nadia Marchant and Elisa Franco. Thanks to all interviewees and to Open Society Foundations, who support the line of research that informs the section on search for the disappeared. This edition is dedicated to Pepe Aldunate, S.J., 1917-2019.

In 2017, outgoing UN Special Rapporteur Pablo de Greiff published a global report on the state of transitional justice thinking and practice.<sup>2</sup> He signalled achievements including the development of a broad notion of justice, one which adds truth, reparations, and guarantees of non-repetition to the criminal justice agenda. He also celebrated the growing recognition of truth as a social right - not only the preserve of victims, relatives or survivors - and an increased appreciation that participation is not only a moral and ethical imperative but also a prerequisite for successful transitional justice. The report called for interventions that promise to change personal and cultural dispositions. It pointed out the preventive potential of civil society strengthening, while criticising an entrenched tendency on the part of states to establish relations of mistrust or even antagonism with civil society.<sup>3</sup>

All these observations offer a strong challenge to Chile's current transitional justice trajectory, where measures have been isolated one from another; announced policies or priorities have been reversed or quietly abandoned, and the state-civil society divide has been jealously guarded. These defects have prevented existing measures from delivering on their full promise or potential. Chile has also been stubbornly blind to the need for personal and cultural change, to move beyond sterile antagonisms. Otherwise there is a very real risk that the present regional and international landscape will exacerbate the verbal and symbolic violence that is too often present in discussions and representations of the recent past.

The new UN Special Rapporteur for transitional justice issues, Fabian Salvioli, has meanwhile echoed previous UN pronouncements by emphasising the need to attend to economic, social and cultural rights (henceforth, ECOSOC).<sup>4</sup> Already in 2006, the UNHCHR signalled the need for transitional justice to support the transformation of oppressed societies, by facing up to economic and social justice questions.<sup>5</sup> In 2010, a UNSG guidance note on transitional justice recommended that states ensure transitional justice processes and mechanisms take into consideration the underlying causes of a conflict or period of repressive government, and the full range of rights violations committed, including to ECOSOC.<sup>6</sup> Chilean transitional justice nonetheless continues to marginalise ECOSOC, despite having suffered authoritarian violence with a particularly regressive impact on equality.

According to expert Naomi Roht-Arriaza, Chile stands out for three characteristics of its pre and post transition. First, having been the poster child for the notion that violent suppression of the social costs of economic 'liberalisation' might be necessary or even warranted. Second, for the official lie that economic transformation had happened without large-scale corruption or looting.

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<sup>2</sup> UN Document A/HRC/36/50/Add.1, UN, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his global study on transitional Justice, 7 August 2017. Authored by Pablo de Greiff.

<sup>3</sup> All direct quotes are taken from UN Document A/HRC/36/50/Add.1, op. cit.

<sup>4</sup> A/73/336, UN Document ONU, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, 23 August 2018. Authored by Fabián Salvioli, who replaced outgoing rapporteur Pablo de Greiff on 1 May 2018, after Mr. De Greiff completed two full consecutive periods in the post.

<sup>5</sup> Louise Arbour, "Economic and Social Justice for Societies in Transition", *Center for Human Rights and Global Justice*, Working Paper 10, 2006.

<sup>6</sup> UN, *Guidance note of the Secretary-General. United Nations Approach to Transitional Justice*, 2010.

Third, for its silence about private sector complicity, and the ways in which dictatorship-era economic policy contributed to Chile's human rights catastrophe.<sup>7</sup>

Chile's transitional justice processes, particularly the official ones, have nonetheless concentrated on the physical violence of the regime and its violation of civil and political rights. More attention is needed to the cultural and structural violence perpetrated by the dictatorship and perpetuated since, mitigation of which is vital for any genuinely transformative transition.<sup>8</sup> In an effort to contribute to this agenda, this year's report places particular emphasis on this issue. We review Chile's major transitional justice actions from an ECOSOC perspective, and enumerate the grave and serious violations of ECOSOC that were committed during the dictatorship and are often overlooked. In section 3.5.5, we also summarise the main arguments of a recent, comprehensive national study of the issue.

## **1. MAJOR THEMES in 2019**

### **1.1 Normative framework and general balance**

#### **1.1.1 The UPE and other reports presented by Chile before the UN Human Rights System**

In January 2019, Chile presented its third Universal Periodic Exam (UPE) before the UN Human Rights Council. Chile accepted 211 of the 266 recommendations that were made by the participating states on the basis of the preliminary official, complementary, and alternative ("shadow") reports prepared, respectively, by the government, the national Human Rights Institute, INDH, and civil society groups.<sup>9</sup> Another 37 recommendations were partially or wholly "taken note of" (meaning that their contents were contested, corrected, or otherwise not recognised).<sup>10</sup> Eighteen of the recommendations were not accepted or not considered, some because they had been emitted by Venezuela, "a regime not recognised as legitimate by the Chilean government".<sup>11</sup> This outcome meant that Chile accepted 10% fewer of the presented recommendations than in its previous EPU, in 2014.<sup>12</sup>

Amongst the recommendations making specific reference to truth, justice, and reparations for dictatorship-era crimes, a first group (nos. 125.2 y 125.3), exhorted Chile to ratify the 1968

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<sup>7</sup> Naomi Roht-Arriaza, "La tardía centralidad de la dimensión económica en la justicia transicional", in Bohoslavsky et al (eds.), *Complicidad económica con la dictadura chilena: Un país desigual a la fuerza*, Santiago, LOM, 2019, pp.47 y 48.

<sup>8</sup> Johan Galtung, *Tras la violencia, 3R: reconstrucción, reconciliación, resolución. Afrontando los efectos visibles e invisibles de la guerra y la violencia*, Bilbao, Red Gernika, 1998. In Chile the Fundación Sol, which has researched the structural violence legacy of the dictatorship, makes special mention of the 'reforms' that were imposed in education, health, and social security. Fundación Sol: "La violencia estructural y cotidiana a 40 años del Golpe: los 11 pilares dictatoriales que sostienen el modelo", 12 September 2013.

<sup>9</sup> The recommendations can be found in their entirety in UN Document A/HRC/41/6, Report of the Working Group on the Universal Periodic Review: Chile, 2 April 2019. Each recommendation only represents the view of the state which formulated it.

<sup>10</sup> In the first ever EPR cycle, states were also permitted to "reject" recommendations, but this category of reply was later withdrawn on the grounds that states which have opted to form part of the universal human rights system cannot then refuse the obligations that come with membership.

<sup>11</sup> A/HRC/41/6/Add.1, op.cit., p. 41.

<sup>12</sup> "Observaciones a respuesta de Chile a EPU 2019", public declaration published on the website of the Centro de DDHH of the Universidad de Chile, 4 July 2019, <http://www.uchile.cl/noticias/155353/observaciones-a-respuesta-de-chile-a-epu-2019>.

Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. Chile chose only to “take note” of these, arguing that it could not commit to a date for ratification because the approval of the legislature would be required. A collective civil society analysis of the EPU published by the Universidad de Chile however pointed out that states appear before international organisations as a single entity, and “cannot therefore excuse [themselves] from meeting ... international obligations by arguing that these depend on the actions of one of [their] own constituent parts”.<sup>13</sup> A draft Bill to enact the required ratification, Boletín 1265-10, has been before parliament for a decade and a half. However, in the half decade since 2014 it has not been assigned the ‘urgent’ status that is virtually a prerequisite for any draft bill to actually stand a chance of becoming law. Recommendations 125.21 to 125.24, which were all accepted, encourage Chile to implement the National Human Rights Action Plan that was promised and even published by the previous administration (Michelle Bachelet, 2014-2018) but which was apparently not validly in force at time of writing [July 2019].<sup>14</sup> Chile “took note of” recommendation 125.52, which invited it to derogate the 1978 Amnesty Decree Law, arguing that the Supreme Court has in recent years disapplied the law. The response however failed to mention that this change, as long as it remains solely interpretative, is perfectly reversible, not least since jurisprudence is not considered a source of binding precedent in Chile. The government’s position also omitted to acknowledge the fact that this same recommendation has been made repeatedly by the Inter-American Court of Human Rights and a range of other regional and international organisations.

Recommendations 125.83 and 125.84 - urging trials and proportionate sanctions for dictatorship-era crimes - and 123.85, suggesting that Chile “continue addressing” transitional justice, were accepted. The state’s response to recommendation 125.82, establishment of a permanent mechanism for recognising victims’ right to reparations, was however limited to “taking note”, signalling its intention to [instead] “continue implementing ... existing measures” (State reply, para. 22). In fact, there is an urgent need for a permanent mechanism or body that would not just administer but improve existing measures, and would have the power to examine and accredit previously unrecognised cases. This measure, promised in 2018, is just one of various firm commitments made by the outgoing (2014-2018) government that its inheritor has failed to honour, as we will see below. Chile also took note of only part of recommendation 125.85, objecting to the statement that many victims or relatives had “not yet received adequate reparation”, on the grounds that this failed to take note of Chile’s “efforts to make progress” (para. 37). This objection confuses efforts with outcomes, since it is evident that what has been achieved to date falls far short of what is required.<sup>15</sup>

Recommendation 125.81 urged Chile to continue to investigate cases of persons still disappeared, in dialogue with the UN Working Group on Enforced and Involuntary Disappearances. Chile “took note” of this recommendation, rather than accepting it, arguing that “the current law(s) contain mechanisms that allow for timely, impartial and effective investigation of reports of enforced disappearances” (A/HRC/41/6 Add.1 para. 21). This reply did

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<sup>13</sup> “Observaciones a respuesta de Chile a EPU 2019”, op.cit.

<sup>14</sup> See below, section 3.6.1.

<sup>15</sup> See section 5 of this report, and the equivalent themed section from previous editions.

not acknowledge that the typification of enforced disappearance as an autonomous offence under the criminal code, something that is required by the relevant international treaties to which Chile is a party, has been pending before the legislature since 2017. The draft bill concerned, presented in 2014, has never received executive sponsorship, without which it is highly unlikely to ever become law. Its text proposes to typify, as a (serious) common crime, enforced disappearances that do not meet the criteria of systematicity or a widespread nature that would place them in the category of crimes against humanity. This new category of crime would therefore apply to cases such as those of José Huenante, José Vergara or Hugo Arispe, victims of disappearance at the hands of agents of the state, occurring after transition, ie since 1990, during the most recent period of democratic government.<sup>16</sup> Enforced disappearance as a crime against humanity is already defined as a criminal offence by Law 20.357, passed in 2009, albeit the definition is deficient.<sup>17</sup> However, Law 20.357 does not apply to recent cases that do not constitute crimes against humanity, while its post hoc application to dictatorship-era crimes would also appear to be ruled out following the non-retroactivity principle adopted by the 1998 Rome Statute.

Chile also presented two thematic reports to the UN system during the period covered by the present report (principally, July 2018-June 2019 inclusive). The first, on torture, was presented to the UN Committee Against Torture, CAT, in July 2018, three years after the date on which it was due. The CAT's final observations on the process underlined Chile's failure to accept or fully implement previous recommendations classified as high priority.<sup>18</sup> These include the derogation of the article of Law 19.992 (which establishes a 50 year embargo on the records of the country's second truth commission, the Valech Commission); legislation to dissolve the effects of the 1978 Amnesty Decree Law (which is technically still in force); the establishment of a permanent body to acknowledge new cases of victims and survivors, and the improvement of existing reparations.

Both the CAT and the INDH observed that, while Law 20.968 has introduced an improved definition of torture - previous versions, contained in Arts. 150A and 150B of the criminal code, did not even use the term "torture" - the penalties that are set down remain insufficient to the gravity of the crime.<sup>19</sup> The CAT welcomed the fact that the Chilean judiciary currently recognises that administrative reparations do not preclude the award of civil indemnization, while acknowledging that civil claims, like criminal actions, are exempt from statutes of limitation where crimes against humanity have been committed. This exemption, currently recognised by a majority of the members of the Supreme Court's Criminal Bench, was also supported by the

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<sup>16</sup> These are the three generally recognised cases to date of enforced disappearance occurring in democracy (after 1990). The UN Committee, and the INDH, have however alluded to a possible fourth case, that of Ricardo Harex, as well as to recent denunciations of 'irregular adoptions' (appropriation of infants and children) committed during and after the dictatorship. See section 1.3.

<sup>17</sup> The deficiencies include an allusion to a "long period" of detention, which runs counter to international jurisprudence rejecting the applicability of a minimum time duration (see, *inter alia*, UN Document CED/C/10/D/1/2013, *Yrusta versus Argentina*).

<sup>18</sup> CAT/C/CHL/CO/R.6, Concluding observations on the sixth periodic report of Chile, English translation published 28 August 2018, para. 9.

<sup>19</sup> CAT/C/CHL/CO/R.6, ONU, op. cit., and INDH, Informe Complementario, op.cit. para. 4.

Inter-American Court of Human Rights in late 2018 in the case *Ordenes Guerra et al vs. Chile*.<sup>20</sup> A second case along the same lines, brought by the family of a victim of enforced disappearance, is currently before the Inter-American Commission on Human Rights, having been declared admissible.<sup>21</sup>

The CAT also called for a complete derogation of statutes of limitation on torture, whether or not committed in a context constituting crimes against humanity. It also remarked that the Chilean state had provided scant information about current trials for past torture, their outcomes, and whether sentences imposed were actually being served.<sup>22</sup> In the Observatory's opinion, this lack of information is exacerbated by the fact that the main state body charged with prosecuting dictatorship-era crimes against humanity – the Human Rights Programme Unit of the Ministry of Justice and Human Rights – only acts in cases of enforced disappearance or extrajudicial execution, and abandoned some years ago, the production and publication of data allowing even those cases to be monitored. The CAT also called for the strengthening of preventive measures, principally the National Torture Prevention Mechanism required under the Optional Protocol, to which Chile is a signatory. Eight months later, on 25 April 2019, the National Human Rights Institute was designated as the prevention mechanism, by Law 21.154.

### **1.1.2 Transitional Justice in Chile from an ECOSOC perspective**

Chile's 1973-90 civil-military regime committed grave violations of both civil and political rights, and ECOSOC. The economic model that was imposed during the dictatorship included regressive measures in education, health, and social security. The right to strike and the right to organise in trades unions were simply abolished. The period also saw massive unjustified sackings, discriminatory clauses in social services entitlement, enforced displacement, and the censoring of cultural expression (including harassment and arrest of writers and artists, and the burning of books).<sup>23</sup> This constitutes the worst possible form of rejection of the obligations to respect for, and progressive realisation of, ECOSOC, acquired by the Chilean state before the 1973 military coup.<sup>24</sup> Nonetheless, examination of Chilean transitional justice initiatives from an ECOSOC perspective betrays an almost complete lack of acknowledgement of ECOSOC violations. These harms are mentioned, if at all, as contextual factors or collateral consequences of the regime. While certain attempts at reparation can be observed in relation to a small number of ECOSOC violations, in general the response has undoubtedly been inadequate to the real scale of harm.

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<sup>20</sup> IACtHR, *Caso Órdenes Guerra y Otros versus Chile*, Sentencia Fondo, Reparaciones y Costas. 29 November 2018. See also también sections 1.2.2 and 3.1, below.

<sup>21</sup> IACHR, *Informe No. 5/19, Petición 1560-08. Admisibilidad. Juan Paredes Barrientos y Familia versus Chile*. 31 January 2019.

<sup>22</sup> UN Document CAT/C/CHL/CO/R.6, op.cit., párr. 11. This same point was emphasised by the INDH in its complementary report: *Informe Complementario*, 18 June 2018, paras. 7 and 8, where it is pointed out that the statutes of limitations periods set down by Law 20.968 range from as few as 5 years, to a maximum of ten.

<sup>23</sup> UN General Assembly (GA) Resolution No. 34/179, 7 February 1980, 4.d; UNGA Resolution No. 46/161, 4 December 1986 9.k; UN Committee on Economic, Social and Cultural Rights (CESCR) E/C.12/1988/4, Report on the 2<sup>nd</sup> Period of Sessions (Chile), 8-25 February 1988, paras. 202, 206.

<sup>24</sup> At the date of the coup Chile had signed and ratified the International Pact on Economic, Social and Cultural Rights. The instrument was not, however, published in the official newspaper [a pre-requisite for any measure to formally pass into Chilean law] until the last year of the dictatorship, via Decree 326/1989, 27 May 1989.

The Rettig Commission, for example, was limited by mandate to considering violations of the right to life and physical integrity, despite its own reference to the indivisibility and interdependence of human rights.<sup>25</sup> Both the Rettig report and the report of the first Valech Commission totally omitted mention of violations such as the forced displacement of entire populations, or large-scale sale of forestry lands, often located in indigenous territory.<sup>26</sup> Intervention in trades unions, and the closing down or censorship of media outlets and educational curricula, are portrayed as mere consequences of, or methods for, the violation of civil and political rights.<sup>27</sup> The limited mandate of the truth commissions thereby played into a partial narrative of the past, focused on physical violence and relativizing or ignoring cultural and structural violence. Although the Rettig commission did recognise that the crisis that preceded the coup had socio-economic roots, it signalled that a deeper exploration of these was beyond its scope.<sup>28</sup> This represented a lost opportunity to analyse the dynamics that permitted a social polarisation that began before the coup, and was deepened and widened after it.

Although the Chilean truth commissions had a limited vision of ECOSOC, they were capable of acknowledging the impact of grave physical violations on the quality of life of direct victims and their immediate circle. This impact included catastrophic consequences on physical and mental health, the loss of jobs, homes, access to study, and etc. Accordingly, some forms of reparation were recommended that would have a positive effect on ECOSOC. These included certain pension and social security entitlements, health support, and study scholarships.<sup>29</sup> Nonetheless, the exclusion of direct consideration of ECOSOC can also be observed in the judicial dimension of transitional justice. The Observatorio is not aware of a single judicial verdict to date that makes direct reference to violations of ECOSOC during the dictatorship. This omission is in part a product of the aforementioned emphasis on physical violence, exacerbated by the general reluctance of the state to shoulder its ex officio duties to prosecute of grave violations. It also reflects the limited justiciability of ECOSOC in Chile in general, and the narrowness of most juridical conceptualisations of their nature.<sup>30</sup>

The absence of an ECOSOC perspective is also evident in the area of institutional reform, an essential component of guarantees of non-repetition. The dictatorship imposed a rigid normative, institutional, constitutional, and economic system, in the form of regressive and discriminatory measures such as the deregulation work, the elimination of collective rights, the weakening of labour protections, and the 'reform' (privatisation) of most health, social security,

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<sup>25</sup> Comisión Nacional de Verdad y Reconciliación, *Informe Rettig*, 1991, Vol. I, Tomo I, Segunda Parte, Capítulo II, A.1.

<sup>26</sup> Decree Law 701/1974 permitted forced relocation: land confiscated in this way was sold or simply divided up amongst military personnel (El Mostrador.cl: "Investigación revela el real valor simbólico de la Villa San Luis". 2 August 2018). The specific, differential impact of dictatorial practices on indigenous communities, and their connection with current conflict and repression in the south of the country, has not been sufficiently researched.

<sup>27</sup> *Informe Rettig*, *ibíd.*, Vol I, Tomo I, Segunda Parte, Capítulo II, A.3.b.1. b.3; Comisión Nacional sobre Prisión Política y Tortura, *Informe Valech*, 2004, Capítulo III, pp.184-185, Capítulo IV p. 207, Capítulos V-VIII, pp. 239-503.

<sup>28</sup> *Informe Rettig*, *ibíd.*, Vol. I, Tomo I, Segunda Parte, Capítulo I, 27.

<sup>29</sup> *Informe Rettig*, *op.cit.*, Vol. I, Tomo II, Cuarta Parte, Capítulo I, D y Capítulo II, B, C, D; *Informe Valech*, *op.cit.*, Capítulos VIII y IX.

<sup>30</sup> The lack of justiciability of ECOSOC in Chile has been criticised by the UN CESCR: E/C.12/CHL/CO/4, CESCR, Concluding Observations-Chile, 6 July 2015, para. C.

and educational provision.<sup>31</sup> Post-dictatorship administrations have maintained this system, introducing only minor modifications.<sup>32</sup> Those few structural reforms that have taken place have mainly been the result of social movement mobilisations. The fragmentary and sporadic nature of the resulting change falls far short of the definitive break with the dictatorship-era model of growth that some have predicted or called for.<sup>33</sup>

Existing reparations measures, for all their defects, are those that have given most space to ECOSOC-related concerns. They allowed certain groups of survivors and relatives access to particular services in health, housing and education,<sup>34</sup> and partially mitigated harm caused by unfair dismissal, via the partial restitution of pension credits.<sup>35</sup> Some individuals, unions, and political parties who suffered forcible expropriation or confiscation of assets received compensation and/or the restitution of their property.<sup>36</sup> These measures however reach to only a small proportion of those whose ECOSOC rights were violated, moreover providing only very modest entitlements. Collective restitution, implemented in other contexts such as Peru, has not featured in Chilean reparations measures. In fact, in one of the few cases in which the violation of rights was clearly collective in nature - the confiscation of land from “*exonerados de tierra*” - reparation took the exclusively individual and pecuniary form of personal pensions.

There has been some progress in the courts since 2014, taking the form of a growing recognition of relatives’ and survivor’s’ rights to seek reparation for moral harms by the judicial route, combined with a recognition of the compatibility of civil demands with take-up of administrative reparations. Nonetheless, as we have observed, judicialisation in Chile is predominantly centred on individuals who suffered extrajudicial execution, enforced disappearance, or torture. Far from challenging the emphasis on the violation of the right to physical and psychological integrity, court-based actions therefore tend if anything to reproduce and even accentuate this emphasis. At the same time, reparation by the judicial route is regressive in the sense that it favours those who possess greater tangible and intangible resources enabling them to access the justice system. This latter inequality is accentuated by the fact that the Human Rights Programme Unit of the Ministry of Justice and Human Rights, the only state entity that offers specialised legal advice over dictatorship-era crimes, does not take any action whatsoever - civil or criminal - on behalf of survivors. Nor does it support civil claim aspects of the criminal cases for enforced disappearance or extrajudicial execution in which it acts. Moreover, a separate state legal entity, the Consejo de Defensa del Estado, actively opposes civil indemnization claims brought by relatives or survivors (see below, section 5). Both civil claims and existing administrative

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<sup>31</sup> DL 2756/1979; DL 3500/1980; Decree with Force of Law N°3/1981; Law 18620; Law 18962; and see *Informe* 2015.

<sup>32</sup> Kirsten Sehnbruch and Peter Siavelis (eds.), *Democratic Chile: The Politics and Policies of a Historic Coalition, 1990–2010*. Lynne Rienner Publishers, 2014.

<sup>33</sup> See, for example, Alberto Mayol, *El derrumbe del modelo*, Santiago, LOM, 2013; or Fernando Atria et al, *El otro modelo*, Santiago, Debate, 2013; 2nd edition 2019.

<sup>34</sup> Laws 19.123; 19.287; and 19.992, and see Observatorio de Justicia Transicional, *Tabla leyes y medidas de reparación en Chile*, 2011, available via [www.derechoshumanos.udp.cl](http://www.derechoshumanos.udp.cl).

<sup>35</sup> Laws 19.234, 19.582, and 19.881, on pension rights of persons sacked or blacklisted for political motives.

<sup>36</sup> Law 19.568: “dispone la restitución o indemnización por bienes confiscados y adquiridos por el Estado a través de los Decretos Leyes N°s 12, 77 y 133, de 1973; 1.697, de 1977, y 2.346, de 1978.”

reparations measures moreover consist of direct or indirect economic transfers (payments, study scholarships, or the replacement of lost pension credits). This encourages victims to quantify harm, and/or to access the market in order to buy goods or services necessary to alleviate the effects of the violation of their rights. The measures thereby embody a mercantilist, individualist, and/or privatising spirit which for many indelibly associated precisely with the dictatorship project.

The categorisation of some of the aforementioned measures as ‘reparations’ must moreover be questioned given that, as we have mentioned in previous reports, reparations *strictu sensu* must contain an explicit quota of recognition of what happened, and the responsibility of the state for it. They must also offer to the rightsholder something distinct from, and additional to, what he or she would already be entitled to via the guarantee of other fundamental rights. This requirement of specificity implies that it is not entirely licit, for example, to count as reparation the provision of adequate health services tailored to the needs of certain user populations, whether or not those needs are the product of human rights violations. The broader introduction of fee-free access to higher education for certain socio-economic groups similarly cannot substitute for or pre-empt the need for the concern with restoring lost opportunities that motivated the establishment of study scholarships for Rettig relatives or Valech survivors.

In conclusion, on analysing the outstanding moral and social debts that Chilean transitional justice must seek to address from an ECOSOC perspective, the starting premise must be that Chilean society as a whole suffered a profound and sustained violation of its ECOSOC. In the present day, the consequences of that violation are still lived out by millions of Chileans in the form of profound inequalities in access to health, and in entirely insufficient and meagre pensions.<sup>37</sup> A recent study, based on access to thousands of previously secret documents, also serves of as evidence of a deliberately authoritarianising transformation of school education, carried out between 1979 and 1990.<sup>38</sup> Despite the widespread nature of this harm, transitional justice in Chile has tried to maintain a firm dichotomy between ‘victims’ and ‘society’, as a result of which campaigns by relatives and survivors are viewed by many as a distant and private concern, rather than as a necessary reaction to a profound rupture of the social pact, one that affected us all.<sup>39</sup> We also observe how neoliberal rationality, premised on the notion of *homo economicus*, has infused the design of existing measures: reparations are shot through with a market logic. Monetary transfers, while they may be necessary, do not satisfy the symbolic dimensions and the need for recognition that are inherent in fuller concepts of reparation.

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<sup>37</sup> According to an INDH-commissioned public opinion poll, when asked which right they considered to be today most often violated, the rights to health, and to a dignified retirement and pension were the ones most frequently mentioned by respondents, attracting 20.7% and 16.8% of all mentions, respectively. (Instituto Nacional de Derechos Humanos, *Resultados de la IV Encuesta Nacional de Derechos Humanos 2018*, November 2018). According to the Fundación Sol, the average amount paid out by the compulsory, privatised, pension schemes known as AFP at July 2015 was CLP128,696 a month. 91% of all retirement pensions paid out by AFP amounted to less than CLP150,519 a month.

<sup>38</sup> Mauricio Weibel, “Prácticas sociales genocidas: La transformación de la educación escolar chilena entre los años 1979 y 1990”. *Revista Austral de Ciencias Sociales*, (36), 2019, pp. 251-274.

<sup>39</sup> See Daniela Accatino, “¿Por qué no a la impunidad? Una mirada desde las teorías comunicativas al papel de la persecución penal en la justicia de transición”, *Política Criminal*, 14(27), 2019, pp.14-64.

Reparation by the judicial route is meanwhile limited by the same inequalities that affect access to justice in general. Moreover, the state continues to actively oppose civil demands. Finally, and perhaps most worryingly, economic rationality, which relegates considerations of equity and the common good to second place, has undermined the quality of Chilean democracy. In its three decades of existence this democracy, the result of a pacted transition, has produced a society with serious defects of social equity.

## **1.2 Major Themes in the 2018-19 Period**

### **1.2.1 Study of mortality among survivors**

An important study of mortality survivors of torture and political imprisonment in Chile was carried out in 2017 and 2018. The research, carried out at the Universidad de Chile, sought to explore concerns expressed by relatives and survivors' associations, NGOs, and health professionals associated with the PRAIS health reparations programme, that survivors were showing an unusually high incidence of mortality and morbidity compared to their age cohort.<sup>40</sup> The research also drew on recent discoveries in neuroscience, suggesting increased mortality rates among individual subject to chronic stress.<sup>41</sup> Taking torture as one paradigmatic expression of the psychosocial trauma proceeding from extreme life experiences suffered during the dictatorship, the research analysed rates of mortality among the total of 38,254 people acknowledged by the Valech commission iterations as survivors of torture or political imprisonment in Chile. Outcomes include a mortality profile identifying the most prevalent pathologies, aimed at facilitating targeted interventions to enhance the prevention and management of risk among the subsets of this population designated as vulnerable. The study promises to generate, for the first time, detailed information on life expectancy of survivors of political imprisonment and torture in Chile. Currently in the final phase of statistical analysis, the study is due for imminent publication. Preliminary results have already been presented by the research team and survivors' organisations to relevant professional bodies, PRAIS teams, etc.

### **1.2.2 Civil claims**

A range of international treaty law that is binding on Chile, together with *ius cogens* norms, establish the rights of victims of grave, massive and systematic violations of human rights to reparation, establishing a corresponding duty on the part of states to provide it. Some of the relevant international conventions also specify that the reparation should contain a range of components: restitution, compensation, satisfaction, rehabilitation, and guarantees of non-repetition; and that reparation should be just, adequate, and timely. Soft law norms, developed particularly by the universal system of human rights protection, develop the content of this right, enunciating and defining standards. These include that reparation should be effective, that it should promote justice, and that it should be proportional to the harm caused. They also establish that states that are part of the universal system of human rights protection must offer reparation to the victims of conduct attributable to states, that constitutes manifest violation of

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<sup>40</sup> The research team behind the Conicyt-funded project was psychologist María José Jorquera (lead researcher) plus psychiatrists Carlos Madariaga y Rubén Alvarado.

<sup>41</sup> La literatura sugiere una prevalencia elevada de patologías incluyendo cáncer, el infarto agudo del miocardio, los accidentes cerebrovasculares, las infecciones respiratorias, la depresión, el alcoholismo y el suicidio.

international norms.<sup>42</sup> It follows that reparation should not be understood as a benefit, but as a right, and that the state and public bodies are mandated to optimise its effective satisfaction. This gives right to a complex obligation, with the corresponding rights held by victims.<sup>43</sup>

We focus here on indemnization (compensation) as a component of reparation. According to the UN's Basic principles and guidelines on the right to remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law, compensation:

“should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

- (a) Physical or mental harm;
- (b) Lost opportunities, including employment, education and social benefits;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Moral damage;
- (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.”<sup>44</sup>

Compensation should therefore be provided for affectations not only of civil and political rights, but also of ECOSOC rights. As we have seen, the second dimension has generally gone unaddressed by the Chilean state. In this sense, monetary compensation ordered by the courts is an extremely relevant juridical and judicial route, necessary to alleviate, at least in part, the deficits or vacuums left by administrative measures. In recent years, the domestic courts have resolved a number of civil demands directed against the Chilean Treasury, requiring compensation for moral harm caused to relatives of victims of execution and disappearance, and to survivors. Domestic jurisprudence has evolved beyond a first stage in which civil demands were usually rejected, invoking the exception of prescription (statutes of limitation). More recently, verdicts have accepted civil demands, abiding by relevant international principles and rejecting the defence presented by the Consejo de Defensa del Estado, CDE, whose job it is to represent the Treasury before the court. The Supreme Court, in particular its second bench (criminal bench) has played a fundamental role in this change since 2014, when it became the

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<sup>42</sup> UN AG Resolución 60/147, of 2005, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. See also IACtHR *Comunidad Mayagna (Sumo) Awas Tingni versus Nicaragua*, sentence of 31 August 2001, series C No. 79, para. 163; *Cesti Hurtado versus Perú: Reparations*, sentence of 31 May 2001, series C No. 78, para. 32; and “*Niños de la Calle*” (*Villagrán Morales and other*) *versus Guatemala*, Reparations: sentence of 26 May 2001, series C No. 77, para. 59.

<sup>43</sup> UN GA Resolution 60/147, of 2005, Principle VII, no. 11: 11. Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law: (...) (b) Adequate, effective and prompt reparation for harm suffered (...)”

<sup>44</sup> Adopted by the UN General Assembly in UN GA Resolution 60/147, 2005, Principle IX.20.

sole venue for all compensation demands that were elevated to the Supreme Court.<sup>45</sup>

In the case *Órdenes Guerra et al vs. Chile*, in November 2018, the Inter-American Court of Human Rights, IACtHR, declared that Chile had breached the rights to judicial protection and judicial guarantees of seven groups of relatives of victims of disappearance and execution, by rejecting the civil demands presented by the relatives, declaring them subject to prescription Avenue laid down in the Chilean civil code. In its presentencing report, submitted in February 2018, the Chilean state acknowledged its responsibility invoking, *inter alia*, the same jurisprudential criteria that are currently visible in Supreme Court verdicts. Recognising and positively valuing this convergence among the parties, the IACtHR considered that controversy to be at an end, proceeding directly to determine adequate measures of reparation. Notwithstanding, the CDE has continued to oppose recognition, by the courts, of the right to reparation by the judicial route. The CDE invokes the argument that the harm caused has already been fully repaired by pensions and other administrative measures, both pecuniary and symbolic; and claims that receipt of such measures is incompatible with the subsequent receipt of judicially defined reparations. In the face of this argument, the Supreme Court has instead recognised the complementary character of these two routes to reparation, accepting that the assignment of pensions does not prevent relatives or survivors from presenting a civil demand for compensation of moral harm.<sup>46</sup> the court also cites arguments enshrined in relevant reparations laws, such as article 24 of Law 19.123; and Article 4 of Law 19.992.<sup>47</sup>

The establishment of suitable amounts for compensation established by the judicial route generally are left to the criteria of judges. According to *Órdenes Guerra*, criteria used include the type of affective bond involved, and the relationship of each affected relative to the aggressions, violations and torture that were committed. Explicit mention is made of the fact that due to the inherently subjective nature of moral harm, it cannot be subjected to the same rules used to determine or quantify material harm.<sup>48</sup> as regards demands brought by survivors, domestic

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<sup>45</sup> On this evolution see Observatorio de Justicia Transicional, *Jurisprudential milestones in human rights cases: Chile 1990-2019* Santiago, Universidad Diego Portales, 2019.

<sup>46</sup> According to the Supreme Court: “the Treasury’s contention that compensation is not appropriate because the claimants have obtained reparations pensions (...) contravenes international norms (...) which cannot be contravened on the basis of other precepts of national law. The regulations to which the Treasury makes reference – which only establish a system of welfare pensions – is in no way incompatible with the compensation that is sought here, and it is not appropriate to assume that these [pensions] were intended to repair all moral harm causes to victims of human rights violations, since these constitute different forms of reparation”. Corte Suprema, Segunda Sala, Rol. 173-2016, 20 June 2016.

<sup>47</sup> According to Art. 24 of Law 19.123: “The reparations pension shall be compatible with any other pension, of any nature whatsoever, that the beneficiary may also receive or to which they are also entitled. It shall also be compatible with any other social security benefit as set down in law”. Under art. 4 of Law 19.992: “(...) the pension established by this law shall be compatible with any other pension, of any nature whatsoever, that the beneficiary may also receive or to which they are also entitled, including the welfare pensions established by Decree Law N° 869, of 1975. They shall also be compatible with any other social security benefit as set down in law”.

<sup>48</sup> IACtHR, *Órdenes Guerra and others versus Chile*. Fondo, Reparaciones y Costas. Sentence of 29 November 2018. Series C No. 372, para. 122.

judiciary takes into account the pain, suffering, and distress caused, and the form taken by the rights violations at issue.<sup>49</sup>

Overall, the changing criteria of the Supreme Court from 2014 has produced an increase in demands for compensation in cases where criminal charges had previously been brought without the inclusion of a civil demand. Cases have also arisen where different relatives of the same victim exercise their right to reparation at different times, generating more than one final verdict with regard to the same victim. One example is the case of Rodolfo González Pérez, a conscript forcibly disappeared in 1974, at the age of 19, as a punishment for helping political prisoners while on guard duty at a military hospital. The criminal case for his enforced disappearance was completed in 2015, including recognition of the right to reparation for one of Rodolfo's sisters.<sup>50</sup> Three additional civil demands were later presented and resolved, on different dates, by other siblings.<sup>51</sup> The 2014 changing criteria reduced relative disadvantage for those whose civil demands had been resolved before the change, at a time when the courts still accepted the application of the statute of limitation. Those affected by this change were prevented from presenting new demands by the principle of double jeopardy (*cosa juzgada*). One example is the case of Juan Paredes Barrientos, whose relatives presented a complaint to the IACtHR after their civil demand, presented in 1997, was denied by the Supreme Court in 2007 despite having been accepted at lower court level. The reversal was due to an appeal presented by the CDE. We cannot but reiterate our objection to the fact that the CDE continues to defend the interests of the state in such a questionable manner, even after the unfavourable verdict of the IACtHR in the *Órdenes Guerra* case was supposedly accepted by the Chilean state (see also section 5.1.1, below).

### 1.2.3 Situation of Survivors

The shameful abandonment of the rights of survivors of political imprisonment torture exile and other grave violations of human rights has been an issue of constant concern in this report. In the present period, as in previous ones, hope that the creation within the Ministry of Justice of a Sub-secretariat of Human Rights would produce a new response has not been realised. An example of this continuing failure can be seen in an official response sent by the Minister to the president of the lower legislative chamber on 11 April 2019. The document confirms that the ministry "has neither sought, nor intends to seek" the reactivation of a draft bill - submitted by the outgoing administration and immediately withdrawn by the incoming one - that would have established a one-off payment to persons acknowledged by the Valech commission.<sup>52</sup> The proposed payment constituted a partial and always inadequate response a 10 point agenda that associations are former political prisoners have spent years presenting before various administrations. High-level dialogue established in 2015 produced supposed agreements on the issue, which were however never honoured, leading to representations by the then representative of the UN High Commission for Human Rights before then president Michelle

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<sup>49</sup> Corte Suprema Rol. 20.362-2018, 15 January 2019.

<sup>50</sup> Corte Suprema, Rol. 22.343-2014, 26 February 2015.

<sup>51</sup> Corte Suprema, Rol. 8105-2018, 13 June 2018; Rol 29.463-2018, 26 March 2019; Rol. 31.766-2018, 28 May 2019.

<sup>52</sup> Ordinario N° 2213, sent by Ministro Hernán Larraín Fernández to Iván Flores García, President of the Chamber of Deputies, dated 11 April 2019, in reply to Oficio 2098, sent on 22 January 2019.

Bachelet on 29 September 2017. His letter has still received no reply, despite ongoing attempts to activate a response.

In the same ministerial communication referred to above, the Minister reports that “despite our interest” in establishing a mechanism for the permanent consideration of victim status -a measure recommended by multiple national and international bodies – “for the present there are no advances to report”. The letter alludes to supposed progress in making contact with those who have never made use of the rights that their acknowledgement by the Valech commission entails. All other measures mentioned in the letter however refer to generic symbolic reparation (monuments and memorials); merely informational initiatives (in regard to rights to housing subsidy), and supposed ‘deepening’ of the search for justice. The example offered for this latter is the modernisation of the IT system of the Human Rights Programme Unit, whose legal advice and legal representation work however completely exclude survivors.

Meanwhile, as ever, a range of survivors’ associations have been active and proactive in defence of their rights. They submitted alternative reports to the UN system in regard to Chile’s various appearances before committees, mentioned above, and more associations joined national coordination instances the Mesa Coordinadora and Comando Unitario. These bodies maintain permanent dialogue with all political parties and lobby before relevant legislative committees, including appearing before the Constitutional Tribunal to submit an opinion on the draft bill on early release (see below). Survivors have also continued to meet with the National human rights Institute to discuss judicial access to the content of the ballot archives. The positive work carried out in association with the Civil Registry, commented upon in last year’s report, continues to bear fruit, although it has thrown up the disturbing statistic that a full 25% of those people at some time recognised by the Valech Commission as survivors are now deceased. This represents a number equivalent to the entire list of those recognised by Valech II in 2011.

### **1.3 Enforced Disappearance**

#### **1.3.1 Chile’s Long Overdue Report to the Committee on Enforced Disappearances**

On the ninth and 10th of April 2019, Chile appeared before the UN Committee on Enforced Disappearances (CED), to discuss a report presented five years late. The substantial official report, received by the committee on 30 November 2018, listed a long catalogue of draft bills that, according to the state, showed that Chile was advancing towards an ever more complete compliance with the International Convention for the protection of all persons against enforced and involuntary disappearance. However, complementary and/or alternative reports submitted by the National Human Rights Institute and by civil society organisations pointed out that the majority of the listed draft bills have been before parliament for between four and five years, most showing no recent signs of advance.<sup>53</sup> Two of them (Boletines 9958-17, prohibition of the elimination of documentation by the Ministry of Defence, Armed Forces, and public security

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<sup>53</sup> Inter alia, Draft Bills (*Boletines*) 9748-07 (inapplicability of statutes of limitation and amnesty to war crimes and crimes against humanity); 9773-07 (‘harmonisation’ of the amnesty law with other dispositions); 10883-17 (fall and direct judicial access to the archives of the Valech commission); 9958-17 (prohibition of the elimination of documentation by the Ministry of Defence, Armed Forces, and public security forces); and 9818-17 (typification of enforced disappearance as an ordinary crime).

forces; and 9818-17 (typification of enforced disappearance as an ordinary crime) were moreover introduced at the initiative of individual parliamentarians, never having had official executive sponsorship. The contention in the official state report that draft bills 9748-07 and 9773-07 “have been prioritised” by the government, forming part of “a set of draft bills prioritised by the human rights secretariat” is difficult to understand, given that the priority (“extremely urgent”) status previously assigned to each was reduced to “simple” in 2015.<sup>54</sup> Mention in the subsequent paragraph of the official report that a draft bill to ratify the convention on the inapplicability of statutes of limitation and amnesty to war crimes and crimes against humanity “was presented” suggests allusion to a recent initiative. Such an interpretation would however be misleading, given that the draft bill in question, Boletín 1265-10, was actually introduced in 1994, reporting no movement since 2004.

The official state report suggests that the right and corresponding duty of full participation is satisfied by the state having “facilitated” a single meeting between an international expert and some associations in February 2017, as well as having “presented” its official report to these associations once completed. The complementary report provided by the INDH however correctly signals that such activities should be considered utterly insufficient for the purposes of complying with the participation requirement.<sup>55</sup> The state report asserts that the typification of enforced disappearance contained in law 20.537 brings domestic legislation into line with the Rome statute, omitting mention of the deficiencies and omissions that the legislation contains (principally, by introducing a parameter of minimum time detention not contained in the statute definition, and in failing to specify aggravating circumstances and other special protections for vulnerable groups). Both deficiencies are corrected in draft bill Boletín 9819-17, mentioned above, which was approved in the lower chamber two years ago but has seen no subsequent movement. The state does acknowledge the nonstate origins of this bill, which came about via social pressure, but asserts that it is now part of the legislative agenda of the subsequent at human rights. As examples of “measures” supposedly taken by the sub Secretariat to promote the draft bills timely adoption, the report mentions “monitoring (*seguimiento*) and the presentation of “observations” during drafting stages of drafting of the text toward its current wording.<sup>56</sup> in the continuing absence of an adequate typification, the state report offers a list of ‘other criminal figures’ which it suggests are “similar”, and applicable to the enforced disappearances practised by the dictatorship. The list however contains, by the state’s own admission, many figures which are wholly inadequate and carry excessively low penalties, none of which moreover includes the element of failure to provide information which is a constituent of part of the specific criminal figure of enforced disappearance. Moreover, after the official state report had been presented, but before it was discussed before the CED, the executive branch introduced a draft bill, in December 2018, that would allow post-sentencing benefits to be offered indistinctly to those responsible for ‘ordinary’ crimes and those sentenced for crimes

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<sup>54</sup> Informe del Estado, para. 83.

<sup>55</sup> INDH, Complementary Report (Informe Complementario al Comité contra las Desapariciones Forzadas de Naciones Unidas, Primer Informe Periódico del Estado de Chile) approved by the INDH board on 11 March 2019.

<sup>56</sup> CED/C/CHL/1 op.cit., para 39, fn.35. The observations of the Committee on Enforced Disappearances, by contrast, require the State to “accelerate” the process, (CED/C/CHL/CO/1, ONU, *Observaciones finales sobre el Informe presentado por Chile versión inicial*. 18 April 2019).

against humanity (Boletín 12345-07). The Constitutional Tribunal, for its part, raised objections to an element of another draft bill, today passed into law, which sought to increase the minimum requirements for the concession of parole to perpetrators of crimes against humanity.<sup>57</sup> Both of these developments militate against the state's compliance with its duty to apply penalties proportional to the seriousness of the offence, a duty to which the CED drew the state's attention, manifesting its concern at the current practices of concession of mitigating circumstances, half statute of limitations, early release, etc. The CED exhorted the state to instead guarantee that perpetrators "are always subject to appropriate penalties that take account of the extreme gravity of the crime".<sup>58</sup> The CED's other recommendations include the provision of judicial access to the Valech archives, given the potential relevance to the resolution of outstanding disappearances; specific regular training for justice system operators and police officers about the convention against enforced disappearance; and for reparations, including access to truth and compensation, for all persons who have suffered direct harm.<sup>59</sup> The CED recognised progress in the courts in acknowledging, on a majority basis, the inapplicability of statutes of limitation to civil claims and the inapplicability of amnesty, while warning of the potential reversibility of both interpretations if not backed up by legislative change. The committee also "lamented" the state's information that the creation of a permanent commission for classification of victims -long promised and often recommended - "is not a priority".<sup>60</sup> It exhorted the state to expand the existing legal figure of "absent by reason of enforced disappearance (*ausente por razón de desaparición forzada*)" so that it can be applied to contemporary cases; and also recommended the intensification of search efforts, introducing effective participation and proactively protecting sites where the possible presence of remains of the disappeared is suspected.<sup>61</sup>

In regard to the matter of intensification of search efforts, the state report alluded at various points to the "investigation and search team (*Equipo de Investigación y Búsqueda*)" that it declared had been created, in 2017, within the existing Human Rights Programme Unit. The official report also acknowledged that the Human Rights Subsecretariat, to which the Unit belongs, is the entity responsible for the formulation of public policy in this area.<sup>62</sup> It mentioned that search is subordinated "for now" (*por ahora*) to judicial processes (criminal investigations), and asserted that the Subsecretariat is seeking to establish an "administrative institution to support search" (para. 174). Taken together, these comments might inspire hope that the National Search Plan once promised might come to pass, a step that has already been taken in countries including Peru and El Salvador, complementing judicial search with administrative measures. However, such an interpretation is not borne out by more recent information provided by the sub Secretariat to the Observatorio, suggesting instead that no such plan will be created and that the role of the mentioned team will be limited to taking "actions" to assist justice system

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<sup>57</sup> The project, in modified form, became Law 21.124, in force since 8 January 2019. See below.

<sup>58</sup> CED/C/CHL/CO/1, op. cit., paras. 10 and 11.

<sup>59</sup> *Ibíd.*, paras. 17, 21, 23, 25.

<sup>60</sup> CED/C/CHL/CO/1, op. cit., para. 24.

<sup>61</sup> *Ibíd.*, paras. 28 and 29.

<sup>62</sup> CED/C/CHL/1. op.cit., para. 50.

organs and/or the legal work already undertaken by the Unit.<sup>63</sup> The state report also mentions the Unit as evidence of measures that have been taken by the state to “provide all possible assistance to the relatives of victims of enforced disappearance in discovering their fate and whereabouts”.<sup>64</sup> This claim is clearly at odds with the perception of relatives’ associations, as set out in their alternative report presented to the CED. It moreover risks reducing the state’s duties to the provision of assistance to third parties to resolve something that is presented as a private problem. In fact, it is of course both a juridical and moral duty for the state that was responsible for the disappearances to be accountable for its previous aberrant conduct, independently of whether each individual victim has still-living relatives actively searching for answers.

### **1.3.2 Search, Identification and Restitution of the Disappeared**

In response to an enquiry from the Observatorio, the Human Rights Unit of Chile’s state forensic and coroners service, the Servicio Médico Legal, SML, informed us that a total of 307 validated identifications have been carried out by or in association with the service between 1990 and June 2019; were validated identifications refers to those that have been underwritten by the courts and accepted as definitive.<sup>65</sup> This universe of 307 individuals includes three people whose remains were discovered in Patio 29 of the Santiago General Cemetery, but who do not figure on the lists of victims of disappearance or extrajudicial execution officially recognised by Chile’s truth commissions. Accordingly, 304 of the total of 3,216 people currently officially acknowledged as victims of those crimes currently have a valid identification.<sup>66</sup> This total of 304 corresponds to 155 people initially classified as disappeared, and 149 classified as victims of extrajudicial execution “without the handing over of remains” (*sin entrega de restos*).<sup>67</sup> Five of the 304 individuals were identified in Argentina: three of these were deceased, the other two were abducted children who survived, and recovered their birth identities as adults. Therefore 299 officially recognised victims have been identified in Chile, 182 using DNA techniques (nuclear DNA, in 167 cases, or mitochondrial DNA, in the case of the remaining 15). A further 116 people were identified using older forensic methods, with one more identified by judicial resolution.

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<sup>63</sup> Meeting and written correspondence 21 June 2019, subsequent electronic correspondence (15 and 31 July 2019).

<sup>64</sup> State’s report (Informe del Estado), para. 173.

<sup>65</sup> The Unit is a new entity that brings together the work of the Specialised Forensic Identification Unit, UEIF, and other parts of the service (see below, section 3.6.2). It should be noted that official identification can only be done by the judiciary, who work on the basis of reports submitted by the SML.

<sup>66</sup> The total of 3,216 has been produced by the Observatorio, in an effort to reconcile, correct and update initial state lists on the basis of subsequent verified happenings (such as the 2008 appearance, alive and well, of German Cofré). The INDH and memory site Londres 38 both mention, in their respective reports to the UN CED, that even supposedly official figures on the total numbers of people acknowledged, found, and/or identified by the state today vary according to the source consulted. This constitutes yet another powerful reason for the creation of a single, consolidated, transparent and up to date register.

<sup>67</sup> This latter category is a peculiar historical construct almost exclusive to Chile. The differentiation between these persons and those classed as ‘disappeared’ (*detenidas-desaparecidas*) is done on the grounds that those classed as executed without the handing over of remains were certified and/or widely acknowledged, at the time or in the early years of transition, to have been killed; even though their remains had not been located or could not be recovered. One example affected people whose deaths were known to, and even sometimes officially certified by, the dictatorship, but who were buried anonymously or en masse in cemeteries or other places. Families were sometimes not informed – and therefore continued to search for someone who they considered to be disappeared – or were notified, but denied more information or the chance to organise or even attend a funeral or burial.

The SML indicated that while their work presents multiple technical challenges, the main impediment to the generation of new finds - the most significant recent discovery of remains having been in 2006 - has been eminently human factors: the “pact of silence” established and maintained by perpetrators, and deliberate acts of cover-up or destruction of remains (Operación Retiro de Televisores and similar episodes).<sup>68</sup> This information underlines two important truths: firstly, search is not solely a technical, juridical, or judicial undertaking; and, secondly, the social harm occasioned by enforced disappearance cannot be resolved exclusively through search. Instead, it requires additional public policy aimed at revealing more truth, repairing some of the perennial and new harm caused, and implementing genuine efforts at non-repetition, something that would imply, amongst other things, breaking the current habit of official secrecy that surrounds the issue of the serving of custodial sentences.<sup>69</sup>

As regards the current judicial mode of search that prevails in Chile, overseen by investigative magistrates, one positive development is the new impulse given in late 2018 to an intersectoral roundtable, Mesa Intersectorial, a space that gathers together the main state institutions that assist the judicial branch in search and identification within the context of criminal prosecutions. The Mesa originated in 2015-2016, as part a research project carried out by members of the SML’s Special Forensic Identification Unit, UEIF, in association with Ulster University.<sup>70</sup> Later falling under the judicial branch’s purview, the roundtable was founded to promote mutual training and provide a forum for the sharing of information, to improve the responses and advice that the Civil Registry, the detective police (PDI), uniformed police (Carabineros), the state Human Rights Programme and other relevant institutions were able to offer to judicial requests and/or when faced with finds of remains. During 2017-18 the instance entered a period of *de facto* abeyance, while a draft protocol that it had drawn up was considered by the participating institutions. The Mesa recommenced its sessions on 19 December 2018, and again on 6 March 2019, in order to revisit the texts of the protocol, incorporating proposed modifications. On 19 June 2019 a meeting was held on the Supreme Court premises, with invitees from relatives’ associations and academic institutions, to incorporate observations made by investigative magistrates currently in charge of human rights cases. The Observatorio understands that subject to the incorporation of those observations by the Human Rights sub Secretariat, a member of the instance, the protocol will be adopted and will come into effect.

The protocol, and the valuable work that it represents and promises, are oriented to improving aspects of the present mode of judicial search. Neither the protocol nor the Mesa itself aim, or have the mandate, to provide a response to the other duties and needs mentioned above, nor can they generate *a motu proprio* new search initiatives or strategies. The Mesa does not either contemplate, at least in its current configuration, the kind of permanent participation from civil society that international standards require, and whose absence has been repeatedly signalled

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<sup>68</sup> Source: Written report supplied by the SML Human Rights Unit to the Observatorio.

<sup>69</sup> The keeping of up to date registers of detained persons, and their openness to scrutiny, is spelt out in the respective International Convention as a duty of states.

<sup>70</sup> Newton-Picarte Project, co-financed by the SML and the British Council, 2015-16.

as one of the major deficiencies of the Chilean state's current response.<sup>71</sup> another deficiency is without a doubt, the absence of a figure that typifies enforced disappearance as an ordinary crime . It is worth remembering that this crime contemplates the criminalisation of the failure to provide relevant information, including by those who played no direct part in the initiation of the disappearance.<sup>72</sup>

Over the statistical period that this report addresses (July 2018-June 2019, inclusive) there were four new identifications of victims classified by the state as disappeared (*detenidos-desaparecidos*, DD), plus two identifications of individuals classified as victims of extrajudicial execution (*ejecutados políticos*, EP), even though the remains had not at the time been found and/or released to their families.<sup>73</sup> At the close of the current edition (August 2019), the remains of five of the six aforementioned persons had been handed back to their families: Pedro Segundo Pedreros Ferreira (a 48 year old labourer, forcibly disappeared from Chihuahua, since October 1973); Pedro Segundo Opazo Parra, extrajudicially executed aged 39; José Fernando Pavez Espinoza, extrajudicially executed aged 30; Abelardo ("Jecho") Quinteros Miranda, a Communist Youth League activist who was forcibly disappeared at the age of 21 alongside his brother Eduardo, who was extrajudicially executed, and Sergio Alberto Gajardo Hidalgo, a 15 year old boy forcibly disappeared the day after the 1973 coup when he left the house to try and take bread to his sister's house nearby. Luis Horacio Soto Silva, forcibly disappeared at the age of 19, had yet to be laid to rest at time of writing. All of the aforementioned persons, with the exception of Pedro Pedreros, had been buried secretly by the dictatorship in Patio 29 under the legend "NN", standing for 'name unknown'. Although some of them had an effect not been identified, in other cases the authorities simply chose to hide the news of the death from their families. From 1991, when the registers of autopsies carried out by the SML during the dictatorship were reviewed, it was possible to establish that some of those individuals had met their deaths, without at the time being able to recover or correctly identify their mortal remains. These were the circumstances in which the first truth commission, the Rettig commission, classified them as victims of extrajudicial execution even in the absence of their remains.

A total of 19 restitution ceremonies were carried out by the SML's UEIF between July 2018 and the beginning of August 2019. One of them restored the remains of an unborn child, a member of the Soto Troncoso family, identified during an investigation of illegal adoptions. The others included the five people already mentioned above, as well as (in 2018): Archivaldo Morales

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<sup>71</sup> For the general requirement see CED/C/7, Principios rectores para la búsqueda de personas desaparecidas, adopted by the UN CED in session 16 April 2019, and in whose preparation Cath Collins took part. On the noting of deficiencies in participation in Chile, see above, section 1.3.1.

<sup>72</sup> The concealment of information and/or of remains has already given rise to at least one bringing of criminal charges in Chile, in 2015, against a contractor who apparently uncovered remains possibly belonging to disappearance victim Ruperto Oriol Torres, while carrying out building work on a police station. The contractor was accused of having hidden the remains again, to avoid a halt being called to the renovations, fearing possible financial loss. The charges were however later dropped. Ruperto is still missing.

<sup>73</sup> For example, José Pávez Espinoza, who was correctly identified by the then Instituto Médico Legal, IML (now SML) at the date of his death in Octubre de 1973, was nonetheless buried anonymously in Patio 29 of the Santiago General Cemetery. His family was not told of his death. In 1991, when the records of dictatorship-era autopsy reports done by the IML were reviewed, the certification of his death came to light, and his family was notified. His remains were however not recovered at that time.

Villanueva; Nicomedes Correa Rodríguez; Félix Figueras Ubach; Armando Castro Contreras; Manuel Catalán Paillal; José Ananías Zapata Carrasco and Víctor Ortega Cuevas. Between January and early August 2019: Sergio Flores Durán; Rene Claudio Carrasco Maldonado; Rudy Vidal Pereira; Guido Quintanilla Palominos, Ricardo Ruiz Rodríguez, and unidentified fragmentary remains associated with the Chihuío case.<sup>74</sup> The SML informed us that in cases such as these, where fragmentary remains cannot be identified with existing scientific techniques, careful discussion and reflection takes place, involving the relatives associations closest to the case, and the investigative magistrate overseeing it, in order to determine how best to proceed. In four cases, such remains have been laid to rest in the memorials placed at each site (Calama, Chihuío, Lonquén y Paine), with the relatives associations taking on the role of family members to assure a dignified reception and burial. Scientific records are kept, in case future advances allow further certainty to be achieved. Situations have also risen in which families who have already recovered their loved one indicated they do not wish to be subjected to a new cycle of grief should later identification of additional fragmentary remains occur. Such situations are resolved on a case-by-case basis, seeking always to ensure the dignity of the person and reparatory treatment of their surviving relatives. Remains that are still held by the SML are safeguarded under conditions of maximum care and security.<sup>75</sup>

### **1.3.3 Beyond Forensics: Acknowledging the Social and Political Catastrophe of Enforced Disappearance**

Advances that could allow the identification of remains already recovered do not necessarily require new scientific discovery: there are still 300 acknowledged victims of disappearance or execution for whom no reference samples exist. The samples, supplied by biological relatives, could allow for the identification of any future remains found, or of remains already held. This makes it imperative to periodically repeat public information campaigns aimed at encouraging relatives to approach the SML to offer samples. The international nature of oppression, via the state-to-state criminal conspiracy known as Plan Cóndor, also makes it necessary to share information and cross-reference finds with other Southern Cone countries.<sup>76</sup> This requires efforts and contributions that go beyond the competence of the SML, which works on these issues as an auxiliary entity to the judicial branch. In countries such as Argentina, it has been the government of the day - irrespective of its political colours - which has taken on the role of transforming the collection of samples and the search for the disappeared into a shared societal goal. This represents one of many urgent challenges that could be addressed by a national search entity, able to take on the numerous civic, administrative, preparatory, preventive, and symbolic duties that the regional and international conventions to which Chile is a signatory require.

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<sup>74</sup> Source: Information provided by the Human Rights Unit of the SML to the Observatorio, op. cit. We are grateful, as always, for the generous collaboration of Marisol Intriago and the Unit team.

<sup>75</sup> This the situation, for example, of some bone fragments found in Fuerte Arteaga that could not be successfully identified in the most recent round of testing, since in this case there is no memorial in which they could be inhumed with due ceremony.

<sup>76</sup> The State report presented to the UN Committee against Enforced Disappearance in 2017 makes generic reference to memoranda of understanding signed with Brazil, Argentina, and Uruguay (in 2014), and with MERCOSUR, but gives no details about how, if at all, these have been used successfully to search for, locate, or identify disappeared persons. CED/C/CHL/1, op.cit., paras. 119 and 120.

This is the sense in which what is required is not simply an accentuation of existing forensic and judicial efforts, but rather comprehension of the magnitude of the social catastrophe that enforced disappearance represents, and action to mitigate it. To offer one example, the maintenance of up-to-date registers of detained persons, and the provision of access to them to any person with a legitimate interest, is one of the responsibilities in the area of non-repetition that are enshrined in the relevant international norms. Another is the typification of the crime of enforced disappearance, and the updating of other relevant laws.<sup>77</sup> These are matters for prison service, the core legislative powers, and other administrative State institutions. Comprehensive public policy is therefore required to identify and address the distinct kinds of fault lines that disappearance produces in families and in society, and to deliver on the right to participation. For these reasons it is particularly disappointing that the promised national search plan - implying an entity where these international duties, to date comprehensively ignored, could be addressed - seems to have been abandoned.

## **2. TRUTH**

### **2.1 Normative framework**

As mentioned in the introduction, current conceptions of the right to truth view it as not simply a matter for victims and relatives, nor something that can be realised by a truth commission or even a series of criminal investigations. Rather, it requires that relatives, survivors and the general public can seek out and acquire information about grave violations, including about the fate and current location of still-disappeared victims; but also regarding the process of authorization, planning and commission. The corresponding state duties include the establishment of institutions, mechanisms and procedures for collating such information and making it public. The UN Special Rapporteur report previously cited also emphasises the particular importance of such measures in post-authoritarian societies, to overcome secretism and the official lies carefully constructed by such regimes.<sup>78</sup> In Chile, by contrast, a deeply-rooted culture of hiding, retaining or withholding information that ought to be public still prevails. This does not just fail to comply with the duty to proactively supply information, but also obliges citizens to repeatedly insist, via tortuous bureaucratic procedures, on having their rights respected. In the face of practices that do not stand up to public scrutiny, authorities prefer to shore up secretism rather than changing those practices. The end result of repeated insistence before the courts could be read in a positive light, since judicial practice today tends to support the principle of access to information. However, the fact that repeated resort to the Council for Transparency and the courts is necessary, speaks of the failure to install a culture of transparency. Other developments during the period of this report meanwhile raise questions about the duty of veracity that applies to private bodies, including the communications media (see section 2.3).

### **2.2 Presidential Pardons: Transparency and Exemption from Scrutiny**

In the 2018 version of this report we analysed the figure of presidential pardon, with particular reference to the oversight that is supposed to be exercised by the Comptroller General of the Republic, Contraloría. On that occasion, the requirement for oversight was responsible for

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<sup>77</sup> Such as reform to the Law on Divorce, incorporating 'absent by reason of enforced disappearance' as a recognised cause of dissolution of marriage.

<sup>78</sup> UN A/HRC/36/50/Add.1, op.cit., section III.

delaying ratification of the presidential pardon conceded to perpetrator René Cardemil until after the latter's death. Shortly afterwards, the requirement was temporarily suspended by Resolution 13/18, of 11 May de 2018, which established that the office of the Comptroller General would not be required to confirm concessions of presidential pardons until at least 15 May 2019. A few days before the measure was due to expire, it was extended for a further six weeks (by Resolution 12/19, 6 May 2019). This suspension both sped up the process of conceding a pardon and removed one of the possible methods of supervision and possible objection to it.

Another method of social monitoring and supervision of the use of pardons is provided by public awareness of their use. In pursuit of this principle of publicity, a writ was presented on 18 July 2018 before the national Council for Transparency, CPLT, denouncing the fact that the Subsecretariat of Justice of the Ministry of Justice and Human Rights had not published the pardon conceded to Cardemil.<sup>79</sup> The writ argued for the importance of making pardons public, since knowledge of the putative reasons for their concession is essential for taking action, should it prove necessary, against any inappropriate use of the power.<sup>80</sup> The CPLT accepted the motion, ruling that all pardons, irrespective of the crimes for which they are conceded, must be made public, with only sensitive personal data withheld.<sup>81</sup> This ruling provoked a complaint of illegality before the Santiago Court of Appeal, alleging, amongst other grounds, a putative 'right to be forgotten'. The third bench of the appeals court rejected the complaints, determining that the CPLT had acted within its mandate, respecting the principle of the divisibility of information (that is, ordering that information that is in the public interest be handed over, while allowing for the reduction of personal and sensitive data). The court added that complete withholding of the identity of someone to whom a pardon had been conceded would "denature the whole institution of pardon which is, by its nature, inherently personalised."<sup>82</sup> The court moreover shared the CPLT's interpretation that pardon only remits or commutes the penalty, without dissolving the guilt of the perpetrator assigned to the guilty. The court added that "it must moreover be considered (...) that a benefit so singular as the pardon, whose origins are questionable from the point of view of the Republican system that we now enjoy, and which must therefore be considered quite exceptional, should not be awarded even greater exceptionalism through conceding a secretive character that is quite unjustified".<sup>83</sup> The court accordingly established that information on pardons, once conceded, must be published: in this case, within a 10 day period. The given period duly expired, causing the CPLYT to have to notify the Subsecretariat of Justice of the penalties established for non-compliance, in order to obtain

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<sup>79</sup> Law 20.285, the Access to Public Information law, establishes that state administrative bodies must maintain certain information permanently available on its website. This includes "acts and resolutions that have impact on third parties" (art. 7 g) – in the case at hand, the impact is on the person to whom the pardon was conceded and, above all, on society as a whole.

<sup>80</sup> There are regional precedents, such as the pardon conceded in Peru in late 2017 to Alberto Fujimori, which was revoked in 2018 due to its illegality.

<sup>81</sup> CPLT. Amparo Rol. C3210-18, 9 October 2018.

<sup>82</sup> Corte de Apelaciones de Santiago. Rol. 474-2018 (contencioso administrativo). *Ministerio de Justicia y DDHH con CPLT*. 12 June 2019, considerando 3º.

<sup>83</sup> *Ibid.*

the publication of the relevant notice on the active transparency section of the ministerial website.<sup>84</sup>

### **2.3 Civil Settlement Rulings: against the newspaper *La Tercera*, for refusing to retract fake news, and in favour of a daughter wishing to establish her right of descentance**

in April 2019, the Santiago appeals court upheld a writ of protection seeking an order against the newspaper *La Tercera* that would oblige it to rectify fake news published on 2 October 1973. On the date in question, the newspaper published an article referring to the “execution” of Jorge Oyarzún Escobar and Juan Escobar Camus, who had purportedly carried out an armed attack on a military housing district. The first bench unanimously upheld the writ presented by Paola Oyarzún Escobar, daughter and niece, respectively, of the supposed ‘subversives’. The case was investigated by judge Hernán Crisosto, who managed to establish, in 2016, that

Jorge and Juan had actually been victims of a crime against humanity. The rectification was requested by the family in 2018, but the newspaper failed to reply. The recent verdict declared that: “the newspaper firm Copesa S.A. must proceed, by way of its *La Tercera* newspaper, to publish the rectification that was requested of it ... in the terms that were requested; that is to say, with a public apology and in the same tone as the 1973 publication, with the same prominence and visibility”.<sup>85</sup>

On the same date, the Supreme Court upheld a writ presented by the INDH, ordering the civil registry to inscribe Tamara Lagos as the natural daughter of Mario Lagos Rodríguez. Mr. Rodríguez was extrajudicially executed by secret police agents in 1984, a few months before Tamara was born. In 1993 verdict, the court had recognised Tamara as the daughter of Mario Lagos, for the purposes of entitlement to administrative reparations.<sup>86</sup> the present rate nonetheless argued that the civil registry had not duly considered or incorporated this verdict. The Santiago appeals court initially rejected the rate, arguing that the 1993 verdict did not require the registry to inscribe Tamara as the daughter of Mario Lagos, and holding that the registry did not have independent legal faculties to make such a determination in the absence of an explicit judicial order. The Third Bench however decided in April that the relevant inscription should be carried out, adding that, irrespective of the date of birth or inscription of an individual, the categories of “natural” and/or “illegitimate” offspring should no longer be used. This latter arose because Law 19.585, of 2004, abolish the terms, replacing them with terms referring to

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<sup>84</sup> Oficio no. 001275, Directora de Fiscalización (s) del Consejo para la Transparencia al Sr. Subsecretario de Justicia, 9 July 2019.

<sup>85</sup> Rol 84.116-2018, 12 April 2019. On 17 September the Supreme Court confirmed the sentence in respect of the obligation to rectify the previous statement in similar terms, and in a similarly prominent place of publication, but without the public apology: Rol 11.044-2019, 17 September 2019.

<sup>86</sup> The Court declared Tamara to be her father’s “illegitimate” daughter, for the purposes of recognising her right to a reparations pension. However, 25 years later, she was denied the right to be party to a civil claim, as it was considered that her standing to do so had not been established. Judge Aldana issued a first instance verdict for the homicides of Mario Lagos and other victims on 4 May 2018 (Rol. 11-2009). In the civil component of the case, the judge considered that neither Tamara nor her mother had successfully established active legitimation (the necessary relationship between persons who request the action of the justice system, and the situation that they are denouncing).

children born inside or outside of matrimony; and establishing that both categories should moreover be given the same rights. Although the new law was passed subsequently to the events in question, the bench considered unanimously that the new terminology, and the treatment that it lays down, should be respected from a perspective of equality before the law.<sup>87</sup>

#### **2.4 Legislative Impasse Surrounding the Valech Secrecy Law Continues: INDH Provides Data to Postulants and, Within the Terms of the Existing Law, to the Courts**

The hapless process of post hoc legislation that sought to impose a 50-year secrecy law on the data compiled by the Valech Commissions continues to take its toll, as we have seen above with regard to recommendations made to Chile by the UN human rights system during the period. We are grateful to the INDH, legal custodian of the Valech archive, for having provided a very complete summary of the relevant laws, its own efforts to clarify and operationalise them, and the current state of affairs.<sup>88</sup> Specific legislation and subsequent actions have been discussed in previous editions of the present report, and in the annual reports of the INDH itself. In regard to the current situation, we have been informed that the work of preserving the documentation, which was begun in 2014, continues, using a dedicated standalone IT system with strictly controlled access for INDH staff. Physical conservation and digital backup had covered a total of one third of the available documentation by May 2019, with a total of 22,551 files processed. Moreover, as we have previously communicated, the institution began in September 2016 to provide postulants to either iteration of the Valech commission with copies of all of the documentation contained in their personal file.<sup>89</sup> As of 31 May 2019, a total of 1831 files of this nature had been handed over to individuals. The majority of these requests (1,156) came from postulants to Valech I; with the remaining 675 corresponding to postulants to Valech II. Around 28% of the total requests received (506 of 1,831) came from persons who were not, in the final analysis, acknowledged by the commission as survivors.<sup>90</sup>

Regarding requests by the courts, the current interpretation of the legal situation, as ratified by the Comptroller General's office in 2014, is that the information collated by Valech I is still subject to an absolute prohibition, valid until 2054. In relation to Valech II, about which the office abstained from pronouncing, the INDH has chosen to directly release information to the courts subject to a written court order. This information is given independent of whether the named persons were classified or not as survivors. The INDH also examines the files of the former Nazi sect 'Colonia Dignidad' - copies of which are also held by the INDH - in order to add any pertinent information. Between 2016 and mid-2019, the INDH had replied to 186 requests from the judicial branch. 62 of these could not be complied with, because they referred to postulants to Valech I;

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<sup>87</sup> Sentence Rol. 2.771-2019, 12 April 2019.

<sup>88</sup> Written communication entitled 'Situación Archivo Valech y Otros', sent by the INDH on 14 June 2019, in response to queries from the Observatorio.

<sup>89</sup> Hasta entonces, se entregaba solamente aquella porción de la carpeta que había sido proporcionada por el o la titular, más otros documentos que podrían considerarse públicos, reservando otra documentación. Hoy, solamente se reservan o se tarjan contenidos que podrían vulnerar los derechos de otros declarantes u otras personas víctimas de violaciones.

<sup>90</sup> A total of 43.5% of the postulants to both iterations fall into this category. Observatorio figures, produced from official data. The percentages of applicants whose cases were recognised was 79.4% for Valech I, but only 30.8% for Valech II.

13 could not be responded to for lack of information; and eight related to individuals classified by the Rettig commission (whose archive is today in the hands of the Human Rights Programme Unit). Accordingly, in only 55.4% of cases was it possible to supply all or part of the requested material.<sup>91</sup> these positive responses led to the handing over of 974 Valech II files. Around 65% of these referred to individuals who were not classified by the commission, underlining the importance of establishing an administrative body that can rectify previous errors or omissions in classification, such as in the case that a subsequent judicial investigation determined that an individual ought to have been so classified.

### **2.5 Press revelations about civilian CNI employees incorporated into Army ranks**

In January 2019, CNN Chile published the names of 1,119 plainclothes agents of the National Centre for Information, CNI - the dictatorship-era intelligence and repressive agency that replaced the DINA secret police - who were incorporated into regular army ranks by direct order of then dictator Augusto Pinochet just a month before Patricio Aylwin took over as elected president of the Republic. Most of the former agents were directly incorporated to the new army intelligence agency the DINE, without any application process, vetting, or training for their new role. Although almost 3 decades has gone by, and various of these individuals have now died, repeated recourse to the national transparency law has failed to achieve access to this list by conventional means. TV channel CNN Chile leaked a copy of the list, establishing moreover that as of late 2018, nine of those named continued in active service. The Minister of Defence acknowledged that both the CNI and predecessor the DINA had constituted completely unjustifiable and unacceptable repressive organisations, and made assurances that all the course of 2019 the nine individuals would all be due to retire. It should however be recalled that in the past, individuals retired and/or removed from the Armed Forces due to their associations with past human rights violations have been subsequently rehired in consultancy roles.

## **3. JUSTICE**

### **3.1 The Interamerican Human Rights System**

in addition to mentions of the Interamerican commission court elsewhere in this report, it should be mentioned that the December 2018 verdict in *Órdenes Guerra vs. Chile* represents the fourth Interamerican court sentence finding Chile in breach of its international obligations in a case related to dictatorship era violations. The second and third such sentences (García Lucero, 2013, and Maldonado, 2015) have been complied with at least as regards actions to be taken in favour of the cases direct petitioners. Nonetheless, in both cases the opportunity to expand the general principle to other similar situations, using the sentences to improve public policy, has not been taken. In *García Lucero*, for example the state has ignored the verdict's reaffirmation of its ex officio responsibilities to investigate and prosecute the crime of torture.

The *Maldonado* case meanwhile ordered the state to provide a mechanism allowing rectification of spurious convictions imposed by military courts and political prisoners. The state's chosen mechanism has required individual survivors and other relatives to initiate the vision on a case-by-case basis. Yet another example came on 27 May 2019, when the Supreme Court annulled

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<sup>91</sup> The requests that were only partly answered requested information about individuals who had applied to Valech I and others who had applied to Valech II. Replies could only be given for those related to Valech II.

sentences imposed by wartime courts martial in Antofagasta and Pisagua in 1974.<sup>92</sup> Regarding *Órdenes Guerra*, the judicial branch had already played its part, changing its practice with regard to the statute of limitation in civil claims even before the final sentence was issued. What remains is to reverse the relative injustice thereby suffered by claimbringers whose cases were rejected, and whose right to reparation by the judicial route was therefore denied, before the change in criteria. The legislation referred to in the sentence also needs to be passed (see section 1.2.2). However, it is the *Almonacid* case, from 2006, which continues to present the most egregious and longest running failure to comply: legislation to remove the validity and effects of the amnesty decree law of 1978 has never been introduced. This requirement was reiterated in the *García Lucero* verdict, and in a high proportion of recent interactions by the state with the universal system (see section 1.1.1).

The Observatorio understands that there are currently at least three actions against the state of Chile in preparation are currently under consideration by the commission. One, already mentioned, deals again with denial of civil compensation (in the case of Juan Paredes Barrientos); one, with the concession of parole to perpetrators, and the third was presented by survivor. The government was prompted by these and various other complaints still pending before the regional human rights system to take the unprecedented step of naming an adjunct to their diplomatic mission in Washington especially to monitor the progress of these cases. The move came three months after the government signed a letter questioning the commission's purpose, underlining the principle of subsidiarity, and exhorting the commission to avoid "invading" spheres proper to state sovereignty. The letter, also signed by the authorities of Argentina, Brasil, Colombia and Paraguay, caused controversy, since it was seen as an attempt to weaken the IACHR. Meanwhile the court, which receives cases that could not be resolved before the commission and in which the commission believes there is *prima facie* evidence of a possible violation of the American Convention, accepted the case of Daniel Urrutia. Urrutia is a Chilean judge who was sanctioned by the Supreme Court for preparing academic report criticising the actions of the judiciary during the dictatorship.<sup>93</sup> the case is ongoing.

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<sup>92</sup> Supreme Court, Roles 8.745-2018 and 15.074-2018.

<sup>93</sup> Case 12.995, *Daniel Urrutia Laubreaux versus Chile*, referred on 1 February 2019.

### 3.2 Domestic Courts

**Fig. 1. Numbers of final verdicts emitted by the criminal bench of the Supreme Court between July 2010 and June 2019 (inclusive) in cases for dictatorship-era human rights violations, by twelve-month period**

	Number of human rights 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 <sup>x</sup>
July 2017 - June 2018	37 <sup>x</sup>
July 2018 - June 2019	44°

\* One of these dealing solely with civil liability

\*\* Four of these dealing solely with civil liability

° 16 of these dealing solely with civil liability

<sup>x</sup> Six of these dealing solely with civil liability

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

**Fig. 2. Detail of the 44 final verdicts emitted by the criminal bench of the Supreme Court between July 2019 and June 2019, inclusive, in cases for dictatorship-era human rights violations**

Causa	Fecha fallo	Rol
1. Civil claim José Emiliano Cuevas Cuevas, victim of enforced disappearance	5.07.2018	Rol 1013-2018
2. Aggravated kidnap of Luis Eduardo Durán Rivas (episode Operación Colombo)	6.07.2018	Rol 38682-2017
3. Homicide of Macarena Torres Tello	9.07.2018	Rol 37770-2017
4. Aggravated kidnap of Gervasio Huaiquil Calviqueo	25.07.2018	Rol 44633-2017
5. Aggravated kidnap of Pedro Vergara Inostroza	25.07.2018	Rol 35736-2017
6. Aggravated kidnap of María Cristina López Stewart (episode Operación Colombo)	7.08.2018	Rol 84785-2016
7. Aggravated kidnap of Álvaro Modesto Vallejos Villagrán	7.08.2018	Rol 19127-2017
8. Aggravated homicide of José Domingo Quiroz Opazo	7.08.2018	Rol 33750-2017
9. Aggravated homicide of Iván Alfredo Quinteros Martínez	7.08.2018	Rol 41554-2017

10.	Aggravated homicide of Arturo Alejandro Navarrete Leiva	9.08.2018	Rol 40774-2017
11.	Aggravated kidnap of Jorge Arturo Grez Aburto (episode Operación Colombo)	14.08.2018	Rol 45911-2016
12.	Crime of 'application of torment' [torture] leading to the death of Héctor Fernando Velásquez Molina.	16.08.2018	Rol 3382-2018
13.	Aggravated kidnap of Arturo Barría Araneda (episode Operación Colombo).	24.08.2018	Rol 34185-2017
14.	Civil claim José Gregorio Araneda Riquelme, victim of extrajudicial execution	28.08.2018	Rol 762-2018
15.	Aggravated kidnap of Bernardo Araya Zulueta and María Flores Araya, case Calle Conferencia	5.09.2018	Rol 36332-2017
16.	Crime of exercise of violence against a detained person, with the aim of forcing a confession, leading to the death of Jorge Alejandro Cabedo Aguilera	6.09.2018	Rol 34579-2017
17.	Crime of 'illicit pressure' [torture] causing the death of José Victorino Martínez Rojas	24.09.2018	Rol 16914-2018
18.	Civil claim Juan Antonio Ruz Díaz, victim of extrajudicial execution	24.09.2018	Rol 17010-2018
19.	Civil claim Luis Jorge Almonacid Dumenez, victim of enforced disappearance	26.09.2018	Rol 19069-2018
20.	Aggravated kidnap of Sergio Arturo Flores Ponce (episode Operación Colombo)	26.09.2018	Rol 36731-2017
21.	Civil claim Héctor Roberto Rodríguez Cárcamo, victim of enforced disappearance	27.09.2018	Rol 14903-2018
22.	Civil claim Atiliano Hernández Hernández, ex political prisoner (survivor)	28.09.2018	Rol 19301-2018
23.	'Caso fusilados': Aggravated homicide of Jorge Eduardo Oyarzún Escobar, Juan Joaquín Escobar Camus and José Sergio Muñoz González	4.10.2018	Rol 43113-2017
24.	Kidnap and aggravated homicide of Blanca Marina Carrasco Peña, victim of extrajudicial execution	16.10.2018	Rol 43142-2017
25.	Aggravated kidnap causing seriously bodily harm to Eva Eugenia Palominos Rojas and Patricia del Carmen Zúñiga Barrios, former political prisoners (survivors)	22.10.2018	Rol 40168-2017
26.	Aggravated homicide of Claudio Rodríguez Muñoz	23.10.2018	Rol 1376-2018
27.	Air Force Academy case (Caso Academia Guerra Aérea): Aggravated kidnap of José Luis Baeza Cruces; aggravated homicide of Alfonso Carreño Díaz, and the kidnap of 11 former political prisoners (survivors): Rosa Barrera Pérez, Jacinto Nazal Quiroz, Agueda Jara Avaca, Senator Jorge Montes Moraga, Guillermo Teiller del Valle, Magdalena Contreras Weise, Rosa María Montes Miranda, Diana Montes Miranda, María Josefina Miranda Tejías, José Canales Pérez and Guillermina Fresia Cervantes.	5.11.2018	Rol 39628-2017

28.	Homicide of José Espinoza Santic	22.11.2018	Rol 1231-2018
29.	Aggravated homicide of Marcelino Marchandon Valenzuela.	7.12.2018	Rol 4080-2018
30.	Aggravated kidnap of Félix Edmundo Lebrecht Díaz-Pinto (survivor of Operación Colombo)	13.12.2018	Rol 38766-2017
31.	Civil claim Jorge Bernabé Yáñez Olave, victim of enforced disappearance	26.12.2018	Rol 15298-2018
32.	Civil claim Carlos Luis Cubillos Gálvez, victim of enforced disappearance.	31.12.2018	Rol 29454-2018
33.	Civil claim Carlos Bastías Kessi, ex political prisoner (survivor)	21.01.2019	Rol 20362-2018
34.	Homicide of Sergio Ramírez Peña	24.01.2019	Rol 43531-2017
35.	Aggravated homicide of José Hernán Carrasco Vásquez	18.02.2019	Rol 4567-2018
36.	Civil claim Newton Morales Saavedra, victim of enforced disappearance	20.02.2019	Rol 12636-2018
37.	Civil claim II, Juan of Dios Salinas Salinas, victim of enforced disappearance	22.02.2019	Rol 12715-2018
38.	Civil claim, victims of extrajudicial execution, Chihuío case	7.03.2019	Rol 29251-2018
39.	Aggravated homicide of Miguel Estol Mery	25.03.2019	Rol 34392-2016
40.	Civil claim II, Rodolfo Valentín González Pérez, victim of enforced disappearance	26.03.2019	Rol 29463-2018
41.	Civil claim José Julián Peña Maltés, victim of enforced disappearance	1.04.2019	Rol 29944-2018
42.	Homicide of Gabriel Salinas Martínez	19.05.2019	Rol 4568-2018
43.	Civil claim Mario Morris Barrios, victim of extrajudicial execution	23.05.2019	Rol 31605-2018
44.	Civil claim III, Rodolfo Valentín González Pérez, victim of enforced disappearance	28.05.2019	Rol 31766-2018

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

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

During the period of the present report, Supreme Court judge Ricardo Blanco took over the role of coordination of human rights cases to which he had been assigned in May 2018, replacing Judge Sergio Muñoz. Judge Blanco sees his role as one of continuing to build on existing foundations, to create a robust structure around human rights cases, which can continue to function independently of the rotation of the coordinator's role. To this end, under the umbrella of the existing Study Directorate (*Dirección de Estudios*) of the Supreme Court, a plan of work for 2019 was drawn up, and approved by a full sitting of the court on 13 May 2019.<sup>94</sup> The new office, under the leadership of lawyer Cristián Sánchez, will continue to implement and improve an IT

<sup>94</sup> Document entitled *Coordinación Nacional Casos Derechos Humanos del Poder Judicial, Modelo de Trabajo 2019*, copy on file with the Observatorio.

system associated to a database of completed and ongoing cases. Once operational, the system will allow alerts to be sent to investigative magistrates informing them of possible duplication in caseload, witnesses, or suspects; which should allow a more efficient case distribution and/or more effective use of existing information and witness statements.

It is also foreseen that the office, to be known as the 'National Coordination [Office] for Human Rights Cases' (*Coordinación nacional en causas de derechos humanos*) will function as a hub coordinating the efforts of auxiliary agencies: alerting magistrates, for example, if a suspect fails to attend a scheduled evaluation appointment with the SML. One immediately welcome initiative was the calling of a meeting between investigative magistrates and auxiliary agencies, in June 2019, part of which was also attended by representatives of some relative associations and academic institutions. In response to concerns about the slow progress of cases, expressed at the meeting and on other opportunities, a series of measures were announced by a full sitting of the Supreme Court on 6 August, acting on a report submitted by Judge Blanco. The measures are aimed at facilitating the passage of human rights cases through appeals courts, creating a special system of monitoring, designating a rapporteur for each court, whose job it is to oversee the smooth progress of these cases, and establish a preferential place for them on the court's docket. Special measures were decreed to avoid self-recusal by any sitting member of the bench leading to undue delay in the hearing of any case.<sup>95</sup> Lawyers currently litigating such cases generally expressed a favourable opinion about the measures, when consulted by the Observatorio.

The measures are consonant with a desire to have the new office's work assist in overcoming bottlenecks that continue to impede a final resolution in cases that have often been ongoing for decades. Another goal is therefore to unify the criteria used by investigative magistrates to report on their caseloads; while there is also a plan to add full details of the early stages of the case (first instance and appeals court) to the records held for cases currently before the Supreme Court. Once completed, this data stream will allow analysis of the mean and median time that cases spend at each level; as well as potentially allowing the identification of differences in the speed with which different appeals courts around the country deal with cases. While such differences can have many valid reasons, including variations in the complexity and reach of each case, monitoring will allow corroboration of the fact that differences are indeed due only to technical considerations, as well as the design of strategies to assist where necessary. Issues such as the correct form of notification of final sentences also require consideration: although the principle of publicity needs to be respected, there is also a potential drawback for the efficacy of justice if sentences are notified and published before measures can be taken to ensure that perpetrators do not evade justice by becoming fugitives.

Some of the delays that commonly affect human rights cases are moreover only partially susceptible to administrative solutions, since they have their roots in the content of applicable laws. To take one example, the requirement that all suspects above a certain age are evaluated for their fitness to stand trial, combined with the fact that existing norms do not allow anyone other than the SML to carry out these valuations, has created a bottleneck that can only be

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<sup>95</sup> Corte Suprema de Justicia, Resolución AD 1253-2019, 6 August 2019.

resolved by legal reforms. Another example is the continuing absence of a proper system for the supervision of sentences, something which has been the subject of numerous representations by the judicial branch over the course of various government administrations. Nonetheless, Judge Blanco and his office have affirmed their intention to require, and place in the public domain, suitable information allowing the monitoring of effective serving sentences by perpetrators of crimes against humanity (information whose publication and/or supply has repeatedly been denied to us by other state offices and institutions).

The first line of response by the courts to their historical debt in providing justice for these cases today rest in the hands of 13 special investigative magistrates, who between them investigate almost 1500 ongoing cases, across the length and breadth of the country (see below, section 3.2.4 for more detail). Although there is a common perception that Judge Carrozza – currently nominated to one of the vacancies on the Supreme Court - is the special magistrate with the largest caseload, in fact judge Arancibia, of the Valparaíso appeals court, was overseeing 443 cases as of 30<sup>th</sup> of April 2019, 409 of them in active investigation stage (*estado de sumario*). Judge Carrozza had 295 cases on his books, a similar number to those being investigated by Judge Marianela Cifuentes, in San Miguel (280). The next highest number, 205, are under the purview of judge Mesa, based in Temuco (and also covering cases from Valdivia, Puerto Montt, and Coyhaique).<sup>96</sup> although the mere total cases can hide significant variation in their size and complexity, judges Cifuentes, Mesa, and Arancibia were also faced with a higher proportion of the cases still in the active investigation stage (over three quarters, for each of them, compared to 55% in the case of Judge Carrozza). All of the judges mentioned have been exclusively assigned to these cases, i.e. relieved of the additional duties that would be usual for an appeals court judge, until the end of 2019 (renewable). Judge Vicente Hormazábal, who has a total of 80 cases, 70 of them at investigatory stage, also has exclusive designation. Judge Aldana, of the Concepción appeals court, appears to be the only one of the special magistrates who still pursues a strict and narrow definition of “human rights cases”, seeing only cases for enforced disappearance or extrajudicial execution. His work has therefore been complemented by that of judge Yolanda Méndez, designated by the Supreme Court on 1 August 2018 to investigate criminal complaints brought by survivors, mostly for torture and arbitrary detention.<sup>97</sup> One final noteworthy observation regarding the kinds of cases that investigative magistrates consider when they report to the National Coordination office on their human rights caseload, is that the lists supplied mention two cases whose date of commission, and nonstate perpetration, do not fit the strict definition mentioned above.<sup>98</sup>

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<sup>96</sup> Source: Oficina de Coordinación Nacional DDHH del Poder Judicial.

<sup>97</sup> Full sitting (Pleno) de la Corte Suprema, Resolución AD-739-2010, 1 August 2018. Although the wording of the resolution is somewhat ambiguous, it seems to convey that the judge is also mandated to investigate irregular adoption and/or appropriation of children that occurred during the dictatorship, as long as these affected women political prisoners. (Similar crimes without any evident connection to political violence are the concern of the respective ordinary jurisdictions).

<sup>98</sup> “[T]error attack on a political authority, resulting in death”, and “terrorist kidnap” (sic.). The crimes concerned are the killing of Jaime Guzmán and the (survived) kidnap of Cristián Edwards, both committed in 1991 by members of the Frente Patriótico Manuel Rodríguez. Mauricio Hernández Norambuena was extradited from Brazil on 21 August 2019, to continue serving sentences in Chile for both crimes.

### 3.2.2 Legislative Change Relevant to Sentencing Practice: Parole Bill (*libertad condicional*), and Draft Bill on Non-Custodial Sentencing Alternatives

In last year's report, we discussed the controversy occasioned by concessions of parole that led to the early release of five perpetrators of crimes against humanity, despite unfavourable psychosocial reports presented to prison parole boards. The Supreme Court adduced, as reasons for its concession, a presumption of automaticity, treating parole not as a benefit but as a right. The episode prompted an unsuccessful attempt to impeach the Supreme Court justices involved. During the course of the impeachment hearing, one of the arguments presented was that the co-legislative powers, rather than the judicial branch, could be held to have failed to fulfil their responsibilities. This in reference to the absence of serious legislative efforts to replace the current parole regime, which is clearly obsolete (having been established in 1925, by decree law 321).

In response to this criticism, an existing draft bill was revived. Boletín 10.696-07, first introduced by a parliamentary motion in 2016, sought to replace DL 321 with a new text which, in its initial formulation, made no specific reference to grave human rights violations or their perpetrators. In October 2016, Communist Party deputy Hugo Gutiérrez, and other parliamentarians, had attempted but failed to introduce a modification that would have completely prohibited the concession of parole in such cases. Instead, the executive branch proposed a different set of modifications to the cross-party parliamentary commission that was in charge of studying the bill. The Executive's modifications would have shaped the bill according to Rome Statute principles.<sup>99</sup> The Parliamentary commission did not accept all of the executive's modifications, adjusted others, and added some new ones of its own. On 14 October 2018, the commission proposed a text that would establish three special requirements for the concession of parole to perpetrators of crimes against humanity. These were, in essence: to have served more than two thirds of the original sentence tariff; to have provided substantial collaboration to resolve the crime in question or other similar crimes, and to have "expressed remorse in the form of a public declaration" (*haber manifestado su arrepentimiento mediante una declaración pública*).<sup>100</sup>

This third requirement raised objections from some right-wing parliamentarians, who considered that it restricted freedom of conscience. Some concern was also expressed about the whole notion of requiring acknowledgement of one's guilt, and how this might be held to affect the right not to incriminate oneself. However, the text was subsequently approved in the lower house, on 20 November 2018, by a relatively slender margin (72 votes to 63). Immediately thereafter, and before the bill had been signed into law by the president, an application was made to the Constitutional Tribunal (which presently has the power of preventive control over new legal precepts). Human rights organisations asked the tribunal to hold public hearings before arriving at its determination (the tribunal can, but is not obliged to, hold such hearings over any matter that is before it). The tribunal acceded to the request, and the date was set for the hearings. Approximately 17 groups applied to take part, representing positions both in favour of and against the aspects of the text that were at issue. Hearings were held on 19 December

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<sup>99</sup> Which do not completely rule out the concession of benefits, although they do establish special considerations.

<sup>100</sup> Boletín 10.696-07, versión available via the Historia de la Ley tool on the website of the Library of Congress, Biblioteca Nacional del Congreso: <https://www.bcn.cl/historiadelaley>.

2018. Participants included representatives of the Socialist party; Sofía Prats Cuthbert (daughter of the army general assassinated by the dictatorship); figures associated with right-wing politics; a lawyer who defends perpetrators, and a range of human rights associations. The participatory nature of the exercise, and the range of human rights groups which took part, should be positively valued insofar as it represents a growing disposition on the part of such groups to be proactive in legislative and legal matters. As regards the substance of the hearing, the tribunal finally declined unconstitutional the requirement of public expression of remorse, which was therefore removed from the final text of the law. The requirements to cooperate with justice and/or acknowledge the crimes were retained, and the bill became law 21.124, which came into force on 18 January 2019.

In June 2018, the government announced the presentation of a draft bill, described as humanitarian in nature, whose objectives were, according to press sources: “to redefine presidential pardons such that in future, they be awarded by the judicial branch”.<sup>101</sup> according to the same source, the Justice Minister, Hernán Larraín, stated that “our desire, rather than to continue awarding such pardons, is to generate (...) And all that allows the judicial process to define who, when, and by what means can apply for [a pardon] if they are terminally ill or become severely disabled”.<sup>102</sup> the announcement took effect at the end of 2018, just after the lower chamber approved the modification to DL 321 mentioned above. Accordingly, on 28 December 2018, presidential message No. 212-366 submitted draft bill 12.345-07 to the consideration of the Senate. The draft bill is entitled “Regulation of the substitution of custodial sentencing for humanitarian reasons for the categories of person here indicated”.

It proposes to modify both the criminal code and the criminal procedure code, in the name of protecting the dignity of persons deprived of their liberty. It proposes that such persons may request the substitution of their imprisonment by full house arrest, in three circumstances: terminal illness, serious and irreversible physical limitations that produce severe dependency; and, reaching the age of 75 years of age or more, having completed a certain proportion of one’s sentence. The accompanying presidential message mentions a range of previous messages and motions that had attempted to regulate the same issue, and signals that the project is based on “respect for and protection of human rights”, “one of the foundations and bases of our institutionality and that of international human rights law”. It cites, amongst its normative foundations, the international covenant on civil and political rights, art. 10.1; the American Convention on human rights, art. 5.2); Principles and good practice guidelines for the protection of persons deprived of liberty in the Americas, by the Inter-American Commission on Human Rights; and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the UNGA in Resolution 43/173, 9 December 1988. The draft bill asserts that, although the mentioned texts are already applicable to the Chilean state, there are holes in existing domestic legislation.<sup>103</sup>

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<sup>101</sup> Radio Cooperativa: “Ley humanitaria: el proyecto del Gobierno que reabre polémica sobre indulto”. 26 June 2018.

<sup>102</sup> Radio Cooperativa, op.cit. The phrase “these pardons” (‘estos indultos’) refers to three pardons conceded by presidente Piñera at the beginning of 2018, one of them to former agente René Cardemil.

<sup>103</sup> Direct quotes from the draft bill Boletín 12.345-07, version submitted on 28 December 2018.

The project goes on to argue that it is particularly difficult for custodial sentences to fulfil their objectives when imposed on persons with the described characteristics, since such persons cannot meaningfully participate in programmes designed for social rehabilitation. It also cites the principle of equality before the law, which permits the adoption of special measures to protect the rights of certain collective groups. The delegation of responsibilities to the judicial branch is justified by the observation that, since it is within the court's exclusive purview to ensure that their judgements are put into effect, it is only proper that they should have oversight of matters that arise during the serving of sentences.

The three conditions proposed for concession of a non-custodial sentencing alternative are, in detail:

i) Prisoners who have been diagnosed with an illness in a terminal phase: reference is made to the "right to live with dignity until the moment of death", recognised in article 16 of law 20.584, which stipulates "the right to palliative care that makes the effects of an illness more bearable [and] to be accompanied by one's relatives or caregivers". According to the presidential message that accompanies the Bill, this "makes clear the need for persons in a terminal phase (...) to serve their sentence in their own home".<sup>104</sup>

ii) Prisoners with a serious and irreversible physical limitation that produces severe dependence: the draft bill mentions that current legislation refers only to prisoners who become seriously mentally ill while serving a sentence, while making no reference to those who lose physical autonomy. It therefore proposes that parole can be applied for in any of three situations: serious and irreversible physical limitation, severe dependency, and/or a causal relation between the two.

iii) Prisoners of 75 years of age or more, who have completed at least half of their final sentence: the project makes reference to "the right to live with dignity in old age, recognised by article 6 of the Inter-American Convention on the protection of the human rights of older persons"; and to article 5 of the same Convention, which mandates a specific focus on persons in conditions of vulnerability, mentioning, among these, persons deprived of liberty. The draft bill adds that article 13 of the same Convention mandates "alternatives to the deprivation of liberty", and asserts that "minimal conditions of humanity (...) [require] avoiding the need for such persons to live in an atmosphere that may accelerate their physical, psychic, and social deterioration".<sup>105</sup> As well as international human rights law, examples are drawn from other criminal law and criminal procedural law. It is proposed that, in addition to the minimum age mentioned, the person must have served half of their sentence or, if sentenced to life imprisonment or a whole life tariff, must have served a minimum of 20 or 40 years, respectively.

Should this bill become law, any prisoner who fits the profile can make a request before the court, which must then "request a psychological and social report from the prison service, which must contain a technical opinion in regard to risk factors and the risk of recidivism on the part of

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<sup>104</sup> Mensaje Presidencial Nº 212-366, op.cit.

<sup>105</sup> Boletín 12.345-07, op.cit.

the applicant” (draft bill art 468b(i)). Those who apply on the basis of terminal illness or physical dependence must obtain a report from the SML (art. 468 b(ii)). In order for the petition to be conceded, in each case the report must support the view of either “a fatal short-term prognosis” or “a permanent affliction with no possibility of recovery”.

The parliamentary commission on human rights, nationality, and citizenship (henceforth, ‘human rights commission’) requested an opinion from the Supreme Court in January 2019. The court responded that the updating of these dispositions is long overdue.<sup>106</sup> It nonetheless expressed reservations, including about the fact that the bill does not specify which court or jurisdictional organ will exercise the mentioned faculties, something which underlines once more, the need for the creation in Chile of the figure of judges to oversee sentence completion (“*jueces de ejecución de la pena*”).<sup>107</sup> The court also made reference to the lack of further precision in the use of the terms “terminal illness” and the notion of “short term” in regard to a fatal prognosis. Mention was also made of the difficulties of specifying that all evaluations should be carried out by the SML, without first resolving the well-known backlog that the institution currently has in the issuing of similar kinds of report. Judges Muñoz, Dahm and Silva Cancino moreover were of the view that the concession of this benefit should be discretionary for the courts, adding that any eventual legislation would have to be applied and interpreted in the light of other international conventions ratified by Chile, making particular reference to article 110 of the Rome Statute.<sup>108</sup>

The Parliamentary human rights commission began hearings on this issue in March 2019.<sup>109</sup> Subsecretary of human rights Lorena Recabarren, representing the executive, insisted that “it is a primordial preoccupation of this government to guarantee respect for human rights and the dignity of all persons, and to advance toward a more compassionate and more humanitarian society”.<sup>110</sup> Asked about which members of the current prison population would, by virtue of their age, be *prima facie* beneficiaries of the project in its current form, the Subsecretary alluded to some 107 individuals, almost 2/3 of whom (69 individuals) are perpetrators of crimes against humanity. She estimated that a further 15 to 22 persons would qualify under the criteria of terminal illness and/or physical dependence, without stating what proportion were perpetrators of crimes against humanity.<sup>111</sup> At time of writing the bill was in its first stage, and had not been given priority status by the executive.

From the point of view of international standards, the project deals with two major themes: the rights of persons deprived of liberty, and obligations regarding the proportionate sanction of

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<sup>106</sup> Corte Suprema, Cuenta Oficio N° 22-2019, considerando decimotercero. 7 February 2019.

<sup>107</sup> Ibid., considerando decimoquinto.

<sup>108</sup> Article that mentions special care and consideration that should be taken in considering conceding benefits to perpetrators of crimes against humanity.

<sup>109</sup> Including the Fundación Paz Ciudadana, the Defensoría Penal Pública, the Corporación Estadio Nacional Memoria Nacional ex Prisioneros Políticos, the Corporación de Familiares de Ex Prisioneros Políticos Fallecidos, Dr. Claudia Cárdenas of the Universidad de Chile, the Fundación Jaime Guzmán, and the Agrupación de Familiares de Ejecutados Políticos (AFEP).

<sup>110</sup> Oral presentation by the Undersecretary to the Commission, which can be viewed on [Tvsenado.cl](http://Tvsenado.cl): “Proyecto de Ley Humanitaria”, 18 March 2019.

<sup>111</sup> Id.

crimes against humanity, today considered an imperative norm in international law. The Rome statute, although it makes no mention of parole, does contemplate the concession of sentence reduction, with requisites that include effective cooperation with justice, as well as changes in the perpetrator’s health or other circumstances.<sup>112</sup> Rule 223 of the statute adds that the guilty party must have demonstrated “disassociation” from the crime, and orders judges to take into account both the possibility of successful rehabilitation, and the potentially negative effect of incarceration on society, victims, and are the relatives of those disappeared or killed. Accordingly, in the opinion of the ICC, “the obligation to provide sanction for crimes against humanity is, in principle incompatible with sentence reduction [or]... The concession of non-custodial alternatives [...] The special requisites are evidence of the tension between the dignity of perpetrators and their possibility for rehabilitation, on the one hand, and the rights of victims and the need for social peace, on the other.”<sup>113</sup> taken together, these considerations suggest the need for differential considerations in cases of crimes against humanity, something that is not allowed for by the present draft bill, as was pointed out by two civil society groups that appeared before the Parliamentary commission. One of these, the relatives’ association AFEP, proposed the incorporation of three special requirements: the obligation to give information about the whereabouts of victims, in the case of perpetrators of enforced disappearance (kidnap); substantial cooperation both with the investigation and with the carrying out the sentence, and repentance not only with regard to the crimes for which the individual was convicted, but with regard to their context i.e. the grave massive and systematic human rights violations committed in Chile between 1973 and 1990. This latter to avoid future public apologia, denialism, or open trivialisation of crimes against humanity.

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

**Table A: Dictatorship-era human rights cases definitively resolved by domestic higher courts between 1995 and 30 June 2019**

<b>Total number of cases/ breakdown by type</b>	<b>426</b>
Civil claim	61
Criminal case	365

<sup>112</sup> Rome Statute, Art. 110.

<sup>113</sup> National Library of Congress Technical Parliamentary Consultant’s report (Asesoría Técnica Parlamentaria) “Alternativas a la reclusión por razones humanitarias: derecho internacional y legislación extranjera. Con especial atención a la cuestión de los condenados por delitos de lesa humanidad”. April, 2019, p. 6.

**Table B: Types of victimhood addressed by criminal cases definitively resolved by domestic higher courts between 1995 and 30 June 2019**

<b>Total number of criminal cases</b>	<b>365 cases</b>
Cases de victims of enforced disappearance	163
Cases de victims of extrajudicial execution	159
Combined cases involving victims of extrajudicial execution, victims of enforced disappearance and/or survivors	22
Cases for torture and other crimes committed against survivors	18
Cases solely for illicit association ( <i>asociación ilícita</i> )*	1
Cases solely for illegal disposal of human remains ( <i>exhumación ilegal</i> )*	1
Cases solely for infractions of weapons laws*	1

\* 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 2019**

<b>Total number of absent victims/ breakdown by type</b>	<b>747</b>
Victims of enforced disappearance	369
Victims of extrajudicial execution	378

<b>Total number of survivors</b>	<b>221</b>
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**Table D: Percentages of women represented in criminal cases completed between 1995 and 30 June 2019, by type of case**

Total number of persons/ number of whom are women	Percentage of the total made up by women
Total of absent victims (disappeared or executed): 747 people, 56 of them, women	7.5% of the total of absent victims in whose case a final criminal verdict has been handed down
Subtotal of disappeared victims: 369 people, 31 of them women	8.4% of the total of disappeared persons in whose case a final criminal verdict has been handed down
Subtotal of absent victims, executed: 378 people, 25 of them women	6.6% of the total of extrajudicially executed persons in whose case a final criminal verdict has been handed down
Survivors: 221 people in whose case a final criminal verdict has been handed down, 73 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*

In the 2018 report we presented, for the first time, statistics allowing measuring of the reach of sentences concluded the domestic courts, since the end of the dictatorship, as a proportion of the universe of commonly acknowledged victims and survivors. In what follows, we update that information by incorporating the 44 final verdicts handed down by the Supreme Court in human rights cases during the statistical period of the present report (July 2018 to June 2019), as well as some previous historical data that has come to light thanks to new information supplied by the judicial branch in January 2019.

According to the Observatory's current records, between 1995 and 30 June 2019 a total of 426 final verdicts have been handed down in cases for crimes against humanity committed during the dictatorship: 365 in criminal cases (which may or may not have a civil claim component), and 61 in cases of solely civil suits.<sup>114</sup> These 426 verdicts have principally been handed down by the criminal bench of the Supreme Court. Nonetheless, they also include a few civil claims which culminated in 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 sentence.<sup>115</sup> The 365 final criminal verdicts which we have on record

<sup>114</sup> i.e. civil claims without an associated criminal investigation. The detail of most of the criminal verdicts can be seen on [www.expedientesdelarepresion.cl](http://www.expedientesdelarepresion.cl).

<sup>115</sup> 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.

correspond to a total of 747 absent victims (369 disappeared persons, DD, and 378 victims of extrajudicial execution, EP); plus a total of 221 survivors.

If we consider these totals as a proportion of the universes of absent victims and survivors currently officially recognised by the Chilean state, 163 of the 365 criminal verdicts correspond to crimes committed against disappeared persons, 159 to extrajudicially executed persons, 22 to crimes with a mixture of category a victim (DD, EP and/or survivors). Meanwhile, 18 criminal cases have been finalised for crimes committed solely against survivors.<sup>116</sup> A total of 221 survivors presented the criminal complaints for torture or other crimes that gave rise to these verdicts. Accordingly, final criminal verdicts have been issued for crimes committed against approximately 23.2% of those the state currently recognises as having been forcibly disappeared or executed.<sup>117</sup> This represents an increase of 1.1% when compared with the same dates in 2018, which is consistent with the total of 29 victims of disappearance execution represented in the criminal cases completed in the 2018-19 period. By contrast, only 0.58% of the 38,254 survivors acknowledged by 'Valech I' and 'Valech II' have seen final sentences in their criminal and/or civil cases,<sup>118</sup> demonstrating a significant gap in levels of satisfaction of the right to criminal justice between absent victims and survivors.<sup>119</sup> 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 *García Lucero*. The human rights programme unit continues to operate with a limited mandate that excludes crimes against survivors, while the denunciation of survived torture sense to the courts by the then subsequent of human rights of the outgoing administration, in March 2018, is receiving no follow-up from any state body outside of the judicial branch.<sup>120</sup>

A breakdown by gender reveals that 31 female victims of disappearance are represented in the criminal verdicts currently concluded for a total of 369 disappeared persons; and 25 female victims of extrajudicial execution are represented in the criminal cases concluded for 378 such victims. Thus in total 56 women feature among the total of 747 'absent victims' for home criminal cases have been concluded, making up 7.5% of the total. This proportion is relatively consistent

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<sup>116</sup> The three completed criminal cases not included in this breakdown represent cases with no names of individual victims associated (criminal association, illegal exhumation, and violation of the laws on control of weapons).

<sup>117</sup> 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 official registers mentioned here, without any adjustments, would be 3,225 people. In either case, the percentage with concluded cases does not fall below 23.1% nor rise above 23.2%. See last year's iteration of this report for more detail of the basis on which these calculations have been done.

<sup>118</sup> Representing an increase of 0.08% over the figure published in last year's edition of this report.

<sup>119</sup> 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 (see section 1.2.2). For survivors, who have historically faced higher barriers to initiation of a criminal investigation, it is more common to see civil claims without previous criminal investigation. We will continue to monitor these trends for future presentations of quantitative data.

<sup>120</sup> See section 3.6.1

with the gender breakdown of victimisation reported by the respective truth commissions.<sup>121</sup> Meanwhile, 73 women survivors of torture and other crimes have seen criminal verdicts brought against perpetrators, constituting 33% of a total of 221 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.<sup>122</sup> 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 exclusively, 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 Tendencies in Recent Supreme Court Verdicts**

The 44 final verdicts of this period are consistent with settled jurisprudential tendencies in denying the applicability of amnesty or statute of limitations to crimes against humanity. They also consolidate the recent tendency to extend inapplicability of statute of limitations to civil as well as criminal action, giving rise to an increase in successful claims for compensation for moral harm. The 33 sentences that consider the question of civil liability all recognised both the incompatibility of the statute of limitation to civil actions, and the compatibility of civil damages with concurrent exercise of the right to administrative reparations.<sup>123</sup> In a number of cases, the Supreme Court reversed concessions of statutes of limitation by the lower courts. As a general rule, these decisions were moreover unanimous within the relevant bench (criminal bench). In those isolated cases where a dissenting vote was emitted, this was emitted by a stand-in replacement, not by one of the permanent members of the criminal bench. Of the 33 cases which resolved, in whole or in part, matters of civil liability, five were actions initiated by survivors. The remainder were initiated by relatives of disappeared or executed victims.

The classification of certain episodes as crimes against humanity was a matter of controversy in two cases during this period. In the first, the Supreme Court confirmed the suspension of the case due to expiry of the period set down by the statute of limitation.<sup>124</sup> The case was over the death of a six-year-old child, Macarena Torres Tello, killed on 23 May 1989 by a firearm during a confrontation between armed uniformed police, and civilians who were attempting to hold up a commercial enterprise. The court found Macarena's death to be a common crime, even though she was classified by the Rettig Commission as a victim of political violence. The finding was that

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<sup>121</sup> Rettig (1991), for example, reported that the universe of victims who were acknowledged was composed of 94% men, 6% women.

<sup>122</sup> 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.

<sup>123</sup> The 33 include outcomes of both 'mixed' cases – where a criminal investigation was accompanied by a civil claim element – and cases where only a civil claim was at issue. In addition, one sentence that only contained absolutions in its criminal component, nevertheless awarded damages (to be paid by the Treasury), since it found that a state agent had been involved (the agent, convicted at first instance and appeals court levels, died before the case reached the Supreme Court).

<sup>124</sup> Rol. 37.770-17, 9 July 2018.

the episode did not constitute a crime against humanity due to the absence of “a context of political persecution directed against opponents of the de facto regime”. The court also made reference to the fact that the investigation had found that the projectile recovered from the scene did not correspond to the type of weapon issued to uniformed police at that time. In the second case where the category of crime against humanity was called into question by the defence, the court instead affirmed it. This was a case for the killing of Gabriel Salinas Martínez, detained in Cunco on 31 August 1975 after allegedly stealing some tools. Gabriel was shot by uniformed policeman Mario Osvaldo Rodríguez Canario, after having been threatened in an attempt to force him to confess. On this occasion, the Supreme Court confirmed the validity of the category of crime against humanity “because the authorities, the political and legal context, and military jurisdiction applied at the time favoured impunity, paving the way for the elimination of people considered invisible or undesirable”.<sup>125</sup> This case is however one of three of the period in which the court allowed the concession of half statute of limitation, the effect of which was to reduce the sentence to a sufficiently low tariff that the guilty party was given the benefit of parole (a non-custodial sentence)

As regards the types of crime for which sentencing was applied, in three cases of survivors, the figure of aggravated kidnap was confirmed. In this way the Supreme Court bolstered the strategy adopted by complainants in recent times, of attempting to make court activity more accurately reflect the full range of crimes committed by the dictatorship, despite the inadequacy of the legal figures and penalties available in the criminal codes that were in force at the time. This strategy aims to achieve an overall response from the criminal law that is more proportionate than the one that results from the sole invocation, in cases brought by survivors, of the minor crime of “apremios ilegítimos”, the nearest, yet wholly inadequate, equivalent of torture available in the criminal code of the time. The figure of kidnap prevents the illegal and arbitrary deprivation of freedom that was carried out by agents of state terror from being hidden under the euphemistic term “detention”. A similar logic can be observed in the case of José Hernán Carrasco Vásquez, a victim of extrajudicial execution: the Supreme Court confirmed the concurrent application of the twin crimes of kidnap, and aggravated homicide. This suggests we are moving away from a previously criticised tendency on the part of the higher courts to only convict for the crime considered most serious.

The crime of aggravated kidnap, the figure usually applied to cases of disappearance, is the one that continues to produce the highest sentence tariffs. By contrast, a more variable range of sentencing was applied to those convicted of aggravated homicide, although most sentences were of 10 years or above. It is worthy of notice that there was a slight tendency to increase the proportion of custodial to non-custodial sentences: alternative sanctions were conceded in only three cases. While in general, then, there is a welcome tendency to apply penalties more proportionate to the gravity of the crimes, the reappearance of the concession of half statute of limitations is a concern: the Supreme Court applied or confirmed its concession in three cases, leading to substantial reduction in penalties.

Although the view that half statutes of limitations, like statutes of limitations per se, are inadmissible in cases of crimes against humanity has generally continued to prevail, these

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<sup>125</sup> Corte Suprema, Rol.4568-2018, 19 May 2019.

decisions have always been made by majority, ie against the dissenting opinion of one or two permanent members of the Court and-or stand-in replacements. This demonstrates the precarious status of the inadmissibility interpretation, and its dependence on the composition of the Supreme Court's criminal bench. Once Judge Milton Juica, who had always supported the inadmissibility thesis, retired, the balance of the permanent membership of the bench on this issue shifted. Three of its current permanent membership of five are more inclined to favour of the admissibility of half statutes of limitation, although their positions differ slightly one from another. Judges Cisternas y Dolmestch consider that half statutes of limitation are of compulsory application, and therefore vote to revoke Appeals Court sentences where they have not been conceded. Judge Künsemuller, on the other hand, holds the view that they are of discretionary application, tending therefore to defer to the decision made in the initial verdict. The positions held on this matter by the senior members of the legal profession who are called to act as stand-ins for senior judges (known in Chile as *abogadas/os integrantes*) can also be decisive: in the three cases mentioned above, where half statutes were conceded, this was due to the vote of one or more stand-in adjudicators.<sup>126</sup> This underlines the importance of this role for accountability outcomes. It is therefore a matter of some concern that the present government has suggested using Constitutional Tribunal judges, instead of senior lawyers, in this role, given the notoriously regressive attitudes of many of the Tribunal's current judges in a whole range of matters relevant for human rights cases (see section 3.2.5.1, below).<sup>127</sup>

If we turn to an analysis of end results in criminal investigations, three of the cases concluded in this period culminated in the absolution of all suspects. In one case, the courts were of the view that violence had been used in legitimate self-defence. In the other two, lower courts had considered that there was insufficient evidence to link the accused to the commission of the crime(s). In regard to final sentences that returned guilty verdicts, the upholding a custodial sentence against Rosa Ramos Hernández makes her only the second female regime agent ever sentenced to actual prison time for crimes against humanity. It is interesting to note that the Supreme Court tends, in its final verdicts, to ratify both guilty verdicts and absolutions proceeding from Appeals Courts. Only in one case did the Supreme Court annul and replace an Appeals Court finding of not guilty, imposing a sentence on an agent who had previously been absolved. Only in two additional cases were lower court findings overturned in favour of absolution. One of these is the case mentioned above, in which self-defence was adduced: in the other, the Court found that the legal threshold required for conviction as an accomplice had not been met.<sup>128</sup>

The most significant reversals, in terms of absolutions of previously sentenced former agents, have instead occurred at Appeals Court level, usually going on to be ratified by the Supreme Court. The main example is constituted by cases related to different episodes of "Operación Colombo" an international propaganda operation used to cover up the killings of over 100 regime

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<sup>126</sup> Respectively: Jorge Lagos Gatica, Juan Manuel Muñoz Prado and Antonio Rojas Cabos. Stand-in lawyers (who substitute for temporary absences of permanent members of the Court) María Cristina Gallardo and Ricardo Abuabud Dagach have also declared themselves, in dissident minority opinions, to be in favour of the application of half statutes of limitation, although their vote has not to date been decisive in changing the direction of a verdict.

<sup>127</sup> *La Tercera*: "La otra reforma judicial postergada: el fin de los abogados integrantes". 22 June 2019.

<sup>128</sup> Respectively, Roles1376-2018, 18 October 2018, and 84785-2016, 6 August 2018.

opponents. Five cases related to Operación Colombo were concluded in the current period, between them producing 86% (132) of the absolutions of individual suspects that were ratified at Supreme Court level. This tendency, commented upon and further explained in last year's report, has to do with the Supreme Court's particular interpretation of the proper limits of its own oversight over lower court findings, specifically in regard to the evaluation of judicially-determined facts. A certain asymmetry can be observed in some verdicts when comparing the treatment given to absolutions, with that given to findings of guilt. Where guilty verdicts are concerned, if defence lawyers allege a lack of sufficient grounding of the finding that their client(s) played a part in the offences at issue, the Court tends to analyse in some depth, the probatory elements that lower court sentences used in order to arrive at their attributions of guilt. On the other hand, where lower court verdicts have resulted in absolutions, the Court has on numerous occasions preferred to defer to the initial findings (usually, the verdict of the investigative magistrate who oversaw the case at first instance level). In order to do so, the Supreme Court makes a strongly discretionary interpretation of the reference made, in art. 456b of the Criminal Procedure Code (Código de Procedimiento Penal, CPP) to the level of "conviction" [in the sense of belief] that is needed for a guilty verdict to be returned.

The Court holds that it is legitimate for a judge to absolve if he or she has not arrived at a subjective inner conviction of the guilt of the accused, irrespective of the quality or quantity of indicators that are available to be counted as a basis for judicial 'presumptions', in accordance with CPP art. 488. Accordingly, the reasoning adduced for decisions to absolve are subjected to a less rigorous examination by the Supreme Court, than reasoning that has been used to convict. This dynamic is particularly well illustrated by the verdict in case Rol. 43.113-2017, Jorge Oyarzún Escobar et. al. (Rol. 43.113-2017). The Supreme Court ratified a decision by the Appeals Court to absolve two former conscripts who had been convicted, in the first instance verdict, of participation in the execution by firing squad of three victims. The Supreme Court argued that "the absence of conviction sufficient to condemn, is not subject to the level of formal requisites that the [appellant party] alleges to be deficient, since the extending of a verdict of absolution has distinct requirements from those applicable to a finding of guilt". Fortunately, some sentences by the Supreme Court do recognise that the requirement for solid explication of grounds and reasoning constitutes an important safeguard against arbitrary decisionmaking in both guilty verdicts and absolutions.

Another significant occurrence during the period was the Supreme Court's decision to organise a seminar in which its human rights case jurisprudence was debated in public. The seminar, entitled "Human Rights and the Judicial Branch in Retrospect and Going Forward", was held on Supreme Court premises on 16 January 2019. Judge Lamberto Cisternas opened with a presentation on the role of the Supreme Court in transitional justice, presenting a full panorama of the 447 final criminal and civil sentences that the Court counts as having been handed down in cases for crimes against humanity,<sup>129</sup> as well as ongoing cases. Comments were then offered

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<sup>129</sup> The differences between the figures provided by various sources, the Observatorio included, are usually due to differences in definition (such as, for example, decisions as to whether to include civil claims in the count, or whether figures for criminal cases should include crimes such as the Berrios assassination, committed outside the strict time frame of the dictatorship but clearly causally connected to it). The Observatorio is in active discussion

by human rights lawyer Nelson Caucoto, and by jurist Daniela Accatino, of the Universidad Austral de Chile. Nelson Caucoto commented on the unique nature of the event as a form of presenting an account of Supreme Court actions. He highlighted the increasing ascendancy of reasonably progressive, and previously controversial, jurisprudential positions, and positively valued the seminar as an exercise in transparency and communication between the courts and citizens. Judge Haroldo Brito, in his capacity as Supreme Court president, took a similar view, maintaining that “Chile has taken strides forward in the criminal sanction of human rights infractions, making it an example in how to advance in justice and social peace. Aware moreover of the importance for the courts of forging links with citizens, we are laying ourselves open today to hearing appreciations of our work in this field”. It is to be hoped that this expression of deserved satisfaction with the institution’s recent trajectory serves to reinforce a coherent state of affairs, one which does not admit backward steps such as the automatic concession of post-sentencing benefits or the return of half statutes of limitation. Only in this way can the judicial branch maintain its founded claim to be the branch of state that has done most, in recent times, to comply with Chile’s international and moral obligations in this area. Chile is undoubtedly today one of the countries with most experience, worldwide, in the judicialisation in domestic courts, of international crimes. It seems that finally, appreciation is growing within the institution itself of the meaning and importance of this fact, and therefore the significance that the courts’ performance on this issue holds for the prestige of a judicial branch formerly characterised by collusion with dictatorship-era repression.

#### **3.2.4. Overall Trends in Criminal Justice**

According to information provided by the judicial branch, as of 30 April 2019 a total of 1,459 criminal cases were ongoing for dictatorship-era human rights violations.<sup>130</sup> 1,114 were at investigatory stage (*estado de sumario*), 114 were in the pre-sentencing stage (*plenario*), and 227 had an initial verdict (at first or second, Appeals Court, level) whose implementation was pending subject to appeals. This caseload was shared between 13 investigative magistrates, seven of them operating in the Greater Santiago jurisdiction (see above). The data supplied by the courts demonstrate some suggestive patterns, although in their current presentation they do not allow for exact calculation of how many individual survivors, disappeared persons, or victims of extrajudicial execution are represented across the universe of ongoing cases.<sup>131</sup> Nonetheless, the mere fact of their existence is of great value, as is the fact that the system that has been put into place for their production also aims in future to consolidate and publish information as to which, and how many, custodial sentences in finalised cases are being actively served at any one

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with the Supreme Court’s National Human Rights Coordination office to make these definitional decisions clearer in all published sources.

<sup>130</sup> Report supplied to the Observatorio on 28 June 2019 by the Supreme Court’s National Human Rights Coordination office under the direction of Judge Ricardo Blanco (document reference IDECS 1805-42). The figure considers ongoing cases at any stage of investigation or initial sentencing, excluding only those cases where a definitive sentence has been confirmed, or where a case has been subsumed into another, open, investigation or has been formally shelved (*sobreseído*). We are grateful to Judge Blanco, and in particular to Cristian Sánchez and his team, for their exemplary assistance in the production and interpretation of this information over the course of various meetings with members of the Observatory team.

<sup>131</sup> An agreement was reached in principle to produce data allowing this calculation going forward. We hope therefore to be able to include this information in future Observatorio bulletins and editions of this report.

moment. This information, despite being of clear public interest, has been repeatedly denied to the public by other state offices and institutions. Its production will finally activate the communicative function of criminal justice, which is one of the main guarantors of public confidence in the justice system and the rule of law.

The information currently supplied shows a clear diversification in types of criminal charges applied in these cases, both within any given case, and across the total case universe. The first of these trends – the appearance of multiple criminal charges within one single case – has two main explanations or contributory factors. The first is a greater tendency to investigate, within a single case, a range of repressive crimes (committed against survivors as well as people who were disappeared or executed, for example). The second is the deepening of a tendency, commented upon in previous editions of this report, to judicialize a higher proportion of the multiple serious crimes that were actually committed against each particular victim or survivor. This helps to produce a more accurate, and more complete, picture of the full extent of the aberrant practices of state terror, leaving behind a more simplistic initial portrayal that tended to associate victims of enforced disappearance with the crime of kidnap; victims of extrajudicial execution, with homicide, and survivors, with torture – prosecuted moreover under the highly unsatisfactory and euphemistic lesser figures available in the criminal codes applicable in the 1970s and 1980s.

Today, by contrast, 49 different types of criminal offence have been alleged, and/or are being investigated, across the universe of 1,459 open cases. The list includes almost a dozen recognisable subcategories, ranging from variations on homicide, to false testimony, crimes related to physical harm, and typifications that have to do with child abduction. The list includes multiple appearances of figures such as “torments resulting in death” (*aplicación de tormentos con resultado de muerte*), mentioned in relation to a total of 11 victims; illegal detention (*detención ilegal*), mentioned in relation to 432 victims, almost always in association with other crimes including torture, homicide, and kidnap; or illegal burial of remains (mentioned in relation to 139 named victims). The frequency with which figures such as “criminal conspiracy” (in relation to the secret police); “illegal detention” and “arbitrary deprivation of liberty” appear, give the lie to any continued pretence that the actions of the dictatorship-era security and intelligence services had any veneer of legality or legitimacy. On the other hand, it is notable that despite increasing general consciousness of the frequency and gravity of the use of sexual violence as a deliberate repressive strategy, rape is only mentioned with regards to 12 victims (although there is also one case that includes what is called “dishonest abuse” (*abusos deshonestos*) and one criminal complaint for ‘forced abortion’ or ‘induced miscarriage’ (*aborto forzado*). It should also be noted, however, that these examples are drawn from a simple listing of all possible figures mentioned in the present titles of cases at quite different stages (from initial private complaint, through to initial verdict). Grounded conclusions about the treatment or importance that particular investigative magistrates, and/or the system as a whole, give to certain crimes, would require a more systematic monitoring of a set of cases in time, from complaint through to final sentencing. Longitudinal studies of this sort could, for example, illuminate any significant variation between the types of crime that are alleged by a survivor or

relative, those for which charges are brought, and those for which someone is eventually held responsible.<sup>132</sup>

Two figures worthy of note at present feature only in denunciations or complaints (*querellas*), that is to say, they have been used by complainants or their lawyers but have not yet been taken up by an investigative magistrate and used as part of a formal indictment or set of charges. These are “genocide” – mentioned in relation to 27 victims – and “enforced abortion” or miscarriage, mentioned in relation to Haydee Oberreuter, a survivor who previously brought a criminal complaint resulting in noncustodial sentences against the former Naval officers who kidnapped and tortured her, occasioning the loss of the son she was expecting at the time. The addition of this new figure, together with those of criminal conspiracy and kidnap, represent new charges that did not feature in the original case, meaning there is no double jeopardy even though the same perpetrators are accused. A similar principle has been used previously by the memory site Londres 38, when triggering investigations for homicide in relation to victims whose disappearance has already been investigated and/or punished under the figure of kidnap. Genocide is not a concept which in its current legal definition is obviously applicable to the Chilean situation, since in international law it makes reference to the intent to destroy, in whole or in part, groups defined by one or more of a list of characteristics (racial, ethnic, etc.), which, as is well known, exclude political beliefs or ideology. In Argentina, where the term ‘genocide’ has nonetheless been adopted, and is commonly used, to refer to the atrocity crimes committed by the 1976-83 dictatorship, there have been particular efforts to develop new understandings of the concept that move beyond this existing legal framing.<sup>133</sup>

Faced with invocation of these new criminal figures, some defence lawyers have reached new lows; cynically arguing, for example, that the otherwise relatively minor crime of illegal disposal or exhumation of remains – which would ordinarily be subject to statutes of limitation, were it not for the context of political violence and crimes against humanity – cannot in fact fall into the latter category, inter alia because what was buried or excavated was not ‘human’ but should be treated as a mere “object”.<sup>134</sup>

An ever more frequent obstacle to the final resolution of cases is excessive delay in the undertaking of pre-sentencing medical assessments, to evaluate the mental state and competence of perpetrators. These evaluations, required by art. 349 of the applicable Criminal Procedure Code, have to be carried out by the SML.<sup>135</sup> Case Rol. 2.182-98, episode “Conferencia

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<sup>132</sup> This type of analysis is partially facilitated by registers of completed cases such as the one created by the Universidad Austral de Chile ([www.archivosdelarepresion.cl](http://www.archivosdelarepresion.cl)). To complete the analysis, criminal complaints, petitions for charges to be brought, first-instance sentences, and other key events in the life of an investigation must also be considered.

<sup>133</sup> The principal referent in this field is Argentine scholar Daniel Feierstein, whose relevant works include the book *Genocide as Social Practice* (Rutgers, 2014; originally published as *El genocidio como práctica social*, Fondo de Cultura Social y Económico, 2007).

<sup>134</sup> Source: report by a human rights lawyer of arguments presented during an oral hearing, in March 2019, in an episode of the ‘Caravan of Death’ case. Name reserved at source’s request.

<sup>135</sup> “A report on the mental faculties of the defendant will be required when he or she is being charged with a crime whose possible sentences under law include the máximo grade of prison sentence... [or] when he or she is ... over 70 years of age” (*El inculpado o encausado será sometido a examen mental siempre que se le atribuya*

II”, for instance, has been pending before the Santiago Appeals Court since 12 June 2017, under reference 829-2017. In February 2018, the Court issued an “urgent” order for medical assessments on a total of 19 perpetrators who had been found guilty in the first instance verdict. The SML initially scheduled the assessments for dates between March and August 2018, up to six months after the ‘urgent’ orders had been emitted. Later, due to personnel shortages, some of them were postponed even further because the relevant SML personnel had to attend court to give evidence. While the case was pending before the Appeals Court, two of those initially sentenced died before a final verdict could be made about ratification of their sentences.

These difficulties play into impunity, insofar as they introduce further delays to the trial of perpetrators. The Supreme Court has raised the issue with the legislature, as for example in *Comunicado 29-2018*, dated 8 February 2018, in which the president of the Supreme Court wrote, to the president of the Senate: “(...) given the scientific role and specialised nature of the SML, it is evident to all that it does not presently have the human and technical resources it needs to meet the requirements made of it: the experience of the justice system is that it is now common for appointments to be offered months after a judicial order has been received”.<sup>136</sup> This same issue was denounced before the parliamentary commission on human Rights and indigenous peoples of the lower chamber, by human rights lawyers Nelson Caucoto and Francisco Ugás. The lawyers asked the commission to call a special session, inviting the Ministry of Justice and Human Rights, the Finance Ministry, and the SML to explain the situation, give information as to the adequacy of the SML’s operating Budget, particularly in mental health, and to detail the measures planned or already being taken to resolve the problem. The commission held a session on 20 January, citing Justice minister Hernán Larraín and SM director Dr. Jorge Rubio to appear alongside the lawyers who had made the complaint. Neither of the officials attended. On 4 March 2019, a new session was held, at which only Dr Rubio was present. He informed the commission that that all 24 internal vacancies advertised between 2013 and 2018 for forensic psychiatrists had had to be declared null due to a lack of qualified applicants. He also reported that 1,024 forensic assessments were pending at that time, across a range of case types (not solely human rights cases): 611 in the Greater Santiago metropolitan district, and 413 in other regions.

Unfortunately, no solution seems to be in hand. There seems to be a lack of recognition on the part of the political authorities, of the serious nature of the problem, combined with a lack of political will to resolve it.

### **3.2.5 Human Rights Cases before the Constitutional Tribunal**

This period has seen a relative decline in the use, or at least the utility, of the Constitutional Tribunal as a mechanism for impunity, a practice that was denounced in previous years’ reports (2016, 2017 y 2018). Defence lawyers continue to bring reiterated, groundless actions alleging unconstitutionality, and the Tribunal is still inclined to suspend further progress in affected cases, pending resolution. Nonetheless, the situation has notably improved when compared to the one

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*algún delito que la ley sancione con presidio o reclusión mayor en grado máximo u otra superior; [o] cuando fuere (...) mayor de setenta años (...)*”.

<sup>136</sup> Corte Suprema, Oficio 29-2018, 8 February 2018, fundamento segundo.

described in our 2018 report, when multiple human rights cases, including the entirety of the caseload of one jurisdiction (Chillán) were suspended. Some Constitutional Tribunal judges still manifest sympathy with defence arguments, and delays have continued to attract criticism, but most of the applications that were pending at the time of our last report have since been completed (and rejected), allowing the affected cases to retake their normal course.<sup>137</sup> Such new applications as have been lodged, have generally been resolved within a more reasonable timeframe and/or without interim suspension of the affected investigation.<sup>138</sup> However, four new applications were admitted in July and early August 2019. Three of them were linked to the case of the aggravated homicide of Carmelo Soria. The applications were made by perpetrators Jaime Lepe Orellana y Sergio Cea Cienfuegos.<sup>139</sup> The fourth was presented by the defence of Óscar Podlech Michaud, in four cases in which he has been charged.<sup>140</sup>

### **3.2.5.1 Cases resolved in, or presented before, the Constitutional Tribunal between July 2018 and June 2019**

Of the 24 cases that were newly presented to the Tribunal during the statistical period corresponding to the present report, 18 remained pending at the end of that same period (ie at end June 2019).<sup>141</sup> Between July 2019 and the close of this edition (late August), all 18 had however been resolved. Fourteen of them were rejected in full.<sup>142</sup> In three more, parts of the applications were allowed.<sup>143</sup> Only in one case was the application allowed in its entirety.<sup>144</sup> Those applications that were allowed in part were directed against the contents of art. 205 of the Criminal Procedural Code, CdPP, which set down how judges are to question witnesses during the investigation phase. The sole application that was accepted in full, in a case over political imprisonment and torture, made reference to art. 78 of the CdPP. In practice, however, the applications that were allowed had no material effect on the cases over which they were made, either because the defence had already been given the case file access that was supposedly in dispute, or because the witness questioning etc. had already occurred. This simply reaffirms the suspicion that the suspension of cases, and consequent delay, are the real objectives sought by defendants and their representatives.

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<sup>137</sup> In his habitual annual address, given on 1 March 2019, the President of the Supreme Court made reference, , to increasing questioning of the role and recent actions of the Constitutional Tribunal by civil society sources, political and judicial authorities, and the co-legislative powers.

<sup>138</sup> Roles 6805 (13 June 2019) and 6985 (10 July 2019).

<sup>139</sup> The actions, all presented on 25 July 2019, were assigned case codes ('rol') 7102 (for the action declared admissible); 7103, and 7104 (for the two actions declared inadmissible).

<sup>140</sup> Rol 7142. Consideration of admissibility was pending at time of writing.

<sup>141</sup> Six more had already been rejected as manifestly unfounded. See the 2018 version of this report.

<sup>142</sup> Roles 3669-17-INA (5-4); 3699-17-INA (5-4); 3929-17-INA (5-4); 3948 (5-3 y 4-4); 3996-17-INA (5-3); 4180-17-INA (8-0); 4210-17-INA (5-3 y 4-4); 4223-18-INA (5-3, y 4-4); 4256-18-INA (6-3); 4512-18-INA (6-2 y 4-4); 4627-18-INA (6-3); 4703-18-INA (8-2 y 7-3); 4807-18-INA (9-0); and 4871-18-INA (7-3), where INA denotes inapplicability.

<sup>143</sup> Roles 3649-17-INA; 4390-18-INA; 4391-18-INA, all rejected in general (by a 5-4 vote), accepted only in reference to article 205 of the Criminal Procedural Code, specifically where it uses the term "secretly" (in regard to questioning of witnesses).

<sup>144</sup> Rol 3681 (6-3 vote).

During the strict statistical period of this report (July 2018 to June 2019, inclusive) 15 new applications were made, two of which were immediately declared inadmissible.<sup>145</sup> Ten of the remaining 13 were rejected, nine in resounding terms. The resolution of each case, ie the time elapsed between presentation and rejection, took between four and five months on average (with the sole exception of case 5952-19-INA, which took eight months, although the respective case was only suspended during half of this time).<sup>146</sup> The relatively swift resolution of the majority of the cases coincided with a period when the Tribunal's president was on annual leave.<sup>147</sup> Action number eleven, Rol 5504, was abandoned due to the death of the appellant. The sole application still to be resolved at time of going to press was one presented in mid-June, in a case in which Judge Carroza is investigating the destruction of Army files.<sup>148</sup> The case remained suspended, pending a resolution of the application. Finally, and falling outwith the strict comparative period of statistical analysis, in July 2019 an application was made in regard to the norms regulating the concession of parole (arts. 9 and 3b of the reformed Decree Law 321), in the case of ex CNI agent Rodrigo Pérez Martínez (rol 6985). The application was admitted, and the ongoing investigation was suspended. Of four more applications made in late July and August, two were immediately dismissed, while two had not yet been examined as to admissibility. Accordingly, no decision had yet been made as to suspension of the originating investigations, and so the only human rights cases where such a suspension was in force at time of going to press were two existing cases, roles 6805 y 6985.

Two new judges joined the Tribunal during the period corresponding to this report, leading to a reorganisation of the composition of the Tribunal's two benches. Judge Marisol Peña completed her appointment to the First Bench on 8 June 2018. In response, Tribunal president Iván Aróstica transferred voluntarily to that bench. The Tribunal's president has the task and of "distributing all cases arising, in an equitable manner between the two Benches"<sup>149</sup>, and from that date on, Aróstica chose to assign every new human rights cases application to his own, First, bench. This led almost without exception to the suspension of the ongoing investigation from which the application had arisen, since the First Bench, with the arrival of Aróstica, contained a majority (three of its five judges) who consistently vote for suspension (Judges Aróstica, Vásquez y Romero). In more recent times the same judges have extended the same treatment to

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<sup>145</sup> The 15 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; 5952-19-INA; 6805-19-INA; 5812-18-INA, and 6447-19-INA. The latter two are the ones that were immediately rejected.

<sup>146</sup> Roles 5189-18-INA (8-2); 5192-18-INA, 5193-18-INA, 5194-18-INA, 5195-18-INA (all by a unanimous 9-0 margin); 5436-18-INA, 5438-18-INA, 5439-18-INA, 5440-18-INA (these four by an 8-1 vote); 5765-18-INA (5-5, resolved in favour of the president's casting vote), and 5952-19-INA (rejected by 5 votes to 4 on 8 August 2019).

<sup>147</sup> During the same period, the Tribunal's interim president assigned application Rol 5952-19-INA to the Second Bench, making this the only application submitted during the period of this report not to be assigned to the First Bench.

<sup>148</sup> Corte de Apelaciones de Santiago, Rol. 1775-2017.

<sup>149</sup> Art. 8º, subsection (b) of the Ley Orgánica del Tribunal. The respective case reference codes are: Roles 4960-18-INA (these two during the chronological period of the 2018 version of this Report); 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; 6447-19-INA; 6805-19-INA 6985-19-INA; 7102-19-INA; 7103-19-CAA (Constitucionalidad de Auto Acordado), 7104-19-CAA, and 7142 (these last five in July and August 2019, thereby falling outside the comparative statistical frame of reference of this report).

applications seeking to paralyse criminal investigations of corruption in the Army. Nonetheless, as mentioned above, the negative results of these suspensions were at least partly alleviated by an increase in the celerity with which applications declared admissible by the First Bench were subsequently resolved – and usually roundly rejected – by a full sitting of the Tribunal.

It is also worthy of note that due to criticism of the negative impact of suspension on human rights case investigations, the Tribunal's Second bench, at least, acceded to lifting the interim suspension of the ten human rights cases that were awaiting resolution before it (these cases having been assigned to the Second Bench before Aróstica began to divert all such cases to the First bench).<sup>150</sup> The lifting of the suspensions allowed the regular courts to continue to investigate and/or try the ten cases in all aspects unaffected by the controversy which was at issue in the application. These factors, taken together, produced the overall improvement mentioned at the outset of this section. These advances are nonetheless potentially reversible given the current configuration of the Tribunal, the manifest personal views of its members on this issue, and the dynamics of imminent change (at the end of August 2019, Aróstica was due to be replaced as Tribunal president by Judge María Luisa Brahm. Elected by vote of the whole Tribunal, Judge Brahm is considered liberal in issues to do with personal freedoms. To date, she has voted consistently to reject the specious arguments presented by defendants in human rights cases.

### **3.2.5.2 The case of Eduardo Frei Montalva**

One of the applications mentioned above was presented on 28 August 2018 in the case for the homicide of former president Frei. Defence lawyers representing former DINA medic Pedro Valdivia presented an application for unconstitutionality with respect to articles 456b, 459, 464, 472, 473, 481, 482, 484, 497, 500 and 501 of the CdPP. The original contentions challenged evidentiary standards (art. 456b), rules of evidence (arts. 459 to 497), other norms about the formal structure of sentences, in particular rules about what they must contain (art. 500) and the obligation for the verdict to state whether the defendant has been found guilty or absolved (art. 501). The impartiality of investigative magistrate Judge Alejandro Madrid, who is in charge of the case, was also called into question. Admissibility hearings were scheduled for 26 September 2018. This represented the first time, since the end of 2017, that the tribunal had chosen to hold such hearings,<sup>151</sup> a welcome development since the admissibility phase allows frivolous or implausible applications to be identified and eliminated, preventing their going before a full sitting of the tribunal. The fact that this phase of consideration admissibility had been bypassed in many of the human rights cases seen since 2018 contributed greatly to unnecessary delays caused by interim suspensions. In the matter at hand, the application was declared admissible, by a 3 to 2 majority, on 27 September, solely in regard to arts. 481, 482 y 484 of the CdPP.<sup>152</sup>

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<sup>150</sup> On 18 July 2018, the suspension affecting case rol. 4703-18-INA was lifted. The same was done on 6 August 2018 for roles 3649-17-INA, 3669-17-INA, and 3699-17-INA. Lastly, on 24 September 2018, the cases relating to roles 4210-17-INA; 4223-18-INA; 4390-18-INA; 4391-18-INA; and 4627-18-INA were reactivated.

<sup>151</sup> The most recent previous occasion was on 28 November 2017, in Roles 3948 (Bautista van Schouwen and Patricio Munita) and 3996 (Operación Cóndor).

<sup>152</sup> By majority vote of judges Aróstica, Romero y Vásquez. Judges Hernández and Silva entered dissenting opinions.

Subsequently, the president of the Republic and the president of both legislative chambers made use for the first time in human rights cases of the attributions granted to them in art. 98 of the organic constituting law of the Constitutional Tribunal. The article allows the co-legislative powers to formulate observations to applications that are declared admissible. The observations submitted by President Piñera criticised the substance of the application, and called for it to be rejected. The application of the CdPP to the case at hand was supported, arguing that it constituted precisely the “due process, applied according to law” that the application alleged had been denied. Calling for a swift resolution of the application, the observations further noted that it did not make explicit in what ways the legal precepts called into question had supposedly produced the constitutional violations that were alleged.<sup>153</sup> The observations submitted by Senate president Carlos Montes, and Jaime Mulet, his equivalent in the lower house, also called for the application to be refused.<sup>154</sup>

The tribunal’s substantive sentence opted by majority vote to reject the requirement, on the grounds that it had not spelt out the ways in which the questioned articles supposedly infringed the constitution (verdict consideration no. 24). It was also critical of the fact that during the hearing of the application before the full sitting of the tribunal, the applicant had “substantially modified the unconstitutionality grounds contained in the application”, substituting them, in effect, with a critique of the supposed lack of sufficient scope for defence in the early stages of the investigation (verdict consideration no. 25).<sup>155</sup> In their dissenting minority vote, Judges Aróstica y Vásquez reaffirmed the position criticised in previous editions of this report, that the old criminal procedure (still applied in human rights cases) supposedly does not offer “the guarantees that a just and rational process would require”.<sup>156</sup> No grounds were offered for this conclusion. Finally, a concurring opinion issued by Judge Romero supported the view that the impugned norms were incompatible with the Constitution, but rejected the application due to defects in its presentation.

### **3.2.5.3 Cases investigated by Judge Mesa: serial litigation before the Constitutional Tribunal**

Our 2018 report observes that many applications for unconstitutionality appear to be carbon copies as regards their legal argumentation, something which runs ipso facto counter to the notion of such applications as a recourse to prevent a certain norm, as evoked in a particular case, from producing effects that run counter to the Constitution.<sup>157</sup> and the end of 2018, this tendency to produce standardised or carbon copy applications began to be seen in a series of

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<sup>153</sup> Presidencia de la República. Formula observaciones que indica. 18 October 2018, pp. 592-594 and ff.

<sup>154</sup> Presidencia del Senado. Formula observaciones. 22 October 2018, pp. 624-628; Presidencia de la Cámara de Diputados. Formula observaciones. 26 October 2018, fojas 650-656.

<sup>155</sup> Constitutional Tribunal. Sentencia de fondo Rol 5189-2018, 9 January 2019.

<sup>156</sup> Ibid., minority opinion of judges Aróstica y Vásquez.

<sup>157</sup> Jaime Bassa, “El Tribunal Constitucional”, in Bassa et. al., *La Constitución chilena. Una revisión crítica a su práctica política*. Santiago, LOM, 2015.

cases overseen by Judge Álvaro Mesa, of the Temuco Appeals Court.<sup>158</sup> Here, we analyse the applications lodged or resolved in this period that proceed from this jurisdiction.

On 31 May 2018, an application was presented in the case for the aggravated homicides of Luis Cotal y Gustavo Rioseco. The application questioned those rules of the Organic Code of Tribunals (COT) in force at the time (1973) which established first instance criminal courts in the region; as well as those which gave powers to appeals courts to designate special investigative magistrates. Although this application was unanimously rejected, 9-0, by a full sitting of the tribunal, the case was on hold for almost 4 months in the interim,<sup>159</sup> something which appears to have sparked copycat initiatives on the part of other defendants in the same case. On the 24 August 2018, a lawyer representing one such defendant presented for actions for unconstitutionality: one in the same case, three in other cases also investigated by judge Mesa.<sup>160</sup> All of the applications were made against art. 8 of Law 19,519 and art. 483 of the CdPP, which regulate the coexistence of parallel criminal systems (the inquisitorial system and its adversarial replacement); and against arts. 45 y 561 of the 1973 version of the COT. At the admissibility stage, the first bench of the tribunal was in favour of admitting the actions, at least in regard to the articles of the COT. The majority decision, passed due to the votes of judges Aróstica, Vásquez and Romero, also resolved to suspend the originating investigations.<sup>161</sup>

The same defence lawyer went on to present for new applications for unconstitutionality, in the same four cases, on 12 October 2018; this time with regard to art. 78(i) of the CdPP. The applications, containing almost identical wording, objected to the secrecy clause that can be used to protect evidence at the investigatory stage, in spite of the fact that the clause was not active in any of the four cases at issue (in two of them, the defence had been granted access to formerly reserved parts of the investigation. In the third, the case was at trial stage, and in the fourth, before the Supreme Court: both settings where the secrecy clause is not applicable). Nonetheless, all the actions were declared admissible, by a 3-2 majority vote. The use of one single template for applications across diverse cases at distinct stages seems to reaffirm their merely dilatory intent. On 16 January 2019 Gonzalo García, acting (subrogatory) president of the tribunal, ruled that two groups of applications should be heard together, on 16 January 2019. The applications at issue were the four made in August over COT regulations, and the four related to art. 78 of the CdPP. The applicants' legal representatives did not even attend the hearing.

In the first set of cases,<sup>162</sup> the tribunal found that the norms allegedly infringed had been incorrectly identified as those which allow for the designation of special investigative

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<sup>158</sup> Under the terms of the redistribution of caseloads carried out by the Supreme Court in January 2017, the same judge also oversees dictatorship-era human rights cases from the neighbouring Valdivia and Puerto Montt jurisdictions.

<sup>159</sup> TC. Rol 4807-2018. Sentencia de fondo 25 October 2018.

<sup>160</sup> The three additional cases were: the torture and/or extrajudicial killings of Bernardo Nahuelcoy, Francisco Porma, Mauricio Huenucoy and Francisco Curamil (at time of writing in pre-sentencing stage, Rol 27.530-A); the extrajudicial killing of Domingo Obreque, before the Supreme Court at time of writing (Rol 5235-2018); and the aggravated homicides of Pedro Muñoz and Eliseo Jara (Rol 57.067).

<sup>161</sup> Judges Hernández and Silva voted for a declaration of inadmissibility.

<sup>162</sup> Roles 5192, 5193, 5194 and 5195.

magistrates, and also criticised the extremely generic nature of the complaint made, amounting to serial litigation allowing a single defence lawyer to paralyse a group of cases with one single application, in spite of numerous differences among the cases in regard to facts and stage of hearing. This first set of applications was judged to be so defective that the verdict, issued on 24<sup>th</sup> January, rejected them unanimously (9-0).<sup>163</sup> The verdict also issued a reproach to the First Bench, noting that the decision to reject on purely formal grounds could have been made at that stage. The second group of almost identical applications, those presented in October 2018 against secrecy clause, were rejected by an 8 to 1 majority on 6 March 2019. The grounds adduced were that the clause had produced no effects on the specific case in which the application was presented; and that the other defects alleged could and should have been challenged during ordinary case proceedings, using the tools and mechanisms set down for these effects in the applicable CdPP.

#### **3.2.5.4 The case of Víctor Jara and Littré Quiroga: impugning the Nuremberg Statute**

Another of the 14 applications mentioned above was made in April 2019, in relation to the investigation of the extrajudicial executions of Víctor Jara y Littré Quiroga. The action, was presented by the defence of Edwin Dimter, found guilty in the first instance verdict. The application challenged the statute of the International Military Tribunal of Nuremberg.<sup>164</sup> It is factually correct that an *obiter dicta*, contained in the first instance verdict as delivered by investigative magistrate Miguel Vásquez, cited the aforementioned statute as part of the *ius cogens* norms which establish the inapplicability of statutes of limitations to crimes against humanity and war crimes. The application nonetheless contained various flaws. As well as being extremely generic in character, it erroneously attributed to the Nuremberg Statute the condition of a “legal precept” valid in Chile. This application, which caused concern at the level of public opinion, was unanimously declared inadmissible on 31 May 2019.

The application produced two observations (opinions concurring with the overall decision, but on the basis of arguments distinct from those accepted by the majority) that are worthy of mention. The first, and most worrying, was presented by judges Aróstica, Vásquez and Romero. It signalled that the inadmissibility decision had been made on the grounds of “errors of form” and a “lack of clear development of the argument”, claiming that this did not prevent recognition of supposed flaws in the legal reasoning of the challenged verdict. These flaws in their opinion included “reasoning based on an international instrument developed in former times (...) and moreover within a criminal code system [the inquisitorial system] whose constitutionality has been implicitly called into question by constitutional and even international jurisprudence (viz. the Palma Salamanca case).”<sup>165</sup> The opinion in effect criticises the judgement of crimes against humanity based on the understanding that such judgement is founded on the IMT statute used

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<sup>163</sup> Constitutional Tribunal, Rol 5192 (incorporating Roles 5193, 5194 and 5195), Sentence of 24 January 2019. The verdict does contain a minority concurring opinion by judge Vásquez which, while agreeing with the overall verdict, argues in favour of the applicability of the norms of the Criminal Procedural Code, following the line taken in cases rol 2991 and 3216.

<sup>164</sup> Rol 6447-19-INA.

<sup>165</sup> Constitutional Tribunal, Sentencia de inadmisibilidad. Rol 6447-19-INA, 31 May 2019, concurring minority opinion by judges Aróstica, Romero and Vásquez, considerando no. 9.

at Nuremberg, which is not the case. It also questions, in passing, the legal reasoning found in the guilty verdict already emitted in the Víctor Jara and Littré Quiroga case. Taken together with other actions, described above, this seems to confirm that these three judges tend to support the position of defendants at all costs, without taking due or correct account of international treaty law, nor of the limits which the constitution itself sets down on the resort to applications of constitutionality.

The second observation, by judges Hernández and Silva, correctly acknowledged that the impugned norm is not a legal precept. It also observed that the IMT statute “has only been employed as one amongst various elements” for classifying the facts of the matter as crimes against humanity,<sup>166</sup> and identified the complainant’s real intention as to impugn a judicial resolution making such a classification. The observation also found that the application had no merit due to its unduly abstract nature.

### **3.2.6 The Constitutionality of Rules of Evidence**

As can be seen in the preceding sections, arguments that have found echo in minority votes within the Constitutional Tribunal include those which impugn the constitutionality of the application of CdPP rules regarding the assigning of probatory value to evidence. Such arguments attempt to give juridical weight to the allegation, commonly formulated by perpetrators’ legal defendants or their apologists, that they have been found guilty on the basis of insufficient evidence. This argument proceeds as follows: affirming, firstly, that the CdPP sets out a system of legal proof that pre-determines the value to be attributed to distinct types of pieces of evidence; secondly, that by so doing, the CdPP violates the principle of discretionary evaluation of evidence; thirdly, that this discretion constitutes a necessary element of any rational and just process. Similar reasoning is applied to a range of probatory rules set down in the CdPP: in particular, art. 488, which regulates the construction of judicial presumption, setting down minimum requirements for indicators that can be used as a basis for presumption; and arts. 481 and 482, which regulates the probatory value of confessions. The majority decisions emitted by the Constitutional Tribunal rejecting these propositions correctly deny that discretionary valuation of proof is a constitutional principle required for due process. They also highlight the ways in which the particular dispositions that are impugned by the defence in fact impose safeguards designed to ensure reliability and solidity. The dispositions thereby contribute to the fairness of the process, making them similar in essence to the dispositions that should be applied in a system of free rational valuation or healthy critique.

Paradoxically, minority votes favourable to applications have been founded on arguments that contradict those made by perpetrators or defendants. These votes have sustained, for example, that the problem in fact lies in the attributions that these dispositions give to the judge to “subjectively value” elements of proof, locating the appreciation of probatory value “in the person of the judge, since for the Code [CdPP], the adjudicator’s intimate and ineffable conviction

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<sup>166</sup> Constitutional Tribunal, Sentencia de inadmisibilidad, Rol 6447-19-INA, 31 May 2019, concurring minority opinion by judges Hernández and Silva, considerando no.3.

is sufficient”.<sup>167</sup> This argument is doubly fallacious. First, it overlooks the fact that the probatory regulations of the CdPP require that the ‘inner’ conviction needed for a guilty verdict be justified with reference to proof that satisfies legal requisites. Second, it fails to recognise that the rule of culmination of the probatory architecture of the CdPP, art. 456b, cedes to the adjudicator freedom to absolve, even when a particular element of proof satisfies the requisites to be considered as full proof, if he or she has other reasons to doubt the effective existence of the crime, or of the participation of the accused therein. As we have seen above, section 3.2.3, it is precisely this freedom to absolve that has tended to be interpreted in subjective and extremely discretionary terms, leading the Supreme Court to (self) limit the ambit of control that it allows itself over the justification of absolutions conceded by lower courts. Only in the case of guilty verdicts has the sufficiency of the evidentiary foundation been submitted to scrutiny.

### **3.3 Milestone Cases: Paine, the “*Quemados*” case, and the Frei case**

In the immediate aftermath of the coup, uniformed police and civilian accomplices in the rural community of Paine executed or forcibly disappeared 70 men. Truck driver Juan Luzoro led a group of civilians who took active part in the transport and execution of the victims. In the episode known as “Paine-Collipeumo”, five men were shot and their bodies were dumped in a canal. Only one of them survived. The first instance sentence, passed on 31 March 2016, classified the crime as especially aggravated homicide, constituting crimes against humanity.<sup>168</sup> Luzoro was sentenced to 20 years, as a material author. The sentence was ratified by the Supreme Court, making Luzoro the first civilian not enrolled in the security services to be handed a custodial sentence for crimes against humanity.<sup>169</sup> He is currently serving his sentence in the Colina I prison. An analysis of the case and its implications was published in the 2018 edition of the Human Rights Yearbook (*Anuario de DDHH*) of the Universidad de Chile.<sup>170</sup>

On 21 March 2019, Judge Mario Carroza handed down the first instance sentence in case Rol. 143-2013, the so-called “*quemados*” incident, which investigates the homicide of Rodrigo Rojas De Negri and the attempted homicide of Carmen Gloria Quintana Arancibia. The two young people were soaked with petrol and set on fire by members of a military patrol, during a national day of protest on 2 July 1986. After the horrific attack, the victims were abandoned 21 km from the site of the crime. Rodrigo died later in hospital, having suffered second and third degree burns over 65% of his body. Carmen Gloria survived, with burns to 62% of her body, including extensive facial injuries. The case was supposedly investigated during the dictatorship, firstly by the ordinary justice system then later by the military courts. In August 1989, the Second Military Court of Santiago found Pedro Fernández Dittus guilty of misdemeanour homicide and serious bodily harm, imposing a suspended sentence of only 300 days’ detention. On appeal, in January 1991, the Court Martial absolved Fernández Dittus for the injuries caused to Carmen Gloria

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<sup>167</sup> Respectively, Constitutional Tribunal Sentence Rol 4210-17, 2 January 2019, considerando XV and Sentence Rol 4627-18, 11 December 2018.

<sup>168</sup> Sentence by judge Cifuentes, of the San Miguel Appeals Court, Rol. 04-2002(B).

<sup>169</sup> Corte Suprema, Rol. 1.568-2017, 16 November 2017.

<sup>170</sup> Francisco Jara Bustos and Francisco Ugás Tapia, “Caso Paine, episodio Collipeumo, contra Juan Francisco Luzoro Montenegro: el primer civil condenado por crímenes contra la humanidad en Chile”. *Anuario de Derechos Humanos*, (14), Santiago, Universidad de Chile, 2018, pp. 167-179.

Quintana, a decision that was ratified by the Supreme Court in 1994. In a parallel case, the same Supreme Court – whose sitting members included former Army Auditor General Fernando Torres Silva, today in prison for crimes against humanity – emitted a verdict in December 1994. This verdict confirmed the first instance finding in which Fernández Dittus had been sentenced as material author of misdemeanour actual bodily harm against Carmen Gloria Quintana, and the misdemeanour homicide of Rodrigo Rojas. The total custodial sentence was only 600 days.

The new, more recent, investigation was able to make use of the testimony of an ex-conscript who took part in the crime, to establish that other perpetrators had also been involved, and/or had ensured a coverup after the fact. The new first instance sentence imposed ten year penalties on Julio Castañer González, Iván Figueroa Canobra and Nelson Medina Gálvez, as material authors of the aggravated homicide of Rodrigo Rojas, and attempted aggravated homicide of Carmen Gloria Quintana; sentencing Luis Zúñiga González, Jorge Astorga Espinoza, Francisco Vásquez Vergara, Leonardo Riquelme Alarcón, Walter Lara Gutiérrez, Juan González Carrasco, Pedro Franco Rivas and Sergio Hernández Ávila to 3 years and 1 day as accomplices. Two more agents were absolved. One of these was Fernández Dittus, since the court chose to consider the new prosecution as double jeopardy, even though it recognised that the initial case did not meet even minimal standards of impartiality. The case is still pending before the Santiago Appeals Court. The Association of Relatives of Victims of Politically Motivated Execution, which has standing in the case, has commissioned an *amicus curiae* brief on the application of double jeopardy.<sup>171</sup>

On 30 January 2019, judge Alejandro Madrid emitted a verdict officially establishing that the death of former President Eduardo Frei Montalva was a homicide. Medic Patricio Silva Garín was sentenced to ten years in prison as a material author; Raúl Lillo Gutiérrez, civilian agent of the CNI, and Luis Alberto Becerra Arancibia, Frei's driver (and a CNI informant), to seven years as co-authors. Doctor Pedro Samuel Valdivia Soto was sentenced to five years as an accessory, and forensic pathologists Helmar Egon Rosenberg Gómez and Sergio González Bombardiere, to three years as accomplices after the fact. Only Rosenberg and González were given non-custodial sentences. The verdict draws on various forensic procedures to conclude that the former president was exposed to thallium and mustard gas, compromising his defences and hastening to his death from septic shock, provoked in part by a second, high-risk, surgical intervention “which does not appear to have been clinically justified”.<sup>172</sup> The verdict also gives an account of an accumulation of abnormal circumstances surrounding the hospitalisation of the former president, which corroborate the thesis that his death was wilfully procured. The levels of expectation generated over the course of the investigation, and a series of partial press accounts of forensic results and other proof, meant the verdict was bound to be controversial. While it is common for perpetrators and their immediate circles to criticise verdicts in human rights cases, in this case the doubts extended even to circles close to the victim. Beyond the detail of the case, the situation invites reflection on the difficulties faced by cases worked under the old,

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<sup>171</sup> It should be noted that in 2010 the Supreme Court disregarded the outcome of a similarly flawed previous verdict, delivered by a military tribunal over the killings of the Vergara Toledo brothers, declaring it to have been a mere “simulacrum” of justice (Case Rol. 7.089-2009).

<sup>172</sup> Rol 7.981-B, Considerando XIX.

inquisitorial system in creating shared public truths. In the absence of a courtroom trial moment, during which the main proofs and arguments are presented orally and in public, inquisitorial systems have to make do with long written sentences, which are difficult to read and comprehend. In this case, the verdict consists of 811 pages, 600 of which are given over to the enumeration and description of the 406 pieces of evidence that were finally classed as relevant. Improving the communicability and comprehensibility of sentences of this sort presents a challenge to both the judicial branch, and academia.

### **3.4 Cases with an international dimension: the extradition of Adriana Rivas**

Adriana Elcira Rivas González, alias “Chani”, is a former DINA agent and sometime secretary of its director, Manuel Contreras. Her extradition was requested by the Chilean courts in 2014 from Australia, where she has resident status. Rivas has been charged as co-author of the aggravated kidnap (enforced disappearance) of seven people, in two episodes of the *Calle Conferencia II* case. She went on the run in 2012, when she was on bail and supposedly forbidden from leaving the country. An arrest warrant issued in March 2012, and reiterated in August of the same year, declared her to be a fugitive from justice and placed the case against her temporarily on hold. Chile’s detective police, the *Policía de Investigaciones*, PDI, Minister establish that she was in Australia, leading to the issue of an international arrest warrant in August 2013. Her presence in Australia became public and notorious in September 2013, when she gave a televised interview to the Australian SBS news channel. In it, she justified the use of torture to “break people”, and said that she had been helped to escape from Chile, via Argentina, back to Australia. Only in February 2019 was she detained by the Australian police. In July of the same year, she was denied bail. At the time this report went to press, a definitive resolution of the extradition was pending.

### **3.5 Agents (perpetrators)**

#### **3.5.1 Prisoners: access to data on numbers, ages, and places of reclusion**

For over two years now, the Observatorio has received no new information about the number and status of persons sentenced and imprisoned for crimes against humanity, from any of the official sources that at one time or another provided this data (chiefly, the governmental Human Rights Programme, now named the Human Rights Programme Unit). A range of organisations and individuals, including the journalist Pascale Bonnefoy and the memory site Londres 38, have had to repeatedly fight lengthy battles to acquire lists of prisoners, via resort to repetitive and time-consuming appeals to national transparency body the Consejo de Transparencia, CPLT. All such requests are routinely appealed by the prison service before the courts, further delaying the handover of lists which are already out of date. In the most recent example, on 28 March 2019, the CPLT found partially in favour of a habeas data petition submitted by the director of Londres 38 against the prison service (*Gendarmería de Chile*). Although the decision upheld the privacy of data regarding those who had already served all pending sentences against them, it found that in regard to current prisoners, the country’s Constitution specifically requires that “those in charge of prisons may not receive anyone in the capacity of an arrested person,

detainee, defendant, or prisoner, unless there exists a record of the corresponding order, emitted by a proper authority, in a register that shall be public”.<sup>173</sup>

The CPLT also declared it to be a matter of public interest “for it to be made known whether persons sentenced by a court of the Republic to custodial sentences for crimes that they have committed, are effectively serving those sentences”. It thereby rejected the argument of the prison service, whose contention was that the unwillingness of the 120 current inmates of the Punta Peuco prison (which houses the majority of those sentenced for crimes against humanity) who had been consulted by the service, to feature on any such list was sufficient grounds for withholding the information. The CPLT’s finding further noted that an essentially similar decision had been emitted on at least three previous occasions.<sup>174</sup> It also affirms the principle that the ages of those behind bars are relevant and should be notified, since this allows independent monitoring of the correct concession of sentencing benefits, some of which are age-dependent. In passing, the Council made mention of a range of judicial sentences supporting its position; in particular, one by the Santiago Appeals Court which was reiterated a month after the Council’s decision. The Supreme Court meanwhile declared inadmissible a complaint formulated by the prison service on the issue, although the rejection was based on matters of form rather than substance.<sup>175</sup>

The new human rights coordination office of the judicial branch has also signalled that data about sentences presently being served is, in its view, a matter of public interest, not least because it allows for societal confidence in the efficacy of criminal justice. However, the office is not presently in a position to include this information amongst the data it produces. Consulted on the point, the human rights Subsecretariat which oversees the work of the human rights programme unit, would only say that “on this occasion”, no response would be forthcoming.<sup>176</sup> Regarding the detailed information on cases and outcomes that the programme unit previously produced, we were informed that once a new IT system is operational, “there will be an assessment of the best formats in which to publish such information as is pertinent”.<sup>177</sup> For the present, the institution’s webpage offers only a series of summary reports, covering the period from 28 October 2016 to 14 March 2017. The summaries consist mainly of HTTP listings linking to copies of the main judicial verdicts of each period, information which is already available via the web page of the judicial branch. A short new summary is added, and the whole document is then uploaded in a format that is rendered illegible by many common web browsers. The

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<sup>173</sup> Art. 19, N° 7, subsection (d) of the Constitution, cited in Council for Transparency (CPLT). Decisión Amparo Rol. C4086-18, 28 March 2019, Considerando no. 5.

<sup>174</sup> Decisions in petitions Rol C1415-11, resolved 15 March 2011; Rol C1214-14, resolved 15 October 2014; and C419-18, resolved 29 May 2018.

<sup>175</sup> The Court found that the prison service (Gendarmería) does not have the independent legal standing required for presenting a petition of this sort, and should have instead been represented by the Consejo de Defensa del Estado. Corte Suprema. Rol. 11.560-2019. 20 May 2019.

<sup>176</sup> Written report provided during a face to face meeting on 21 June 2019.

<sup>177</sup> Idem.

information therefore offers no added value over bulletins already published by FASIC, or indeed by the Observatorio.

Accordingly, we once again find ourselves unable to supply reliable information on this issue. From the perspective of the right to justice and the right to truth, it is unacceptable that such important information should be denied time and time again, despite numerous judicial decisions finding that it should be in the public domain. We are therefore grateful to the judicial branch's national coordination office for their statement of intent, and we exhort the prison service and the human rights programme unit to take similar steps to initiate or recommence the proactive, periodic publication of this data. Only in this way can the national community and universal human rights system have confidence in domestic Chilean justice, and be enabled to carry out the monitoring function that is proper to external actors.

One peculiar situation arising came in late 2018, when a complete copy of a report requested from the Ministry of Justice and human rights by UDI member of parliament Osvaldo Urrutia appeared on the website of the lower legislative chamber. The document, accompanied by a copy of the memorandum sent from the undersecretary of justice to the lower chamber, consisted of three annexes providing individualised information, even about prisoners now deceased. Each page was headed with the legend "reserved [ie restricted] information". Annex one listed the names, side of reclusion, number and tariff of sentences, date of imprisonment and projected release date, date when application for parole will be possible, and even evaluations of conduct behind bars, for a total of 174 perpetrators who were in prison on the date the report was produced (which is not specified, but can be deduced to be July 2018).<sup>178</sup> Annex 2 provides data on 18 individuals who died serving sentences, and annex 3 details each of 475 applications for parole or similar made between 2015 and 2017, adding, where relevant, the reasons why the benefit was denied. The outcome is that the actions of a parliamentarian who has made no secret of his open sympathies for perpetrators prompted the publication and free circulation of information which they themselves had insisted should be kept out of the public domain.

Meanwhile, on 29 October 2018, the newspaper *La Tercera* revealed that the entirety of the 33 requests for parole made by inmates of Punta Peuco in the most recent round of applications, had been turned down. The grounds were that the applicants could not be considered "corrected nor rehabilitated (...) since the accompanying psychological evaluations establish that they do not express acknowledgement of the crimes committed."<sup>179</sup> These decisions were the product of the first new round of applications after the so-called "Supremazo" of mid-2018, when the criminal bench of the Supreme Court allowed habeas corpus writs presented by seven incarcerated perpetrators, leading later to the concession of parole to five of the seven. The decisions caused national and international controversy, even leading to an unsuccessful attempt to impeach the judges responsible (see our 2018 report). They also gave rise to the introduction of a new law, Ley 21.124, which since January 2019 has provided for additional requisites to be

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<sup>178</sup> Ord. N° 5081, dated 22 August 2018, and three accompanying appendices. On file with the Observatorio.

<sup>179</sup> *La Tercera*: "'No están corregidos para la vida en sociedad": Niegan libertad condicional a los 33 reos de Punta Peuco que postulaban al beneficio". 29 de octubre de 2018.

applied if parole is to be conceded to perpetrators of crimes against humanity (see above, section 3.2.2).

### 3.5.2 Guilty Verdicts

**Fig. 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 2019 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
<b>Number of cases completed before the Supreme Court</b>	<b>23</b>	<b>18</b>	<b>4</b>	<b>12*</b>	<b>44**</b>	<b>58°</b>	<b>55*</b>	<b>37*</b>	<b>44°</b>
<b>Total absolutions</b>	12	12	0	10	26	10	44	4	154
<b>Total convictions</b>	84	49	11	49	159	122	212	102	128
▪ Number of custodial sentences	34	13	5	18	132	81	179	67	113
▪ Number of non-custodial sentences	50	36	6	31	27	41	33	35	15
<b>Total number of discrete individuals affected by convictions and/or absolutions</b>	<b>64</b>	<b>48</b>	<b>11</b>	<b>53</b>	<b>103</b>	<b>98</b>	<b>155</b>	<b>78</b>	<b>281</b>
▪ Number of those agents convicted in at least one case	52	40	11	43	73	88	127	68	<b>77</b>

\* One of these dealing solely with civil liability

\*\* Four of these dealing solely with civil liability

° 16 of these dealing solely with civil liability

\* Six of these dealing solely with civil liability

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

The list of sentences and individuals sentenced in the 28 criminal cases finalised in the Supreme Court in this period shows two concessions of half statutes of limitation and a high number of absolutions (the total number of which is, for the first time, greater than the total of findings of guilt). Those findings of guilt however produced a high proportion of custodial sentences (88%, the highest proportion in the nine consecutive years for which we have produced comparative results). Three quarters of the cases seen produced at least one guilty verdict, while in half of the 28 cases, all sentences imposed by the verdict were custodial in nature. Ten cases however concluded without a single custodial sentence, five due to the concession of non-custodial alternatives, and the other five because no guilty verdict was brought.

### 3.5.3 Deceased and Fugitive Perpetrators

According to press sources, at least seven perpetrators of crimes against humanity died during this period, in prison and/or having been sentenced: Altez España Risiere Del Prado, ex PDI and ex DINA, convicted of the enforced disappearance of Antonio Patricio Soto Cerna; ex-Colonel Sergio Carlos Arredondo, convicted in the Caravan of Death case; former police officer Leonidas Bustos San Juan, aged 87, convicted of the homicide of urban shanty town dwellers in Quilicura; Armando Cabrera Aguilar, serving life for the murder of Tucapel Jiménez, among other crimes; former DINA agent Carlos López Tapia, sentenced to over 87 years' imprisonment for 14 enforced disappearances and three extrajudicial executions; former Air Force colonel and *Comando Conjunto* agent Edgar Cevallos Jones, freed from prison for health reasons having been convicted of the torture, leading to death, of general Alberto Bachelet (father of exPresident Michelle Bachelet), and former police officer José Luis Guzmán Sandoval, convicted of the homicide of Nicanor Moyano Valdés.

Over the same period, four former agents who were fugitives from justice, were captured: two in Chile, two overseas. The period also saw the detention, pending extradition hearings, of Adriana Rivas (see above). The two on-the-run agents tracked down in Chile were Juan Eduardo Rubilar Ottone, ex Army Colonel convicted of four counts of homicide, captured in the town of Pucón in July 2018, and Demóstenes Cárdenas Saavedra, former DINA agent captured in November 2018 after two years on the run. Cárdenas was sentenced in 2016, for the enforced disappearance (kidnap) of four people. In July 2018, Argentinian federal police detained Sergio Francisco Jara Arancibia, convicted in Chile in 2017 for two homicides. On 4 June 2019, former military officer Walter Klug was detained in Italy, pending the outcome of an extradition request from Chile, where he has an outstanding ten-year sentence for kidnap and murder. In May 2019, Hartmut Hopp was freed of all charges by the German justice system, two years after his extradition to Chile, where he was convicted of the sexual abuse of minors, was refused. The German prosecutor decided that there was insufficient evidence to charge him with either sexual abuse or human rights violations, despite his long career as right hand man of paedophile and dictatorship collaborator Paul Schaefer, the now deceased cult leader of the notorious *Colonia Dignidad*.

### 3.5.4 Denunciations of supposed ill-treatment and 'persecution' of perpetrators

On 5 July 2019, the Comptroller General's office published its report of an investigation triggered by denunciations presented by well-known dictatorship sympathiser and former UDI congressman Jorge Ulloa. Ulloa alleged irregularities in the prison service in relation to post-sentencing benefits and hospital visits for perpetrators imprisoned in Punta Peuco.

The report found gaps in the provision of rehabilitation workshops and some administrative procedures, but found no merit in any of the allegations that prison regulations had been broken in ways that were detrimental to inmates.<sup>180</sup> Meanwhile, in August 2019 the self-styled "Military and Police Human Rights Observatory", in practice an organisation that defends perpetrators, took advantage of a speech by the President of the Supreme Court to launch a delirious attack

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<sup>180</sup> Comptroller General's Office (Contraloría General de la República), "Informe de Investigación Especial No 437-2017 Gendarmería de Chile sobre eventuales irregularidades - julio 2019". 5 July 2019.

on the process of justice for human rights violations. The group called into question, with no evidence or grounds, the “ethical credentials” of the SML, for emitting technical-forensic reports which the group considers prejudicial to the perpetrators they defend. Unfounded accusations that investigative magistrates had “failed to apply the law” were also made. The statement revived old resentments over an incident in 2017 in which judge Arancibia quite properly ordered the arrest of a convicted perpetrator who failed to present himself on the date he and his defence had negotiated to begin serving his confirmed sentence. The (informal) procedure whereby perpetrators are allowed to stipulate or propose dates at their own convenience is itself a significant concession, rarely if ever made available to other convicted criminals. Ironically, to bolster its unfounded accusations of “inhuman” treatment, the association appended to its mailshot, a series of letters and reports containing personal and medical information of a much more sensitive nature than data that perpetrators have themselves attempted to keep out of the public domain (see section 3.5.1, above).<sup>181</sup>

### **3.5.5 Economic Complicity with the Chilean dictatorship**

The period of this report saw the publication of the book *Complicidad económica con la dictadura chilena: Un país desigual a la fuerza*,<sup>182</sup> analysing economic complicity with the dictatorial regime. Below, the book’s co-editors present some of the key arguments presented in the text.

Chile’s military coup, the consolidation of the Pinochet regime, and the atrocious crimes perpetrated by the dictatorship were utilised to create the conditions for the implementation of neoliberal economic policy.<sup>183</sup> Dictatorship-era rationality was fundamentally economic in nature, which means that any complete historical narrative must take into account the often-ignored matter of the responsibility of economic actors. The concept of “economic accomplices” stretches beyond solely the web of corruption and illicit enrichment revealed by the Riggs case investigation. Complicity denotes, rather, all the contributions that paved the way for the commission of crimes or made them easier.<sup>184</sup> These contributions came from private as well as public companies, as is demonstrated by ongoing criminal investigations of the fishery company Pesquera Arauco,<sup>185</sup> or the LAN Chile airline.<sup>186</sup> A wide range of practices that fall under the heading of collusion include incitement of the repression and killing of regime opponents; lending premises and vehicles used for torture and enforced disappearance; providing financial assistance, manipulating press reports and developing arguments to justify repression. Economic resources were also used to generate support for the dictatorship among powerful actors, by way of tax incentives; industrial, forestry, and extractive subsidies; prison, taxation and monetary

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<sup>181</sup> Electronic mail with the subject line “Humanising the Legal Profession (‘Humanizar la Profesión de Abogado;’); which was circulated on 20 August 2019, with attachments including a letter to the Supreme Court and copies of medical reports from Army and SML sources, relating to an individual currently serving a prison sentence for crimes against humanity. On file with the Observatorio.

<sup>182</sup> Juan Pablo Bohoslavsky et. al. (eds.), *Complicidad económica con la dictadura chilena. Un país desigual a la fuerza*, Santiago, LOM, 2019.

<sup>183</sup> Juan Pablo Bohoslavsky, “La complicidad en contexto: ¡Es la economía, estúpido!”, in Bohoslavsky et. al. (eds.), op.cit., pp. 25-43.

<sup>184</sup> Comisión Internacional de Juristas, *Corporate Complicity and Legal Accountability*, Ginebra, vol. I, 2008, pp. 9.

<sup>185</sup> Karinna Fernández and Magdalena Garcés, “Los casos de la Pesquera Arauco y Colonia Dignidad”, en Bohoslavsky et al (eds.), op. cit., pp. 389-404.

<sup>186</sup> Informe de la Comisión Nacional de Verdad y Reconciliación (Rettig Report’), Tomo 2, Santiago, 1996, pp. 722-7.

policy, and the privatisation of state companies. The common denominator of these policies was economic benefit for elites and national or transnational capital, at the cost of increasing inequality.

A closer look at these dynamics – which included, for instance, the incorporation of business sector representatives directly into the supposedly technical corps providing expert advice to the dictatorial regime – betrays a blurring of cause and effect. Did the dictatorship extend economic benefits to business sectors in order to prop itself up in power; or did economic elites support and promote the coup so that the military would implement policies favourable to their interests? The question leads us to re-examine our suppositions about who was the accomplice, who the protagonist. The commission of economic crimes that benefited civilian elites and the military, was a tool for the strategic distribution of resources to buy loyalty. At the same time, economic entities such as chambers of commerce publicly supported the dictatorship and kept silent about crimes against humanity.<sup>187</sup> The complicity of some media sources, think tanks, and academics is explained not only by political and ideological affinity, but also by traffic in material benefits.<sup>188</sup>

The macro-level correlate of these micropolitics was a radical redistribution of wealth away from the working class toward business elites, translating into a brutal increase in inequality. Resulting discontent was contained via state violence toward trades union leaders and a substantial weakening of the power of collective negotiation, resulting in deterioration of working conditions.<sup>189</sup> Counter to a strong prevailing tendency of overall fiscal restraint, police and defence spending increased their share of public spending from 14.9 %, in 1969, to 23.3%, in 1982. Social spending dropped over the same period.<sup>190</sup> The underlying logic of use of state resources is clear: financially sustaining an efficient bureaucratic-repressive apparatus to allow for the implementation of economic policies whose regressive nature generated social and political resistance.

As we have seen above (section 1.1.2), the Chilean agenda in truth, justice, reparations and institutional reform has focused almost exclusively on crimes involving bloodshed. This emphasis has led to marginalisation of the role, and possible responsibilities, of economic accomplices. Debate about the economic rationale at the heart of the regime has been limited to particular cases, such as revelations about the corruption practised by the dictator and his relatives. Occasional breakthroughs in holding economic actors to account for their responsibility in crimes of enforced disappearance and execution, such as the successful prosecution of Francisco Luzoro,

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<sup>187</sup> Rodrigo Araya, “El apoyo de las cámaras empresariales a la dictadura”, in Bohoslavsky et al, (eds.), op. cit., pp. 209-224.

<sup>188</sup> Bohoslavsky, op. cit., p. 28.

<sup>189</sup> Ángela Vergara and Peter Winn, “Los empresarios hacen lo que quieren: sindicatos y trabajadores bajo la dictadura de Pinochet”, and Daniela Marzi, “Derecho sindical: la antisindicalidad como triunfo neoliberal”, both chapters from Bohoslavsky et al (eds.), op. cit., pp. pp. 287-301 and 303-334.

<sup>190</sup> On military spending: Thomas Sheetz, “Gastos Militares en Chile, Perú y la Argentina”, *Desarrollo Económico* 25, 1985. On social spending: Jorge Marshall, “El Gasto Público en Chile 1969-1979”, *Colección Estudios CIEPLAN*, 51, 1981, p.18. For labour market and social spending indicators between 1970 and 1990, see Javier Rodríguez, “Promover y asegurar la desigualdad: las consecuencias distributivas de la dictadura”, in Bohoslavsky et al (eds.), op. cit., p. 187.

former president of the powerful truckers' association in Paine, or of executives of the CMPC paper mill, have been isolated instances.

A full account of the dictatorship would require consideration of the responsibility of economic accomplices, the role of businesses and the business class, and the economic policies that were pursued, making links to the current social justice agenda and asking to what extent dictatorship-era policies and their outcomes, are reproduced in the democratic period. Accountability is a key component in the consolidation of justice and democracy, and requires a broader frame of reference than the criminal law. This is particularly evident if we consider the current social, economic and political landscape, much of it shaped and imposed by the dictatorship, the legacy of which still weighs down Chilean society.<sup>191</sup>

### **3.6 Key actors and institutions in transitional justice matters**

#### **3.6.1. Human Rights Programme Unit**

In May 2019, lawyer Mauro Torres took over as new head of the Human Rights Programme Unit of the Human Rights Subsecretariat of the Ministry of Justice and Human Rights, bringing to an end a situation of uncertainty that had persisted since early 2018, when the office's then Executive Secretary was suspended, pending the outcome of a disciplinary procedure.<sup>192</sup> Although members of the legal team stood in as coordinators of the legal team, and an interim director was installed, the situation clearly restricted the potential for decisionmaking and strategic planning. Those of us who follow Chile's transitional justice trajectory closely from a non-state perspective undoubtedly missed the levels of fluid communication and active public diffusion of the office's work that had been put into place in former times. The definitive resolution of the situation reassigned the post held by the person who was suspended, freeing a space at the requisite level to allow the naming of a new head of the office. It is to be hoped that this allows the Unit to recover its previous position as a reference point for those of us who lobby for the state to fulfil its duty to be a protagonist in truth, justice, reparation and guarantees of non-repetition.

At the beginning of March 2019, the Programme Unit did not appear to present oral arguments in favour of a petition for charges that the Unit itself had submitted. Since the defendant is former general Bruno Villalobos, ex-director of the uniformed police, Carabineros, this omission was heavily criticised by human rights sectors and by congressman Miguel Cristi. The criticism was further accentuated when the outcome of the hearing became known, as the Appeals Court chose to reject the petition, overturning the charges. According to press reports, the decision not to appear was considered justified because other parties to the case would be arguing on behalf of the motion.<sup>193</sup> In practice, those other parties were lawyers representing relatives of the victim, a student who was tortured and murdered in 1985. The actions of private casebringers ought not to be placed on a par with the position that the state is duty bound to take in the face

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<sup>191</sup> Julio Pinto, "Chile actual: genealogía de un paraíso empresarial", in Bohoslavsky et al (eds.), op. cit., pp. 455-475.

<sup>192</sup> The procedure was finally resolved in February 2019. Irrespective of the outcome of appeals that were ongoing at time of writing, the person concerned will not be returning to the Unit.

<sup>193</sup> El Mostrador: "Programa de DDHH del Ministerio de Justicia justifica ausencia en alegatos para mantener procesamiento a Villalobos porque pensaba que 'otros irían'". 7 March 2019.

of any serious crime, particularly crimes against humanity, whose criminal persecution is obligatory. The force and meaning of state action over these issues does not reside solely in the achievement of a particular case outcome: it also lies in the communicative purpose served when the social body, as represented by the State, expresses repudiation of what has been done.

In June 2019 the Observatorio held a meeting with the Undersecretary of Human Rights, her chief of staff, and the new head of the Programme Unit, to discuss requests for information submitted for the purposes of this report, as well as queries submitted at various points since late 2018, that had gone unanswered. The meeting was followed up with e-correspondence.<sup>194</sup> We were told that, of the three staff members added to the team in 2017, in principle to strengthen the search for the disappeared (see 2017's edition of this report), one is instead preparing a report on all state actions in truth, justice and reparations since 1990, due for publication at the end of 2019. The other two are not preparing a National Search Plan, a promise made under the original published version of the National Human Rights Plan which has now been abandoned. Instead, the team members are embarked upon a "set of actions" to support the activities of the courts in judicially-framed search, including taking part in the Interinstitutional roundtable described above. We were also informed that the National Human Rights Plan mentioned above has never been technically valid or in force, despite which, the current administration affirmed that it was working towards the same goals enunciated in the document as published.<sup>195</sup> We were further told that, although work continues to be done towards the production of an accurate and consolidated number and list of persons recognised by the state as having been disappeared, "no updated figure is yet available". For questions relating to the structure and architecture of search, we were referred to the official report presented before the respective UN Committee (see above). This response in effect confirms that no role for civil society participation is contemplated beyond that of channelling information to the judicial branch, directly or via the Subsecretariat. Finally, we were assured that "the State is seeking to intensify its efforts to search for the disappeared", although in the absence of a National Plan or any channels for genuine participation, it is difficult to see what these intensified efforts consist of.

Consulted as to official perceptions of transitional justice advances in the period, the Undersecretary made reference to the consolidation of the area of projects and memorials (with the

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<sup>194</sup> Face to face meeting held on 21 June 2019, subsequent electronic communications received on 15 and 21 July 2019.

<sup>195</sup> In the face to face meeting mentioned above, and in the followup communication received on 15 July 2019, we were told that "no National Human Rights Plan is currently, or has ever been, in force" (*'no existe un Plan Nacional de DDHH vigente, ni nunca ha existido'*), with the explanation that the version published by the previous administration lacked the Comptroller General's *nihil obstat* without which the respective Presidential Decree is not fully valid. We were also told that the updated (modified) plan prepared by the present administration had not, as of 15 July, been through this process; but that nonetheless none of the Plan's original goals had been modified during its updating, and interim work towards the Plan's objectives had continued meantime, "on a good faith basis" (*'actuando desde la buena fe'*). Sources: as above, preceding note. After the original version of this report went to press, we were told that the new Presidential Decree, Decreto Supremo no. 368, dated 9 July 2019, had been submitted to the Comptroller General's office on 5 September 2019, with a resolution expected by October. The contents of the modified text, available from [https://planderechoshumanos.gob.cl/files/plan\\_v2.pdf](https://planderechoshumanos.gob.cl/files/plan_v2.pdf), is discussed in other chapters of this Report and will be analysed in future Observatorio bulletins and reports.

hiring of more staff), and the new IT system referred to above, which has been in construction since April 2019. In the legal area, the Unit reported that it was party to a total of 817 criminal investigations, relating to crimes committed against 1,469 victims; and that between 2017 and April 2019, the Unit had financed interventions requested by investigative magistrates to a total cost of CLP \$530.170.000. The Unit also intervened to support the reactivation of a budget item within the SML that is used to fund identification work on remains. As regards to memorialisation, competitive funding awards continue to be offered for civil society groups in two main areas: memory sites, and cultural activities. In 2019, 13 projects were awarded, for a total of CLP \$103.231.896. The Unit's social work team continued its activities in support of relatives.

As regards survivors, we were informed that the office that deals with people blacklisted or sacked for political reasons during the dictatorship – the Oficina de Exonerados Políticos – “is not part of the remit” of the Subsecretariat or justice ministry, continuing instead in its somewhat anomalous adscription to the Ministry of Home Affairs and Public Security, Ministerio del Interior y Seguridad Pública. The position first enunciated in 2018, that the “legal mandate of the Human Rights Programme Unit does not include this category of person [ie survivors], was repeated, without explanation as to why or in what senses the Subsecretariat considers itself to be subject to the same limitation. “Actions” to improve waiting lists for the PRAIS health reparations programme (which attends survivors as well as relatives) were nonetheless mentioned, as were measures to inform leaders of relevant associations about existing reparations entitlements in the area of access to social housing. We were also informed that the Unit/ Subsecretariat has taken steps to “identify children of former political prisoners who would be eligible for fee-free access to higher education: we have already set out, in section 1.2.2 above, the reasons why we believe that this access cannot be considered a reparations measure. The Subsecretariat also communicated that the generic criminal complaint for torture that was placed before the justice system by Lorena Fries in her final week as Undersecretary of Human Rights, and is signed by her in that official capacity, is in their view not part of their purview, since it “was not the Subsecretariat, institutionally, that presented the complaint” (email communication received 15 July 2019). A followup query observing that the document carries that title and heading, received the following reply: “the presentation was made by the former Undersecretary in her capacity as a civil servant, rather than as head of service, and therefore there is no institutional involvement on the part of the service [Subsecretariat]” (email communication received 31 July 2019).

### **3.6.2 National Coroner's and Forensic Service (Servicio Médico Legal, SML)**

Major developments related to the search and identification of the disappeared, one of the main areas in which the SML's work is relevant for transitional justice, are reported in section 1.3, above. Other relevant SML news includes a reorganisation, in February 2019, of the most explicitly human rights focused dimensions of the Service's work with the creation of a Human Rights Unit. The Unit is directed by Marisol Intriago, formerly coordinator of the SML's Special Forensic Identification Unit, UEIF, which now falls under the umbrella of the new Unit. The UEIF operates in cases related to dictatorship-era human rights, but also complex contemporary criminal cases and identifications needed after natural disaster. The Unit will also bring together work previously done elsewhere in the service. They apply a rights perspective to public policy

and SML work related to torture, children, young people, and women; and to people trafficking. The SML in general is working towards the creation of a National Forensic Identification System, SNIF, and a national IT system that will assist institutional standardisation and communication around forensic procedures.

Under the auspices of the new Unit, the 35 members of the interdisciplinary UEIF team will continue to assist justice system operatives in everything related to identification of human remains, determination of causes of death etc. Over the period covered by this report, the team made a total of 16 interventions in the field, spread over six of the country's regions. The objectives included search and excavation, restitution and inhumation, and the recovery of posthumous reference samples from deceased relatives of the disappeared. Three exhumations were carried out, to confirm the identity and/or cause of death of victims of political execution. Family members of the disappeared continued to be traced and interviewed, with a total of 73 new reference samples taken to add to around 5,000 already held in the existing database of genetic profiles. A little-known but demanding aspect of the UEIF's work consists of responding to reports of possible finds, something which often requires resource and personnel-intensive fieldwork, which often results in the discounting of the find as being of non-human origin, or clearly dating from a much earlier time period. This latter was the final outcome in regard to remains that had been stored at the headquarters of relatives' association the AFDD, which were briefly in the news in May 2018. The remains were submitted by the SML under judicial order. Upon examination, they proved to be of human origin, but of archaeological interest (dating from pre-modern times).

On 2 October 2018, the Unit presented a balance of advances and milestones since its creation in 2011, at a public event which was addressed by International Committee of the Red Cross forensic consultant Dr. Morris Tidball-Binz, founder member of EAAF Argentina and an eminent expert in the field of forensic practice for human rights. Dr. Tidball-Binz stressed the strong international interest in the SML's work in this area, and paid tribute to Dr. Patricio Bustos, RIP, who did so much during his time at the head of the service (2007 to 2016) to earn the respect and prestige that the unit enjoys today. In the written summary that the unit made available at the event, emphasis was placed once again on the importance of stable funding and permanent efforts at interinstitutional coordination. The need for a permanent state office to coordinate classification of victim cases was underlined: exemplified by the fact that formerly unacknowledged victims of disappearance and execution discovered through the Unit's work are currently not recognised.<sup>196</sup> In later communication with the Observatorio, the unit also drew attention to the importance of the training of local forensic teams, and permanent exchange between the service and national and international academic circles. The diverse nature of the Unit's work is also worthy of mention: (search, recovery, identification and restitution; but also

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<sup>196</sup> Special Forensic Identification Unit, Unidad Especial de Identificación Forense 'Avances y Grandes Hitos en Derechos Humanos, 2011-2018' November 2018. On file with the Observatorio.

accompaniment, awareness raising, taking of samples, and attention to reparations and guarantees of non-repetition).<sup>197</sup>

### **3.6.3 National Human Rights Institute (Instituto Nacional de Derechos Humanos, INDH)**

The section on Truth, above, discusses the useful information supplied by the INDH about its work with the Valech archive. In section 1.1.1, we also made reference to the complementary reports presented by the Institute as part of the process of submission of reports by Chile to the universal human rights system. The INDH also continues to be active in the cases known as the “disappeared in times of democracy”, and its 2019 annual report will contain special analysis about the search for the disappeared, both contemporaneous and from the dictatorship period. Consulted by the Observatorio regarding society’s right to access information about the status of serving sentences by perpetrators of human rights violations, while the Institute did not adopt an official position, it made reference to a range of analyses, memos, and publications in which it has argued for a perspective of guarantees of non-repetition. The contents of these materials emphasise the importance of penalties being seen to be proportional to the harm caused, and of the ability of the community to be reassured that these penalties are being served, and that any benefits are properly conceded.

The INDH has seen an unusually high rotation in its directorship since Branislav Marelic chose to turn his early 2018 dismissal by the board of directors into a legal battle. The matter was settled in September 2018, when the Supreme Court rejected his appeal in full.<sup>198</sup> This very public airing of internal differences undoubtedly rebounded to the benefit of political forces hostile to the Institute and its mission. These opponents later proposed the incorporation of police representation onto the board of the Institute, something which would contravene every principle of autonomy as set down in the Paris Principles, in effect the international standard for institutions of this type. A motion was even placed before Parliament attempting to require the removal, in her turn, of Marelic’s replacement as Director.<sup>199</sup> Finally, in July 2019, Sergio Micco took over as the third director of the institution in just 18 months. His term will in principle run until 2022. Micco’s appointment was immediately questioned in some circles, due to his personal views on abortion. It is to be hoped that the directorship of the Institute is not transformed into a party political battleground, since its mandate transcends particular political configurations, and its mission to monitor state actions requires stability, legitimacy, and autonomy. The overall conduction of the Institute is in any case a matter for its board of directors, to which both the most recent ex-presidents continue to belong. Meanwhile, from a gender parity perspective it is notable that the current board counts only three women among its 11-strong membership.

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<sup>197</sup> Source: written responses to questions submitted for purposes of the present report, received by the Observatorio in June 2019.

<sup>198</sup> Rol. 8135-2018, 24 September 2018.

<sup>199</sup> El Mostrador, “Crisis migratoria pone al INDH en la mira de la derecha”. 19 July 2019.

#### 4. Guarantees of non-repetition

##### **Draft Bill to promote memory and human rights teaching at primary and middle school level**

On 11 October 2018, Communist Party Congresswoman Carmen Hertz presented a draft bill to make teaching on memory and human rights compulsory in primary and middle school education. The stated objective is to “contribute to the formation of new generations in knowledge about our recent history, in particular, state terror and the systematic human rights violations committed by the civil-military dictatorship.”<sup>200</sup> An open letter signed by more than 50 academics and teachers expressed support for the proposal.<sup>201</sup>

The bill is currently in its first reading stage before the lower chamber, whose human rights commission emitted its first report on 9 April 2019. Some deputies from the ruling right-wing coalition questioned the project’s focus on the teaching of the history of the recent past; while others agreed with assessments produced by the Library of Congress’s analysis section (Departamento de Asesoría de la Biblioteca del Congreso Nacional), to the effect that the creation of new elements in the school curriculum is an exclusive prerogative of the executive branch. The human rights commission of the lower house reached two agreements, by majority vote. The first was to recommend emphasis on teaching dictatorship-era violations using Chile’s two truth commission reports (Rettig and Valech) as a basis. The second was that such teaching should fall under the curricular recommendations already existing thanks to Law 20.911, passed in 2016, which created a plan for civic education in state recognised educational establishments.

From a transitional justice perspective, the initiative must be positively valued as offering a valuable, albeit belated, implementation of truth commission report recommendations geared towards the consolidation of human rights culture through education.<sup>202</sup> The commission’s rejection of four modifications proposed during the debate of the draft is, however, worrying. The first three made reference to the incorporation of the same curricular elements into the training programs of the Armed Forces, uniformed police, detective police, and the prison service. The rejection of this measure doubtless constitutes a lost opportunity to rectify deficiencies and gaps that have been pointed out by various organs of the universal human rights system.<sup>203</sup>

The fourth modification that was rejected proposed that a normative statement should be incorporated into the Decree with Rank of Law (Decreto con Fuerza de Ley, DFL) N°1 issued by the Ministry of Education. The statement would have obliged all universities that carry out teacher training to include a human rights module. This suggestion was rejected, despite the fact that the Rettig report calls for university level education “to also incorporate these issues into curricula, in particular (...) teacher training”.<sup>204</sup> It is to be hoped that the draft bill comes to fruition, promising as it does to contribute to the shaping of informed, critical citizens committed

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<sup>200</sup> Text of Draft Bill (Boletín) 12167-17.

<sup>201</sup> Radio Uchile.cl: “Derechos Humanos, el contenido ausente en la educación chilena”. 13 January 2019.

<sup>202</sup> Rettig Report (1991), p. 1291, and Valech Report (2004), p. 529.

<sup>203</sup> See, for example, section 1.1.1 of the present report.

<sup>204</sup> Rettig Report (1991), p. 530.

to democratic principles, values which all mainstream political parties in the country have acknowledged are fundamental for national life.

## **5. REPARATIONS**

### **5.1 the general state of public policy on reparations**

In previous reports, and in section 1.3, we have made reference to the right reparation, the corresponding duty on states to provide it, and the enshrinement of that duty in a range of international instruments, some of them binding. We have similarly analysed reparations implemented in Chile in the light of these obligations, formulating recommendations aimed at enhancing the internal and external coherence that international law requires (where internal coherence refers to the fit between one reparations measure and another, and external coherence looks for fit between reparations and the other dimensions of transitional justice) The section which follows pays particular attention to this theme. We start from the premise that reparations is one of the transitional justice measures that was attended to soonest, and in some senses most comprehensively, in Chile.<sup>205</sup> True reparation however requires the delivery of services to be accompanied by a message that recognises relatives and survivors as rights holders; repudiates the violations that they suffered, and seeks to regain their trust. Accordingly, we attend to these elements in our evaluation. Over the course of May 2019, the Observatorio requested information and follow-up meetings from a range of relevant state institutions,<sup>206</sup> and met with representatives of some survivors and relatives' associations.<sup>207</sup> We also consulted some former state officials, secondary literature, and relevant norms and standards.

#### **5.1.1 Problems of Access to Reparations**

Provision of effective access to reparations measures is an important consideration for any public policy on reparation. Chile's two truth commissions – Rettig and Valech, in the latter's two iterations – have, over time, become the main and almost the only turnstile for access to many administrative reparations programmes. The Commissions however had a time limited existence, and controversies have arisen regarding the possible margin of error in their acknowledgements of individual cases, plus the limited nature and specific parameters of their mandates. This has in practice resulted in the denial of access to a presently unknowable, but certainly significant, number of survivors and relatives. It has also made it impossible for victims newly accredited by way of the judicial process, to be administratively recognised by the other branches of state. The partial acknowledgement of these deficiencies was one motivation for the second iteration of the Valech commission carried out in 2011. Nonetheless, the fact that this iteration was also time limited, together with the complete absence of a process for reconsideration of cases that were not recognised, only increased pressure for the creation of a permanent mechanism. The National Human Rights Plan published by the outgoing

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<sup>205</sup> 2011's iteration of this report, section 1.6.

<sup>206</sup> Requests were sent to the Instituto de Previsión Social, IPS; the Ministry of Education, health reparations programme PRAIS; the Oficina de Exonerados Políticos, and the Subsecretariat of Human Rights.

<sup>207</sup> Specifically with Haydee Oberreuter, member of the Unitary Command of former Political Prisoners and Relatives, Comando Unitario de ex Prisioneros Políticos y Familiares, and Alicia Lira, President of the Association of Relatives of Victims of Political Execution, Agrupación de Familiares de Ejecutados Políticos, AFEP.

administration in 2017 mentions the creation of such a commission;<sup>208</sup> an aspiration that was also mentioned by the new administration's Minister of Justice and Human Rights, Hernán Larraín, when he was called before a parliamentary human rights commission on 6 June 2018. As this report went to press, however, there was no sign that any such commission would be set up.

The existing truth commissions moreover limited themselves to assessing individual cases of people who were forcibly disappeared, extrajudicially executed, or subject to political imprisonment and/or torture. Reparations measures that were introduced before or alongside the operation of these commissions, and/or for other categories of victimisation, set their own, *sui generis*, access requirements. In regard to exiles, for example, Law 18.994, introduced in 1990, created the National Office for Return (Oficina Nacional de Retorno), for people exiled for political motives who wished to return to Chile. The same law however stipulated that the Office would cease to function as of 20 September 1994. In practice, therefore, the measures that it provided for – principally, customs waivers and some educational support – were only available to those who were in a position to act upon their desire to return, within the specified period. Subsequently, and through to the present day, there is no state institution available to support former exiles or their offspring. The recent emergence of an association of 'children of exile', "Agrupación de Hijos e Hijas del Exilio" (see the 2018 version of this report) constitutes the clearest possible signal that there are still multiple needs in this area that have gone unaddressed.

In relation to those who lost their jobs and/or were blacklisted for political motives (referred to as '*exoneradas y exonerados políticos*'), three specific pieces of legislation established some reparatory measures. Law 19.234, from 1993, established some measures for people who lost their jobs in political reprisal for their opposition to the regime.<sup>209</sup> To qualify, those affected had just a year to apply to a special office, the Oficina de Exonerados Políticos, set up within the Ministry of the Interior.<sup>210</sup> This deadline proved to be so peremptory that two further laws were passed to extend the initial period, each time by 12 months (Law 19.582, of 1998, and Law 19.881, of 2003). Over these three time periods, 257,624 individual applications were received by the office.<sup>211</sup> Closed to new applications since 2004, the office has now spent over a decade and a half on the task of assessing and approving existing applications. In 2011, they reported

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<sup>208</sup> "Promote the creation of a Permanent Classification Commission for the clarification of all human rights violations committed during the dictatorship (extrajudicial execution, enforced disappearance, and torture), (*Promover la creación de una Comisión Calificadora Permanente para el esclarecimiento de todas las violaciones a los derechos humanos cometidas durante la dictadura (ejecución política, desaparición forzada y tortura)*' First National Human Rights Plan, Primer Plan Nacional de Derechos Humanos, Gobierno de Chile, version published in 2017. p.24.

<sup>209</sup> In some cases, the measures included monetary payments, but in others, lost pension credits were simply restored. In still other cases, acknowledgment had no financial implications. Documents available from [www.derechoshumanos.udp.cl](http://www.derechoshumanos.udp.cl).

<sup>210</sup> Law 19.234, art. 7, section 1.

<sup>211</sup> Data supplied by the Oficina to the Observatorio de Justicia Transicional in June 2019.

that 157,000 cases had been assessed, with a further 93,000 still in process.<sup>212</sup> In 2015, then-President Bachelet made reference to the subsequent resolution of just over 10% of outstanding cases in her annual state-of-the-nation address in May.<sup>213</sup> The Observatorio has not been able to discover any subsequent mention of the work of the Office either in annual reports of the work of the Ministry of the Interior, or in presidential state-of-the-nation addresses.

For the purposes of the present report, we contacted the Office to ask for an update. We were told that, exactly 15 years after the closure of the last deadline for presenting applications, thousands of cases are still awaiting definitive resolution. Specifically, we were informed that a total of 158,778 applications have been approved, 19,468 were declared inadmissible, 2,954 were assessed but rejected, and 76,424 are still awaiting qualification. The Inter-American Commission on Human Rights has stated that reparation programmes must guarantee “the right to receive a decision which is based on a publicly scrutinisable process and sets out the reasons and basis on which it was made; the right to a reasonable time frame; and the right to judicial review of administrative decisions”.<sup>214</sup> In the case of those thousands of applicants whose cases are yet to be resolved, the wait has without a doubt been significantly longer than could be considered “reasonable”.

It should be noted that the Office informed the Observatorio that a new work plan has been adopted, which aims to improve the process of acquiring the data needed to resolve outstanding cases. Channels of communication have been established for the exchange of information with the country’s main social security agency, the Instituto de Previsión Social, and with the Agricultural and Livestock Service, Servicio Agrícola y Ganadero, SAG. This latter agency is relevant for accrediting previous employment in a rural occupation, and/or claims to land title distributed under land reform but later seized without compensation. The Office also informed us of additional innovations including letters to applicants informing them of the current status of their application and/or informing them of interim steps and decisions. The long hiatus that these measures attempt to alleviate owes much to the absence of a stipulated or normed procedure for assessing applications. This apparent legal vacuum simply means, however, that general norms of administrative procedure are the ones that should apply. As this has not been done, the assessment process has suffered from a lack of transparency and the absence of due administrative process.<sup>215</sup> In the circumstances, the efforts of the current staff are to be praised,

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<sup>212</sup> Approximate figures supplied by the Oficina’s then-director and reported in the 2012 iteration of the present report, at p. 45.

<sup>213</sup> Presidential State of the Nation address (Mensaje Presidencial), 21 May 2015, Michelle Bachelet.

<sup>214</sup> OAS Document OEA/Ser/L/V/II.131 Doc. 1, Inter-American Commission on Human Rights (CIDH). ‘Lineamientos principales para una política integral de reparaciones. 19 February 2008, point 10. Although the document makes particular reference to Colombia, it is clear in the text that the underlying principles are treated as general. Reference is also made to OAS report OEA/Ser. L/V/II.129, Informe sobre el acceso a la justicia como garantía de los Derechos Económicos, Sociales y Culturales, of September 2007.

<sup>215</sup> Weaknesses which undoubtedly contributed to irregularities, discovered in 2008, that included cases of unwarranted classifications, some of them fraudulent. The uncovering of these cases was used as a pretext to question the integrity of all applicants. (See the 2012 and 2013 iterations of this report).

but the glaring absence of a comprehensive policy to resolve the underlying problem is ever more apparent.<sup>216</sup>

Another issue worthy of mention in relation to the same Office is one that was raised by the Inter-American Court of Human Rights in the case *García Lucero v. Chile*. The information supplied to the Oficina de Exonerados Políticos as part of the application process includes a large number of testimonies giving accounts of serious human rights violations, including torture and kidnap, perpetrated by state agents. In pursuit of external coherence between reparations measures and other dimensions of transitional justice, this information should be proactively studied to assess its possible judicial relevance. It is therefore curious to note that neither administrative nor judicial authorities appear ever to have taken such action, especially given that the testimonies are not subject to any embargo or secrecy law such as currently impedes access to the files of the Valech Commission.

Returning to the question of access, the State has an obligation to promote conditions of equal access and enjoyment of the measures that are offered. While recognising rights to pensions, educational scholarships, and other measures is a valuable first step, it does not by itself constitute a guarantee of effective delivery and takeup of those rights by rightsholders. Access barriers may include lack of awareness, lack of trust, fear of the authorities, and the costs associated with certain bureaucratic procedures. Taking as an example the actual disbursement of reparations pensions to former political prisoners recognised as such by the state, a first observation is that almost a quarter of these people were either acknowledged only after their death, or have died subsequently. According to information from one association that groups together organisations of former political prisoners and/or their relatives (the Comando Unitario de ex prisioneros políticos y familiares), as of April 2016, reparations pensions had at some point in time been paid to 34,705 of the total universe of 38,254 survivors acknowledged by the Valech I and Valech II commissions. Payments are ongoing with regard to 26,663 people, but there are 467 individuals accredited by the Commissions on whose behalf no-one has ever made use of the economic reparations entitlement. That is to say, 467 pensions have never been received either by the original rights holder or by a surviving spouse, in the event of the rights holder's death.<sup>217</sup> In this regard Haydee Oberreuter, of the Comando Unitario, informed the Observatorio of actions taken by the association itself to contact and inform the rightsholders, assisting them where necessary to complete the required paperwork.<sup>218</sup> The size of the challenge has led to a 'virtuous circle' of cooperation with state bodies including the Civil Registry, Registro Civil.<sup>219</sup> While this has served as a positive example of participation and joint working between civil society and the

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<sup>216</sup> This gap is accentuated, in the opinion of the Observatorio, by the continued administrative dependence of the Oficina on the Ministry of the Interior (Ministerio del Interior y Seguridad Pública). Reassignment to the Human Rights Subsecretariat would make much more sense.

<sup>217</sup> Data supplied by the IPS to the Unitary Command. The many peculiarities of reparations measures in Chile include an inexplicable gender bias that dictates that only widows can inherit a 'Valech pension' as the surviving partner of a former political prisoner recognised by the Valech Commission. Widowers receive nothing.

<sup>218</sup> Interview with the Observatorio, 9 June 2019, and see *Informe* 2018.

<sup>219</sup> See *Informe* 2018.

state, the *Comando* is an entirely voluntary and self-funded organisation which has neither the resources nor the powers of state bodies to whom, moreover, the responsibility really belongs.

Social services entity the Instituto de Prevision Social, IPS, is the body in charge of paying out economic reparations when these are of an administrative nature. The *Comando* asked the IPS to inform it how many people had never received their Valech pension, and to reveal what measures the IPS had taken to trace them. Faced with a negative reply, the *Comando* was forced to resort to the national Council for Transparency, Consejo para la Transparencia, to get access to the required information. As it turned out, the IPS has finally begun to contact the people involved,<sup>220</sup> an outcome that if anything underlines the nonsensical nature of their initial refusal. When public administration and civil society groupings share a particular interest or goal, it should be simple common sense for the State not only to accept, but to actively propose joint working. Such an approach would not only improve the efficacy of state actions, it would also deliver on the right to participation. This right, which has been asserted in relation to all the dimensions of transitional justice, requires that survivors and relatives “become active subjects, and not only objects, of [transitional justice] measures”.<sup>221</sup> It is also important that the State make every effort to carry out its transitional justice duties by the most sensitive, and reparatory, means possible. Since in this example the Comando Unitario moreover has a closer relationship with survivors, the actions needed are likely to be more effective and appropriate on multiple levels, if state and civil society work together and collaborate.<sup>222</sup> Accordingly, while it is doubtless positive that the IPS has recently begun to be more proactive in guaranteeing the operationalisation of the right to reparation, it would be appropriate for them, like other state bodies, to lose their apparent fear of working alongside or communicating openly with nonstate groups.

When considering the potential of the judicial route (civil claim-making) as an alternative channel for making effective the recognition of state responsibility and its duty to offer remedy, we should start by asserting that this route ought not to be considered mutually exclusive with use of the administrative route. That is, anyone who has made use of their rights under a particular administrative reparations programme should not on those grounds be prevented from bringing a civil claim before the courts, not least because the type of harm that is being (partially) remedied is different in one and in the other setting. This position is today supported by a majority of members of the Criminal Bench of the Supreme Court, and was even recognised by the Chilean state before the Inter-American Court in the *Órdenes Guerra* case. There are, however, evident differences in levels of access to the judicial route. Although many of these may be endemic to access to justice in general, they are potentially exacerbated by the effects of the same grave violations that the courts are being asked to remedy, inasmuch as those violations often caused ruptures in life plans and career trajectories, including through the loss of the principal breadwinner in many families. The effect on a family’s socioeconomic situation

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<sup>220</sup> According to Patricio Coronado, IPS director, in a meeting with the Observatorio on 10 June 2019.

<sup>221</sup> Paula Saffon and Viviana Tacha, *La participación en las medidas de la justicia transicional. Un estudio comparado*, Bogotá, Centro de Estudios de Derechos, Justicia y Sociedad, Dejusticia, 2018, pp. 85.

<sup>222</sup> UN Document A/69/518, *Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, 2014.

can be dramatic and longlasting.<sup>223</sup> Civil claim-making before the judicial branch implies certain costs (payment of document certifications, notary fees etc, and, sometimes, lawyers' fees). It is not within the means of all survivors or relatives to cover these costs.

Accessing the justice system also requires a certain level of knowledge and information about one's rights, and how they can be asserted and defended. In this sense, the judicial route to reparations is more accessible to those who have higher levels of formal education and/or economic resources; thereby favouring the least, rather than the most, disadvantaged. For all of these reasons, the State must provide assistance to ensure effective and equal access to justice, whether in its criminal or civil forms. Amplifying the mandate of the existing Human Rights Programme Unit would be a useful first step,<sup>224</sup> and should include both the mandating of the Unit to act in cases of crimes committed against survivors, and permitting its lawyers to support relatives in the civil claims aspect of the criminal cases in which they currently act.

At the very least, and as we have repeatedly insisted, the State should desist from actually opposing compensation for relatives and survivors, as it does currently via the actions of the Consejo de Defensa del Estado, CDE. Even after the admissions made by the state in the *Órdenes Guerra* case, it is still routine for CDE lawyers, acting in the name of the state, to appear before the courts invoking statutes of limitation, and/or alleging '*excepción de pago*', in relation to civil compensation.<sup>225</sup> In the process, phrases are used that seek to play down the suffering of those who were harmed by the state, such as by making reference to supposedly "excessive" requests for damages,<sup>226</sup> or insisting that survivors should "consider themselves to have [already] received full reparation".

This phrase was used in an oral hearing in a case over torture. The CDE lawyer went on to exemplify this reparation by citing the work of the human rights programme unit, whose work on behalf of survivors is in fact, as we have seen, non-existent.<sup>227</sup> This kind of behaviour is not only incoherent and contradictory with the state's international obligations: it also constitutes a new offence for victims and survivors who make use of the courts. Eliana Largo Vera, sister of a victim of disappearance, recently wrote to the CDE's governing Council to explain the profound impact that it had on her to hear the CDE using terms such as "excessive" and "groundless"

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<sup>223</sup> This is one of the reasons that many survivors take offence at the suggestion that tuition-fee-free University access - introduced under the second Bachelet presidency to assist students from lower socioeconomic strata - makes reparations in the form of study scholarships redundant. In the words of one survivor: "they made us poor, then they turn round and say "being poor is your reparations"."

<sup>224</sup> This also appears in the text of the original National Human Rights Plan, as published in 2017.

<sup>225</sup> During the period of the report, the CDE has attempted to invoke the statute of limitation (*prescripción*) in before civil courts, in cases including Roles C-7564-2019 and C-9565-2018, before the Second Civil Court (2° Juzgado Civil) of Santiago; C-5701-2019, of the Fifth Civil Court (5° Juzgado Civil) of Santiago; and Roles 2813-2019, 4352-2019, and 3576-2019 of the Santiago Appeals Court.

<sup>226</sup> In two recent motions, the CDE referred to amounts requested by claimants as "excessive and unfounded" (*excesivos y carentes de fundamento*): Rol. 143-2013, 'Quemados' episode; and Rol. C-37.023-2017, civil claim over the disappearance and subsequent killing of Luis Alejandro Largo Vera.

<sup>227</sup> Source: oral arguments conducted in April 2016, attended by the Observatorio's director.

(*'carente de fundamento'*) in relation to her civil claim.<sup>228</sup> In response, the president of the CDE said only that their action “was related to the responsibilities that the law sets down for us to defend Treasury resources” and “was what the law required”.<sup>229</sup> The reply did not however offer any legal or factual justification for the choice of the adjectives “excessive” and “groundless”. While it is certainly true that the CDE’s job is to legally defend the interests of the state, its actions must adhere to the existing legal order, which includes the constitution and all international law and treaty law valid for and in Chile. Its actions in these cases seem bereft both of solid legal reasoning, and of any indication that the CDE understands itself as part of a state which has transitional justice duties that include dignified treatment of people who have suffered at the state’s hands.

### **5.1.2 Internal and external coherence in reparations policy**

There is no single entity in Chile able to coordinate state actions in reparations, nor to channel communication between the state, survivors and relatives. Pensions, scholarships, compensation payments and other measures are each administered by different state departments, leading to fragmentation and impeding a holistic and truly reparatory rights-based policy approach.<sup>230</sup> The measures do not adequately take account of multiple offences committed against the same person, nor do they accompany affected persons throughout the life-cycle. The almost complete absence of channels for feedback, evaluation and participation moreover means that improvements are rarely made.<sup>231</sup> There is a perception among relatives and survivors that existing measures are a mere sop, offered in an attempt to pacify their demands, and survivors associations report having been informed that their demands are simply not a priority for the present administration.<sup>232</sup> The absence of a single specialised body is perfectly remediable within existing institutionality, particularly since the Sub Secretariat of human rights was created, in 2017, and entrusted with the functions of “promoting the creation of policies, plans and programmes in human rights issues”, and drawing up an annual human rights plan which includes “promotion of the investigation, sanction and reparation of crimes against humanity”.<sup>233</sup>

The same problems that detract from internal coherence of reparations measures can be observed in relation to their external coherence with other dimensions of transitional justice. One paradigmatic example is law 19.992, which while establishing limited reparations for survivors of political imprisonment and torture, imposed a 50 year embargo on their testimonies, placing an obstacle in the way of the achievement of truth and justice. Another example, already

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<sup>228</sup> Terms used by the CDE in an appeal before the First Civil Court of Santiago, case Rol No. C-37023-2017, 28 January 2019.

<sup>229</sup> Communication dated 17 April 2019, signed by María Eugenia Manaud Tapia, CDE president, addressed to Eliana Largo Vera.

<sup>230</sup> The Presidential Advisory Commission on the Pensions System, Comisión Asesora Presidencial sobre el Sistema de Pensiones, known as the “Comisión Bravo”, found that the relationship between reparations pensions and the ‘solidarity’ (non-contributory) pensions system is such that the specifically reparatory aspect of the former is lost. Comisión Asesora Presidencial sobre el Sistema de Pensiones, *“Informe final”*, 2015, pp. 144.

<sup>231</sup> PRAIS is one of the few programmes that does have a built-in user consultation, via User Committees.

<sup>232</sup> Words of the Coordinator of the national network of survivors of political imprisonment and torture, mesa nacional unitaria de sobrevivientes de prisión política y tortura, addressing a public event held at the former Congress building on 1 July 2019.

<sup>233</sup> Law 20.885, of 2016, which created the Human Rights Subsecretariat.

mentioned, the practice of supporting criminal prosecution of perpetrators of crimes against humanity, yet opposing claims for the civil liability that arises. The overall effect of this lack of coherence is to detract from both the nature of the measures and their reparatory effect, in circumstances in which the state should be exercising the greatest of care to eliminate contradictions, vacuums, and secondary harm.

## **5.2 Reparations for Persons Deprived of Land: an example of monetised logic**

Although the dictatorship arbitrarily deprived thousands of peasant farmers of their lands, the post dictatorship state did not give a holistic response to the generalised dispossession of the group known as “exonerados de tierra”, people who lost their land.<sup>234</sup> The persistence in the Senate of authoritarian enclaves, implacably opposed to any kind of land redistribution, made it difficult to return dispossessed lands by way of legislation. Instead, grace and favour presidential pensions were utilised. Pensions, administered through the state Institute of Agriculture and Fisheries, Instituto de Desarrollo Agropecuario, INDAP, were awarded to 3,574 former peasant farmers over the course of the three subsequent presidential periods.<sup>235</sup>

While the effort to provide some kind of response is praiseworthy, looked at from today’s viewpoint the assignation of monetary pensions seems insufficient to take account of the multiple violations that were committed. In particular, the response discounted demands made by some of the affected parties, who both before and after the transition lobbied instead for the constitution of a common land fund.<sup>236</sup> In so doing, the state ignored those international standards that speak of *restitutio in integrum* as the yardstick or preferred goal of reparation. Recent actions by peasant farmers and workers associated with the former Forestry and Logging Complex (Complejo Forestal y Maderero) of Panguipulli expose the enormous debt that the state still owes to this particular group of affected persons.<sup>237</sup>

## **5.3 Symbolic Reparations**

Civil claimants who bring actions do not always request economic reparations. Relatives and survivors of Colonia Dignidad, for example, have attempted to use the courts to secure symbolic reparation. In May 2015, the civil aspect of a criminal investigation over disappearance was granted, with the court ordering what the relatives’ and survivors’ association behind the case had asked for: the creation of a Memory Museum at the site; the protection and preservation of now-excavated mass graves, and the installation of signage at former sites of torture on the Colonia’s estate. Unfortunately, in August 2018, the Supreme Court ratified an earlier Appeals Court decision which found in favour of the CDE’s contention that the associations involved (the

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<sup>234</sup> Decree Law 208, of 1973, excluded approximately 5,000 former land reform activists from land title. According to Faiguembaum this decree, in combination with new agriculture policies, dispossessed between 33.000 and 50.000 families. Sergio Faiguembaum, *Toda una vida. Historia de INDAP y los campesinos (1962-2017)*, Santiago, INDAP and FAO, 2017.

<sup>235</sup> The great majority (2,999) during the presidency of Eduardo Frei Ruiz-Tagle. Interview with Liliana Barría, formerly on the staff of INDAP.

<sup>236</sup> Elizabeth Lira and Brian Loveman, *Políticas de reparación. Chile 1990-2004*, Santiago, LOM, 2005, pp. 349-372.

<sup>237</sup> On 21 June 2019, former workers blocked the route between Llifén and Maihue, in protest at denial of access by new owners of lands forcibly seized by the dictatorship, and later privatised. On 1 July 2019, representatives of seven associations, with a total membership of 3,000, testified before the Senate Human Rights Commission.

Corporación Parque por la Paz Villa Grimaldi" and the "Asociación por la Memoria y los Derechos Humanos, Colonia Dignidad". did not have standing (*legitimación activa*) to bring the claim.<sup>238</sup> In a similar case, seen in September 2018, first instance judge Mario Carrozza chose rather to reject the CDE's contentions that the claimbringer had already received full reparation and that in any case, the statute of limitations should be invoked.<sup>239</sup> The claim, brought by Paulina Veloso, the wife of Alexei Jaccard, forcibly disappeared as a consequence of Plan Condor, demanded that the state actively search for the whereabouts and/or remains of her husband; forbid the carrying out in public spaces of acts of homage to direct perpetrators and the dictatorship-era high command, and publish the outcome of the case in a media outlet with national reach. It also required the creation, financing and maintenance of acts of memorialisation consisting in improvements to public green space; the installation of a human rights library in the schools her husband had attended, and the provision of a scholarship in his memory, at the university where he had studied. The CDE opposed every single aspect of the claim.

Although judge Carrozza did not accept the CDE's position, he did decide that he had no powers to order any measure that would require the disbursement of funds normally allocated in annual budgetary legislation (the Ley de Presupuesto). He also refused to order some of the other measures on the grounds that they would require actions that fall under the exclusive purview of local authorities.<sup>240</sup> He concluded that "although it falls outside of [my] powers to order the State to carry out each of the actions requested in the form in which they have been presented, I can make recommendations and acknowledge the existence of other, non-pecuniary, forms of reparation, and therefore the claim is partially granted".<sup>241</sup> This partial acceptance took the form of accepting the petition to order publication of part of the verdict – designating the judicial branch website [www.pjud.cl](http://www.pjud.cl) as the relevant medium – and exhorting the state to comply with the terms of Armed Forces Service Regulations DNL-912.<sup>242</sup>

While the content of the civil claim in this case is certainly unusual, it is fully in line with the kinds of measures that the Inter-American Commission and Court of Human Rights, and other parts of the universal system of human rights protection, have ordered or recommended to states in relation to reparations obligations. Once again, therefore, we see the CDE adopting an anomalous and inflexible position which seems quite unjustified. In the opinion of the Observatorio, the final verdict represents a partially wasted opportunity, the judicial branch having been offered the chance to apply international reparations standards at the domestic level. The measures requested differed little if at all, in essence, from actions ordered by other venues for the adjudication of international law in real cases (including cases involving Chile). There is also a seam of analogous case law in other national courts, such as those of Colombia, who have ordered the publication of verdicts, the placing of commemorative plaques, and the

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<sup>238</sup> Rol 2.182-1998, Villa Baviera, episode Álvaro Modesto Vallejos Villagrán, first instance verdict, 7 May 2015; Santiago Appeals Court, Rol 1.051-2015, 10 April 2017; Supreme Court, Rol 19.127-2017, 7 August 2018.

<sup>239</sup> Rol 2.182-1998, consideration (*considerando*) 186, in relation to grounds (*fundamentos*) 179 to 180 (i).

<sup>240</sup> *Ibid.*, grounds 186 to 193.

<sup>241</sup> *Ibid.*, grounds 191.

<sup>242</sup> Article 155, letter (g) of the relevant Armed Forces Regulations (Reglamento de Servicio de Guarnición de las Fuerzas Armadas) forbids the rendering of funeral honours to Armed Forces personnel who have been found guilty of offences carrying a custodial sentence.

offering of public apologies. In terms of the substance of Judge Carrozza's misgivings, while it is true that, as a general rule, no judicial actor or sentence can or may encroach on terrain that is the exclusive prerogative of the Executive or Legislature, it is also true that every time a court orders the payment of compensation as reparation – as has become relatively common practice in recent years – resources that fall under budgetary law are involved. It should also be considered that the satisfaction, and guarantees of non-repetition, that the measures aim to deliver, are components of the reparation which it is the state's obligation to provide.<sup>243</sup>

Another legal action with a symbolic reparation component worthy of mention is a writ of protection (*recurso de protección*) submitted by the National Human Rights Institute, INDH, on behalf of Tamara Lagos Castro (see section 3.3). Despite the favourable eventual outcome of the case – in which the Court recognised the symbolic importance, for Tamara, of having the state recognise her status as the daughter of Mario Lagos Rodríguez– international law concerning reparations was not cited among the grounds for the finding.<sup>244</sup>

## 6. MEMORY

### 6.1 Memorialization and celebration of iconic human rights defenders

In August 2018, a mural was inaugurated in Santiago in honour of the recently deceased Ana González Recabarren, founder member of the Association of Relatives of the Disappeared, AFDD, and public face of the SML's campaign to collect DNA samples from relatives. Ana lost four members of her immediate family to the dictatorship's repressive violence: her husband, Manuel Recabarren, their two sons, Manuel Guillermo and Luis Emilio, and her daughter-in-law Nalvia Rosa Mena, who was pregnant at the time of her disappearance. In the same month in which the mural was unveiled, the distinguished and much-loved human rights lawyer Andrés Aylwin died at the age of 93. His wake took place in the former Congress building in Santiago, and was attended by relatives of many of the victims whose cases he represented. In late January 2019 Elena Muñoz, known as the "Purísima de Lonquén", died. Elena was a human rights activist, and the mother and wife of five of the victims of disappearance whose bodies were discovered in 1978 in the lime kilns of Lonquén. The following month, Violeta Zúñiga Peralta died at the age of 86. Violeta, an indefatigable AFDD activist, was known for her solo interpretation of Chile's national dance, the '*cueca*', which she would perform in lament and protest over the 1976 disappearance of her husband Pedro Silva, kidnapped by the DINA. In June 2019 a mural was inaugurated at the Sindicato community centre in Quinta Normal in honour of Dr. Patricio Bustos, ex director of the SML and Villa Grimaldi survivor, highly respected, *inter alia*, for his strenuous efforts to rebuild the confidence of relatives in identification efforts when he was appointed to head the service after the Patio 29 identification errors had come to light. Dr. Bustos was also commemorated in an event at Villa Grimaldi in the same month, marking a year from the date of his death from cancer. The year has also seen the sad loss of many other relatives, survivors and human rights activists, who did not live to see full truth and justice in the cases to which they dedicated their lives. While we cannot mention each one here by name, their loss impoverishes the human rights community and society as a whole. It should also inspire us to redouble our

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<sup>243</sup> UNGA Resolution 60/147, from 2005, "Basic Principles and Directrices...", op. cit., Principle IX.

<sup>244</sup> Although reference was made to the right to personal identity established in articles 7 and 8 of the Convention on the Rights of the Child.

efforts to move ahead more rapidly in creating answers and solutions for others who have already waited too long.

## **6.2 Public Debate, Veracity and Democratic Values**

The memory field can be considered both a place of symbolic reparation and a means of non-repetition. It is also a terrain that is in constant dispute. Physical attacks on memory sites is one of the most visible public expressions of denialism about human rights violations and hatred towards those who refuse to forget them. These attacks are associated with the proliferation, in recent years, of groups and entities of an openly neofascist character which celebrate the dictatorship and even its most abhorrent crimes. This tendency can be seen in social media postings and websites which groups of this kind use to spread their messages of hate. Although the regulation of virtual space presents both technical and legal challenges, the experience of other countries demonstrates that it is possible to unmask those who attempt to hide behind the anonymity of the web to inflict physical and psychological harm on others, or incite third parties to do so.

It is also important that the authorities, and society as a whole, send clear and consistent messages about the unacceptability of these messages and the anti-values that lie behind them. It is incumbent on all of us to seriously and soberly consider the limits of the leeway we want to allow, and to allow ourselves, in the name of open debate of ideas. In this vein it is at best unfortunate that recent trends in national television programming seem to favour the creation of supposed 'formats for debate' which do little more than generate empty polemic in a search for ratings. There is no apparent concern whatsoever with fact checking, veracity, the truthfulness or otherwise of what is said, and subsequent consequences. In October 2018, the television programme "Mentiras Verdaderas" chose to bring Communist party mayor Daniel Jadué head to head with ultra-right wing figure José Antonio Kast. Scrolling onscreen banners accentuated the air of a Roman circus that surrounded the event by billing it as the "'round' we've all been waiting for". Camila Flores, a member of parliament for the right wing Renovación Nacional party, also took part in the programme. Flores added to her already sadly notorious record of inept pronouncements betraying a profound ignorance, making ludicrous allegations that the Communist Party had committed 'massacres' during the Popular Unity government of 1970-1973 and mistaking the Ramona Parra Mural Brigade for an 'armed extremist group' (sic.). She went so far as to assert that "according to press cuttings" renowned human rights lawyer Carmen Hertz had supposedly "called for people to be assassinated" during the dictatorship. This final blatant lie led current Communist Party parliamentarian Hertz, whose husband, Carlos Berger, was assassinated by the Caravan of Death in 1973, to announce that she would be suing Flores for slander.

In May 2019, the current affairs discussion programme Estado Nacional invited Carmen Hertz to join a panel alongside Mauricio Rojas, the man who lasted less than a weekend as Culture Minister in 2018 after it transpired that he had previously railed, in print, against the Memory and Human Rights Museum, describing it as a "put up job" (*montaje*). After the programme aired, Hertz was subjected to a barrage of virulent abuse on social media, accentuated after she and two female colleagues were verbally attacked by RN parliamentarian René Manuel García, who went on to physically attack a journalist who asked him about the incident. In an age of

widespread and increasing incivility in the public sphere and in politics, in Chile and elsewhere, it is incumbent on our democratic representatives and the media to consider how to act responsibly, particularly in the very parliament which is supposedly the seat and guarantor of democracy.

Meanwhile, there has been little progress in regulating the expression of homage to figures associated with the dictatorship and its crimes. Although the lower legislative chamber approved a declaration in 2017 requiring the removal from public spaces of monuments which exalt members of the dictatorship-era military juntas (see this report's 2018 version), this has not been turned into a legal measure. Another initiative introduced in 2017 that did take the form of draft legislation was draft bill Boletín 11.424-17, which sought to typify the crime of inciting violence. The draft would have rescinded one article of the current law on freedom of information, opinion, and the journalism profession, which was adopted in 2001. The effect would be the abolition of the particular sanction that article 31 of the law establishes for "social communications media that produce publications or transmissions destined to promote hatred or hostility". The argument put forward for the rescinding is that the new prohibition established by the draft bill would apply to the media as to any other potential transgressor, making the special 2001 article unnecessary and "placing media professionals on the same footing as all other persons."<sup>245</sup> At first glance, this argument does not seem to address or take account of the greater weight, social reach, and therefore power that media figures enjoy when compared to other natural persons. In 2018, a session of the Human Rights and Indigenous Peoples Commission of the lower chamber introduced into the bill, as a sanctioned behaviour, denial of crimes against humanity documented by Chile's two truth commissions. This despite the fact that parliamentarians from the right-wing Chile Vamos coalition managed to include modifications that would limit the power of the article to impose sanctions.<sup>246</sup> In any case the draft bill remains at the first stage of discussion, and has not been assigned the priority status (*urgencia*) without which it is unlikely to become law.

### **6.3 Attacks on Memory Spaces: material expressions of denialism and hatred**

During the period of this report, attacks on memory sites and commemorative artefacts have continued. Since 1990, 27 former illegal detention and torture centres have been declared national monuments in Chile based on requests and applications made by civil society organisations. Hundreds of monuments and memorials have also been erected to victims, survivors, opponents of the dictatorship and human rights defenders. These are more likely to be protected by Law 17.288, as public monuments, due to their location in public space. Despite this supposed legal protection, various sites and artefacts have been subjected to attacks, evidence that the rejection of historical truth about state terrorism still persists, or may even be resurgent. In Santiago, the self-styled "Social Patriotic Movement" (Movimiento Social Patriota) launched two attacks on the Villa Grimaldi Peace Park (in August 2018 and January 2019). The memory site José Domingo Cañas suffered damage and the depositing of human excrement on

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<sup>245</sup> Presidential Message Nº 115-365, 4 September 2017, accompanying the presentation of draft bill (Boletín) 11.424-17.

<sup>246</sup> Adding, as a precondition of sanction: "... on the condition that said incitation causes a breach of public order, or impedes, obstructs, and restricts to an illegitimate degree, the exercise of a right on the part of the offended party".

its premises in August 2018, and an attempted robbery in March 2019. In April 2019, paint was daubed on the plaque in the Estación Central district of the capital where Carmen Gloria Quintana and Rodrigo Rojas De Negri were burned alive by a military patrol in 1986. In May 2019, a memorial to victims of enforced disappearance in the city of Antofagasta was sprayed with the legend “Long Live Pinochet”, an attack similar to one that took place in Valparaíso in April 2018 (see last year’s version of this report).

Former detention centres transformed into memory sites are public property, making it particularly important that public authorities respond swiftly and with firmness to efforts to destroy what is now social patrimony. In June 2019, the Ministry of Justice and Human Rights replied to a request made by the social collective “Popular Declassification”, invoking the Access to Public Information Law. The request asked for sight of the text of a supposed protocol or established procedure for reporting damage to memory sites. The Ministry had made reference to the supposed protocol in April, in response to a query made by the lower house.<sup>247</sup> The June 2019 reply admitted that the protocol that had been referred to did not in fact exist, announcing that a roundtable would be convoked to create one.<sup>248</sup>

There are also a series of former detention centres that are still under the control of the Armed Forces, and suffer deterioration or destruction in spite of having been given the status of national monuments. Examples include the former Morro fort in Talcahuano, and the Rocas de Santo Domingo site, which have both been exposed to attacks from vandals. The refusal of public authorities to take these sites out of military hands prevents both public access and work to preserve them. It leaves them vulnerable to illicit attempts at obliteration like those which have already affected Villa Grimaldi and José Domingo Cañas.

The current state of monuments and memorials which are sited in open public space, and are accordingly more exposed, shows up the insufficiencies of a symbolic reparations programme that limits itself to funding works, without assigning resources for later upkeep or repair or delegating responsibility to local authorities. The monument to women victims of the dictatorship that was inaugurated in 2006 on the central reservation of the Alameda, Santiago’s main thoroughfare, has been in a state of complete disrepair and virtually total destruction for years (see previous editions of this report). The memorial to Littré Quiroga and Víctor Jara located in the Lo Espejo district, is now the site of regular, and apparently deliberate, dumping of rubbish and rubble. In August 2018, the Hualpén memorial was vandalised with swastikas, a crime attributed to the neofascist movement ‘Chile Action for Identity’ (Acción Identitaria Chile). Between August and September, the Neltume Cultural Centre and Museum reported the loss of two of six plaques that record the names of MIR activists killed by the dictatorship in 1981. The names of two other activists were obliterated from a memorial in the town, and all the names on a memorial sited in Llancahue, at the entrance to the Valdivia prison, were painted over. The Los Ríos regional office of the INDH lodged a criminal complaint over the incident.

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<sup>247</sup> Ordinance Nº 2213, 11 April 2019, issued by the Ministry of Justice and Human Rights, in reply to Oficio Nº 20948, 22 January 2019.

<sup>248</sup> Ordinance Nº 502, 4 June 2019, issued by the Human Rights Subsecretariat of the Ministry of Justice and Human Rights.

## 6.4 Archives

### Situation of Archives that Document Human Rights Violations

The right to access information about crimes against humanity is held by society as a whole as well as by victims or survivors, and has been enshrined in various international norms and documents. These set out that the right to know implies the preservation of archives that document past crimes. This requires protective measures to prevent the theft, destruction, or misappropriation of relevant documentation, whether state produced or not. It also requires the production of inventories that identify the location of relevant archives, at home and abroad, and where necessary establishes international cooperation for consulting them and/or ensuring their repatriation. Regulations to facilitate access and consultation are also needed if documentation is to be used effectively to combat denialism and manipulation.<sup>249</sup> The Inter-American Commission on Human Rights has stipulated that states, in particular their Armed Forces, cannot invoke national security exceptions when faced with requests for information on grave violations included enforced disappearance. It has also considered that maintaining relatives of the disappeared in ignorance about the whereabouts of their loved ones constitutes inhuman and degrading treatment.<sup>250</sup> Meanwhile, those who deny or conceal information about the whereabouts of a victim of enforced disappearance can be considered co-responsible for the crime, since the denial of information is consubstantial with the definition of the crime.

Towards the end of the Chilean dictatorship, the impeding of access to documentation about grave violations began with Law 18.771 of 1988, which modified article 14 of Decree N°5200 of 1929. The decree instructed state bodies to make annual deposits of their documentation to the National Archive. The 1988 law established exemptions from this obligation for the Ministry of Defence, Armed Forces, security forces, and other establishments linked to defence, which would henceforth be allowed to archive or destroy their documentation as they saw fit. In 2015, the Londres 38 memory site launched a campaign to modify Law 18.771. An associated draft bill, Boletín 9958-17, sponsored by parliamentarians from a range of parties, attempted to reverse the modification introduced in 1988. The bill is at its second stage, but has no priority status. Previously, in 2007, member of parliament Jaime Naranjo had presented a draft bill stipulating that archives of the former DINA and CNI should be transferred to the Ministry of the Interior, and from there to the (at the time embryonic) INDH.<sup>251</sup> This bill did not prosper either, and is currently archived. Nor has the 'Valech secret' been derogated, despite repeated international organisation recommendations to that effect.<sup>252</sup>

Against this backdrop, a project carried out by the National Archive in 2017 is worthy of praise. It undertook an analysis and cataloguing of a range of its ministerial holdings from a human rights perspective. Two hundred volumes of files from the Ministries of Justice and the Interior, dated

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<sup>249</sup> UN Document A/72/523, Report of the Special Rapporteur on Truth, Justice, Reparation and Guarantees of Non-Recurrence, 12 October 2018, on prevention.

<sup>250</sup> OAS, 'Access to Information on Human Rights Violations', thematic report by the Special Rapporteur on Freedom of Expression, 2010.

<sup>251</sup> Draft bill (Boletín) 5167-06.

<sup>252</sup> OAS/ Ser.L/V/II; IACHR/RELE/INF.16/17, 'Special Report on Freedom of Expression in Chile', IACHR, 15 March 2017.

between September 1973 and mid-1980, were included in the first run. The aims included identification of documents whose potential relevance to human rights violations had previously been overlooked due to their classification under apparently unrelated headings.<sup>253</sup>

Civil society also has important holdings of human rights related documentation, some of which were added to the UNESCO Memory of the World register in 2003. The Museum of Memory and Human Rights has identified and listed many of these sources, around the country. Recent academic work coordinated from the Universidad Alberto Hurtado has explored archives that were amassed in the course of defence and support of people targeted by repression.<sup>254</sup> Dictatorship-era human rights organisations including the ex Vicaría de la Solidaridad archive FUNVISOL, FASIC, and the Comisión Chilena de Derechos Humanos chose to keep their own documentation and to undertake conservation and archiving work without official support. In 2013, the building that currently houses the Comisión – and was formerly the clandestine detention and torture centre known as the “Clínica Santa Lucía” – was burgled. This prompted the Comisión to deposit some of its documentation in the National Archive, for safekeeping. However, the Comisión continues to receive documents donated by individuals and by other organisations. FUNVISOL and FASIC meanwhile respond on an ongoing basis to court orders requesting papers that may serve as proof in ongoing criminal investigations.

FASIC continued to offer direct legal assistance to relatives and survivors until the mid-2000s, and still supplies documents that users might need to open civil claims and/or exercise their right to administrative reparations. These organisations have had no solid or regular state support for this work, which has had to be done through a mixture of shoestring budgeting, sporadic income from competitive funding bids, and above all, donated labour in the form of voluntary work.<sup>255</sup> The lack of reliable finance and support puts the future of the archives, and access to their contents, in jeopardy, despite the fact that in two cases (FASIC and the Vicaría) they are in theory protected under their status as national monuments.<sup>256</sup>

#### **6.4 Controversies over historical monuments and criticism of the new Ley de Patrimonio**

In July 2019, the president of the right-wing UDI party was joined by other right-wing politicians in railing against the awarding of the status of historical monument to a complex which includes a former clandestine camp used by MIR armed opposition members during the dictatorship. The status was conceded in December 2017, but only recently signed into effect via official publication. The current minister for Culture, the Arts, and Patrimony responded to criticism by explaining that she did not have the power to reject the measure, although she made sure to add that “any citizen is free to request the reconsideration of a decision made by the Council for

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<sup>253</sup> Website of the National Archive, News section, ‘Descripción documental. Fondos Ministeriales y su dimensión de derechos humanos’. 24 January 2018.

<sup>254</sup> The university research project ‘Tecnologías Políticas de la Memoria’, housed at the Universidad Alberto Hurtado, can be seen online at: [www.memoriayderechoshumanosuah.org/tecnologias-politicas-de-la-memoria/](http://www.memoriayderechoshumanosuah.org/tecnologias-politicas-de-la-memoria/).

<sup>255</sup> In 2018, for the first time, an agreement was approved transferring CLP \$67.340.000 from the National Service for Cultural Patrimony (Servicio Nacional del Patrimonio Cultural) to FUNVISOL. The grant was renewed in 2019.

<sup>256</sup> The FUNVISOL archives were given National Monument status in 2017, with FASIC’s following suit in 2018. In both cases, the process was initiated by the organisation itself.

National Monuments”.<sup>257</sup> The controversy threatens to convert the Council, and the whole concept of national monument, into a party political football, something that would militate against the very nature of the organism and its activities. In mid-August, feminist groups and associations of former political prisoners strongly questioned the sale of a former torture centre to a property developer. The site, located on Iran Street in the Santiago district of Macul, is notorious for having been a focus of sexual violence used as a method of torture. The site was declared a Historic Monument in 2016, which means that according to the law, the state should have a preferential option to purchase should its private owner decide to sell. The Council said it had not been notified of the intended sale, and announced its intention to study options for legal recourse. A draft bill proposed by the government in June 2019 to replace the current Law of National Monuments, which dates from 1925, was criticised for the meagre participation contemplated for civil society and “overrepresentation of state bodies”.<sup>258</sup>

## 7. CONCLUSIONS

The 46th anniversary of Chile’s 1973 coup takes place in a context that promises little by way of action to better meet the numerous urgent moral debts that the Chilean state owes to its citizens over dictatorship-era violations. In the area of truth, continued secrecy, uneven criteria, and contradiction prevail, as is illustrated by the repeated reluctance or downright refusal by the prison service to provide information that the national Council for Transparency and the courts have both repeatedly found to be of legitimate public interest. The CDE’s behaviour is meanwhile founded on the citation of internal norms, mandates or rules as if they provided justification for actions that run counter to the state’s obligations under international law; displaying a profound lack of comprehension on the part of state entities of their shared responsibility for compliance with those obligations. In the justice arena, advances in the recognition and punishment of a broader range of criminal offences, and in the co-ordination, prioritisation and communication of ongoing cases are all welcome. It is however worrying that the jurisprudential consensus regarding the inapplicability of crimes against humanity seems increasingly under threat. The failure to recognise various incidents documented by the Rettig report, as crimes against humanity meanwhile serves as a salutary reminder that the 1978 Amnesty Decree Law is still in force and could in theory be invoked in such circumstances. More than a thousand people subjected to enforced disappearance are yet to be traced, and the promise of a dedicated national action plan to prioritise the search for them has been reneged upon.

Reparations, a particular focus for this year’s report, has been insufficient and often also badly administered even where it has existed. In the area of guarantees of non-repetition, state made pronouncements before international organisations do not match either the actual state of legislative progress, or the observable behaviour of the uniformed police on the streets, in secondary schools and poor urban areas, and toward vulnerable groups.<sup>259</sup> Their appalling

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<sup>257</sup> Electronic newspaper *El Mostrador*: “Ministra Valdés por monumento al MIR: ‘No tramitar este acuerdo significa caer en notable abandono de deberes’”, 19 July 2019.

<sup>258</sup> Newspaper *La Tercera*: “Expertos de la UC critican nueva ley de Patrimonio”. 19 August 2019.

<sup>259</sup> Note to the English edition: this report was written before the widely reported police violence that was unleashed on protesters who took to the streets in mid-October 2019. This violence included dozens of incidents in

behaviour in Patio 29 of the General Cemetery during commemorations of 2019's coup anniversary is simply one more example of an established pattern of unnecessarily brutal and violent behaviour. In the areas of prevention and of memory, the continued rise of denialist tendencies has most unfortunately been boosted by lamentable attempts to instrumentalise, for ideological purposes, bodies whose correct functioning requires that politicians of all stripes respect their autonomy and independence.

## **8. RECOMMENDATIONS**

For the first time in the nine consecutive years in which the Observatorio has been responsible for preparing this chapter of the UDP annual human rights report, it is not possible to identify a single one of last year's recommendations that has been put into practice. Given their importance and urgency, we reiterate them, as well as adding others which reflect this year's spotlight on the reparations dimension of transitional justice.

In the interests of furthering its compliance with the duties of the state in truth, justice, reparations, memory and guarantees of non-repetition in relation to the grave human rights violations committed during the 1973-1990 civil-military dictatorship, the Chilean state should:

1. Create a permanent, dedicated and adequately staffed and funded body to coordinate all public policy related to truth, justice and reparations, in order to achieve internal and external coherence of policy measures; ensure full participation for relatives and survivors; consider new applications to existing categories of recognised victim and survivor and assess the need to create new ones; and promote the search for the disappeared. Improve existing reparations programmes, create new ones that respond to the mass violation of social, economic and cultural rights committed during the dictatorship, and implement a gender perspective. Consider expanding the current attributes and mandate of the Human Rights Programme Unit and/or the Subsecretariat of Human Rights to which it belongs, for this purpose.
2. Implement accompaniment and legal advice/ legal representation programmes for relatives and survivors who want to inform themselves about and/or activate paths to reparation, including the bringing of civil claims for compensation. Instruct the Consejo de Defensa del Estado that its pronouncements and actions must respect the state's duties and obligations under international law, in particular so that it ceases unjustifiably opposing the exercise of rights to holistic reparation.
3. Create a National Search Plan for the Disappeared that complies with, inter alia: the numerous recommendations made by the UN Working Group in 2013; Chile's duties under the International Convention against Enforced and Involuntary Disappearance and its regional counterpart, and the search principles adopted by the relevant UN Committee in 2019. This Plan should be implemented by an agency that collaborates actively with the

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which protesters and bystanders were blinded by the deliberately reckless use of plastic bullets and tear gas canisters fired indiscriminately, and at head height, into crowds.

justice process and ensures direct, permanent and full participation by relatives and, where necessary, by suitably qualified representatives of civil society

4. Recognise and proactively take steps to comply with the final recommendations made by the Chilean state as the outcome of its presentations before the UN Committee Against Torture, in 2018 and the Committee against Enforced Disappearance, in 2019. Similarly, acknowledge and implement the recommendations proceeding from Chile's Universal Periodic Review before the UN in 2019. Comply with the remaining outstanding measures ordered by the Inter-American Court of Human Rights in the cases *Almonacid*, *García Lucero*, and *Órdenes Guerra*.
5. In particular, take all necessary steps to achieve the passing and implementation of the typification of enforced disappearance as an ordinary crime (outside of contexts constitutive of crimes against humanity), and of all other pending draft bills mentioned by the State in its presentations before the aforementioned UN Committees but which currently have no priority status assigned and/or report no recent movement.
6. Modify the current draft bill on Patrimony so that it provides for a greater role for the active participation of civil society groups with relevant expertise; and introduce a draft bill and practical mechanisms for the protection of memory sites, similarly provided as regards participation.
7. Respect and defend the formal, financial, and functional autonomy of the Instituto Nacional de Derechos Humanos.
8. Resolve, as a matter of urgency, the "bottleneck" which currently affects the SML's carrying out of assessments of mental faculties and other procedures that are essential to the justice process in dictatorship-era human rights cases.
9. Ensure that the laws regulating release on parole or licence (*libertad condicional*), the current executive-sponsored draft bill on the substitution of non-custodial sentences in case of illness or infirmity, and related legal dispositions that currently exist or may be introduced, are formulated, interpreted and applied in such a way as to respect the state's duty to provide effective and proportionate penalties for grave human rights violations.
10. Affirm, protect, and deepen the measures taken by the Supreme Court and its *Coordinación Nacional de DDHH* to galvanise the justice process; find ways to actively promote public awareness and knowledge of the outcomes of this process, including providing public information about the serving of sentences and any post-sentencing benefits conceded to perpetrators