

## CHILE

**The former military ruler, General Augusto Pinochet, returned to the country and faced proceedings before the Chilean judiciary. Although the judiciary took significant steps to advance the Pinochet trial, in July 2001, the Santiago Appeals Court suspended proceedings against the former dictator on health grounds. Politicians opposed to Pinochet's prosecution and the Armed Forces exerted considerable pressure on both the executive and the judiciary. Judges appeared to be willing to open trials for past human rights violations. However, the 1978 amnesty law continued to be a major obstacle to such prosecutions. The criminal law system reform process, which attempts to incorporate aspects of the adversarial model, progressed substantially in several areas.**

### BACKGROUND

The Chilean Constitution was designed by the former military government and approved by popular referendum in 1980. In 1989, the Constitution was amended slightly after the military dictatorship lost a referendum concerning the question as to whether (ret'd) General Pinochet should continue to be President. Although the Constitution establishes the separation of powers, it also includes provisions to protect the military's interests by granting it excessive powers in the functioning of the democratic institutions. The President, who is elected for a non-renewable six-year term and is head of State and head of the Government, exercises executive power. A bicameral Parliament, composed of the Chamber of Deputies and the Senate, exercises legislative powers. There are 120 deputies and 49 senators elected through periodic direct elections, with the exception of nine designated senators. Four of these designates are former chiefs of military branches and two are former Presidents who are senators-for-life. The Constitution provides for an independent judiciary. The influence of the military in the judiciary has significantly decreased, as continued rotation in the court system has reduced the number of military-period nominees.

In March 1999, the United Nations Human Rights Committee (HRC) expressed concern over certain powers retained by members of the former military dictatorship. The HRC also noted that the structural constitution of the Senate prevents legal reforms that would enable Chile to comply more adequately with its Covenant obligations. In January 2000, the Inter-American Commission on Human Rights (IACHR) found that the institution of designated senators, who instead of being elected are appointed by the military and other non-representative institutions, was undemocratic and a breach of human rights obligation because it distorted political representation. In October 2000, a Senate Commission approved unanimously a proposal to shorten the presidential period from six to four years and to eliminate the institution of non-elected senators starting in 2006. However, this motion has not become law and remains under consideration by Parliament.

Ricardo Lagos was elected President in January 2000 and took office two months later. As a presidential candidate, Mr. Lagos led the *Concertación para la Democracia*, a centre-left coalition that included his Socialist party. President Lagos has attempted to reach political agreements to end the excessive role the military has played in Chilean institutions, give the President the power to dismiss and promote members of the army, democratise the Parliament, and address the impunity for past human rights violations. However, the *Concertación's* lack of a working majority in Parliament and electoral rules that give excessive representation to the second most popular party or coalition, presently the centre-right coalition Alliance for Chile (*Alianza por Chile*), have made difficult the smooth approval of Presidential initiatives.

## HUMAN RIGHTS BACKGROUND

A number of criminal suspects detained by members of the uniformed police (*carabineros*) were reportedly tortured or otherwise ill-treated. In April 2001, Parliament passed a new press law, which effectively extended the protection of freedom of expression. The new law repealed article 6(b) of the State Security Law, which had criminalized "contempt of authority" and provided for prison sentences for those who "insulted" public authorities. Since 1990, more than 30 journalists, politicians and ordinary citizens had been prosecuted under this law. The most recent cases were brought in February 2001. Article 66 of the Statute was also repealed. That provision had been used in 1999 to confiscate the entire stock of the "Black Book of Chilean Justice", an exposition of judicial corruption in Chile, on the day of its launch (See *Attacks on Justice 2000*). The new law protects journalists from any obligation to reveal their sources, eliminates courts' powers to censor press coverage of criminal cases, and ends the powers of military tribunals to try journalists for sedition. However, existing legislation still offers ways to ban publications and prosecute critics for defamation. The ordinary criminal code permits prosecution for defamation of the President, legislators, judges and ministers. Other criticised provisions include article 30 of the State Security Law, which allows judges to confiscate publications used to carry out defamation against State authorities. In March 2001, President Lagos pledged to introduce legislation to repeal the contempt of authority provisions of the Chilean Criminal Code.

### Impunity

Judges were inclined to investigate and open trials for past human rights violations. Nevertheless, such cases posed substantial legal and institutional obstacles, particularly the amnesty law passed in 1978, covering crimes committed between 1973 and 1978. In 1999, the HRC, in reviewing the periodic report of Chile, reiterated its previous view that amnesty laws are generally incompatible with the duty of the State party to investigate human rights violations. In July 2001, the International Commission of Jurists, together with Amnesty International submitted a report on the incompatibility of the 1978 amnesty law (Law 2191) with international law. The report highlighted the international human rights obligations of Chile; the State's obligation to judge and punish the authors of human rights violations; the incompatibility of the amnesty law for perpetrators of human rights violations; the imperative of the *pacta sunt servanda* principle; and the non-application of the amnesty by domestic tribunals.

Since 1999, Chilean courts have managed to prosecute cases, notwithstanding the 1978 amnesty laws, by applying a jurisprudential rule which established that the "disappeared" should be considered to be victims of abduction because the last known fact about their situation is their illegal capture. According to the Supreme Court, it is necessary to ascertain whether a person is in fact dead and, if so, to establish the time of death. If it were discovered that he or she was still alive at the time of the 1978 amnesty law and was killed shortly thereafter, the perpetrators could not benefit from the amnesty. The cases then remain open until the legal truth is established about the fate of the disappeared. This jurisprudence was complemented by a more recent Supreme Court ruling that full investigation of a crime that is allegedly covered by the amnesty law and the identification of the person responsible for that crime are required before the amnesty law may be applied.

Investigation of the 1982 killing of labour leader Tucapel Jiménez continued. Judge Muñoz led the Appeals Court to order the detention of 12 persons for the crime, including retired army General and former Director of army intelligence, Ramses Arturo Alvarez Scoglia. Judge Muñoz also charged General Hernán Ramírez Hald, suspected to have helped one of the suspects to flee the

country. In November 2000, an investigative judge indicted Brigadier-General Hernán Ramírez Hald in the Tucapel Jiménez case. The indictment was the first ever of a General on active duty. Seventeen people have been charged in this case.

In November 2000, an Argentinean court found Chilean intelligence agent Enrique Arancibia Clavel guilty and sentenced him to life in prison for his role in the 1974 car bombings in Buenos Aires, Argentina, which killed former Chilean Army Chief Carlos Prats and his wife. The Argentinean judge requested the extradition of Pinochet and other military officers allegedly involved in Prats' murder. In 2001, The Chilean Supreme Court rejected the extradition petition on technical grounds.

In December 2000, Italy requested the extradition of (retd) General Manuel Contreras and another official to serve life prison sentences for the 1975 murder of Chilean political leader Bernardo Leighton, which occurred in Italy. The extradition request was denied on the grounds of insufficient evidence and lack of due process because the two former officers had been tried in Italy in absentia.

### **The Round Table (Mesa de Diálogo)**

The *mesa de diálogo* was set up in 1999 to deal with the disappearances during the years of military rule between 1973 and 1990. Although several prominent human rights lawyers took part in the Round Table, the major groups representing the victims of human rights violations refused to participate. The *mesa de diálogo* signed a declaration in June 2000, which recognised the gross human rights violations committed during the dictatorship. The *mesa de diálogo* also accepted the explanation of the armed forces and the uniformed police (*carabineros*) that they did not have information on the disappeared but were committed to cooperate in obtaining such information. The Declaration set a timetable to collect information and asked for legislation to provide a limited measure of anonymity to those who provided information on the whereabouts of the remains of the disappeared. Legislation with this purpose was approved in July 2000.

On 8 January 2001, the armed forces released a report describing the fate of 200 victims, in fulfilment of agreements reached by the *mesa de diálogo*. The report revealed that the armed forces had dumped the bodies of more than 150 prisoners into the ocean, rivers and lakes of Chile. Most of the cases registered in the armed forces' report dated from the first six months of the military dictatorship, before responsibility for repression was given to a centralised apparatus, the secret police known as DINA. Although the report was important because it represented the first time that the Chilean armed forces gave information about their widespread human rights violations, a great deal of information was lacking, especially regarding the fate of hundreds who disappeared after being abducted by the DINA, which ultimately responded to General Pinochet alone.

The armed forces had some interest in establishing the fate of the disappeared in order to stop ongoing prosecutions. Doubts arose concerning the consequences of the army's report on cases of disappearance, with some arguing that information on the victims' deaths means the amnesty law should end ongoing prosecutions. However, the information provided by the military was vague and inadequate to allow for judicial verification. Although approximate identification of the sites where the bodies were dumped was provided, the report did not give details on when the prisoners were disposed of, how the prisoners were killed, or what happened to their bodies after they were murdered. It is clear that only independent confirmation could allow judges to close investigations and to award amnesty when there is no definitive proof of death.

On 16 February 2001, relatives of the victims filed two suits which accused the three commanders in chief of the armed forces and the director of the National Police of having obstructed justice by releasing minimal information concerning the fate of those executed or disappeared during the Pinochet regime. However, these charges were dismissed in March 2001 by the Santiago Criminal Court.

### **General Augusto Pinochet Case**

On 3 March 2000, (ret'd) General Augusto Pinochet Ugarte returned to Chile after the authorities of the United Kingdom ordered his release on medical grounds from house arrest in England (*See attacks on Justice 2000*). In Chile, complaints before more than sixty tribunals, involving nearly 2,000 individual cases of human rights violations lodged since January 1998, were awaiting General Pinochet. However, in addition to the political challenges that would confront the judiciary in trying General Pinochet, the legal obstacles included the 1978 amnesty law, the parliamentary immunity of the retired General and his alleged illness. By the time of General Pinochet's return, human rights lawyers had filed a legal complaint before the Santiago Appeals Courts to lift Pinochet's parliamentary immunity from prosecution as a lifetime senator. The 1980 Constitution awarded all former Presidents who have completed their terms this non-elected post.

In April 2000, Parliament approved a constitutional reform granting parliamentary immunity to former Presidents who have served a full term and therefore encouraging General Pinochet to resign from the Senate without jeopardising his protection from prosecution. However, General Pinochet failed to resign his Senate position, and his counsel argued before the Santiago Appeal's Court that as the General was too ill to carry out his defence, the proceedings would violate his right to a fair trial. In May 2000, however, the court dismissed petitions to undertake a medical test before deciding on Pinochet's immunity. On 23 May 2000, the Santiago Appeals Court voted thirteen to nine to remove Pinochet's immunity, on the grounds that there were bases for Pinochet to be prosecuted. The Supreme Court confirmed the decision by an even larger majority in August 2000. The Supreme Court ruled that "the true purpose of an immunity proceeding is to decide whether there is probable cause against a congressman charged with a crime", and added that according to the Code of Criminal Procedure, "there is probable cause when evidence is discovered against a congressman charged with a crime". The Supreme Court decision on Pinochet also gave guidelines calling for full investigation of cases of deaths and disappearances that are likely to fall under provisions of the amnesty law or that eventually may be subject of the statute of limitations. The Court reasoned that amnesty should not be applied in the abstract, but instead only to individuals found guilty of a crime. In the same way, the statute of limitations should be applied only after the guilty has been identified and the courts determine that no impending factors, such as subsequent crimes by the accused, are relevant. The investigating judge's request for lifting of immunity related directly to the case known as the "Caravan of Death", an operation carried out one month after the military came to power in 1973, in which 72 people were secretly executed. It was unclear what effect the ruling would have on the approximately seventy other criminal cases pending against General Pinochet.

General Pinochet's loss of immunity produced tensions between the President and the armed forces. President Lagos emphasised that he would respect the court's rulings and that regardless of any political agreement on past human rights violations, justice must continue. However, the courts came under pressure when, under urging from the armed forces, President Lagos called a meeting of the National Security Council, which is constituted by members of the armed forces, thus sending a clear message to the judiciary that Pinochet's indictment was considered an issue of national security.

On 1 December 2000, the case judge, Juan Guzmán Tapia, indicted Pinochet on charges of kidnapping and asked that he be placed under house arrest pending trial. However, 10 days later, the Santiago Appeals Court dismissed these charges on the grounds that Judge Guzmán Tapia had failed formally to interrogate General Pinochet. Days later, the Supreme Court confirmed the Appeal Court's dismissal of the charges, but ordered Pinochet to undergo questioning regardless of whether medical tests to establish fitness for trial had been undertaken. On 9 January 2001, General Pinochet submitted to medical tests, pursuant to which a team of six experts established unanimously that he suffered from "vascular dementia" (a light to moderate form of dementia, according to one expert) caused by several minor strokes. One independent expert chosen by each side, in an apparently impartial procedure, observed the six experts. After the medical diagnoses it remained for the judge to decide whether Pinochet's condition was grave enough to prevent him from carrying out his defence and understanding the charges against him.

On 23 January 2001, General Pinochet was formally questioned at his home for two hours by Judge Guzmán. During the deposition, Pinochet was reported to have denied that he had ordered the "caravan of death" executions and to have suggested that local commanders might have been responsible. Following the deposition, Judge Guzmán renewed Pinochet's house arrest and, on 29 January 2001, reinstated charges against him. Judge Guzmán determined that Pinochet was fit to stand trial and indicted him on 57 charges of murder and 18 of kidnapping. On 28 March 2001, the Court of Appeal in the capital Santiago ruled that the charges should be reduced to those concerning conspiracy to conceal the activities of the military death squad. The Court also approved Pinochet's release from house arrest after the payment of a bail.

On 9 July 2001, the Santiago Appeals Court suspended the proceedings on health grounds. Although the investigating judge had concluded that Pinochet's condition did not rise to the level of madness or dementia required under the law, the Santiago Appeals Court ruled, by two votes to one, that his physical state did meet the requirements based on a different interpretation of the term "dementia". Although opinion on the matter among outside observers was in no way unanimous, many criticised the decision on the basis that trials in Chile are largely written procedures and that Pinochet seemed to some to be fit enough to understand the charges and adequately instruct his defence team.

On 22 August 2001, the Supreme Court reopened the possibility of a trial of the former dictator. While the contents of the ruling of the Santiago Appeals Court could not be appealed, prosecutors went to the Supreme Court arguing that the decision was illegal on technical grounds. Prosecutors said that the tribunal had based its decision at least in part on a reform of Chile's penal code, which is not yet in effect in Santiago. The Supreme Court voted 5-0 to study the request and did not set a date for the issuing of a final ruling.

Whatever the ultimate outcome, the Pinochet case has helped to establish the principle that certain grave human rights violations are subject to "universal jurisdiction" and that heads of states are not immune from prosecution. Furthermore, Chilean courts overcame the 1978 amnesty law by stating that prosecutions of ongoing disappearance are possible, because the crime continues as long as the fate of the victim is concealed.

## JUDICIARY

The Constitution provides for an independent judiciary. The influence of the military in the judiciary has significantly decreased as continued rotation in the court system has reduced the number of military-period nominees. In 2000, the judiciary's budget was US\$ 155,339,806, which constitutes a mere 0.83 per cent of the annual State budget.

### *Structure*

The judiciary is constituted of an ordinary court system and a specialised court system. Within the ordinary system, the 21-seat Supreme Court has the highest position. There are also 17 Appeals Courts with jurisdiction over the regions, and courts of first instance (*juzgados de letras*), with jurisdiction over a district within a region under the principal jurisdiction of an Appeals Court. The Supreme Court is responsible for general supervision, including discipline and resource management and also plays a key role in the appointment procedure.

The President of the Supreme Court, while delivering the Court's annual report, expressed dismay at the interference and the unjustified criticism the judiciary has faced in respect of a number of its decisions. The President of the Supreme Court rejected criticism that political pressures have influenced judicial decisions.

In June 2001, following a petition from the Government, the Supreme Court decided to appoint nine criminal judges, who would exclusively carry out 51 investigations on disappearance. Fifty-one first instance judges were also appointed to oversee proceedings on 65 cases of disappearance. The decision was taken on the grounds that a substantial number of cases are being carried out on facts that allegedly constitute human rights violations committed since 1973. The appointment of these judges is directed toward achieving a significant advance in these cases.

A Constitutional Tribunal is empowered to exercise control over organic laws and the laws that interpret a constitutional provision. Due to its restricted powers and because of its composition, the Constitutional Tribunal has maintained a low profile in Chile. The appointment of justices is one of the enclaves of powers retained by members of the former military dictatorship, as three of the six members are appointed by the National Security Council, half the members of which belong to the armed forces. When the Constitutional Tribunal reviewed the new Code of Tribunals it recommended that Parliament re-draft the provisions in order to guarantee certain rights. The Parliament, on the understanding that the statement was a recommendation only, did not change the text of the code and it was ratified by the President. In this case, it was clear that the rulings of the Constitutional Tribunal were ineffective.

### *Appointment and Security of Tenure*

Supreme Court justices are appointed by the President and ratified by at least two thirds of the senate of the Republic from a list of five candidates submitted by the Supreme Court (Article 75). Appeals Courts justices are appointed by the President from three-candidate lists submitted by the Supreme Court. First instance judges are also appointed by the President from a list submitted by the Appeals Court of the corresponding jurisdiction. The law of the Public Prosecutor's Office establishes that the appointment of prosecutors follows the same method of appointment.

The Constitution, under article 77, guarantees security of tenure to judges "during good behaviour", but stipulates lower level judges will exercise their functions during the time established by the law. The Supreme Court may remove judges on grounds of "bad behaviour" upon the request of the President of the Republic, of an interested party or on its own initiative. By majority vote of its

members, the Supreme Court may also transfer a judge to a different position. Furthermore, judges and magistrates are subject to periodic evaluations by the next superior court (Code of Tribunals, Articles 273, 275 and 277). In 2000, the Supreme Court imposed 146 disciplinary measures, including the removal of one justice of the Appeals Court of Santiago. Removals, transfers and other sanctions applied by the Supreme Court were seen by most observers as being in compliance with legal provisions. The new Commission of Ethical Control, created in March 2000 within the Supreme Court, has carried out advisory functions on behalf of the plenary with regard to general policies on addressing irregularities within the judiciary and the investigation of cases.

The wide powers of the Supreme Court with regard to magistrates and judges undermines the latter's independence.

### *Judicial Reform*

The reform of the criminal law system, which began in the early 1990s, continued during the period under review, with substantial progress reported in different areas. Following the 1997 constitutional reform, which established the Public Prosecutor's Office (*Ministerio Público*), several laws have been evaluated and approved to modernise the Chilean Criminal law system. In 1999, the new Law of the Public Prosecutor's Office was adopted by Parliament (Law 19640). This law created the Office of the Public Prosecutor, which enjoys autonomy and independence. During the period under review, three new laws entered into force. Law 19696 provided for a new Code of Criminal Procedure; Law 19665 reformed the Code of Tribunals; and Law 19718 created the Public Penal Defence.

Most of the administrative and financial efforts of the judiciary have been directed toward implementing this reform throughout the country. The reform is to be implemented over the entirety of the country by the end of 2003. The planned gradual implementation is for the purpose of accounting for any disadvantages of the new system, so that they may be corrected through appropriate legislative measures.

Law 19640 (*See Attacks on Justice 2000*) grants to Public Prosecutors the powers to investigate and formulate criminal charges. Prosecutors have direct control over the investigations and the police forces for this purpose. However, orders to deprive individuals of their constitutional rights, such as arrest warrants, need prior approval by a judge (*Juez de garantías*). The Prosecutor-General, the head of the Public Prosecutor's office, is appointed by the President of the Republic with the consent of the Senate from a list of five candidates submitted by the Supreme Court, following an open and public contest. The Prosecutor-General, elected in 2000, will serve for a non-renewable ten-year term.

Law 19665, containing a new Code of Criminal Procedure, establishes a criminal procedure based on an adversarial model that is due to be fully implemented by the year 2003. The new code separates the function of investigation, prosecution and judgement by giving these functions to different organs, contrary to the former system under which they were concentrated in the criminal judge. The new organs are the Public Prosecutor's Office, in charge of the investigation and prosecution; Courts of Guarantees responsible for ensuring the fulfilment of the procedural guarantees during the investigation stage; and an Oral Tribunal that will carry out the judgement. The new code grants prosecutors control over the police during the investigation stage, contrary to the former system, in which the police enjoyed free initiative to act. The entry into force of the new system will bring a substantial increase in the number of criminal judges and prosecutors. By September 2001, the Supreme Court started to organize merit-based contests to fill the vacancies.

According to the Ministry of Justice, the Public Prosecutor's Office must have 642 specialised prosecutors.

Law 19665 reformed the Code of Tribunals. Its purpose is to tailor the structure of the judiciary to the new Code of Criminal Procedure. The new Code created 151 Courts of Guarantees, with 413 judges; and 43 Oral Tribunals with 396 judges.

Law 19718 created the Public Defender's Office. It will be composed of approximately 417 legal defenders who will provide free legal assistance to those accused who do not have the resources to cover their legal defence in criminal cases. The Public Defence has its own budget, which will be controlled by the President through the Minister of Justice. In April 2000, the head of the Public Defence Office was appointed.

## MILITARY JUSTICE

Military courts continued to hold broad jurisdiction over all matters involving military officers. The military courts also have jurisdiction to try civilians for certain kinds of criminal offences. Decisions in the military court system are subject to review by the Supreme Court, but the Supreme Court has seldom overturned a military court decision. Moreover, in respect of disputes of jurisdiction that have arisen between the military and civilian courts, the Supreme Court has tended to grant jurisdiction to the former. However, as the composition of the Supreme Court no longer reflects an overwhelming military influence, this trend has begun to shift in recent years. (By September 2001, only three of the Supreme Court's members had been appointed by the military.) One example was the transfer of the Albania case from the Military Courts to the civilian judiciary in June 2000. Operation Albania refers to the 1987 killings of 12 members of the Manuel Rodríguez Patriotic Front.

Regarding the military tribunals' jurisdiction, the Committee against Torture recommended in March 1999 that "the law be amended to restrict the jurisdiction of the military courts to trials only of military personnel charged with offences of an exclusively military nature". In 2000, the Human Rights Committee expressed concern at "[the] wide jurisdiction of the military courts to deal with all cases involving prosecution of military personnel and their power to conclude cases that began in the civilian courts." The Committee added that this phenomenon "contributes to the impunity which such personnel (military officers) enjoy against punishments for serious human rights violations". The Committee recommended that the law be amended in order to restrict the jurisdiction of the military courts to trials only of military personnel charged with offences closely related to military matters.

## CASES

**Julia Urquieta {Lawyer}**: Ms. Urquieta is a member of the Committee for the Defence of People's Human Rights (CODEPU). On 30 October 2000, Ms. Urquieta gave a television interview in which she explained on behalf of those she was representing in a case the reason that Mr. Ricardo Claro Valdés was being accused of having supported the repression carried out by the military regime. Following the statement of Ms. Urquieta, legal proceedings were initiated against her at a criminal court in Santiago on 23 May 2001. On 1 June 2001, lawyers and human rights organisations submitted an *amparo* petition aimed at seeking protection for constitutional rights, which was rejected. The case, currently at the Second Chamber of the Supreme Court, is said to



lack merit and to have been undertaken against Ms. Urquieta in response to her exercise of legitimate legal activities.