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Human Rights Law Clinic**



State violence in Chile

An alternative report to the
UN Committee Against Torture

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PART I : STATE VIOLENCE IN CHILE

1. INTRODUCTION

This General report has been drawn up by Centro de Salud Mental y Derechos Humanos, CINTRAS, based on the analysis of the most important and recent studies and publications regarding torture and maltreatment in Chile, on a general review of the printed press over the last few years, and on interviews with lawyers specialized in this field, as well as with representatives of entities that work defending the rights of people arrested and imprisoned.

2. GENERAL CONTEXT

Chile has a unique political system in the sense that it possesses all the formalities of a democracy but continues to be ruled by the Political Constitution imposed in 1980 by the Pinochet dictatorship (1973-1990). That Constitution defined a severely restricted and controlled democracy for the “permanent period” following 1990. Its most basic anti-democratic features are the semi-autonomy of the Armed Forces and uniformed Police (Carabineros) from civilian power¹; the existence of a peculiar binominal electoral system that enables a political minority (Right-wing forces in the case of Chile) to neutralize popular majorities in the composition of both chambers of the national Congress²; the existence of a National Security Council composed of the four commanders in chief of the Armed Forces and Carabineros, as well as by four civilians (the President of the Republic, the President of the Senate, the President of the Supreme Court and the General Comptroller of the Republic) that may be summoned by two of its members and adopt agreements against the opinion of the President of the Republic³; the existence of a Constitutional Tribunal capable of deciding that a law is unconstitutional (and thus revoke it) upon the request of only 25% of the members of the Chamber of Deputies or Senators. Out of its seven members only two come from the Legislative or Executive Powers of the State⁴. Lastly, the need for a high quorum in order to reform the Constitution imposed in 1980⁵, making that possibility impossible without the support of the right-wing minority that – in practice – created that Constitution⁶. Naturally, such a restricted democracy severely impacts the validity of the most

¹ Its most relevant characteristics are found in the impossibility of removing its commanders-in-chief during the four years that they are appointed for by the President of the Republic, out of the five most senior officers in active service; and in the lack of faculties by the President to remove Armed Forces and Carabineros officers in whom he has lost confidence (See Articles 93 and 94)

² The binominal system means that each electoral constituency – for Deputies or Senators – simultaneously elects two and only two representatives. Thus, in an artificial and anti-democratic manner, the will of 34% of the electorate becomes equal to the will of 66% of the electorate. Certainly a unique system in the world.

³ Including “presenting the President of the Republic, National Congress or Constitutional Tribunal, its opinion regarding any event, action or matter that in its view severely undermines the basis of the institutional framework or that can compromise national security.” (Art. 96).

⁴ One lawyer appointed by the President of the Republic and the other elected by the Senate. Of the remaining five, three are Supreme Court judges elected by that Court, and two are lawyers elected by the National Security Council. (See Art. 81).

⁵ For most of its parts, it requires 60% of active deputies and senators, and two-thirds of all deputies for chapters related to Basis of the Institutional Framework; Constitutional Rights and Duties; Constitutional Tribunal, Armed Forces and Law and Order Enforcement Institutions; National Security Council; and Reform of the Constitution. (See Art. 116).

⁶ An ad hoc commission appointed by the dictatorship and comprised of right-wing jurists drew up the 1980 Constitution, in force. It was then reviewed by a Council of State, also appointed by the Pinochet regime and comprised of right-wing political personalities. The Government Junta, comprising the four commanders-in-

fundamental human rights, including the right to physical and mental integrity; especially with the high degree of autonomy that the Armed Forces and Carabineros have from civilian power.

3. THE PRACTICE OF TORTURE

Despite the fact that after 1990 the systematic practice of torture by the State - through its security agents - came to an end, this scourge has never ceased to be a factor that has severely impaired the validity of the right to physical and mental integrity⁷. It is true that torture has diminished in intensity and that following the disarticulation in the mid-90's of the groups that put up armed resistance against the dictatorship and continued to operate subsequently (Movimiento Lautaro and Frente Patriótico Manuel Rodríguez-Autónomo), and the approval of the new Criminal Procedure Code at the beginning of this decade⁸, its most severe expressions have also tended to diminish. However, torture, cruel, inhuman or degrading treatment continues to be frequently used in police work and especially in the activities of prison wardens (Gendarmería).

3.1. Torture in prisons

Living conditions in Chilean prisons of convicts and of prisoners awaiting trial constitute severe and systematic forms of violations of the right to physical and mental integrity. In the first place, these people live in extremely overcrowded conditions, something that became much more severe during the 90's. Thus, according to Gendarmería figures, in 1995 there were 22,027 prisoners countrywide, and in the year 2000 that figure had risen to 33,050. This implies roughly a 50% increase in 5 years. According to the same source, in the year 2000 the penitentiary system had a capacity to hold 20,791 prisoners – a 50% deficit.

This dramatic reality becomes anguishing in the more overcrowded penitentiary centres. In 1999, the prison in the town of Limache, with a capacity for 54 prisoners, held a population of 266 prisoners (a deficit of 393%). The prison in the city of Copiapó held 496 inmates, with a real capacity for 122 (a deficit of 307%). The Santiago prison for women held 623 inmates, but a real capacity for 180 inmates (a deficit of 246%). The prison for men in Rancagua had a population of 787 prisoners, but capacity for 250 (a deficit of 215%), and the prison in Casablanca held 125 prisoners, with a capacity for 40 (213% deficit).⁹

*“At the ex Penitenciaría in the Metropolitan Region – the facility with the largest number of inmates in the country (3,506) – one of the alleys (No. 4) holds 450 people and there are only 36 small rooms. In consequence, between 15 and 20 people have to sleep in each one, often in sitting position, and the rest out in the open”.*¹⁰ In addition, *“as a general rule cells have no*

chief of the Armed Forces and Carabineros, approved its final text. Its ratification was via a plebiscite that failed to comply with any of the requirements of a truly free popular election.

⁷ This has been corroborated by successive reports by Amnesty International, Human Rights Watch, International Commission of Jurists, State Department of the United States and the United Nations Special Rapporteur on Torture.

⁸ This replaced the traditional investigative system that dated back to the colonial period, where a single judge conducted the investigation, accused and passed sentence, based primarily on a secret procedure; with a system of oral and public trials where there is a division in the functions of investigation and accusation (prosecutors), supervision of the rights of the accused (guarantee judge) and sentence (sentencing judges). In addition, the right to defence of the accused is guaranteed via a Public Defence Office. However, the Metropolitan Region (Santiago and surroundings) is still operating with the old system, encompassing nearly 40% of Chile's population.

⁹ Facultad de Derecho. Universidad Diego Portales, *Informe Anual sobre Derechos Humanos en Chile 2003. Hechos de 2002*, Santiago, 2003: 65-66.

¹⁰ Facultad de Derecho...(2003): 69.

*adequate ventilation or heating systems, forcing inmates to withstand very low or very high temperatures without any type of assistance”.*¹¹

Another factor – closely linked to the previous one - that severely impairs the right of people incarcerated to physical and mental integrity, are the precarious conditions of hygiene in prisons. So much so, that *“very often they have no toilets whatsoever, or have to share one or two among a population of 300 or 400 inmates, as occurs in some of the facilities of the ex Penitenciaría in Santiago”.* Thus, *“conditions of cleanliness in cells are precarious, resulting in diseases and infections, and it is very common to find an abundance of bed-bugs and scabies”.*¹²

On the other hand, feeding conditions in prisons are very deficient; this is often provided in a degrading manner, or worse still, provided as in Module Alfa in the Colina II Prison in the Metropolitan Region, where conditions were so extremely disgraceful that the Courts ordered their refurbishment, *“where in a premeditated manner Gendarmería provided inmates little food in order to create competition among them”.*¹³

In addition to the above, we must add the especially degrading conditions of the punishment cells, where a large group of inmates are held in a small and unsanitary space. In many cases they even have to satisfy their physiological needs in that same place.¹⁴

On top of the appalling living conditions, one must add the very deficient health care that inmates receive in case of illness. Prison infirmaries are located outside the cell areas within penitentiary facilities, and thus the provision of health care relies on the willingness or unwillingness of prison wardens to take prisoners to the infirmary. In consequence, *“on many occasions, especially when fights break out within penitentiary units, [...] many days can go by before prison wardens allow that to happen, even if inmates are in critical condition”.* Also, *“during the night there are no permanent prison guards in the alleys, galleries or towers, and the only way inmates can report the need for immediate health care is by knocking on the cell bars to call the attention of a guard.”*¹⁵ On the other hand, inmates suffering from HIV/Aids *“do not receive the medicines or therapies – bi-therapy and tri-therapy – that they need to survive”.*¹⁶ In addition, inmates whose cases are dismissed as a result of mental illness, often have to remain in prison because of lack of space in the Psychiatric Hospital.¹⁷

But the most severe violations of the right to physical and mental integrity within prisons are produced as a result of the systematic maltreatment of inmates by prison guards. All the reports drawn up by local and international entities about the situation of human rights

¹¹ Universidad Diego Portales. Escuela de Derecho. y CEJIL, *Tortura, Derechos Humanos y Justicia Criminal en Chile*, Santiago, 2002: 71.

¹² U. Diego Portales y CEJIL (2002): 69.

¹³ U. Diego Portales y CEJIL (2002): 72.

¹⁴ A prison guard from ex Penitenciaría stated *“punishment cells measure 2.5 by 4 meters and hold between 7 and 15 people. Now they have a place to go to the toilet (till recently that did not exist)”*; and Manuel Henríquez, Executive Director of CONFAPRECO (Confederation of Relatives and Friends of Convicts) stated that *“inmates are kept in small cells 1.60 by 2 meters, often in groups of many inmates, and in they have to remain in that place without changing clothes, washing, they have to eat in bottles that have been cut or in milk cartons. They are only allowed to go to the toilet once a day, therefore they are often forced to relieve themselves in the same recipients they use to eat and then empty out and wash so that they can again eat out of them”* (Quoted in U. Diego Portales and CEJIL (2002): 79-80). The prison warden Chaplain himself declared to the Chamber of Deputies’ Special Commission on Citizen Safety that punishment cells were inhuman. (See U. Diego Portales and CEJIL (2002): 80).

¹⁵ U. Diego Portales and CEJIL (2002): 106.

¹⁶ U. Diego Portales and CEJIL (2002): 106-107. See also Corporación de Promoción y Defensa de los Derechos del Pueblo (CODEPU), *Informe de Derechos Humanos 1990-2000*, Santiago, 2001: 101.

¹⁷ See U. Diego Portales and CEJIL (2002): 107 and CODEPU (2001): 101.

coincide with that conclusion. The last Amnesty International Annual Report on Chile (2003), that analyses the situation in 2002, states *“there were continuous reports on the harsh conditions of reclusion and maltreatment of inmates, including minors”*.¹⁸ The report produced by Universidad Diego Portales and CEJIL (Centre for Justice and International Law, based in Washington) published in 2002, concludes that *“our research reveals the effective usage of abuse and torture, both physical and mental, against inmates in all the prisons we visited”* and *“we were able to detect [...] the existence of a punishment regime within prisons that exceeds the acceptable international ranges and, what is even worse, a ‘culture’ of permanent hostility towards inmates, translated into permanent harassment (from verbal maltreatment to brutal beatings) that go beyond the punishments authorized by the Regulations.”*¹⁹

Beatings and cruel treatment are a routine when the roll of inmates is called. They also occur during the fairly frequent searches conducted by prison guards to confiscate forbidden elements that inmates may have in their cells, such as alcohol, drugs or mobile phones. According to Manuel Henríquez, President of the Confederation of Relatives and Friends of Convicts (CONFAPRECO), what occurs on these occasions is *“a collective torture that consists in searches involving a large number of special guards that conduct the so-called ‘carpet’, whereby all inmates have to lie on the floor face down with their hands behind their head, while the guards run on top of them beating them at the same time”*.²⁰

One of the most severe cases of maltreatment took place in January 2002, involving nearly 30 inmates of Module Alfa in the Colina II prison, a high security installation where convicts regarded as very dangerous are confined for months. The situation became known because on January 18, visiting day, 25 out of the 29 convicts that were in the unit wounded themselves with sharp objects as an extreme measure in order to call attention to the following: *“on the night of January 16, Manuel Iturrieta Muñoz, first convict to be sentenced to effective life imprisonment (i.e. 40 years in prison before enjoying any kind of release), held in Module Alfa, was brutally beaten by a group of prison guards. In view of this situation, the following day the remaining inmates in Module Alfa demanded an explanation [...] but were answered with a severe beating that left 13 injured inmates, four of which suffered severe injuries (broken eardrums, back injuries, etc.)”*.²¹ The prison guards’ version was that the convicts had *“beaten themselves up”*. However, the Supreme Court decided in favour of the convicts and ordered the Module to be closed and reconditioned to guarantee a minimum level of dignity for inmates.²²

Inhuman conditions of incarceration, together with constant maltreatment, lead – in turn – to recurrent mutinies that are mercilessly repressed. In consequence, the result of every mutiny

¹⁸ Amnistía Internacional, *Informe Anual 2003*, Madrid, 2003: 131.

¹⁹ U. Diego Portales and CEJIL (2002): 77. This is aggravated by the reticence of common prisoners to denounce the torture and maltreatment they suffer. According to CODEPU this is due to various factors: *“- the common criminal generally comes from social sectors where violence forms part of their daily cultural reality, therefore, when he is beaten by a State official it is normal; -considers maltreatment, in general, a ‘cost’ within the ‘business’ of crime; -is unwilling to act in coordination with other inmates – except in some exceptions – thus, any denunciation is necessarily individual in nature, and in consequence has little relative weight, and what is most determinant, the ensuing cost of denunciations expressed in repression by prison authorities also has to be paid for individually; -and his denunciation is not received with good will by most people, given that they come from criminals and do not form part of any ‘popular cause’”* (CODEPU, 2001: 104).

²⁰ Quoted in U. Diego Portales and CEJIL (2002): 83. It is worth noting that despite the fact that during the 90’s political prisoners imprisoned in the Santiago High Security Prison – for crimes with political motivations committed after the end of the dictatorship – suffered similar treatment to that described above, as from 1999 this situation has been changing and since 1999 there have been no reported cases of torture. Undoubtedly, international pressure on the government has had an effect, as well as the greater attention paid to them by both the Catholic Church and some Deputies from different political parties.

²¹ Facultad de Derecho...(2003): 71. See also Amnistía Internacional (2003): 131.

²² See Facultad de Derecho...(2003): 71-72 and Amnistía Internacional (2003): 131.

is people injured and even dead. In these cases a special anti-mutiny group is in charge of repression. One of the spokesmen for inmates explained to Universidad Diego Portales and CEJIL researchers that *“reprisals only begin with the arrival of the anti-mutiny group [...] when all inmates, without any exceptions, are attacked from all flanks, and this includes everyone; those that took part in the mutiny and those that didn’t. We are attacked by a group of sadists, specifically trained for that purpose, armed to the teeth and protected by shields and helmets. They attack us with shotgun pellets, gas, batons, rifle butts, feet, etc. Normally, they corner us in one of the yards or in the gym where they strip us down to our underpants and force us to wait with our faces against the floor while they destroy our places of reclusion and all its contents. In other words, our improvised furniture, television sets, radios, stereo sets, thermos flasks, clothes, suitcases, everything, absolutely everything. After that [...] they return us to our alleys or galleries and we must go through several ‘dark tunnels’, as we call them, where we are beaten, resulting in broken bones, wounds, etc., in some cases also involving the loss of eyesight or open head wounds that you are left with for life”*.²³ Between December 1999 and March 2002, 9 serious mutinies took place in prisons in the Metropolitan Region, Valparaíso, Concepción, Antofagasta, San Antonio, Coronel and Ancud.²⁴ In 2003 several major mutinies took place: in January in the Colina II prison, where 5 inmates subsequently wounded themselves with sharp objects because they *“feared for their lives”*,²⁵ in October a mutiny in the Rancagua prison resulted in eleven injured *“that were transferred to the Regional Hospital because of severe injuries”*.²⁶ That same month of October, 45 inmates from La Serena prison held an *“indefinite hunger strike to protest against living conditions inside the prison”*.²⁷ In January 2004 there was a major mutiny, including a fire, in the Rancagua prison that ended with six inmates wounded in the Regional Hospital and with tough repression of relatives of convicts that were protesting outside the prison.²⁸

The constant escapes and attempted escapes resulting from the intolerable incarceration conditions also generates behaviour that has a serious impact on the physical and mental integrity of inmates: *“Escapes create a scenario for prison guards to commit abuse, torture and other degrading treatment against the prison population in order to search their cells and investigate the inmates responsible and their collaborators”*.²⁹ Between February 1999 and February 2000, the press reported the escape of 58 convicts in Iquique, Calama, Copiapó, La Serena, Limache, Valparaíso, Viña del Mar, Santiago and Victoria³⁰. In each case this led to some degree of repression.

Another very serious form of violation of inmates’ right to physical and mental integrity is the omission or delay by prison guards to control the fights among inmates and, especially, the fires – premeditated or accidental - that break out inside prisons: *“Whenever fights break out among inmates, prison wardens do not intervene until the situation is desperate for those that are fighting. What’s more, often prison guards are keen to watch fights among inmates”*.³¹

With regards fires, the negligence of prison guards has caused several tragedies over the last few years. On December 11, 2000, eleven inmates suffocated during the fire in Tower 2 of the San Miguel Preventive Detention Centre. In the appeal for protection presented by

²³ Quoted by U. Diego Portales and CEJIL (2002): 95.

²⁴ See U. Diego Portales and CEJIL (2002): 96-98.

²⁵ See *La Cuarta*, January 15, 2003.

²⁶ *El Mercurio*, October 17, 2003.

²⁷ *La Nación*, October 14, 2003.

²⁸ See *La Cuarta*, January 25, 2004.

²⁹ U. Diego Portales and CEJIL (2002): 98.

³⁰ U. Diego Portales and CEJIL (2002): 99-100.

³¹ Facultad de Derecho... (2003): 81.

CONFAPRECO it is stated, *“after the start of the fire, prison guards took 50 minutes to arrive, when under normal circumstances it takes them 5 minutes”*.³²

In the fire that took place on May 20, 2001 in the prison in Iquique, 26 inmates were burnt to death because the prison guards on call allowed the only guard that had a key to the area of the fire to be drunk and lying down in an internal facility.³³ That situation caused great impact in the city because all the fatal victims were young, had no previous police records and their cases were under investigation. In other words, it was possible that some of those cases would be dismissed for lack of evidence.

In the fire that broke out in the “El Manzano” prison in the city of Concepción, on September 11, 2003, nine inmates were killed and 18 were wounded. Bernardino Sanhueza, Regional Representative of the Ministry of Justice, tried to explain the events stating that *“when the flames started to appear there was a general power cut in the area next to the prison and that could have led to delay the help provided by prison guards to the module in question ”*.³⁴

Thus, in accordance with prison guard figures, in only 3 years (between 1999 and 2001) there were 56 deaths inside prisons located in the Metropolitan Region, as a result of natural causes, fights, suicides and accidents.³⁵

A further form of torture or cruel, inhuman or degrading treatment of inmates is the movement of prisoners, people arrested and convicts, using handcuffs or shackles without the relevant court order and with no need to do so, especially when these prisoners are exhibited to the press. Likewise, there have been many cases where inmates (convicts or those awaiting trial) are moved from one prison to another without the necessary court order, thus violating their right to receive the visit of their relatives.

During visits to inmates, their relatives’ elemental rights are violated by being subjected to degrading body searches: *“Women, especially, have to undress in front of female prison guards and are often forced to bend over to be registered inside their bodies, in the vagina and anus”*.³⁶

In addition to the appalling incarceration conditions and the existence of a repressive “culture” among prison guards, in order to have a full picture of the extremely serious

³² Facultad de Derecho... (2003): 82.

³³ See *La Estrella de Iquique*, May 21, 2001.

³⁴ *La Nación*, September 12, 2003.

³⁵ See Facultad de Derecho.. (2003): 80.

³⁶ Facultad de Derecho... (2003): 87. Faced with an appeal for protection presented by a woman who during a visit had suffered the introduction of a female prison guard’s finger in her anus, whilst she was forced to strip, the Prison Guard Service justified this practice to the Santiago Court of Appeals stating that *“unfortunately they are obliged and need to adopt all measures to prevent behaviour that may alter the internal regime of any prison [...] and that is finally translated into actions that may eventually be unpleasant or uncomfortable, not only for the person that suffers them, but also for the official that, in turn, is obliged to perform them”*; adding that *“in consequence, and regarding what was expressed in the appeal, it is impossible to understand that in any way has the specific constitutional guarantee of any person been violated, because on the one hand, the rights of people that for whatever reason go to a prison cannot be violated by the interests of one particular individual, requiring that every person submits, for the benefit of all, to the measures that enable us to provide minimum levels of security”*. The Court finally accepted the appeal stating clearly that *“this action (checking of the anus), with or without anal introduction, must be considered a serious violation or attack against a person and implies severe moral alteration impacting the mental health of the person that suffers it”* and that *“indeed, such an exception technique cannot be accepted by someone wishing to visit an inmate, regardless of how dangerous the latter may be; the action in itself runs counter to the essential principles that safeguard human beings, and if there is danger that prison authorities wish to avoid, it must seek other civilized means to prevent them, and if they do not exist, it is better to run that risk than to violate the right of persons to their physical and mental integrity and to their free disposition”*. (Quoted in Facultad de Derecho... (2003): 87-88)

violations of the most basic human rights within prisons, we must consider the terrible working conditions of prison guards and the non-existent administrative and judicial control over their behaviour.

For starters, the small number of prison guards is an element that severely aggravates insecurity in prisons and exacerbates prison guards' weariness, frustrations and aggressiveness towards inmates. Between 1980 and 1999 the prison population increased from 15,230 to 30,051, in other words by 100%, while the number of prison guards increased from 4,663 to 5,339, in other words by just over 14%. The ratio of 1 prison guard for every 4 inmates in 1980, changed to 1 prison guard for every 6 inmates in 1999.³⁷

It must be mentioned that according to the leaders of the National association of Penitentiary Staff (ANFUP), *"many guards perform administrative tasks in clinics, provide security in Courts, at the Ministry of Justice, and some even act as bodyguards for different authorities. All this on top of working hours as long as 100 hours per week, more than twice the 48 hours established by law for workers"*.³⁸ Such a pitiful scenario led Mario Riquelme, ex President of ANFUP, to express the following in August 2000 to newspaper "La Tercera": *"the prison warden staff continues to suffer from inhuman shifts, controlling an overcrowded prison population on the verge of explosion, preventing mass escapes and mutinies with neither the necessary rest period, nor the appropriate retribution"*.³⁹

With regards the control of staff behaviour, *"within the prison guard service there is no transparent and effective internal control system to verify, investigate and punish behaviour that violates inmates' basic rights, despite the procedures laid out in prison Regulations. The due processing of petitions is the responsibility of each prison governor. However, in some prisons the governor never becomes aware of the complaints presented or against whom they were presented. Some comply with the formality of having a book to register complaints, but in practice nothing happens with those complaints"*.⁴⁰ Therefore, the acknowledgement made by the Director of the Prison Guard System in March 2002, in the sense that in three and a half years only 20 prison guards had been punished in one way or another is hardly surprising.⁴¹

Nor is there an effective judicial control because in Chile there are no special courts to supervise the application of sentences. On the other hand, ordinary courts *"tend to avoid getting involved in these cases, as if it was an aspect that they are not in charge of supervising [...], something that is strengthened by the feeling that it is very difficult to obtain evidence of the commission of these acts"*.⁴²

An important factor that enables violence, torture and serious maltreatment in Chilean prisons today is, undoubtedly, the fact that the prison guard system as an institution was not purged of members that were involved with the dictatorship's secret police DINA (1974-1977) and CNI (1977-1990). In April 2002, the magazine "El Periodista" conducted a study evidencing that *"at least nine high officials in active service in the Prison Guard System and*

³⁷ See Facultad de Derecho... (2003): 79. Thus, during the tragedy in the San Miguel Preventive Detention Centre, there were 9 guards on duty, while 30 were resting. In other words, there were 39 guards for 1770 inmates (1 for every 45 inmates). And during the fire in Iquique, there were also 9 guards on duty and another 12 were resting, catering for 1400 inmates (despite the fact that the facilities had been built to hold 500 inmates). In other words, there were 21 guards for 1400 inmates (1 guard for every 66 inmates). (See Facultad de Derecho... (2003): 79).

³⁸ Facultad de Derecho... (2003): 79.

³⁹ Quoted in Facultad de Derecho... (2003): 79.

⁴⁰ Facultad de Derecho... (2003): 83-84. In addition, as mentioned, because of fear of reprisals and lack of solidarity among them, inmates are very reticent to the presentation of denunciations.

⁴¹ See Facultad de Derecho... (2003): 84.

⁴² Facultad de Derecho... (2003): 86.

three retired, participated in repressive organizations".⁴³ It is significant that two commanders working in prison Colina II, where the worse maltreatment occurs, have been recognized as people linked to the dictatorship's repressive organizations.⁴⁴ Carlos Quezada, CONFAPRECO lawyer, states that it is possible to detect a systematic policy of repression, whereby after inmates are beaten they are given cold showers in order to make it very difficult to prove lesions, concluding that these are methods that *"bear a curious resemblance to those used against political prisoners during the dictatorship"*. José Orrego himself, President of the National Association of Penitentiary Staff (ANFUP), insists on the need to purge the institution, explaining that *"During the military regime repression and discipline was privileged over and above the mission of the Prison Guard Service which, at the end of the day, is the rehabilitation of the inmate and his/her reinsertion as a useful person. So far this has not occurred because militarism is still privileged and that leads to this state of tension"*⁴⁵

With regards the problem of overcrowding, the Chilean government has undertaken a policy of prison construction. However, it is highly probable that with the maintenance of a social-economic model that according to various specialized international entities, places Chile among the countries with worse income distribution in the world, crime and therefore the prison population will continue to grow at very high annual rates. We believe that as long as society and the State do not become aware of the serious violations of prison inmates' right to physical and mental integrity, very little can be achieved in this respect. In this sense, the expressions of Juan Carlos Pérez, Director of the Prison Guard Service, on May 28, 2003 when he reacted to the critical Annual Report by Amnesty International could not be more ominous, *"I guarantee [...] that in our institution there is neither maltreatment nor torture of the 37,000 inmates presently held in Chilean prisons."*⁴⁶

Faced with this reality, it would extremely important for Chile to ratify the Optional Protocol of the Convention Against Torture, enabling visits to any prison in the country by impartial local and international commissions. It is well known that representatives from the Chilean government participated in the Work Group that prepared the text of that protocol and that Chile acted as one of the co-sponsors.⁴⁷ However, following the approval of the Optional Protocol by the General Assembly of the United Nations in December 2002, nothing has been done to disseminate its contents among public opinion in our country or to ratify it in Congress. Once again, this confirms the vision of human rights organizations such as CINTRAS, in the sense that despite the fact that the Chilean government is interested in promoting an international image as a defender of human rights, reality within our country differs enormously from the official discourse.

3.2. Torture in police procedures

It is important to highlight that in areas of our country where the Criminal Procedure Reform is already underway (to date the only exception is the Metropolitan Region), there has been a significant drop in torture and maltreatment aimed at obtaining information and confessions from the accused. The substitution of an investigative system by oral trials, where investigative, precautionary and sentencing functions are separated, one of the most important incentives for the police to use maltreatment has been eliminated: to obtain confessions from the accused that may be accepted by the investigative-accuser-sentencing judge. Moreover, there is also the effectiveness of the regulation that establishes a summons

⁴³ *El Periodista*, April 15, 2002.

⁴⁴ Quoted in *El Periodista*, April 15, 2002.

⁴⁵ Quoted in *El Periodista*, April 15, 2002.

⁴⁶ *El Mercurio*, May 29, 2003.

⁴⁷ See Margarita Mondaca, "Protocolo Facultativo de la Convención contra la Tortura. La urgencia de su aprobación". CINTRAS publication, magazine *Reflexión* 29: 25-28.

of the accused to control the arrest before the Guarantee Judge, at the most 24 hours following the arrest.⁴⁸

However, there is still a concerning degree of physical maltreatment and psychological torture at the moment of the arrest of the accused. Thus, *“for most of the judges and defenders that were interviewed, this situation prolongs itself in subsequent stages, motivated by a sort of reprisal against resistance [...] They describe that at that moment slaps in the face, kicks, violent squeezes, etc. are frequent.”*⁴⁹ Likewise, threats and false promises to promote the hand-over of information in police stations are also frequent, especially in drug-related cases.⁵⁰

The continuation of these practices is undoubtedly influenced by the survival of “culture of violence” that has long characterized Chilean police institutions, as well as the previously discussed prison guard system. In this sense, it is even possible to evidence an increase in the reports of unnecessary violence by Carabineros (the institution that by far makes most arrests) during the 90’s. According to a study conducted in the Metropolitan Region, as well as in Regions IV, V and VI (including more than half the country’s population): *“The number of reports of unnecessary violence increased two-fold during the period 1990-2000 (from 803 to 186 reports per year respectively) and the allegations of unnecessary violence when the police claimed physical maltreatment against them increased three-fold during the period 1990-1998 (from 102 to 331 reports); in all of them there is an important increase as from 1995-96.”*⁵¹ The study states that the general magnitude of reports during the decade as a whole is very alarming, considering that given the culture of violence that criminals live in, most maltreatment is not even reported: *“The number of reports of unnecessary violence during the period March 1990 - December 2000 totals 1,349 cases, equivalent to an average of 10.45 reports per month. Reports of unnecessary violence when Carabineros claimed maltreatment against them total 2,528 case, equivalent to an average of 19.6 reports per month. The total added number of both types of reports is 3,877 cases, equivalent to 30.05 cases per month. In other words, approximately once a day a citizen of Regions IV, V, VI or Metropolitan alleges having been subjected to unnecessary violence by Carabineros between March 1990 and December 2000.”*⁵²

Apart from these cases, the study also registers the following reports during such a period: 4 homicides, 5 quasi-homicides, 57 bullet wounds, 13 cases of rape or sexual abuse, 52 deaths in cells, 19 suicides in cells, 37 deaths during police procedures and 9 un-specified deaths.⁵³

On the other hand, data revealing an increase in violence by Carabineros match the reports made by two ex Officers of that institution (husband and wife) that sought political asylum in the United Kingdom⁵⁴, who stated that torture is frequently applied against those arrested using the following methods: *“‘dry submarine’ (plastic bag over the head to suffocate); ‘wet submarine’ (submerge the head of the person arrested in a container with putrid liquid); electricity applied to different parts of the body; ‘Russian roulette’; ‘crucifixion’ (handcuffs in both hands to hang the person arrested from the cell bars); ‘the telephone’ (hit both ears with open palms); psychological torture (threaten to harm the arrested person’s family); denial of*

⁴⁸ See Facultad de Derecho... (2003): 35-43.

⁴⁹ Facultad de Derecho... (2003): 44.

⁵⁰ See Facultad de Derecho... (2003): 46

⁵¹ Claudio Fuentes, *Denuncias por Actos de Violencia Policial*, Santiago: FLACSO-Chile, 2001: 52.

⁵² Fuentes (2001): 52.

⁵³ See Fuentes (2001): 32.

⁵⁴ Request that in the case of Julio César Pino Ubilla was accepted by the Birmingham Court on August 13, 2003, stating “if he returns to Chile now, there is real risk that his rights will not be protected”. (*La Tercera*; September 11, 2003). With regards his wife, Miriam Alejandra Solís Fernández, her request is presently being assessed.

the use of a toilet; food deprivation and beatings (using clubs).⁵⁵ It is important to specify that neither of the two had direct experience with the new Criminal Procedure Reform system since they worked in Santiago police stations between 1995 and 2002 (when they resigned).⁵⁶

Likewise, in its latest Annual Reports, Amnesty International states that one of its main concerns in the case of Chile is the subsistence of torture and maltreatment, both by the police and in prisons. In the 2001 report (that refers to the year 2000), it states *“we constantly received reports of torture and maltreatment by Carabineros against presumed criminals they had arrested. Some victims needed hospital treatment as a result of the injuries they suffered and others presented official accusations”*.⁵⁷ In 2002, Amnesty stated *“according to the reports, Carabineros made use of excessive force in a series of cases, among them in breaking up peaceful demonstrations [...] scores of demonstrators were maltreated when arrested and while they were held in Santiago police stations”*.⁵⁸

The large majority of people that suffer these forms of violence and maltreatment are the poor and, especially, young people. This is due, on the one hand, to the extreme social inequality that strongly encourages these sectors to commit various crimes against property and, on the other, to the deep-rooted social class hatred within Chilean society, especially among the police and judiciary.

The recurrence of torture and maltreatment by Carabineros is highly influenced by the strong military nature acquired during the 17 years of dictatorship and its ensuing absorption of the “national security” doctrine; as a result of the fact that its organization *“is structured around the idea that the operational staff working in the streets is primarily an army of policemen with very little training, badly paid and subjected to a very strong discipline”*⁵⁹; and because it maintains its autonomy from civilian power.

Other factors that influence its authoritarian and aggressive nature are its own internal regulations that violate its members’ rights to personal liberty and to marry. Thus, Article 25 of its disciplinary regulations includes – among the disciplinary sanctions that can be applied to Carabineros personnel in an administrative manner – the arrest up to 30 days in the case

⁵⁵ *La Nación*; September 14, 2003. They also reported that during the last few years the following detainees had died as a result of torture committed by Carabineros: Miguel Vallejos Palma in February 1995, in the Panimávida Police Station; Rubén Bascur Jäger in July 1995 in the Futrono Police Station; Ricardo Parra in the Lebu Police Sub-Station; Eric Silva Retamal; José Luis Oyarzún; Juan Pablo Acevedo in the Constitución Police Station; Rigoberto García Alfaro and Fernando Orellana in the José Santos Ossa Police Sub-Station; Paola Olivares Reveco in the Quilicura Sub-Station; Luis Canuilag Toro in the Lo Lillo Police Sub-Station; and Cristián Abarca Abarca in the Juanita Aguirre Police Sub-Station in Conchalí (*La Nación*, September 11, 2003). These reports were not contradicted by the institution whose director general only said that Julio Pino *“is a corporal that had received long medical leave, of a psychiatric nature, that deserted, travelled to London, and from there the Consul informed us through the Ministry of Foreign Affairs. We proceeded as appropriate and reported him to the courts for desertion. Finally, he decided to stay in London. His wife, also a Carabinero, subsequently asked for voluntary retirement and travelled to be with him. That is all; it is more of a personal situation”*. Asked about allegations of death threats against these two ex police officers, he answered: *“No, that is false, there is nothing in that respect. I think those are very premature opinions, mere justifications to obtain some benefit, asylum and all the rest”*. (*La Nación*, September 11, 2003)

⁵⁶ See *La Nación*, September 14, 2003.

⁵⁷ Amnistía Internacional, *Informe 2001*. Madrid, 2001: 137-138. The same report mentions that in October 2000, a delegation from the world organization presented the government of Chile reports of torture or maltreatment received during 1999 and the first half of 2000 by 141 people. (See Amnistía Internacional, 2001: 138)

⁵⁸ Amnistía Internacional, *Informe 2002*. Madrid, 2002: 133.

⁵⁹ U. Diego Portales and CEJIL (2002): 37.

of non-commissioned officers.⁶⁰ On the other hand, articles 67, 68 and 69 of its personnel selection and promotion regulations stipulate violations of the basic right to marry.⁶¹

The sub-culture of police violence has historic roots so strong that even within the framework of the new criminal procedure reform will require tremendous effort to reduce it. In this sense, if police personnel are not re-socialized the “new” prosecutors will end up adapting to the “old” police and not the other way around. The attitude of most prosecutors of justifying the actions of the police is already concerning.⁶² A prosecutor interviewed about injuries caused by police maltreatment even stated that “they are minor injuries and we do not conduct any type of investigation because we understand that the rigour of police work can cause this type of injury, they are reasonable. Since I have been a prosecutor I have become familiar with police procedure and that makes us aware that police work is of tremendous importance and we are facing a type of criminal that is very far from deserving a different type of treatment. If the rights of the accused were impinged upon, I would accept that as part of the work. A slap in the face is the least that can be expected by someone who has raped or sexually abused a child”.⁶³

In the case of Investigaciones (plain-clothes civil police force) there has been a favourable evolution since 1990, resulting from their effective subordination to civilian power. This has led to a profound purification of its members, a change in values within their training and the existence of effective internal control mechanisms. In consequence, between 1990-94 and 1995-2000, reports of torture or maltreatment per capita increased in the case of Carabineros from 0.003 to 0.008, whilst in Investigaciones they dropped from 0.009 to 0.007.⁶⁴ However, the level of reports in the latter institution still remains high and it is only due to the enormous disparity between the number of agents in Carabineros (35.000) and Investigaciones (3.000) that this seems significant.⁶⁵

⁶⁰ That article defines arrest as “depriving the detainee of the right to enjoy the benefit of permits to leave the Station or the place established for the arrest by the superior that applied the sanction” and will be imposed for full and successive days, and for a period no shorter than one day”. That same article establishes that “in special cases resulting from the dangerous nature of the detainee, or as a security measure [...] the detainee may be kept in an Arrest Room; not in a normal cell”; that the personnel under arrest in the police station may be visited by his/her relatives during the hours established by his/her superior”; and that the arrest of Officers shall be notified by the superior that imposed the sanction or by another Officer of higher rank or of the same rank, but greater seniority than the detainee and will always be done in writing” (See “Reglamento de Disciplina de Carabineros de Chile, N° 11)

⁶¹ Article 67 states that “s may not get married. Non-compliance shall be sanctioned with an arrest of at least 15 days. The provision outlined in the previous paragraph is not applicable to Sub-Lieutenants from the Order and Security and the Quartermaster area that for whatever reason reach the age of 30 with that rank or receive a salary assigned the rank of Capitan, nor female Sub-Lieutenants from the Order and Security area who may marry following approval of the relevant request that must comply with the requirements outlined in Article 69, where it is stated that “The marriage application shall be processed in a reserved manner and shall be accompanied by the following documents: a) Of the contracting party: 1) Birth, marital status and health certificates; 2) Consent of the parent, guardian or legal representative in case of a minor; and 3) Confidential report of the Prefect Commissar of the contracting party’s sector of residence regarding her honesty and, whether in his opinion, she deserves to be the wife of a Carabineros Officer ... b) Of the applicant: 1) Medical certificate of health condition compatible with marriage; and 2) Report of his superior the economic situation and moral conditions for their marital life”. In turn, Article 68 states “Carabineros Officers, excluding those with ranks between Lieutenant-Colonel and General, will need the written authorization of the General Directorate in order to get married. Civilian employees with ranks equivalent to those between Second Lieutenant and Major and professionals subject to the salary regime established in Law No. 15.076 (Medical Surgeons, Pharmacists, Chemical Pharmacists, Biochemists and Dental Surgeons)” (See Regulations for the Selection and Promotion of Personnel in Carabineros de Chile)

⁶² See Facultad de Derecho... (2003): 46-47.

⁶³ Quoted in Facultad de Derecho... (2003): 48.

⁶⁴ See Fuentes (2001): 28.

⁶⁵ See Fuentes (2001): 28.

The complex psychosocial phenomenon underlying police actions has been analysed by institutions such as CINTRAS in order to contribute towards overcoming a situation that is extremely negative for society as a whole. In a paper presented at a forum in Universidad ARCIS we expressed: *“The social system tends to find in juvenile behaviour the most important cause of social violence. Official strategies have a clear repressive nature and focus preferably on this sector of society. The more profound causes of violence and citizens’ insecurity are undermined. In our opinion those causes are, on the one hand, the economic, social, political, cultural and environmental conditions imposed by an economic and societal model that gives rise to highly contrasting living conditions, unemployment, poverty, impoverishment, environmental degradation, cultural counter-values, severe limitations to health and education, etc. On the other hand, resulting from a series of psycho-social processes inherited from the military dictatorship that underlie peoples’ spontaneous consciousness, determining certain behaviours of human groups by encouraging social apathy, the lack of the sense of social solidarity, individualism, fear, the reproduction of violent behavioural patterns at the level of primary social sub-systems, etc.”* The paper concludes that: *“A strategy of citizens’ security that as a State policy underestimates the real causes of social violence will not resolve the problem; on the contrary, it will contribute to encourage polarization and belligerence between this sector of civil society and the State levels responsible for the implementation of such a strategy.”*⁶⁶

3.3. Torture and maltreatment in the conflict with the Mapuche ethnic group

The so-called conflict with the Mapuche Indians has its origin in the various oppressive forms of exploitation and plundering of their land and resources suffered by this indigenous people that live in the south of Chile since the XVI Century and maintained until the present day.⁶⁷

Following his official visit to Chile in July 18-29, 2003, Rodolfo Stavenhagen, UN Special Rapporteur on the situation of human rights and fundamental liberties of indians, stated in his report on the Mapuche Indians that this ethnic group suffers from *“a high index of poverty and a low index of human development, resulting from the long history of discrimination and social exclusion, especially during the military dictatorship”*.⁶⁸ Indeed, that was the period during which forestry companies were able to expand most, gradually plundering their land.

The main problems he identified were: *“a) land owned by the Mapuche is extremely scarce and over-exploited; b) land owned by communities is isolated within privately-owned land, especially extensive forest plantations, [...]; c) as a result of the development of forest plantations, the soil in the Mapuche land has lost its sources of water [...], wild fauna has diminished or disappeared [...] as has the undergrowth [...]; d) the use of herbicides [...] and pesticides [...] has various impacts upon health and crops; e) the extraction activities in mature forests leads to the contamination of lakes, rivers and waterways, causing important losses in its ichthyologic potential (fishing)”*.⁶⁹

Faced with this reality that has become increasingly severe over the last decade, as from 1997 some Mapuche communities have reacted with strong demonstrations in order to stop the expansion of forestry companies in their territories and demand recognition and respect for their territorial and political rights from the Chilean State. On repeated

⁶⁶ Carlos Madariaga, “Tortura en Chile ayer y hoy: el problema de la prevención”. Publicación de CINTRAS publication, Magazine *Reflexión* 25: 27.

⁶⁷ Additional information regarding this conflict may be found in the Report of the Special Rapporteur on the human rights situation and fundamental liberties of the native population drawn up in November 2003 following his visit to Chile. (E/CN.4/2004/80/Add.3)

⁶⁸ Naciones Unidas, E/CN.4/2004/80/Add.3, paragraph 8

⁶⁹ Naciones Unidas, E/CN.4/2004/80/Add.3, paragraph 19.

occasions they have seized land that belonged to them in the past and whose ownership they are now claiming.

The government has reacted to these events increasing the police contingent in the area, ordering the forced eviction of occupants and the arrest of the main leaders of the communities involved in territorial disputes with forestry companies and of organizations that demand political autonomy for the Mapuche people. By and large, those arrested have been charged with violating the State's Internal Security Law and even of violating the Anti-Terrorist Law, still in force from the period of the dictatorship, thus 'criminalizing' their protest expressed as a just agrarian vindication and what is fundamentally a political demand for a new treatment by the State.

Especially during the first years of the conflict, organizations such as Coordinadora Mapuche Arauco-Malleco reported numerous cases of both torture and inhuman and degrading treatment, not only of those under arrest, but also of many members of their communities whenever the police conducted searches to find their leaders.⁷⁰

In subsequent years, police violence and maltreatment was used especially during evictions from land occupied by Mapuche groups or against their demonstrations. In its report of year 2001, Amnesty International stated *"long-lasting land disputes in the southern regions led to increasing tension between the police and members of indigenous groups. Agents [...] used excessive force during demonstrations and other police operations"*.⁷¹

In 2002 the situation was similar: *"there were new confrontations and reports were received of excessive use of force by Carabineros within the context of land rights disputes that continued to take place in the south of the country"*.⁷² On November 13 of that year, during a protest demanding the recovery of a farm from an important forestry company in Ercilla, Alex Lemún, a 17 year-old young Mapuche was shot several times by the Carabineros in charge of repressing the demonstration and died a few days later.⁷³ Rodolfo Stavenhagen, UN Special Rapporteur also registered this event in his report and *"regrets that to date no measures have been taken to punish those responsible or compensate the family and calls upon the government to adopt the measures necessary to clarify this case"*. He also states *"it is concerning that in September 2003 the Carabinero responsible for the death of young Lemún has been freed"*.⁷⁴

Despite the fact that the Araucanía Region, with the largest concentration of Mapuche population, has been one of the first to implement the Criminal Procedure Reform, this situation has not really benefited their community leaders accused of illegal terrorist association (a law that, for example, permits the existence of face-less witnesses) or indicted by military tribunals under their own procedures. According to the Special Rapporteur *"this is concerning [...] in terms of their right to a due process"*.⁷⁵

As from when their territories were incorporated to the Chilean nation in 1883, the Mapuche people has suffered violence, impoverishment and racial discrimination, and this has also become evident in the treatment they have received from State agents, especially by the police. In consequence, we believe that respect for their fundamental human rights,

⁷⁰ See Coordinadora Mapuche Arauco-Malleco, Oficina de Derechos Humanos. *Wallmapuche. Informe anual de derechos humanos 1999*. Cañete, 2000. Unpublished document.

⁷¹ Amnistía Internacional, 2002: 134.

⁷² Amnistía Internacional, 2003: 132.

⁷³ Amnistía Internacional, 2003: 132.

⁷⁴ Naciones Unidas, E/CN.4/2004/80/Add.3, paragraph 29

⁷⁵ Naciones Unidas. E/CN.4/2004/80/Add.3, paragraph 37

especially for their right to life and physical and mental integrity deserves special attention by the government.

3.4. Ex Colonia Dignidad: a slave State within the Chilean State

Last century, in the early 60's, what was virtually to become a State-within-a-State was created in the centre-south of Chile by a score of German citizens. Under the guise of a welfare society, they created a small slave society that has subjugated a few hundred German settlers and scores of Chilean children. This society, commonly known as Colonia Dignidad, has become self-sufficient in an area that at the end of the 80's totalled around 5,000 hectares and that possesses all the infrastructure necessary to develop itself separately from the national community, from industries and a hospital to cemetery and airstrip. In that colony, the tiring and virtual forced labour of hundreds of people has been exploited mercilessly for decades.⁷⁶ In addition, the perimeter of the Colony has been closed in such a way that it is almost impossible to get in or out without the explicit authorization of its leaders.⁷⁷ Among these leaders, Paul Schäfer, a German ex sectarian preacher has exercised tyrannical and unchecked control. To make matters worse, Schäfer has been a contumacious pederast, accused of that crime by German justice at the beginning of his sect in Gronau (Germany) in the late 50's.⁷⁸

In Chile, the organization became popular in the surrounding area as a result of the hospital services it provided freely to the poor peasants in the region, and as a result of an effective policy of cooptation of political authorities and the social elite in that zone (Parral). However, within the Colony a small closed society developed that seriously violated all fundamental human rights in the most comprehensive and despicable manner. Not only because of slave labour, but because of the attempt to completely control the minds of its members by – among other means – prohibiting all means of external communication (press, radio, television); implanting unconditional devotion for Schäfer –including the “confession” of their faults to the leader and the provision of children for his permanent paedophilic practices-; preventing all independent contact with the external world, establishing strict censorship of the mail; separating children from their parents in daily life; prohibiting all social relationships among youth of both sexes; and granting Schäfer the authority to exceptionally authorize marriages.⁷⁹

The natural escapes (in the most literal sense of the word) that an entity of this nature provokes, led Schäfer and his followers to increase physical and mental repression, including beatings, torture using electricity, solitary confinement, electroshocks and mental drugs used in a sufficient dosage to eliminate all physical capability and, especially, the will to escape.⁸⁰ In the few cases of successful escape, commandos were sent out to recapture settlers, emotional pressure was exerted on them using the relatives that has stayed behind, the complicity of the authorities, police and professionals was sought so that they would return “to their home”, or a ferocious campaign was launched to discredit those that had managed to escape, together with a Machiavellian combination of promises and threats.⁸¹

What was most serious was the complicity or negligence evidenced by Chilean and German public powers when confronting that horrendous situation. First of all, in the case of Chile, we

⁷⁶ Gero Gemballa, *Colonia Dignidad*. Santiago, Ediciones CESOC, 1990: 69-72.

⁷⁷ Gemballa (1990): 88; 146 and 178.

⁷⁸ Gemballa (1990): 60-61.

⁷⁹ Gemballa (1990): 73-82.

⁸⁰ Gemballa (1990): 109-112; 122-123; 130-131 and 134-144). Various settlers that have escaped from Colonia have made testimonies of such torture official in various judicial and parliamentary entities in Chile, Germany and Canada.

⁸¹ Gemballa (1990): 109-122.

evidence the absolute irresponsibility of governments that welcomed an evidently sectarian group, whose maximum leader already faced serious legal accusations in Germany. Secondly, the grotesque attitude of Chilean courts that sentenced the first notorious escapee, Wolfgang Müller (who subsequently changed his surname to Kneese) to five years and one day in prison for the crime of libel and the theft of a horse used in his escape.⁸² Lastly, the shameful attitude of the Chamber of Deputies that after an investigation conducted by an ad hoc commission in 1968 approved a resolution in favour of the Colony, that almost completely dismissed the numerous charges that various local entities were already levelling against it.⁸³ In the case of Germany, the negligence of its government was evidenced from the very beginning by failing to duly process the numerous reports that by the mid-60's they were already receiving from inside the Colony or from their relatives in Germany.⁸⁴ In any case, as a way of avoiding additional scandals, the Colony officially announced that Paul Schäfer had disappeared from the Colony leaving behind a letter expressing his intention to commit suicide.⁸⁵

Following the military coup in 1973, the Colony also became a torture and execution centre of political prisoners, as formally accredited by the Report of the National Commission for Truth and Reconciliation (Rettig Commission) drafted in 1991.⁸⁶ The Colony also became a recreational destination for members of the dictatorship's military and civilian elite, especially for its security services.⁸⁷

The Colony acquired such a sinister national and international image – especially after the escape and subsequent declarations made in 1984 and 1985 by Hugo Baar, co-founder of the sect with Schäfer; and of Georg and Lotti Packmor, a married couple that also formed part of the Colony's privileged elite – that after the end of the dictatorship it once again became the subject of a legal investigation. As a result of that investigation, Hernán Roberts, special judge from the Talca Court of Appeals concluded that in the Colony *“children are separated from their parents when they are born [...] This violates Article 1 of the Constitution that stipulates that the family is the fundamental nucleus of society”*.⁸⁸

As from 1990 numerous reports have been made public from people such as Adriana Bórquez, teacher Iván Treskow and psychiatrist Enrique Peebles who were all tortured during the first years of the dictatorship in Colonia Dignidad.⁸⁹ On the other hand, various legal testimonies have established the existence of clandestine cemetery hiding the remains of more than one hundred disappeared political prisoners.⁹⁰ Testimonies have also come to light of people that assure having seen alive inside the Colony agricultural workers that were arrested in Parral in late 1973 and who have remained as disappeared political prisoners since that date.⁹¹ Despite the presentation of numerous charges in order to conduct the

⁸² Gemballa (1990): 116. Subsequently, after a new successful escape, the situation of slavery became so evident that the Chilean and German governments managed to get him released and finally travel to Germany.

⁸³ Gemballa (1990): 127.

⁸⁴ Gemballa (1990): 118 and 123-127). In addition, in 1974, Paul Schäfer was able to visit the German Federal Republic despite the existence of a warrant for his arrest. (Gemballa, 1990: 119).

⁸⁵ Gemballa (1990): 118-119 y 254-255.

⁸⁶ *Informe de la Comisión Nacional de Verdad y Reconciliación*, Santiago, 1996 (Re-edition), Volumen I, Tomo 2: 469-470.

⁸⁷ Gemballa (1990): 214-218.

⁸⁸ Felipe Portales, *Chile: Una Democracia Tutelada*. Santiago, Editorial Sudamericana, 2000: 299. Even Hernán Felipe Errázuriz, Pinochet's Minister for Foreign Affairs, concluded, *“by studying and analysing the report in question, it can be concluded that Colonia Dignidad possesses the characteristics that are appropriate of a sect, and an intentional manipulation of its members cannot be ruled out”*.

⁸⁹ See *El Siglo*, May 15, 1998; *Punto Final*, May 1990 and *Punto Final*, August 1997.

⁹⁰ See *El Siglo*, August 15, 1997.

⁹¹ See magazine *Ercilla*, October 6, 1997; *Ercilla*, October 20, 1997; *Las Últimas Noticias*, October 22, 1997 and *La Tercera*, May 5, 1998.

relevant legal investigations, to date not a single report has actually been resolved and those responsible for these actions continue to be protected by a shield of impunity.

Present Chilean democracy, restricted and limited in 14 years has been unable to terminate that slave State where maltreatment and horror is manifest. President Aylwin's administration cancelled its legal status as a welfare corporation, but that had practically no effect because its assets are in the name of its leaders. Different charges were also brought to bear on the Colony by the Aylwin administration for different reasons (taxation, labour, etc), but nothing has yet been resolved by the Judiciary. To the extent that the population in the neighbouring areas has lost fear, an increasing number of charges have been levelled against Schäfer for rape and sodomy of children. As in the 60's he has 'disappeared'. As a result of the above-mentioned situation, the prestige of the Colony has suffered and the successful escape of settlers has increased.

However, in concrete terms, the small slave society where all the rights of its inhabitants – especially the right to physical and mental integrity – are violated every day continues to exist. And very probably its leader Paul Schäfer continues to abuse Chilean and German children as he has done for more than 40 years. Shame and disgrace on Chile and Germany.

4. LEGISLATION, PREVENTION AND SANCTION OF TORTURE

Chilean legislation is very contradictory with regards torture. Thus, despite the fact that the Chilean State ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Sentences in November 1988, its incorporation into internal legislation is still very far from effective.

4.1. Non-Compliance with the Convention Against Torture

First of all, this is the result of the fact that the definition of the crime of torture in Chilean legislation is more restrictive than that of the Convention. For the latter, torture is *“any act whereby severe pain or suffering is inflicted on a person, be it physical or mental, with the purpose of obtaining information or a confession from the victim or from a third party, as punishment for an act he/she has committed or is suspected of having committed, or to intimidate or coerce that person or others, or for any reason based on any type of discrimination, when such pain or suffering is inflicted by a public official or any other person in the exercise of public office, instigated by him/her or with his/her consent or acquiescence”*; and in its Article 4 it is stipulated that *“every State that is a Party to this Convention shall ensure that all acts of torture constitutes a crime in accordance with its criminal legislation. The same shall apply to any attempt to practice torture and to all acts by any person that constitutes complicity or participation in torture”*.

However, in Article 150 A of the Criminal Law, Chilean legislation only establishes that *“the public official that subjects a person deprived of his/her freedom to torture or unlawful coercion, physical or mental, or orders or consents its application shall be punished [...]”*. In other words, it sets forth in a restricted manner that the crime is committed against people 'deprived of their freedom' and does not include 'any attempt to practice torture'.

A second element is the lack of severity of sentences that sanction torture in Chile. Despite the fact that the Convention does not stipulate maximum or minimum sanctions, in Article 4 it states that *“every State that is a Party to this Convention shall sanction these crimes with adequate sentences that take into consideration its severity”*. Article 150-A of the Chilean Criminal Law, however, establishes that the public official that tortures *“shall be punished with the sentence of minor imprisonment or reclusion at a medium to maximum degree*

(between 541 days and 5 years)". That article also includes a criminal sanction of the superiors of the person that commits torture, lowered by one degree. In addition, if the specific objective of the torture is to force a confession, statement or the provision of some type of information from the victim, the sentence increases to major imprisonment or reclusion at a minimum degree (between 3 years and a day and 10 years); and if torture results in severe injury or death of the victim, sentences increase to major imprisonment or reclusion in minimum or medium degree (between 5 years and a day and 15 years), but "*only if that result can be attributed to negligence or carelessness by the public official*".

Clearly, minimum and maximum sentences are light. In Chile, a sentence of up to three years imprisonment can in practice become the mere obligation to sign once a week in a specific place ("remitted sentence"). Therefore, a policeman that applies severe torture simply in order to frighten or punish, without causing severe injuries to his/her victim could receive a sentence that does not even imply one day in prison. On the other hand, the fact that after terribly torturing a victim, a policeman may leave a person in agony for days, and not receive a sentence higher than 15 years imprisonment (with good conduct in prison the convict may be paroled after seven and a half years), makes a mockery of the idea of justice and clearly contradicts Chile's own internal legislation that sanctions the more serious homicides with life imprisonment without any possibility of benefits during the first 40 years of the sentence.

A third factor, closely linked to the previous one, is that in Chile's internal legislation the crime of torture is still extinguished after 5 years, in those cases in which it is practiced as intimidation or punishment. This has increased to 10 years in the case of torture inflicted in order to obtain information or confessions and for those cases resulting in death.⁹² In other words, ratification of this treaty by the Chilean State has not meant major changes in the period in which the crime can no longer be prosecuted: an aspect that is so very important in the conception of the severity of the crime. The fact that Chilean courts still favour domestic legislation whenever a contradiction arises with international law, even in the case of treaties fully ratified by Chile, makes the above-mentioned situation even worse. The most representative example of this is the priority that courts have given the 1978 amnesty decree-law (passed by the dictatorship in order to grant impunity to the crimes of torture, executions and forced disappearance of political prisoners carried out by its own security agents) over and above the Geneva Convention.⁹³

A fourth, extremely serious element, is the flagrant violation of Article 2 that states, "*orders from a higher official or public authority cannot be invoked to justify torture*". This is in contradiction with the principle of due obedience that is still in force in the Chilean Armed Forces and Carabineros. Thus, Article 7 of the Disciplinary Regulations of Carabineros states that "*on reception of an order from a competent superior it must be carried out without any objection [...] except when the order notoriously tends towards the committal of a crime, in which case the subordinate may not carry out such order or modify it, according to the circumstances, immediately notifying his/her superior. Should the latter insist in his/her order, the subordinate shall carry it out as ordered, but receive written confirmation*". In other words, it is a duty to commit a crime such as torture so long as a superior repeatedly orders it.

⁹² Article 94 of the Criminal Code stipulates that "*criminal action is extinguished: In the case of crimes that the law sanctions with the death penalty or life imprisonment, after 15 years. In the case of other crimes after 10 years. In the case of minor violations after six months*". In accordance with Article 21 of the same code, crimes are those sanctioned with major imprisonment, life imprisonment or death) that is, as from five years and one day); and simple crimes, those that can be sanctioned with up to minor imprisonment, that is a maximum of five years.

⁹³ Court proceedings for crimes committed between 1973 and 1978 have only been possible since they have been classified as "permanent kidnappings", assigned to the forced disappearance of people, to the extent that such people have not appeared, neither dead nor alive.

A fifth factor is the non-applicability in Chilean domestic legislation of Article 5 of the treaty that establishes the extra-territoriality of criminal action in the case of torture *“when the presumed criminal is a national of that State”* and *“when the victim is a national of that State and the latter considers it to be appropriate”*. Even more so, during the evolution of the “Pinochet case”, when he was arrested in the United Kingdom and his extradition was requested by Spain, all the Chilean public powers (executive, legislative and judiciary) adopted an extreme interpretation of the principle of territoriality, clearly contradicting the precepts of Article 5.

A sixth failure to comply with the treaty is related to Articles 6, 7 and 8 regarding the granting of extradition in cases of people accused of the crime of torture. In effect, according to domestic legislation and jurisprudence, extradition may only be granted to torturers that have committed their crimes less than 5 years before (in cases where torture sought exclusively punishment and to instil fear) or less than 10 years before (in cases of torture aimed at the extraction of information or confessions), because otherwise their criminal responsibility would be considered extinguished. If existing legislation and jurisprudence is maintained, Chile could even become a ‘sanctuary’ for old torturers, as it was for nazi war criminals.⁹⁴

A seventh element is the very relative compliance with Article 10 that refers to *“full education and information on the prohibition of torture in the professional training of law enforcement officials, be they civilian or military, of medical staff, public officials and other people that may participate in the custody, interrogation or treatment of any person subjected to any type of arrest, detention or imprisonment”*. For starters, the virtual autonomy of the Armed Forces and Carabineros makes the introduction of this type of training impossible without the acquiescence of its maximum authorities. In 1991, in a statement regarding the Report of the National Commission on Truth and Reconciliation, Carabineros generals questioned various recommendations of that report aimed at preventing future violations of human rights, pointing out that *“without doubting your good intentions, this implies limiting police action, especially preventive action”*. Among others, Carabineros challenged the recommendation to end their faculty to arrest people on suspicion, to deprive extra judicial confessions of all legal value and to incorporate in the Carabineros curriculum *“human rights subjects or contents and international humanitarian law”*.⁹⁵ Despite the fact that lately the Armed Forces and Carabineros have revealed greater willingness to introduce such subjects into their training material, the scope of that will depend – as in 1991 – on the willingness of their authorities, given the fact that in constitutional and legal terms they still maintain the same independence they had at that time.⁹⁶ Certainly, it is difficult to expect a major change in that direction in institutions that continue to highly value their actions during the 17 years of dictatorship that included the systematic practice of torture and that maintain principles like due obedience that greatly undermine basic human rights.

An eighth factor is the lack of special legislation to enforce Article 14 of the Convention, one that *“guarantees the victim of an act of torture reparation and the right to a fair and adequate compensation, including the means for his/her rehabilitation as comprehensive as possible”*. There is only one general constitutional regulation that states that *“any person whose rights are violated by the State Administration, its entities or local authorities, may complain before*

⁹⁴ Thus, in 1963 the Supreme Court rejected the extradition request to Germany of Walter Rauff, the notorious creator of the “death trucks” (precursors of the gas chambers), where tens of thousands of Jews are believed to have been murdered. The Supreme Court itself admitted that all the judicial elements to grant the extradition were present, but it was denied because it was deemed that Rauff’s criminal responsibility had extinguished, given that more than 15 years had gone by since he committed his crimes. Thus Walter Rauff lived peacefully and “honourably” in Chile until he died of natural causes in the mid 80’s. (See *El Mercurio*, February 15, 2004)

⁹⁵ *La Epoca*, March 29, 1991.

⁹⁶ In the year 2000, the Carabineros School incorporated the subject Human Rights in the curriculum for Officers. As reported by the institution, the issue was analysed in courses of Professional Ethics, Application of the Law and International Law. (See *La Tercera*, March 12, 2001)

the courts established by law, regardless of the responsibility of the official that caused the harm” (Article 38); and regulations of the Organic Constitutional Law on State administration that regulate that right.

Given the unwillingness on the part of the Chilean State to effectively incorporate the Convention Against Torture and Other Inhuman or Degrading Treatment or Sentences into its legislation, it is not surprising that to date it has abstained from making the optional Declarations of Article 21 and 22 in order to grant competency to the Committee Against Torture to receive communication from a State that is Party to the Convention against another State that is party to the Convention and to receive reports of individuals subjected to its jurisdiction.

4.2. Other regulations regarding torture or maltreatment

In the legislative field, a further factor related to police torture and maltreatment is the faculty that the police have had to make arrests simply because of suspicion (until 1977) and, as from the year 2000, the faculty to ‘retain’ (euphemism for detention) people that do not carry their identity card for up to four hours.⁹⁷ These faculties have a great impact on the occurrence of police maltreatment because more than half of the reports about such maltreatment state that it occurs in public spaces at the moment of the arrest.⁹⁸ Thus, despite the increasing introduction of the new criminal procedure reform that has had a positive impact in reducing torture and maltreatment during police interrogation in police stations, reports of ‘unnecessary violence’ increased significantly at the end of the 90’s, especially concerning Carabineros, in charge of detaining or ‘retaining’ on the basis of suspicion.

What is even more alarming is the fact that recently there have been legislative motions aimed at expanding detention periods on the grounds of suspicion with the pretext that the person is not carrying his/her identity card. The initiative presented by Right-wing Senators Alberto Espina, Baldo Prokurica, Mario Ríos and Hernán Larraín, seconded by the Socialist Senator José Antonio Viera-Gallo, at the beginning of September 2003 established that *“the police may ask to see the identification of any person whenever there are signs that the person committed, is poised or tries to commit a crime, simple felony or offence”* and that *“the police may also ask to see the identification of any person that can provide useful information for the investigation of a crime, simple felony or offence”* and that *“such identification may only be through documents issued by public authorities; that is, identity card, driving license or passport”*. The Bill adds that *“if more than six hours have passed since the beginning of the identity control procedure and it cannot be ascertained, despite the fact that all due facilities have been provided for that effect, fingerprints will be taken and the suspect will be detained and placed at the disposal of the Court as author of the fault established in Article 5 of the Criminal Code that sanctions whoever ‘hides his/her real name from the authorities [...] or refuses to provide it or provides a false address’”*.⁹⁹

Another very concerning aspect is that positive legal modifications, such as Law No. 19,567 dated July 1998, that makes it mandatory for the police to inform the person arrested the reason for his/her arrest, as well as his/her rights, are hardly applied in practice¹⁰⁰. Thus, given the ignorance of these issues, detainees are left defenceless. In addition, in those

⁹⁷ In 2003 this faculty was expanded to six hours. It is important to bear in mind that despite previous public announcements by Carabineros against the elimination of that faculty, this reform was later publicly questioned by the uniformed police (See Fuentes 2001: 62). So much so, that *“a few months after this law came into force (eliminating arrests on the grounds of suspicion), Carabineros produced a report very critical of its operation and a public debate resulted in the passing of a new law modifying some aspects of identity control that replaced arrests on the ground of suspicion”* (Facultad de Derecho...2003: 112)

⁹⁸ See Fuentes (2001): 46-7.

⁹⁹ *El Mercurio*, September 8, 2003

¹⁰⁰ See U. Diego Portales and CEJIL (2002): 23 and CODEPU (2001): 97.

aspects of the Law related to the appointment of a defence lawyer (within the framework of the old procedure system), this is only guaranteed in case the detainee is effectively indicted; yet the key police interrogation is conducted before the actual judicial procedure.¹⁰¹

In view of all this, there is also great concern about the Bill presented by government last January (2004) that expands the faculties of Carabineros to investigate and arrest people. If approved, its agents will be authorized to enter closed premises without requiring a court order to persecute presumed criminals (at present they can only enter if there was a prior call for assistance); they could obtain a verbal arrest warrant (at present they can only act with a written warrant); they would be authorized to arrest a person violating a precautionary measure without needing to resort to a guarantee judge for that purpose (as is presently the case); they could apprehend a person and take him/her to the nearest guarantee court, even if it is outside of its jurisdiction (at present the police have to present the detainee to the judge that ordered his/her arrest within 24 hours); and conduct independent investigations of the most commonly committed crimes (today the police has to contact the prosecutor so that the latter may issue instructions).¹⁰²

Concern about these changes impacting the fundamental rights of citizens was expressed by Diego Simpertegui himself, president of the Association of Magistrates (judges), and by Nelson Caucoto, Human Rights Director of the Judicial Assistance Corporation who pointed out that *“every time police faculties are increased, citizens rights are weakened”* and if these changes are introduced *“we will face a sort of law of the jungle”*.¹⁰³

4.3. Lack of prevention by the State on this issue

The work undertaken by the Chilean State to prevent violations of human rights – specifically violations of the right to physical and mental integrity – is very weak. First of all, because there has been no communicational campaigns aimed at socializing human rights and the mechanisms citizens can resort to in order to defend them. Nor have there been campaigns to inform the population about the new laws that improve their defence and that are especially important when it comes to respect for the right to physical and mental integrity.¹⁰⁴

Secondly, because there has been no introduction in the school curriculum of subjects that socialize human rights and its respect, as well as the importance for children of developing behaviour that asserts their own rights and promotes the respect for the rights of others. Attempts have been made to mitigate this serious vacuum via the introduction of human rights as a ‘transversal objective’ within the educational system, seeking to ‘permeate’ the contents of various subjects with such principles. Even if this is something positive, it is also absolutely insufficient in order to attain a civic education where human rights are at the very core of the values held by youngsters that become citizens.

¹⁰¹ See U. Diego Portales and CEJIL (2002): 23. Thus, in a study conducted by Universidad Diego Portales, published in 1998, on 264 criminal cases in the Metropolitan Region that concluded in verdicts of guilty, it is established that there were contradictions between the extra judicial and judicial statements in 52.2% of cases, and that in 84.8% of cases judges attached greater value to the former. (See U. Diego Portales and CEJIL, 2002: 23-24)

¹⁰² See *El Mercurio*, January 23, 2004.

¹⁰³ *El Mercurio*, January 24, 2004

¹⁰⁴ Thus, for example, the information poster about the rights of the detainee that Supreme Decree No. 668, dated October 31, 1998 (enforcing Law No. 19.567 dated July 1998) mandated be displayed in police stations has not been disseminated by television, radio or press. The poster entitled Rights of the Detainee states: *“The right to know the reason for the arrest; To keep silent so as not to incriminate oneself; To have a relative or other person informed, in the presence of the detainee, that: He/she has been arrested. The reason for the arrest and place of detention; To meet his/her lawyer. If he/she does not have a lawyer and is charged, the State shall provide legal defence; and Receive visits if not incommunicado by court order”*. (U. Diego Portales and CEJIL, 2002: 23)

In this sense, the proposal made by Ricardo Lagos in 1991 when he was Minister for Education (today he is President of the Republic) of using the Report of the National Commission on Truth and Reconciliation (Rettig Report) as a school text, was discarded in view of the clear opposition of Unión Demócrata Independiente (UDI), extreme right-wing political party most closely akin to the dictatorship.¹⁰⁵

At the higher education level, only a few universities have begun to incorporate the subject of human rights, especially in law degree courses, despite the fact that it should also be of great importance in degree courses such as medicine, nursing, social work, psychology and sociology.

With regards the health sector, psychiatrist Carlos Madariaga, clinical director of CINTRAS, has stated that faced with the challenge of preventing torture, the attitude of the government has been to “*distance itself and delegate responsibility on other sectors that it mistakenly perceives as closer to these issues*”; thus already in 1996 it suggested “*deploying a permanent integration effort among sectors and communities to design this type of initiative*”. In this sense, Dr. Madariaga made suggested some specific action that the State should implement and promote, among them: “*-Promote the development of an ethic to reject torture in professional associations of the health sector, preventing the participation of these professionals in the practice of torture and encouraging an active denunciation of that practice. Promotion and dissemination of medical-psychological and psychosocial research on torture [...]. -Support the role of non-government organizations working in this field; development of collaboration strategies with public health areas*”.¹⁰⁶

A further aspect that contributes to the lack of effective action to prevent violations of human rights is the inexistence of local institutions, as defined by the United Nations system, working to protect and promote human rights. In this sense, Chile is a regrettable exception within Latin America where most countries have a peoples’ defender or a national human rights commission concerned with the education of these rights, the study of their validity at a national level, concerned with interceding in favour of victims in cases of specific violations of those rights and with promoting the improvement of regulations in order to achieve a more effective respect for human rights.

It is true that since 1990 Concertación administrations have presented various constitutional and legal bills aimed at the creation of the Peoples’ Defender, or other similar institutions. However, these initiatives have not succeeded because the right-wing political parties have opposed them. As has already been explained, in a clearly anti-democratic fashion, they hold a majority in Congress despite the fact that they are a minority in terms of the votes cast in their favour. Nevertheless, it is also true that Concertación governments have attached a very low priority to these bills, doing little or nothing to disseminate the importance of its contents among the population, to obtain the approval of the Right and to clarify the doubts that have arisen within the judiciary.

The government has developed two entities with very specific aims within the field of promotion and defence of human rights. Due to the fact that they are absolutely dependent entities, they are not non-government public national institutions. One is the Human Rights

¹⁰⁵ See *El Mercurio*, March 7, 1991. There was such lack of interest on the part of the Concertación government (Aylwin) in disseminating and socializing the Rettig report, that it was never even registered in the Intellectual Property Register and, thus, left out of public libraries, until 1996 when a new edition was duly registered. (See Portales, 2000: 104)

¹⁰⁶ Carlos Madariaga, “La prevención de la tortura como problema de salud pública” in *Reflexión*, 24: 8. To date, none of the recommendations have been adopted, except for some recent training initiatives for PRAIS teams implemented by the Ministry of Health’s Mental Health Unit, where CINTRAS has played an active role.

Department of the Ministry of the Interior, aimed exclusively at the promotion of actions and measures to find the disappeared political prisoners or their remains in the very probable case that they were murdered, and to collaborate with the judiciary in that task.

The other entity is a Presidential Advisory Commission for the Protection of Peoples' Rights, created as the precursor of the Peoples' Defender, but that in practice has been limited to the final reception and processing of complaints by people that feel they have been harmed by the behaviour of entities belonging to the central administration of the State.

By omission, the State is also failing in its prevention work when it leaves out the issue of human rights, or any of its aspects (education, legal defence, research, mental health care, etc.), from its priorities for the development of civil society contestable projects. As a side effect, this also contributes to the severe financial weakness suffered by domestic non-government organizations that defend human rights, as a result of the drastic cutbacks in international cooperation¹⁰⁷ and because major corporations and private foundations in Chile make absolutely no contribution whatsoever to human rights NGO's.

In order to achieve truly effective results, prevention of torture must be taken on board by the State in an active, global and comprehensive manner. In this sense, psychiatrist Carlos Madariaga expressed the following in an article published in 1996 in the CINTRAS institutional magazines: *"An effective prevention strategy needs to satisfy certain basic theoretical and methodological principles, such as its full support of the doctrine of human rights; applying a comprehensive and global vision of the problem; incorporating inter-sector work and designing State social policies that obtain resources and open all the necessary doors – for example, in the educational system and the media; finally, incorporating all social actors, at different levels, promoting social participation both in the design of the prevention objectives, as well as in the implementation of specific working techniques"*.¹⁰⁸

4.4. Non-sanction of torture

Regarding sanctions imposed by the Judiciary on torture and police or prison guard maltreatment, they are only very exceptionally applied. We have already referred to the reticence of courts to conduct serious investigations of reports received from prison inmates. A very positive exception is the investigation conducted on the serious violations of the right to physical and mental integrity produced in Module Alfa of the Colina II prison.

As stated, the work of the Judiciary has been completely ineffective in eradicating the slave regime that violates the dignity and the physical and mental integrity of people subjugated within Colonia Dignidad.

In so far as the sanctioning of police abuse is concerned, it is important to draw a distinction between the work of courts under the old investigative system (presently being abolished and only operational in the Metropolitan Region), and their work under the new criminal procedure code. In the old system impunity was practically total. For starters, the 'effectiveness' of the police to obtain confessions is very 'useful' for an investigative-prosecutor-sentencing judge overwhelmed with legal cases and under pressure to obtain 'results' by a society increasingly fearful of the rise of crime. For this reason, the tendency of

¹⁰⁷ Cutbacks that have valid reasons given the end of the tragic situation of the period 1973-1990 and the emergence of dramatic situations in other parts of the world. However, those drastic cutbacks have not taken into consideration that within the framework of a democracy restricted by the 1980 Constitution, severe violations of the right to political participation, of the freedom of association and expression, of labour and union rights, of the rights of the indigenous population and, in general, the economic, social and cultural rights of a large part of the Chilean population continue to be seriously violated.

¹⁰⁸ Carlos Madariaga, "Tortura en Chile ayer y hoy: el problema de la prevención". In *Reflexión*, 25: 28.

judges (in Santiago) is to ignore the methods used by the police to obtain confessions of crimes. Within this context, the ineffectiveness of the protection recourse in our country can be easily understood. Originally, this recourse was designed so that the detainee could be brought before the judge so that the latter could verify his/her condition first hand. However, in Chile *habeas corpus* has been reduced to a judicial procedure that consists in the provision of paperwork and control of legal resolutions, rather than an effective instrument to prevent situations of arbitrary arrest and the violation of the physical integrity of detainees. Indeed, Articles 309 and 310 of the Criminal Procedure Code establishes “as something exceptional” that “a magistrate (judge) goes to the detainee or that the latter is brought to him/her”.¹⁰⁹

On the other hand, courts tend to grant absolute impunity to Investigaciones (civil police) when they are accused of torture or maltreatment.¹¹⁰ When these violations are committed by Carabineros, the experience of the Judicial Assistance Corporation reveals “most civilian judges do not even open an investigation declaring themselves incompetent and transferring the case to military justice”.¹¹¹ Military justice, on the other hand, as a result of the subordination of its members to their superiors, due to the ideology of ‘national security’ that characterizes them and because of the old institutional practice of torture and maltreatment, lack the necessary characteristics to effectively sanction these crimes. Thus, according to a study conducted by CODEPU in 2001, of a total of 173 cases, military justice had passed a verdict of guilty in only 6 cases (3,4%).¹¹² Another study related to reports presented by CODEPU and the Judicial Assistance Corporation between 1990 and 1997, it is concluded that only in 4.7% of cases was a verdict of guilty passed by military courts.¹¹³ If one analyses cases received by military courts between 1990 and 1997 and compares sentences for reports of civilian maltreatment of Carabineros and of unnecessary violence used by Carabineros, verdicts of guilty were returned in 11.7% of the cases presented by Carabineros, but only in 0.2% of the cases presented by civilians against Carabineros.¹¹⁴

Looking ahead, there are two factors of special concern regarding the non-sanction of torture. One is the maintenance of military justice with wide-ranging faculties that in many cases even enables them to try civilians; with their composition that prevents them from being effectively independent; and what is even worse, with their exclusion – established by the Constitution - from the new criminal procedure regulations.¹¹⁵

The other factor is the negligence evidenced within the new criminal procedure system regarding police maltreatment reports. The 2002 Report on Human Rights in Chile, produced by the Law School of Universidad Diego Portales, states that “*The opinion of all judges interviewed is that almost always the police reports that the blows against the detainees were necessary due to the circumstances of the arrest. With this information, if the accused chooses to proceed with the report, some judges send these cases to the public prosecutor to open an investigation that, in practice, is never opened. In some cases involving personal injury the principle of opportunity has been applied and the facts have not been investigated. In others, prosecutors point out that victims of maltreatment should present their report to the*

¹⁰⁹ U. Diego Portales and CEJIL (2002): 34.

¹¹⁰ See CODEPU (2001): 97 and U. Diego Portales and CEJIL (2002): 33.

¹¹¹ U. Diego Portales and CEJIL (2002): 33.

¹¹² See CODEPU (2001): 97.

¹¹³ See Fuentes (2001): 40. It is important to highlight that none of the studies specify whether verdicts of guilty refer to cases of torture or unnecessary violence resulting in death or serious injury.

¹¹⁴ See Fuentes (2001): 42.

¹¹⁵ Thus, Article 80 A of the Constitution, regarding the Prosecuting Authority explicitly states that “*the exercise of public criminal action and the direction of investigations of the facts that constitute a crime, of the ones that establish punishable participation and those that prove the innocence of the accused in cases seen in military courts, as well as the adoption of measures to protect victims and witnesses of those events, shall lie in the hands of the entities and people established by the regulations of the Code of Military Justice and respective laws*”.

*public attorney's office because minor injuries constitute a crime dealt with prior to an individual action, and because that report is not presented, they do not investigate. In any of these options, all interviewees stated that they were unaware of the results of the investigations and ignore if sanctions were applied. Another option for prosecutors, in cases of police maltreatment, is to declare themselves incompetent and to send the cases to the military prosecution service, but again stated they were unaware of the results. Some judges send these cases directly to military justice, but also stated they were unaware of the results. [...] defenders stated they were unaware of the procedures followed subsequently and some replied they believed it was necessary for other lawyers to represent them as victims in those cases".*¹¹⁶

Given that the new procedure system will soon be applied throughout the country (it is only in the Metropolitan Region that it has been postponed for a year), it is crucial to establish a clear and effective system to process a report, so that police torture and maltreatment can be adequately sanctioned in the new system.

4.5. Lack of reparation for the victims of torture suffered during the dictatorial period

From the very onset, Concertación governments adopted an attitude of omission with regards torture systematically used by the dictatorship. In consequence, and despite the fact that torture, cruel, inhuman and degrading treatment were all key elements of that regime's repressive policy, the registration of people arrested and tortured was left out of the tasks undertaken by the National Commission on Truth and Reconciliation (Rettig Commission)¹¹⁷

The government also failed to adopt an adequate attitude after the Rettig Report itself highlighted in its analysis and conclusions the ferocious extension of the phenomenon of torture between 1973 and 1990. It is estimated that some 300 thousand people were subjected to some kind of torture during Pinochet's dictatorship.

Domestic and international organizations, working in the field of mental health and human rights, have outlined the severe sequels of this cruel form of repression in countless written documents. In an article published in 1996, the clinical director of CINTRAS emphasized not only the personal, but also the social damage caused by this scourge: *"Torture as a personal human experience is a traumatic event with serious consequences that invariably damages the bio-psycho-social unit of the individual. Likewise, as an experience of large human groups, torture triggers off serious psycho-social problems that impacts the behaviour of society as a whole"*.¹¹⁸

Despite multiple evidence of the damage and the need for reparation, until 2003 the only thing done by the successive Concertación governments in favour of people arrested and tortured was to provide precarious health care, free of charge, through the Ministry of Health's Reparation and Comprehensive Health Care and Human Rights Program (PRAIS).

¹¹⁶ Facultad de Derecho... (2003) 49. In the case of psychological torture, the procedure is even more unclear, despite the fact that few reports had been made: *"An interviewee (defendant lawyer) stated that in a summons for the control of detention, he had revealed certain threats made by a prosecutor, but there were no consequences. Another defender had reported certain maltreatment by the police and the prosecutor firmly denied that, threatening him with legal proceedings for libel"*. (Facultad de Derecho... 2003: 49)

¹¹⁷ See Beatriz Brinkmann, "Tortura: crimen que espera castigo". CINTRAS Publications, Magazine *Reflexión* 26: 10-12. The only consistent policies developed by the Concertación in favour of victims of the worst abuse by the dictatorship, has been the registry of executed and disappeared political prisoners aimed at providing reparation to their relatives; support for judicial tasks aimed at establishing the whereabouts of the remains of people disappeared and the pardons and commutations of sentences for those that committed politically motivated crimes in their struggle against the dictatorship.

¹¹⁸ Carlos Madariaga, "La prevención de la tortura como problema de salud pública". CINTRAS publications, Magazine *Reflexión*, 24: 5.

No steps had even been taken to eliminate the police records of people arrested, tortured and imprisoned for political reasons during the dictatorship, nor for the restitution of their civil and political rights, such as the right to vote and to be elected to public office.

As a result, to date many ex political prisoners, survivors of torture, have been unable to achieve their social and labour reinsertion, they feel stigmatised, outcasts and live in precarious conditions, resulting in worsening of the psychosocial consequences of torture.

As a result of the repeated demands of local and international human rights organizations¹¹⁹ and, especially, of those made over the last few years by the Ethical Commission Against Torture,¹²⁰ in August 2003 President Ricardo Lagos finally announced the creation of a government commission to officially accredit people that were detained and tortured during the dictatorship, in order to subsequently provide reparation.

Unfortunately, in accordance with the aims outlined in an official document entitled “There is no tomorrow without yesterday”, such certification will only “*entitle people holding it, and who have received no other form of reparation, to an austere and symbolic reparation established by the Executive (power)*”.¹²¹ It is worth noting that in accordance with what is stipulated by the United Nations Convention Against Torture, what is appropriate is fair and adequate reparation considering the physical, mental, moral and material damage caused. This is what had previously been pointed out to the government in various documents prepared by CINTRAS, CODEPU and other human rights organizations that comprise the Ethical Commission Against Torture.¹²²

As has already been pointed out, survivors of torture, in general, are people that apart from greatly suffering during the period they remained in detention, subsequently also suffered exile or severe discrimination in the field of employment or as students, leading to permanent damage of diverse nature that for many has resulted in extremely negative psychological or material conditions. Granting them a merely symbolic compensation would imply additional suffering for the victims. It would also be damaging to condition this compensation to not having received other forms of reparation.¹²³ On the other hand, a matter of this importance should not be left at the discretion of the Executive, but become a Law of the Republic. In addition to an equitable compensation, it would also be absolutely just to provide victims with other forms of moral vindication effectively extolling them before the rest of society. As a result of the fact that this omission by the Concertación governments has lasted for many years, a significant part of victims have already died. Therefore, it would also be just to make all possible efforts to accredit their situation¹²⁴ so as to morally vindicate them and grant reparations to their descendants.

¹¹⁹ One of its expressions was the inclusion of the demand for reparation of victims that survived torture in the Open Letter to President Frei, sent by the Chilean Section of Amnesty International, CINTRAS, the Chilean Human Rights Commission, CODEPU, FASIC, the Documentation and Archive Foundation of Vicaría de la Solidaridad, PIDEE and SERPAJ-Chile, on occasion of the 50th anniversary of the Universal Declaration on Human Rights (See CODEPU, 2001: 328-329).

¹²⁰ Commission that coordinates the work in this field conducted by various organizations and people committed to the defence of human rights.

¹²¹ Government of Chile, 2003: 27

¹²² See CINTRAS, “La reparación para sobrevivientes de tortura en Chile”. In *Reflexión*, 27: 33-34. (ANNEX 1)

¹²³ Because no reparation has been granted for torture, that could only be interpreted in the sense that not even this austere and symbolic amount would be awarded those that have received reparation as relatives of executed or disappeared political prisoners; or as beneficiaries of the meagre benefits granted people dismissed from their work for political reasons or those people that have returned from exile.

¹²⁴ Given the rigour of archives belonging to Chilean human rights NGO's, in many cases this would be completely feasible. Their rigorous work has meant that UNESCO itself has officially declared these archives a memory of humanity.

Based on the contents of the document “There is no tomorrow without yesterday”, the government presented various Bills containing some positive measures, such as the elimination of criminal records of ex political prisoners and improvements in health care, but also evidenced serious mistakes related to the right to justice. In this sense, and responding to a direct petition of the Chamber of Deputies Commission on Human Rights, CINTRAS prepared a document that refers to what it believes are the fundamental principles for an effective reparation: comprehensiveness, universality, simultaneousness, efficacy, legality and legitimacy.¹²⁵

What would evidence a new attitude towards reparations for torture victims is if the Council for the Defence of the State was to put to an end to the clearly unjust and fallacious defence of State patrimony against civil proceedings seeking compensations from the State initiated by survivors of torture and relatives of disappeared or executed political prisoners.

So far, that institution has made such an absolute defence of the financial interests of the State that it has gone to the extreme of denying that the Report of the National Commission on Truth and Reconciliation constitutes valid evidence when it comes to the accreditation of fatal victims of the dictatorship¹²⁶; of accepting the version of the military patrol that claims that Carmen Gloria Quintana accidentally burnt herself¹²⁷; of denying that executions took place during Operación Albania, claiming that there were armed confrontations¹²⁸; of denying the existence detention and torture camps during the dictatorship even, on some occasions, of even denying the existence of a dictatorship!¹²⁹

With regards claims levelled against the State for civil compensations by torture victims, the Council for the Defence of the State has also adopted an extreme attitude aimed at completely blocking these proceedings. In consequence, they have argued that there is no evidence that public officials inflicted such maltreatment, that such crimes have become extinguished, thus concluding that in case of a contradiction domestic legislation must rule over international law; and has sought the dismissal of complaints presented as a group, so they may be replaced by individual claims. This would make it impossible for claimants to even initiate legal proceedings because the mere notification to the defendant (in this case the State) would cost the plaintiff \$80.000, equivalent to more than US\$130.¹³⁰

This situation becomes even more serious contrasted with the Chilean State’s attitude of promoting of the right to reparation that it has demonstrated at an international level. Since

¹²⁵ CINTRAS, *Los proyectos de ley de reparación del gobierno de Chile*. Unpublished text. (ANNEX 2)

¹²⁶ See *El Mercurio*, July 28, 2000; *El Mercurio*, May 28, 2003 and *La Segunda*, May 15, 2002.

¹²⁷ Together with Rodrigo Rojas (who died as a result of his burns) during a national protest in 1986 she became a victim of an atrocious form of repression by a military patrol: to be burnt alive. Carmen Gloria Quintana survived, but her completely disfigured face had to undergo numerous surgical operations abroad thanks to international solidarity. During the subsequent legal proceedings to obtain compensation from the State for moral and material damage, the Council for the Defence of the State reached this outrageous conclusion. Later, the case was submitted to the Interamerican Commission on Human Rights, and several years later this Commission was able to convince the Chilean State to grant her compensation. It is important to bear in mind that the Chilean judiciary – during the dictatorship – had accepted the arguments put forward by the military patrol and only sentenced the officer in charge of the patrol for criminal negligence because he had not driven this victim of an “accident” to a hospital.

¹²⁸ Operación Albania was an infamous massacre of 12 people carried out by CNI in one single day in June 1987. As usual, that security agency fabricated the version that these people had died during armed confrontations with the police, something that was completely discarded as a result of the legal investigation conducted by judge Milton Juica. In what was virtually schizophrenia, the Council for the Defence of the State that had successfully argued – as a plaintiff in the trial – that the thesis of confrontation was false, finally supported this same thesis when some relatives of victims of Operación Albania initiated civil proceedings against the State. (See *El Mercurio*, July 28, 2000.

¹²⁹ See *El Mercurio*, May 28, 2003.

¹³⁰ See *El Siglo*, October 11, 2002.

1994, the government has submitted at the United Nations Commission on Human Rights a proposed resolution on this matter – approved by consensus – calling on all States in the world to repair and rehabilitate victims of severe violations of human rights.

5. POLICY OF IMPUNITY AFTER 1990 REGARDING TORTURE AND OTHER SERIOUS VIOLATIONS OF HUMAN RIGHTS COMMITTED DURING THE DICTATORSHIP

Despite the fact that the Chilean State abandoned its policy of systematic torture applied between 1973 and 1990, it has continued the systematic policy of seeking impunity for the most severe violations of human rights, and this is especially so in the case of torture. This policy has expressed itself in the following fundamental aspects.

5.1. Confirmation of the 1978 Amnesty Decree-Law

Despite the fact that the Program of Concertación de Partidos por la Democracia (coalition of political parties in government since the end of the dictatorship) clearly expressed the idea of repealing or revoking this decree-law¹³¹ (consistent with its strong criticism expressed during the dictatorial period), as explained by Edgardo Boeninger, one of its most important Ministers, in a detailed book published in 1997¹³², Patricio Aylwin's administration discarded this idea from the very onset. In addition, and in line with this attitude of unwillingness to be consistent with the most conflictive points in its Program, the Concertación coalition conducted a paradoxical negotiation of the 1989 constitutional reforms, whereby - among positive and negative aspects – accepted the loss of the parliamentary majority that awaited Aylwin if the Constitution imposed in 1980 had remained unchanged.¹³³ In consequence, in 1990 it was unnecessary to acknowledge the above-mentioned situation the Boeninger acknowledged years later. It was enough for the government to state that it lacked the parliamentary majority required to repeal the amnesty decree-law. This same argument was also used in defence of the Chilean State, faced with reports of denial of justice presented to the Interamerican Commission on Human Rights.¹³⁴

That this strange renunciation of a parliamentary majority went by unnoticed is, on the one hand, explained by the fact that in the plebiscite that ratified this aspect, a vote was cast for a

¹³¹ “The democratic government will promote the annulment of the (1978) Amnesty Decree Law” (Part II: Human Rights; Point 2: Truth and Justice)

¹³² See Edgardo Boeninger, *Democracia en Chile. Lecciones para la gobernabilidad*. Santiago, Edit. Andrés Bello, 1997: 400-402.

¹³³ In the understanding that Pinochet would win the plebiscite in 1988 and remain as Head of State until 1997, Articles 65 and 68 of the 1980 Constitution stipulated that the government could approve all ordinary legislation with an absolute majority in one Chamber of Congress and just a third in the other Chamber. Because it was quite rightly foreseen that the pro-Pinochet right-wing forces did not possess a popular majority, an additional article guaranteed an absolute majority in the Senate by means of the previously mentioned binominal electoral system and with nine Senators directly or indirectly appointed by Pinochet himself. At the same time, thanks to the binominal system, it was also certain that it could easily obtain more than a third of the Deputies. But with the defeat of Pinochet in the 1988 plebiscite, the situation turned upside down. The easy victory of the Concertación presidential candidate was to be expected (Aylwin) and, likewise, that this political coalition – that would obtain an absolute majority in the Chamber of Deputies and a third in the Senate – would then benefit from those Articles. (See Portales, 2000: 35-37)

¹³⁴ See Portales, 2000: 32-33. This argument lost validity with the change of millennium, because the Lagos administration fortuitously obtained an absolute majority in the Senate between August 2000 and May 2002 (because Pinochet and Francisco Javier Errázuriz were suspended as Senators), but failed to submit a Bill to Congress during this period aimed at repealing or revoking the 1978 Amnesty Decree-Law.

'package' of 54 reforms, and on the other by the completely authoritarian manner in which the leadership of the Concertación was already defining its future positioning.¹³⁵

The lack of political will to repeal or revoke the amnesty decree-law has been maintained despite the categorical declarations of the Interamerican Commission on Human Rights and of the Human Rights Committee of the International Agreement on Civil and Political Rights stating that the maintenance of such a provision implies an infringement by the Chilean State of the American Convention on Human Rights and the United Nations International Agreement on Civil and Political Rights.¹³⁶

On several occasions, Concertación governments have tried to consecrate the amnesty decree-law submitting Bills to Congress that in practice, and after a certain period, lead to the closure of cases regarding disappeared political prisoners in the period 1973-1978. This refers to the 1993 Aylwin Bills, the 1995 Frei Bill and the Figueroa-Otero agreement that same year – Bills that received the enthusiastic support of the Armed Forces and the Right-wing political parties, rejected primarily as a result of the moral impact of the strong opposition of human rights organizations and associations of relatives of victims.¹³⁷

At the end of 2003, the Lagos administration presented a Bill regarding human rights in which, once again, the Concertación's promise to repeal or revoke that decree-law is broken.¹³⁸ Of greater concern is the fact that Clara Szczeranski, president of the Council for the Defense of the State, in public statements made in July 2003, expressed that she was in favour of the application of such a decree-law, explaining that in case of conflict with human rights treaties ratified by Chile the decree-law should prevail by virtue of the "pro reo principle".¹³⁹

A further deeply concerning element in presidential announcements prior to the presentation of its Bill, is the good disposition towards pardoning the handful of agents of the State convicted of premeditated and perfidious homicides, preceded by torture, committed between 1978 and 1990, if "*they have genuinely expressed their regret, have already been in prison for a long time and have acknowledged their crimes cooperating with the truth and Courts of Justice*".¹⁴⁰ This view is supported by Clara Szczeranski, who crudely stated the convenience of pardoning violators of human rights unbelievably arguing "*we are dealing with crimes that have a historical, political and social reason, where there is no personal relationship between the offender and the victim. In addition, these were committed not by disorderly mobs, but by highly hierarchical and disciplined institutions. Thus, when it comes to assessing guilt it is absolutely necessary that we take into account the duty to obey and to express reservations*".¹⁴¹ In other words, literally the same defence could have been made of

¹³⁵ See Rafael Otano, *Crónica de la Transición*. Santiago, Edit. Planeta, 1995: 84.

¹³⁶ See CODEPU (2001): 201-206 and 219-227.

¹³⁷ See Beatriz Brinkmann, *Itinerario de la impunidad: Chile 1973-1999. Un desafío a la dignidad*. Santiago, Edic. CINTRAS, 1999: 115-120 and 131-137; Andrés Allamand, *La Travesía del Desierto*. Santiago, Edit. Aguilar, 1999: 435-438, 440-448, 451-453 and 462-464; and Portales (2000): 245-250, 332 and 338-341.

¹³⁸ Despite this, ten Concertación Deputies, headed by Juan Bustos (Socialist Party) and Gabriel Ascencio (Christian Democrat), submitted a Bill that in practice cancels the effects of the amnesty decree-law, stating that actions classified as torture or forced disappearance of persons cannot be included in an amnesty or pardon because these crimes represent genocide, crimes against humanity and war crimes. (See *El Mercurio*, September 5, 2003)

¹³⁹ See *El Mercurio*, July 19, 2003. Argument that was strongly opposed by several human rights lawyers, among them Nelson Caucoto who highlighted the fact that the pro-reo principle can never grant more rights to the perpetrator than the victim. (See *El Mercurio*, July 24, 2003). Although, on the other hand, he was significantly supported by Aylwin who said that "it is unreasonable to create a scandal because there is a possibility that the amnesty law may operate [...] this is a law that is in force" (See *El Mercurio*, July 23, 2003).

¹⁴⁰ Gobierno de Chile: *No hay mañana sin ayer*, Santiago, 2003: 35.

¹⁴¹ *El Mercurio*, July 19, 2003 and *La Nación*, July 29, 2003.

the material executors of the Nazi Holocaust. But the president of the Council for the Defence of the State went even further when in relation to human rights violations she stated that “*the Chilean military are innocent, regardless of the command that led them astray instigated by civilian interests, external and foreign to military life. These institutions need to free themselves from the unjust weight that overwhelms them today. Chile needs them free of this burden*”.¹⁴²

That implies that in addition to the implicit confirmation of impunity for the period 1973 – 1978, we are now witnessing an emerging impunity for the period 1978 – 1990.

5.2. Government attitudes favouring impunity in cases with special international relevance

Governmental promotion of impunity for crimes committed by the dictatorship has gone so far that it has even impaired justice in cases especially relevant for other countries or the international community in general. Relevance resulting from the victim’s prominent role in society and because the violation constituted a case of international terrorism, as the attempted murder of Bernardo Leighton in Italy in 1975; or because it involved a Carmelo Soria, a distinguished Spanish-Chilean United Nations official murdered in 1976 after being brutally tortured; or because the case revolved around the ex dictator Augusto Pinochet himself as the person with greatest responsibility for crimes against humanity committed between 1973 and 1990.

In the Bernardo Leighton case, following a long trial in Italy, the ex head of DINA, retired general Manuel Contreras and the ex head of DINA’s foreign department, retired colonel Raúl Iturriaga were sentenced to 20 and 18 years imprisonment respectively as intellectual perpetrators. Despite the fact that the Chilean government had been one of the plaintiffs in this trial, it completely ignored the extradition request. At the request of Human Rights Watch, the Italian government finally asked for their extradition at the end of 1999. The Chilean government did not become a party to the procedures and the Supreme Court rejected the extradition request without even initiating legal action in Chile. However, the Supreme Court initiated these legal proceedings after dismissing several extradition requests presented by Argentina in the trial of the murder of general Carlos Prats and his wife in Buenos Aires in 1974. Faced with this situation, the Lagos administration has, to date, remained absolutely impassive.¹⁴³

In the Carmelo Soria case, legal proceedings progressed as a result of pressure exerted by the Spanish government, resulting in the appointment by the Supreme Court of a special judge from its own ranks by virtue of a law passed in the early 90’s that allows for this in legal cases that can impact Chile’s international relations. In addition, because the Chilean State had signed an international convention in 1977 protecting diplomats and international officials, the amnesty decree-law was not applicable in this case. However, the Supreme Court exculpated those responsible for his torture and murder with the application of the amnesty law, echoing a government report that deceitfully denied Carmelo Soria’s status of international official. Subsequently, based on a 1999 resolution by the Interamerican

¹⁴² *El Mercurio*, September 7, 2003. In a revealing coincidence with his expressions, Juan Emilio Cheyre, Commander-in-Chief of the Army had previously declared that “today politicians face a new challenge in this matter (human rights)”, after saying that politicians in 1973 “and in all these years were incapable of controlling the crisis they provoked”, hopeful that they will be able to close “this chapter that they themselves opened”. (*El Mercurio*, July 19, 2003)

¹⁴³ See Patricio Mayorga, *El cóndor negro. El atentado a Bernardo Leighton*. Santiago, Edic. El Mercurio-Aguilar, 2003: 190-197; Human Rights Watch, *When Tyrants Tremble. The Pinochet Case*. New York, 1999: 40 and Portales (2000): 295-297.

Commission on Human Rights calling upon the Chilean government to effectively sanction those responsible for Soria's murder and repair his relatives, within the framework of an amicable solution envisaged within the interamerican system for the protection of human rights, the government has expressed that it is willing to advance in both directions, but no tangible progress has been made to date.¹⁴⁴

In the case of Augusto Pinochet, we have to bear in mind that already in 1998 – on occasion of a constitutional accusation presented against him by various Concertación Deputies to prevent him from becoming a Senator for life after leaving his post as commander-in-chief of the Army in March 1998 – the Frei administration had put up a strong defence in his favour.¹⁴⁵

Later, following his arrest in London in 1998 in response to a request by Spanish justice, the Chilean government made frantic international efforts to prevent the only effective possibility of putting Pinochet on trial for his crimes, as quite rightly expressed by various local and international human rights organizations. For this purpose, the Chilean government used almost exactly the same arguments that Pinochet used against the United Nations when in 1974 the UN began to condemn his regime for severe and systematic violations of human rights: that Chilean sovereignty was being violated; that a double standard was being used against Chile; that none of the domestic progress was recognized; and that a precedent was being established that would impact small nations within the international community.¹⁴⁶

Justifying Pinochet's return to Chile, José Miguel Insulza, Minister of the Interior, went as far as stating that it was far more possible to put Pinochet on trial in Chile than in Spain: *"Following the verdict of the Chamber of Lords, in Spain Pinochet can only be tried for torture or conspiracy to commit torture in crimes committed after 1988. In Chile there is no immunity or amnesty that prevents him from being tried for his actions. The possibilities of putting him on trial are far greater than in Spain. A trial in that country (Spain) may be of greater interest for those that only want a symbolic trial"*.¹⁴⁷ As had already been explained by Jorge Schaulsohn, ex Deputy and president of PPD, this argument was absolutely deceitful: *"The whole world knows that he is not going to be put on trial in Chile. And if he were ever to be tried, the case against him would be dismissed with the application of the Amnesty law or by declaring that the crimes he is accused of have extinguished. It is deceitful to state that he will be put on trial in Chile, because he is not going to go to Court here for the same reasons that he has never gone to Court in all this time"*.¹⁴⁸

As a further mechanism to convince the international community that Chile had its own methods to face up to its past and that, in consequence, Pinochet should be returned to

¹⁴⁴ See CODEPU (2001): 224-227 and Portales (2000): 292-295.

¹⁴⁵ Given the fact that in constitutional terms he could not be charged for his actions during the dictatorship, he was charged with reiterated actions - that in his position as commander in chief of the Army as from 1990 – represented violations of the Constitution imposed by himself in 1980; and of embarrassing international episodes that seriously damaged Chile's prestige. Despite the fact that such an accusation was destined to be finally defeated in the Senate (because of the right-wing majority), the Frei administration succeeded in exerting great pressure on Concertación Deputies so that the accusation. This was achieved thanks to the negative vote of over a score of Concertación Deputies, almost all Christian Democrats. (See Portales, 2000: 358-378).

¹⁴⁶ See Portales (2000): 17-19.

¹⁴⁷ *El Mercurio*, March 28, 1999.

¹⁴⁸ *Qué Pasa*, November 14, 1998. Insulza himself, as Minister for Foreign Affairs during the Frei administration, had stated in November 1997 in relation with the trial of Pinochet in Spain, that *"I am unaware of legal proceedings against Pinochet or the members of the Chilean Military Junta. The only legal proceeding of that nature was presented in Spain. The question is whether it would not be more reasonable, from a strict legal viewpoint, to present legal proceedings in Chile. And this is where we move into politics: why aren't those legal proceedings presented in Chile? Because everyone knows that this would seriously endanger the transition"*. (*La Epoca*, November 21, 1997)

Chile, the Frei administration created the “dialogue table on human rights” that sought to ways to find the remains of disappeared political prisoners and shed light upon the circumstances of their death. The basic assumption was that the military and the police would provide the information necessary to reach this objective. The dialogue table consisted of representatives from the different branches of the armed forces and Carabineros, together with personalities from different sectors of civil society. However, due to their mistrust of this mechanism, associations of relatives of victims chose not to participate because they were seeking the maintenance of judicial proceedings to resolve and sanction these crimes against humanity.¹⁴⁹

Lastly, having achieved Pinochet’s return to Chile, the Lagos administration conducted an intense public and private campaign aimed at judge Juan Guzmán and the judiciary to prevent Pinochet from being tried on the ground of health “reasons”. The convenience of this was upheld by Insulza, Minister of the Interior¹⁵⁰, by ex President Patricio Aylwin¹⁵¹ and by Andrés Zaldívar¹⁵², President of the Senate, and President Ricardo Lagos himself justified their statements.¹⁵³

On the other hand, judge Guzmán himself on several occasions publicly denounced private government pressure.¹⁵⁴ Likewise, The New York Times ran a report in December 2001 on the private pressure exerted by the Lagos administration on the Supreme Court for the same purpose.¹⁵⁵

Lastly, in order to relieve Pinochet from his situation, the government submitted an ad hoc constitutional reform proposal – that was quickly approved – enabling him to resign to his post as Life Senator and to accept a statute for ex Presidents of the Republic that ensures him the same privileges as those of Life Senator, including judicial prerogatives.

This attitude of concern for the well being of Pinochet and other violators of human rights contrasts sharply with the government’s lack of concern for the effects that the guarantee of impunity has and continues to cause the victims of crimes against humanity and their relatives. In this sense, a CINTRAS study states: *“The psycho-social trauma produced by the military dictatorship has a recurrent and episodic character, pointing to the fact that it evolves over time with exacerbations that are very acute on certain occasions, in accordance with situations that have a relationship of meaning with these traumatic experiences. That is the case of impunity for crimes committed. It results in the daily increase of the suffering of those that seek truth and justice for their dead. Impunity is the fundamental mechanism in the recurrence of the trauma: every new circumstance or event that evidences impunity in the mind of victims and their relatives triggers mental suffering”*.¹⁵⁶ This aspect was also highlighted in a public statement issued as a result of the severe damage inflicted on relatives of victims by the publication of the report on the fate of disappeared political prisoners – prepared by the Armed Forces in 2001 as a result of the “dialogue table” – that was full of mistakes and lies: *“The fragile psycho-emotional stability that relatives achieve in some periods rapidly weakens and depressive and anguished symptoms are reactivated,*

¹⁴⁹ See Brinkmann (1999): 191-193 and Beatriz Brinkmann, “Cálculo político y conciencia ética frente a la impunidad”. In *Reflexión* 28: 26-30

¹⁵⁰ See *La Nación*, August 10, 2000; *Caras*, August 18, 2000; *Qué Pasa*, September 2, 2000 and *La Nación*, April 16, 2001.

¹⁵¹ See *Caras*, August 18, 2000.

¹⁵² See *La Segunda*, June 2, 2000.

¹⁵³ See *La Segunda*, June 5, 2000.

¹⁵⁴ See *La Nación*, August 28, 2002; *La Nación*, August 30, 2002 and *El Mercurio*, January 18, 2004.

¹⁵⁵ See *El Mercurio*, December 15, 2001.

¹⁵⁶ Carlos Madariaga, “La Mesa de Diálogo y sus efectos psicosociales en la provincia de Iquique”. In *Reflexión* 26:5

*hidden pains and suffering accumulated in nearly thirty years. The maintenance of this tragic psycho-social damage is an iron gate in the way of reconciliation between Chileans”.*¹⁵⁷

5.3. Appointment to high public office of people involved in torture or other serious violations of human rights

A further factor that reflects the State's attitude in favour of impunity are the reiterated appointments or maintenance in their high public posts of military or Carabineros officers involved in the execution or cover up of serious violations of the right to physical and mental integrity, and even the life of opponents of the dictatorship.

On many occasions, this has seriously damaged Chile's international image. The appointment of military attaches or ambassadors to represent Chile abroad, has led to embarrassing reactions in various parts of the world, including the United Nations. These were all people that held positions of responsibility in the secret police DINA (Dirección de Inteligencia Nacional) – that changed its name to CNI (Central Nacional de Informaciones) in 1978 – the main repressive agency of the Chilean military dictatorship, renowned for the terrible tortures practiced against the people it arrested.

One example is retired Brigadier Jaime Lepe (member of DINA's Mulchén brigade that tortured and murdered Carmelo Soria) whom the government tried to appoint to the military mission in Spain, but ran into the opposition of Spanish authorities.¹⁵⁸ Also in Spain, in 1997, Carlos Parker, socialist official of the Ministry of Foreign Affairs, recognized Héctor Barrientos, the Air Force Attaché, as his ex torturer, but despite his denunciation, the air force officer remained in his post.¹⁵⁹

Similar situations to the Lepe case also occurred in Ecuador and El Salvador in 1996, when the Chilean government successively tried to appoint retired Brigadier Pablo Belmar, another member of DINA's Mulchén Brigade, as military attaché in those countries, resulting in a clear rejection by the authorities and public opinion in both countries.¹⁶⁰ In addition, there was further controversy again in El Salvador in 1996 when Argentina accused George Willeke, Chilean military attaché in El Salvador, for his participation in the assassination of General Carlos Prats.¹⁶¹

The same thing happened at the United Nations when in 1998 it became known that General Sergio Espinoza, head of the Mission of Observers in the India-Pakistan border, had formed part of a court martial in the north of Chile that sentenced four Socialist Party leaders from the city of Iquique to death in 1973.¹⁶²

In 1994 the Frei administration tried to appoint Luis Winter as ambassador in Switzerland. This official had been accused in 1977 by that country's Solidarity Committee with the People of Chile (whilst acting as Chilean representative before the United Nations in Geneva) of having ordered tortures after the military coup in 1973 when he was Naval prosecutor in

¹⁵⁷ “CINTRAS ante el Informe de las Fuerzas Armadas”. In *Reflexión* 26: 9.

¹⁵⁸ See Ascanio Cavallo, *La Historia Oculta de la Transición*. Santiago, Edit. Grijalbo, 1998: 350.

¹⁵⁹ See *El País* (España), November 4, 1997. Government attitude revealed such lack of social sensitivity that José Miguel Insulza, Minister of the Interior, declared that “if all types of accusations are levelled against a diplomat in the newspapers of the country where he lives, that can unfortunately be an injustice for that diplomat, but he is no longer appropriate for the job entrusted to him and a decision would have to be taken in that respect”. (*La Epoca*, November 21, 1997). In any case, “the Air Force Attaché was not removed from his post and abandoned Spain at the end of his normal term”. (Portales, 2000:301)

¹⁶⁰ See *La Nación*, January 31, 1996 and *La Tercera*, February 17, 1996.

¹⁶¹ See *La Nación*, January 31, 1996.

¹⁶² See *La Nación*, September 18, 1998.

Valparaíso. The Swiss government directly asked for the withdrawal of that appointment, and the Chilean government appointed his Consul General in Houston.¹⁶³

Inside Chile, undoubtedly the most relevant case is the present appointment as Commander-in-Chief of the Army of General Juan Emilio Cheyre, publicly accused of having taken part in the “death caravan” executions in La Serena; in the cover-up of those crimes; in the practice of torture in that city after the military coup and of the cover-up of torture in Copiapó in 1988.¹⁶⁴ Both the debate and the investigation of this case came to an end the day after this report was published by *El Siglo*, when Michelle Bachelet, Minister of Defence, stated: “[...] I want to say that the government, President Lagos and myself as Minister are absolutely convinced that General Cheyre is an honest person that has committed no type of violation or crime of concern [...] we are certain and fully convinced of that”.¹⁶⁵ On the other hand, a few days later Adriana Muñoz (PPD), President of the Chamber of Deputies, stated: “The truth is that I am unaware of his situation, but I believe that today we must look ahead and work to reconstruct relations and trust between the Army and the country as a whole”.¹⁶⁶

Nor was there any apprehension or public debate when Jaime Krauss, at present aide-de-camp at the Chamber of Deputies, and brother of Jaime Krauss, Minister of the Interior during the Aylwin administration and presently Chilean Ambassador in Spain, was accused by one of his subordinates at that time of having ordered executions at the Pisagua concentration camp in the months following the military coup.¹⁶⁷

Another important case is that of Nelson Mery, director of Investigaciones (civil police) between 1992 and 2003, who after the military coup acted as Investigaciones delegate in the Linares Artillery Regiment that became a notorious detention and torture camp. Mery resigned last year after well-publicised reports of torture against him came to light. It is noteworthy that shortly before his appointment in 1992, leaders of the Association of Relatives of Disappeared Political Prisoners discussed their strong questioning of this policeman’s repressive actions with the government, but had no effect on the government’s decision.¹⁶⁸

Lastly, it recently became known that Colonel Rodolfo Ortega, military attaché at the Chilean Embassy in Spain, was head of CNI in the city of Punta Arenas between 1986 and 1989 and, by virtue of his position, responsible for the execution of young socialist Susana Obando who was found dead in a beach hours after her arrest on July 26, 1988. Asked about this case, Enrique Krauss, Chilean Ambassador in Spain, answered very naturally that the accusation against Ortega in Chilean courts was “an old subject”, already known to him for several months.¹⁶⁹

5.4. The illustrative case of training ship “Esmeralda”

The creation of a real domestic culture of impunity can be illustrated perfectly by the manner in which the Chilean government and various institutions have tackled the case of Navy training ship “Esmeralda” that undertakes a long training voyage every year stopping in many ports in all continents.

¹⁶³ See Portales (2000): 302-303.

¹⁶⁴ See Jorge Escalante, *La misión era matar. El juicio a la caravana Pinochet-Arellano*. Santiago, Edit. Lom, 2000: 18, 122-127, 133, 137-140 y 147; *El Siglo*, March 15, 2002 and *La Firme*, April 2, 2002.

¹⁶⁵ *La Tercera*, March 16, 2002.

¹⁶⁶ *La Nación*, March 23, 2002.

¹⁶⁷ *Siete más 7*, May 23, 2003.

¹⁶⁸ *El Mercurio*, July 19, 2003.

¹⁶⁹ See *La Nación*, February 29, 2004 and *La Nación*, March 1, 2004.

After the military coup in 1973, this ship was used as a detention and torture centre, as stated in the Report of the National Commission on Truth and Reconciliation, confirmed by various reports and publications in Chile and abroad.¹⁷⁰

However, neither the Navy nor successive governments after 1990 have conducted any act to purify the vessel or repair and vindicate its victims. Even worse, the training ship has continued to sail around the world, and is bid farewell every year by the President of the Republic as an “ambassador” of good will, as if nothing had happened aboard.

With regards the media in general, in the 14 years since the end of the dictatorship it has failed to report the demonstrations against “Esmeralda” when it has stopped in ports of countries with active human rights organizations and colonies of Chilean exiles.

On occasion of the commemoration of the 30th anniversary of the military coup last year, an increase of demonstrations in Europe was to be expected. Despite that, however, President Lagos still bid the training ship and its crew farewell, stating that *“part of our motherland, of Chile’s traditions and history, as well as the spirit of the Navy sets sail with you, and you will reach other territories with the pride of representing a country that is a small star in the south of the world, respected for its democracy and human rights”*.¹⁷¹ Subsequently, on June 21, 2003, after the strength of demonstrations led to the cancellation of stopovers of “Esmeralda” in several European ports, in statements made to Radio Bío-Bío, President Lagos said that he did not regret having officially bid the vessel farewell: *“I believe we must accept history as it is. I think that if transgressions and violations of human rights, and even murders and deaths, as stated in some countries, were committed aboard Esmeralda – something that I have no proof of – that is something that has nothing to do with the youngsters that had not even been born at the time of the coup”*.¹⁷² However, on July 15, in statements made during the BBC program Hardtalk, he stated that *“this time I think it was a mistake”* for Esmeralda to have made this tour.¹⁷³ When the Navy was asked about these last statements, a Navy spokesman answered, *“that is the opinion of the President and he is free to say whatever he likes. The Navy does not comment on his opinions”*.¹⁷⁴

5.5. Government attitudes favouring impunity of torture

When it comes to criminal trials of torture, the government has emphatically adopted a negative attitude. Thus at the beginning of 2001 – when a debate was opened as a result of responsible reports against General Hernán Gabrielli, at that time Vice-Commander-in-Chief of the Air Force - José Miguel Insulza, Minister of the Interior, expressed that: *“We have to say it frankly. In this country there was a wide-ranging situation of repression in 1973. Therefore, acts of violence, indiscriminate imprisonment of people and exile were common and frequent events. If we start to pursue the whole of this matter, we would certainly find ourselves in a different and difficult situation. [...] I am concerned that everyone will start to make denunciations in this country because I feel it would be negative. [...] Do we want to go out looking for 5 or 20 thousand perpetrators? Do we have to take to court all those that beat people? My concern is for tension in our country and not for tension with the Armed Forces”*.¹⁷⁵

¹⁷⁰ *Informe de la Comisión Nacional de Verdad y Reconciliación*, 1996: 292-295 and Edward Crouzet, *Sangre sobre la Esmeralda. Sacerdote Miguel Woodward. Vida y Martirio*. Santiago, Edic. Chile América - CESOC, 2000: 173-189.

¹⁷¹ *La Segunda*, July 16, 2003.

¹⁷² *La Segunda*, July 16, 2003.

¹⁷³ *La Segunda*, July 16, 2003.

¹⁷⁴ *La Segunda*, July 16, 2003.

¹⁷⁵ *La Nación*, February 15, 2001.

Along these same lines, influential socialist Senator José Antonio Viera-Gallo, expressed the following: “[...] if torture trials were to multiply, courts would be jammed and it would be impossible to deal with this because there would be thousands of cases. [...] I believe that today it is really pointless to open this judicial debate on torture [...] The cause of human rights [...] must focus on the events that caused the death or disappearance of people. In this sense, there were many other types of abuse or crimes that are impossible to prosecute”.¹⁷⁶

The little importance paid by the State and its main institutions to the systematic application of torture during 17 years, has had very negative repercussions on the morale of Chilean society as a whole.

This has led its victims to feel doubly violated. First of all, by a dictatorial State that savagely damaged and humiliated them, and secondly, by a limited democratic State that has upheld the impunity of perpetrators, and in some cases even promoting them to high public office.

In consequence, the issue of the effects of torture has been cast aside and has strongly deterred victims and society as a whole from the search for the truth, justice and reparation. Very few have dared to denounce perpetrators, and – significantly – in many of these cases victims have been sued for damages and libel, receiving no support from government that has remained absent.

Thus, Hernán Gabrielli, Vice-Commander-in-Chief of the Air Force, began legal proceedings in 2001 against ex political prisoners Carlos Bau, Juan Ruz and Héctor Vera, for publicly denouncing him as the torturer of Eugenio Ruiz-Tagle, young leader of the MAPU Party, executed in Antofagasta shortly after the military coup. In view of this situation, the ex political prisoners presented a legal accusation of torture against Gabrielli, supported by other witnesses of his violent repressive actions.¹⁷⁷ As normal, both legal proceedings were closed without any tangible results.

This is the same situation that involved Emilio Meneses, political scientist and university lecturer, who in 2001 began legal proceedings against another academic, Felipe Agüero, because the latter denounced him as his torturer when he was imprisoned in the National Stadium after the military coup. In this trial, many other victims have come forward in support of the accusation presented by Agüero.¹⁷⁸ Faced with this situation, the director of the Catholic University’s Institute of Political Science suspended the professor for one year, but soon came under pressure from Rector Pedro Rosso to reinstate the expert on defence to his academic activities.¹⁷⁹ This is an example of the little importance that even the highest educational levels give a horrendous crime such as torture.

Likewise, previously mentioned ex director of Investigaciones, Nelson Mery, also initiated legal proceedings against ex political prisoner Odette Alegría who had denounced him for torture and humiliating treatment. This, in turn, led to the presentation of legal proceedings for torture, that are still underway– supported by the Association of Ex Political Prisoners in

¹⁷⁶ El Mercurio, February 14, 2001.

¹⁷⁷ See *Nación*, February 13, 2001, *La Tercera*, February 18, 2001 and Beatriz Brinkmann, “Tortura: crimen que espera castigo”. In: *Reflexión* 26: 10-12. It is worth noting that at the end of the 90’s Gabrielli was appointed Chilean Air Force Attaché in the United States.

¹⁷⁸ See Fernando Villagrán, *Disparen a la bandada. Una crónica secreta de la FACH*. Santiago, Edit. Planeta, 2002: 249-258.

¹⁷⁹ See *Reportajes de La Tercera*, April 8, 2001. Eventually, he lost so much prestige before his peers that he had no choice but to leave the University.

Linares – against Mery and seven other people that had been active in the Linares Artillery School after the coup¹⁸⁰.

To the extent that we fail to deal with the phenomenon of torture during the dictatorship with truth and justice, the message effectively conveyed to State agents and society as a whole is that, beyond speeches, the signature of international treaties and established legislation, torture does not constitute a serious transgression of ethics and morality for Chilean society.

6. CONCLUSIONS

We close this report with the conclusions of an analysis on the existence of torture in Chile, conducted by CINTRAS in 1996 and that – unfortunately – are still valid today.

“People are still tortured in this country for several reasons that are all inter-linked: because the military regime’s repressive apparatus and underlying doctrine was never dismantled; because military and police forces have never been democratised, and in consequence, the repressive model, coercion techniques and same actors are still in place; because Chilean society has still been unable to deny legitimacy to a certain ethic upheld by the armed forces that does not question, but on the contrary, supports and becomes an accomplice of criminal actions perpetrated in the name of this doctrine.

*“Also, people are still tortured because the transition to democracy has not been able to provide a political and judicial solution regarding the problem of impunity of violators of human rights. The Chilean State still has to face up to the challenge of reparation of the psycho-social trauma, at all levels, the material, social and moral reparation of each one of the victims, and the subjection of criminals to justice. As occurs in the psychological conflicts of an individual or a couple, a society that does not repair the damage produced risks making the same mistakes that were made in the past. Additionally, this contributes to the generation of conditions that upset human coexistence”.*¹⁸¹

¹⁸⁰ See *La Nación*, July 14, 2003; *La Segunda*, July 17, 2003; *El Mercurio*, August 17, 2003; *La Nación*, September 12, 2003; *El Mercurio*, October 3, 2003; *El Mercurio*, October 21, 2003 and *El Mercurio*, November 15, 2003.

¹⁸¹ Carlos Madariaga, “Tortura en Chile ayer y hoy: el problema de la prevención”. In: *Reflexión* 25: 28.

PART II : STATE VIOLENCE AGAINST CHILDREN IN CHILE

1. DEFINITION OF THE CHILD

- According to Chilean legislation¹⁸², a person reaches the age of majority at the age of 18 years. It corresponds to the age of legal capacity.¹⁸³

Article 26 of the Civil Code provides that anyone below the age of 7 is considered as an infant or child; a boy from 14 and a girl from 12 has reached the age of puberty and is thus considered as an “adult”; in civil Chilean legislation an adult is a person who has reached the age of puberty (14 for boys and 12 for girls) but it does not mean this person is legally a major; in this framework a person may be both a minor and an adult. Finally, under this provision, a person who has reached the age of 18 is considered as a major.

Regarding sexual consent, in the absence of an expressed norm regarding the legal age of consent, it is nonetheless considered rape to engage in sexual activity with those under a determined age. Until January of 2004, vaginal, anal or oral penetration of a minor less than 12 years of age was considered rape. After that date, a new law went into effect which increases the age to 14, effectively establishing a legal consensus that the age of sexual consent is 14.

In terms of criminal responsibility, the law will apply to majors (18 years old) but below that age distinctions must be made :

- Those younger than 16 years old are not considered to be legally responsible, that is, they cannot be tried as adults for a crime, according to article 10 of the Chilean Penal Code, and in the event that the minor is accused of associated criminal activities, those legal situations will be addressed in the juvenile justice system, as is stipulated under the Minors Law.
- Those older than 16 and younger than 18 years of age are in principle not considered legally responsible subjects, but if it is determined that they acted “with discernment” of the illegality of their actions, they are to be tried as adults. Otherwise, if it is considered that they acted “without discernment”, then they are legally treated as minors under age 16, and their legal outcome will depend on the decision of the minors court judge.

2. TORTURE

2.1. International framework

In addition to the Convention Against Torture, Chile signed on 26th January 1990 and ratified on 13th August 1990 the Convention on the Rights of the Child which protects children from being "subjected to torture or other cruel, inhuman or degrading treatment or

¹⁸² Act n°19221 of 1st June 1993.

¹⁸³ CRC/C/65/Add.13 Periodic report of Chile § 12 (25 June 2001).

punishment"(article 37 a), "deprived of his or her liberty unlawfully or arbitrarily" (article 37 b), especially children who have infringed the law (article 40).

Just as the Convention Against Torture, the Convention on the Rights of the Child has constitutional status.¹⁸⁴ However the self-execution of the CRC is doubtful since there is no real consensus on doctrine and jurisprudence concerning constitutional rank of the CRC.¹⁸⁵

2.2. National framework

Article 150 A of the Criminal Code¹⁸⁶ characterizes torture as an offence and establishes special penalties for public employees who practice torture causing physical or mental injury. Furthermore certain conduct characterized as crime (castration, mutilation and bodily harm) can be used to punish ill-treatment. However neither of these provisions make specific reference to children as victims.

In case of ill-treatment of a child, which does not qualify as torture, a state agent who has maltreated a child may be prosecuted for maltreatment as "child abuse by a non-family member".

According to article 62 of the Juvenile Act¹⁸⁷, child abuse committed by a non-family member is any act or omission damaging the physical or mental health of a minor. Thus the expression potentially includes a broad set of behaviours such as injuries to a minor, forms of mental violence, deliberate humiliation, neglect or exploitation. Furthermore every person not considered to be a member of the family of the child victim falls within the scope of this provision. Thus one can infer that a state agent could be punished on the ground of this provision for child abuse.¹⁸⁸

Nevertheless state agents are not specifically targeted as potential offenders. The penalties incurred in case of child abuse¹⁸⁹ are not really dissuasive since they would have no effect on the state agent's career.

The Criminal Code has been recently amended by the Act n° 19927 of 14th January 2004 concerning sex abuses against children which may be included in the definition of torture from the Convention Against Torture. Its main improvement is to raise the age of sexual consent from 12 to 14. Some of the new provisions expressly include state agents as potential offenders; whereas others concern any person.

¹⁸⁴ Article 5.2 of Chilean Constitution: "It is the duty of the state organs to respect and promote such rights, as guaranteed by its Constitution and by International treaties ratified by Chile which are in force."

¹⁸⁵ CAT/C/39/Add.14 Periodic report of the Chile § 3 (28th October 2002).

¹⁸⁶ Introduced by Act n° 19567 of 1st July 1998; CAT/C/39/Add.14 Periodic report of the Chile § 21, 54, 55 (28th October 2002).

¹⁸⁷ Ley de Menores n°16618, also called Minors Law.

¹⁸⁸ CRC/C/65/Add.13 Periodic Report of Chile § 380-385 (25 June 2001).

¹⁸⁹ As stated in CRC/C/65/Add.13 Periodic report of Chile § 385 (25 June 2001): Extra-family child abuse may be punished by all or some of the following measures:

- (a) Attendance by the perpetrator at therapeutic or family counselling programmes. The Act does not specify a term for this measure, and its duration is determined by the institution which the court deems most suitable, for example the National Service for Women, the National Service for Minors (SENAME), the diagnosis centres of the Ministry of Education, or the community centres for family mental health;
- (b) Performance of work for the community, municipality or municipal corporations in the commune of residence similar or related to the occupation of the offender, at his express request;
- (c) A fine equivalent to one to 10 times the offender's daily income.

First, according to article 361 of the Criminal Code, any vaginal, anal or oral penetration of a person under the age of 14 is considered and punishable as a rape in all cases. Article 362 of the Criminal Code considers that a minor over 14 is raped in cases where force or intimidation is used, where there is absence of sense, or inability to resist, or where there is an abuse of the mental disorder of the victim.

Secondly, article 363 concerning rape and 366.2 concerning abuses (excluding rape and prostitution) of the Criminal Code establish other cases which involve more severe penalties, particularly where the offender abuses of his relationship with a minor between ages 14 and 18 whom he is in charge of the custody, education or care.

Furthermore articles 367 and 368 of the Criminal Code¹⁹⁰ also set up aggravating circumstances with respect to the penalty in cases where the offender, i.e. the person who asks for money or other services in exchange for the prostitution of a 14-18 minor, is particularly a state agent, a teacher or a guardian, or in cases where there is a breach of authority or trust.

Finally article 366 of the Criminal Code prohibits every production, distribution, acquisition or storing of materials of pornography involving all person under 18.

In September of 2002 a highly controversial case involving child abuse and paedophilia was discovered in Santiago. The case is relevant not only because of the number of minors involved over nearly a decade and allegations that some were possibly drugged to death, but also because of the involvement of influential Chileans. Initial investigations have already revealed the involvement of a sizeable network of Chileans in a variety of socio-economic contexts. There are also allegations of the attendance of congressmen at parties and the substantiated claim of the complicity of a high-ranking uniformed police officer.

This case is still under investigation, and the responsible parties have not been officially determined.

2.3. Complaints procedure

There is no separate procedure for minor's complaint of torture or ill-treatment committed by a state agent in Chile. General procedures may be used:

- When the situation of abuse of children can be subsumed under a defined criminal code, the court considers that the case deals with "abuse constituent of a crime" and the processing of the child will correspond to the criminal activity involved: physical injury, kidnapping, murder, etc.
- Abuse committed by family members is regulated, according to legal definition, procedure and sanctions, by a special law called "Domestic Violence Law."
- Abuse against children by non-family members is addressed under article 62 of the Minor Law. However, up until this date there has never been a prosecution under this law.
- The recourse to *amparo*¹⁹¹, (habeas corpus) may be used by every person arrested, taken into custody or put into jail unlawfully or with infraction of the Constitution. It is considered to be an expedited legal resource that can be presented to the

¹⁹⁰ Introduced by the Law n°19617 of 12th July 1999.

¹⁹¹ Article 95 of the Code of Criminal Procedure.

corresponding Appellate Court, by the affected or by whomever on his or her behalf, and obligates the court to immediately adopt the necessary measures to provide protection to the affected person. This procedure has constitutional status and, even if there is no particular reference to minors, both doctrine and case-law recognize that *amparo* is available to all minors.¹⁹²

In 2003 the Adolescent Legal Defense team of the NGO Opción presented twenty habeas corpus actions for protection of girls, boys and adolescents in situations of unlawful deprivation of their liberty, obtaining positive results in the majority of instances.

- There is a right to lodge a complaint against a decision of the juvenile judge; nevertheless the child in question cannot contest such a decision, only his parents or guardians may do it. Moreover, the procedure is very constraining.¹⁹³
- The SENAME asks any person with knowledge of child abuse in its system to report it. Complaints may be lodge also by children against any person working for the SENAME network both in public and private establishments.

3. CHILDREN IN CONFLICT WITH THE LAW

3.1. Administration of juvenile justice

Concerning the age of criminal responsibility, the principle is as follows:

- Persons age 18 and older are treated as adults under the Chilean justice system.
- Persons over 18 and those under that age declared “with discernment” are tried as under the ordinary justice system, in accordance with the laws and criminal procedures applicable to adults. Those minors in “deprivation of liberty” are taken to adult penitentiary facilities. The only difference between the criminal treatment of adolescents and adults is outlined by Penal Code 72, which asserts for the adolescent, “the minimum sentence and the least degree of those penalties specified by the law for crimes of which the person is responsible.”
- Those minor less than 16 years of age or between 16 and 18 years of age are determined to be “without discernment” they remain as subject of the minor legal justice system, regulated in general by the Minors Law.

It is within the juvenile justice system where the most severe situations of torture and abuse have been detected, primarily when the juvenile is arrested by police officials, and also afterward in various detention facilities. These situations were documented in a report, *Tortura, Derechos Humanos y la Justicia Criminal en Chile* (Torture, Human Rights and Criminal Justice in Chile) prepared by Universidad Diego Portales/Center for International Justice, 2002. This report had a specific chapter dedicated to the topic entitled “Adolescents and Children: Police and Centers of Detention.”

¹⁹² CRC/C/65/Add.13 Periodic report of Chile § 1038 (25 June 2001).

¹⁹³ “The admissibility of complaint proceedings in juvenile cases requires: (a) That a jurisdictional decision has been made by a juvenile judge; (b) That in handing down this decision the juvenile judge has committed a serious error or abuse; (c) That the decision in question is a final decision or an interlocutory decision terminating the case or making its continuation impossible; (d) That this final or interlocutory decision is not subject to any other remedy, either ordinary or extraordinary.”
CRC/C/65/Add.13 Periodic report of Chile § 410, 419-423 (25 June 2001).

Additionally, *the Informe Anual sobre Derechos Humanos en Chile 2003* (Annual Report on Human Rights in Chile, 2003) published by the Universidad Diego Portales, signals that “while ‘severe’ mechanisms of torture have decreased during the nineties in the case of adults, in the case of children these mechanisms are increasingly being used.”

1/ The Minors Law system

The first regime is, according to the Chilean government, a regime of protection¹⁹⁴ ruled by the Juvenile Act¹⁹⁵. It is a juvenile justice system with specific rules, courts, procedures and “protective measures applicable to children in ‘irregular situations’”; that is, children in need of protection and children in conflict with the law. Thus, in theory, every person under 18 who has infringed upon the law may be submitted to this regime of “protection”.

The main actor of this regime is the juvenile judge. Having broad powers, he is generally competent to decide and apply the appropriate measures of protection¹⁹⁶ and also to hear and investigate on criminal acts committed by juveniles.¹⁹⁷

Until 2002, there was only one set of protection measures for this regime, contained in Article 29 which consisted of a range of measures including: return of the minor to his guardians with prior judicial reprimand, a program of supervised liberty; the assignment of a child to special educational establishments (correctional facilities); the entrusting of a child to some person who agrees to the legal conditions and ensures strict adherence to the supervision regime.

The existence of only one set of protection measures, as outlined by Article 29, signified that these measures would apply “in cases of the present law” and all but guaranteed that there would be no differentiation between cases of a child’s infraction of the law and other situations (the same Article specified that these measure were applicable to child victims of abuse). Nonetheless, given the judge’s broad discretion when applying the law, it was possible to creatively apply another type of measures (Article 26, item 7 authorized the judge to “to make a decision based on the future of the minor”, when he or she would be in “physical or moral danger”).

In May of 2002¹⁹⁸ a law was passed called “*Normas Adecuatorias*” (Appropriate Norms) in order to monitor the current judicial reform process and update any laws that were not in synchrony with the reform. In the case of juvenile justice, this law is used to make new distinctions between those measures applicable to children guilty of legal infractions and minors who are victims of a crime. In this way, Article 29 was retained to address specifically infractions of the law, and Article 30 was established to address the applicable measures for situations involving a violation of the minor’s rights.

The heading of Article 29 whereas before addressed all matters before the minors judge, now addresses only infractions (the cases outlined in Article 26, item 10 of this law) , specifically “those matters in which a punishable crime is attributable to a minor less than 16 years old, or those between the ages of 16 and 18, who have acted “without discernment.” As stated before, the new Article 30 has been added to address specifically those situations where the minor’s rights have been violated.

¹⁹⁴ CRC/C/65/Add.13 Periodic report of Chile § 1020 (25 June 2001).

¹⁹⁵ Ley de Menores n°16618 (3 February 1967), also called Juvenile Law.

¹⁹⁶ CRC/C/65/Add.13 Periodic report of Chile § 403, 404, 407 (25 June 2001).

¹⁹⁷ CRC/C/65/Add.13 Periodic report of Chile § 1054 (25 June 2001); article 26.8 of the Minors Law.

¹⁹⁸ Ley 19.806 , contains appropriate norms of Chilean legislation regarding the procesal reform of the penal justice system.

Measure number 3 of Article 29 is now phrased in the following way: “The minor is to be assigned to those special transit or rehabilitation centers that the law indicates, according to how the situation corresponds to the law.” An aside was also incorporated that states, that the protective measures will “be in effect for the duration determined by the presiding judge for minors, who may reverse or modify the protective measures, if the circumstances change from the time that they were issued, according to the testimony of the director or person in charge of the center or respective program.”

According to the Minors Law proceedings, a juvenile judge has no obligation to hear the child in irregular situation in question prior to ruling on the case and most often he bases his decision only on police or professional reports and not according to the law.¹⁹⁹ In addition the right to a minor to get legal counsel for his defence is not fully implemented: “in criminal and juvenile cases the judicial practice allows minors (under 18) to issue such instructions”; however, “as regards appearance, a minor does not require legal counsel when appearing before a juvenile judge”.²⁰⁰

OMCT and *Opción* deem that a juvenile judge should hear, in every case, the child in question prior giving a ruling and take the interest and the opinion of the child into consideration as the highest comparing to other statements.

2/ Application of the ordinary criminal system

There is also a second regime normally applicable to young offenders under 18 but over 16 who are deemed to have acted with discernment when committing an offence. These minors are submitted to the same procedure as adults. They face the ordinary justice system governed by the Criminal Code and the Code of Criminal Procedure, in all matters ranging from their arrest to their imprisonment. The only exception relates to the sentence, which has to be less than the minimum sentence provided for the offence when committed by an adult.²⁰¹

The discernment decision is made by the juvenile judge.²⁰²

However, ordinary criminal judges are competent to conduct the initial investigations into the case and it is only when it is certain that the person in question is under age 18 that the case is handed over to the juvenile judge.²⁰³

The latest data that the NGO *Opción* collected reveals that in 2001 there were 5,642 declarations of discernment, requiring a minor judge’s determination of whether the minor acted with or without discernment, 1,872 were found to be situations “with discernment” (33.2%).²⁰⁴

3/ Juvenile justice reform

¹⁹⁹ NGO Initiative Committee on the Rights of the Child, Comments on the second report of the Chilean state (1993-1998) on the measures adopted to make effective the fulfilment of the U.N. Convention on the Rights of the Child § 133, March 2001.

²⁰⁰ CRC/C/65/Add.13 Periodic report of Chile § 200, 1038 (25 June 2001).

²⁰¹ Article 10.3 of the Criminal Code.

²⁰² The procedure for declaration on discernment is ruled by articles 10§3 and 347 bis a) of the Criminal Code and articles 16, 26§8, 28, 51 of the Minors Act.

²⁰³ CRC/C/65/Add.13 Periodic report of Chile § 1035 (25 June 2001).

²⁰⁴ SENAME Database.

There is a project of legal reform underway that has as its main purpose to establish 14 as the minimum age of criminal responsibility. It would therefore establish a juvenile justice system with procedures and sanctions applicable to all minors between ages 14 and 18 and thus abolish the doctrine of the child in irregular situation²⁰⁵ as well as the discernment decision for minors over 16.

The stated intention of the proposed bill is to bring Chilean laws into compliance with the Convention on the Rights of the Child, especially article 40. Nonetheless, there is also significant political and cultural pressure that this law also serve to combat juvenile delinquency more effectively. As a result, the reform is perceived almost unanimously as a measure to reduce the age of criminal liability and serves to harden the State's position toward juvenile offenders.

NGOs specializing in juvenile offender services, like Opción and Hogar de Cristo, have expressed their rejection of these specific aspects of the bill in the grounds that it tends to make more rigid the treatment of young offenders than is recommended by Articles 37 and 40 of the Convention on the Rights of the Child²⁰⁶. Their criticisms in general refer to the weakening of minimal guarantees specified by the international agreement with respect to children's rights, and the progressive departure from the type of juvenile justice system that CRC intends to foster.

3.2. Grounds of arrests and police custody

It is in the initial stages of the minor's contact with the juvenile justice system, during the arrest of the minor by police, when the child is typically most helpless and vulnerable to grave abuses to his or her physical and psychological integrity. Various investigations have revealed the frequent mistreatment of children by police²⁰⁷.

According to the various reports, among the most common types of violations of children by police include beatings using the fist, repeated kicking, police wands, and other metal objects. There have also been reported cases of suffocation with plastic bags or holding the minor's head in a bucket of water, the application of electric shock and other practices clearly constituting torture (Torture, Human Rights and Criminal Justice in Chile, UDP/CEJIL, 2002). These same investigations indicate that the minor's treatment significantly improves when under the custody of the designated police unit for minors.

"The majority of youth (81.0%) characterized their treatment by police as bad, 7% as average, and barely 12% responded their treatment as good. When in custody of the officers assigned to the special unit for minors the results are the opposite. Only 11.3% of those interviewed

²⁰⁵ « Doctrina de la situación irregular » (Doctrine of the Irregular Situation) is the name which refers to the model of law widely used to address children in Latin America. It was designed in the first decades of the twentieth century and is characterized by the state's tutelage of minors in «social risk », which in large part formally denies the punitive nature of the state's response to children, and by the overwhelming discretion of the minor judge to make decisions regarding the child's detainment and all types of interventions into the lives of these children.

²⁰⁶ Many of these criticisms can be found in the publication « Penal Responsibility of Minors » published by the NGO OPCION, which is a collection of presentations from a 2002 seminar on the the Bill.

²⁰⁷ Riego y Tsukame, Estudio de circuito de atención a niños y adolescentes vinculados al sistema de justicia (1998); Jiménez, Adolescentes privados de libertad y justicia de menores (2000); UDP/CEJIL, Tortura, Derechos humanos y justicia criminal en Chile (2002) ;Facultad de Derecho UDP, Informe Anual sobre Derechos Humanos en Chile (2003) ; Defensa del Niño Internacional-Chile/Corporación OPCION, Diagnóstico sobre Justicia Juvenil (2003).

characterized their treatment as bad, 27% responded that the treatment was average and the majority (61.7%) reported that their treatment was good”.²⁰⁸

The most common police abuse according to data collected by Jimenez’s study include: repeated kicking, beatings with the fist, police wands, and metal sticks, 120 cases; drenching with hoses during the night, 33 cases; suffocation by applying plastic bags over the head, 27 cases; hanging the minor naked by his hands and feet in a tree, 17 cases; forcing the minor’s head into a bucket of water, 14 cases; the use of electric prods, 11 cases.

One of the main powers of the Juvenile Police is to arrest “any children in irregular situation who require assistance or protection”.²⁰⁹ Since children in irregular situation include “children who have no one to exercise guardianship over them” and “children [with] behavioural disorders and in situation of social risk”. The majority of persons less than 18 years of age are apprehended due to “the necessity of protection.” Surveys published by the Justice Ministry indicate that of the total of minors apprehended between 1995 and 2001, 20.1% correspond to circumstances of protection, and 32.5% correspond to reports of minor juvenile offenses, for a total, 52.6%. In the same report on torture and criminal justice contains numbers of apprehensions carried out by Police Unit 34 of Santiago, the designated police unit for juvenile males. Their data indicate that in 2000 29.8% of apprehensions were for protective custody (3,692) and 9.9% (1,375) were based on minor juvenile offenses. Based on the high percentage of cases of children released to their parents in the same police unit, and the fact that so many do not correspond to a situation of criminal wrongdoing, this practice seems to contradict the mandate of CRC which states that a child’s detention should be used a last resort, for the shortest time period possible.

Despite their potential broad powers the Juvenile Police have to comply with several duties:

- o Some are specific to children:
 - They may not hold persons under 18 in the same premises as adults offenders. If an agent disregards this prohibition he should be subject to sanctions.²¹⁰
 - When a child may be easily located, the police should immediately release him and order him to appear later.²¹¹
- o Others apply to every person regardless of age:
 - They have to present immediately to the judge the person under arrest; if this is not possible officers still must not keep the minor in police custody for no more than a maximum of 24 hours²¹². In regions of Chile where the procedural reform of the justice system has been implemented, the turn-around time has been reformed and in theory the minor must be presented “immediately.” This has resulted in presentations occurring in considerably less than 24 hours in most cases, but never exceeding the maximum of 24-hours.
 - The police must inform the person under arrest immediately of the reason for his arrest and detention, and of his rights.²¹³

²⁰⁸ María Angélica Jiménez, Adolescent Detainees and Minor’s Justice, UDP, 2000. The percentages cited are based on sample of 160 youth interviewed.

²⁰⁹ CRC/C/65/Add.13 Periodic report of Chile § 403 (25 June 2001).

²¹⁰ CRC/C/65/Add.13 Periodic report of Chile § 285 (25 June 2001).

²¹¹ CRC/C/65/Add.13 Periodic report of Chile § 285 (25 June 2001).

²¹² Article 131 of the Code of Criminal Procedure.

²¹³ CAT/C/39/Add.14 Periodic report of Chile § 34 (28th October 2002); CRC/C/65/Add.13 Periodic report of Chile § 45 (25 June 2001).

- A person under police custody, even if held incommunicado, has also the right that his family, his lawyer or another person designed by him be informed as soon as possible of his situation.²¹⁴

However, according to several local NGOs²¹⁵, Carabineros “practice torture on children as a method to forcibly gain information, to sanction or to provoke self-inculpation”. “When such situations are denounced, there are no consequences or sanctions for the responsible parties (...). The courts of justice rarely respond to these denunciations either. Furthermore children who are taken from specific minors’ centres to police premises and vice versa, are handcuffed or put in irons, and kept under custody of armed guards”.

3.3. Deprivation of liberty

1/ The situation of children in need of care and protection

Every minor "in material or moral danger" may be deprived of his liberty in two situations:

- firstly during the determination of the measure by the juvenile judge;
- upon decision by the judge of a protection measure in a “special educational centre”.

The first case refers to internment for the purpose of performing a diagnostic analysis of the child, and the second deals with detention in order to provide a measure of protection.

Recently, Law 19.806 which brings various Chilean laws into compliance with the reform of penal processes, has introduced the possibility of differentiation into the Minors Law, addressing the type of measures at the minor judge’s discretion for situations of infractions of the law by minors or cases of abuse against them. The protection measures applicable to minors “extremely vulnerable or whose rights are gravely threatened” are contemplated in Article 30. In principle the Minor Judge has ample discretion, considering that he or she “would be able to determine the measures necessary in order to protect minors who are gravely are extremely vulnerable or whose rights are gravely threatened.” However, some specific measures are included:

- “The ordering of program attendance or other support actions, reparation and counseling to minors, their parents or legal guardians in order to confront and overcome a situation of crisis, by providing the appropriate guidelines and instructions.”
- “The ordering of a child to a “*Centro de Tránsito o Detención*” (transit or allocation center), temporary shelter or other boarding facility.”

Therefore, the judge retains the option of detaining the minor for protective motives but the law does offer safeguards. As such, it specifies that the internment will only take place when the physical or psychiatric integrity of the minor is jeopardized by his or her presence in the home, and it becomes impossible to entrust the care of the child to parents, family members or others in the home. Furthermore the measure will be necessarily temporary, without putting a decree for any span of time exceeding a year, and the minor’s case should be reviewed after six months.

²¹⁴ CRC/C/65/Add.13 Periodic report of Chile § 46 (25 June 2001).

²¹⁵ NGO Initiative Committee on the Rights of the Child, Comments on the second report of the Chilean state (1993-1998) on the measures adopted to make effective the fulfilment of the U.N. Convention on the Rights of the Child § 61, March 2001.

OMCT and Opción regret that the Chilean law does not respect article 37 (b) of the CRC, which requires that the detention of a child be used only as a measure of last resort. It also regrets that the regime applicable to children does not separate penal and tutelary criteria when it allows the adoption of measures of deprivation of liberty. Thus it adopts such measures on the basis of a social situation. This system blurs the distinction between sanction and protection, tends to weaken the requirement of culpability and the presumption of innocence in the judiciary process of legal requirements protected under article 40 of the CRC.

2/ Pre-trial and pending-trial detention

In the Chilean juvenile criminal system, pre-trial detention mainly corresponds to the time when the discernment decision is pending, for children aged between ages 16 and 18.

According to the Code of Criminal Procedure, the judge has no more than fifteen days to make a discernment decisions for cases involving criminal offences of minors between ages 16 and 18. Nevertheless, according to local NGOs, this time limit is not respected in practice.²¹⁶ What is worse, this represents only one aspect of the procedure as the case must then go to the Appellates Court and the minor often remains in detention much longer than one month. OMCT and Opción believe this provides strong evidence that a maximum time-period should be established not based on decision of discernment, but rather corresponding to a maximum period the minor can be detained awaiting a discernment decision.

During proceedings pending a discernment decision or a trial, a young offender, in principle, should only be detained in an Observation and Diagnosis Centre. If there is no ODC in the locality he must be detained in an alternative facility expressly determined²¹⁷ or in separate sections of an adult prison too; in such cases a minor has to receive support from the SENAME.²¹⁸ Otherwise if the detention is not necessary, a child may receive care in a Transit and Allocation Centre.²¹⁹

3/ Imprisonment

Beyond detaining persons older than 16 and younger than 18 during the determining of discernment, in the Chilean juvenile justice system, the deprivation of liberty of minors can be the result of other situations:

- Arrest by minors police of juveniles caught in the act of an illegal activity “*sorprendidos en comisión de un delito flagrante*”.
- Detention (called “retention” by the Minors Law) of children in situations of irregular need of assistance and protection.
- Internment of those older than 16 years old and less than 18 years old declared to be without discernment in correctional facilities. Judges can also sentence juvenile offenders between the age of 14 and 16 to these centers.
- Internment of minors of 16 years of age to a transit, allocation or diagnostics centre.

²¹⁶ NGO Initiative Committee on the Rights of the Child, Comments on the second report of the Chilean state (1993-1998) on the measures adopted to make effective the fulfilment of the U.N. Convention on the Rights of the Child § 133, March 2001.

²¹⁷ The relevant places are determined by a Supreme Decree of the President of the Republic pursuant to article 71 of the Minors Law.

²¹⁸ CRC/C/65/Add.13 Periodic report of Chile § 1034 (25 June 2001).

²¹⁹ CRC/C/65/Add.13 Periodic report of Chile § 1034 (25 June 2001). En la práctica, muchos CTDs funcionan también como centros de privación de libertad.

As was already mentioned, those older than 16 years with discernment are tried as adults and detained in adult jails.

The guarantee of the human rights in premises where a person may be deprived of his liberty is enshrined both in international and national instruments including in the Chilean Constitution. More precisely, in 1994 the Juvenile Law was amended to remove children from adult prisons.²²⁰ It prohibits the detention of children under 16 in adult prisons "in any circumstances". Of course as far as minors age 16-18 are concerned, this is contrary to the CRC provisions concerning all persons under 18 whom "the arrest, detention or imprisonment [...] shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time" (article 37 b), and according to which "a variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence" (article 40.4).

OMCT and Opción note that there are still some minors aged between 16 and 18 who live in adult prisons²²¹, even if it is in separate sections.

Moreover, Antonio Frey, a sociologist in the Minor's Department of the Chilean Justice Ministry, stated on September 2003 during a session with the Committee on the Rights of the Child²²², "minors [are] judged as adults and [are] held in the same penal institutions" even if it is in different sections with specific regime.

Furthermore--the same law 19, 343 despite the fact that it tends to eradicate the presence of children in adult prisons, also authorizes that in those places where there are not special facilities for minors, the President of the Republic, by decree, will determine where the minor should be placed which include reclusion in adult facilities. In practice, this decree is too often used to place minors in adult penitentiaries as a place of reclusion and there have even been documented cases of internment in adult prisons of children for protective purposes.

As reported by Amnesty International²²³, on September 2002 a court found the Chilean authorities guilty of having infringed upon the CRC by permitting some minors to be detained with adults and also by holding them in punishment cells.

This sentence was pronounced, resolving an "amparo" action authored by attorneys at the Hogar de Cristo, due to a series of violations suffered by minors detained in the Preventative Detention Centre of Santiago-South (an adult jail). In this instance, the Court pronounced the illegality of the practice of sending adolescents to tribunals along with adults, and also declare the illegality of the solitary confinement of children, established in the Regulation applicable to minors who are interned or in establishments administered by the Gendarmería of Chile (specific division of police responsible for the management of prisons), for conflicting with international norms of the same regulation cited (principally the Beijing Rules and those of Riyadh).

²²⁰ Act n°19343 Of October 1994.

²²¹ CRC/C/65/Add.13 Periodic report of Chile § 1039 (25 June 2001).

²²² CRC/C/SR.764 Consideration of Chilean report by the Committee on the Rights of the Child § 14 (25 September 2003).

²²³ Amnesty Report 2003 on Chile, <http://web.amnesty.org/report2003/chl-summary-eng>.

Furthermore, it has been reported that "in the 13 years that have followed ratification to CRC, about 40 children have died in prisons, most of which in adults prisons, other in special detention centres where children are supposed to be protected rather than sanctioned".²²⁴

SENAME has a Programme for Legal Defence and Psychological Support to Young Offenders. It concerns young offenders in minors' sections of the detention centres of the Gendarmería and is directed at both young offenders waiting for a discernment decision and those who have been formally accused. According to the Chilean Government this programme has improved the situations of detained young offenders. For instance procedures for an earlier release have been expedited and life condition have improved due to increased contact with the family and support from professionals. Nevertheless, despite this programme, the Chilean authorities acknowledge that segregation from adults remains a problem. Moreover there is a lack of human and material resources and also withdrawal drug symptoms.²²⁵

Although there have been some targeted experiences including specific training with respect to children in recent years, Gendarmería agents in contact with young people are not trained adequately.

4. SCHOOLS

According to local NGOs, "generally speaking the school system is not able to protect and warrant the school children's rights". Furthermore they denounce the fact that the "Chilean educational system is disciplinary and punitive" and that "physical and psychological violence by teachers is a frequent occurrence".²²⁶

In its consideration of the last Chilean report²²⁷, the Committee on the Rights of the Child notes that corporal punishment to children is not expressly prohibited and that it further remains socially acceptable and practiced in schools.

²²⁴Dr Julio Cortés (*Cooperación OPCION, Chile*), Derechos Humanos del Niño, enfoque crítico de las penas de los niños, Taller de análisis, Montevideo, September 2003. The newspaper « El Mercurio » reported on May 30, 2000 that over the past decade 74 minors had died in similar facilities throughout the country. The already mentioned UDP/CEJIL report confirmed the death of 38 children in "deprivation of liberty" between 1998-2002

²²⁵ CRC/C/65/Add.13 Periodic report of Chile § 1078, 1081 (25 June 2001).

²²⁶ NGO Initiative Committee on the Rights of the Child, Comments on the second report of the Chilean state (1993-1998) on the measures adopted to make effective the fulfilment of the U.N. Convention on the Rights of the Child § 26 *in fine*, 55, 61, March 2001.

²²⁷ CRC/C/SR.764 Consideration of Chilean report by the Committee on the Rights of the Child § 31 (25 September 2003).

PART III : STATE VIOLENCE AGAINST WOMEN IN CHILE

General Observations

1. Gender often has a determinative impact on the form of the torture and ill-treatment, the circumstances in which the torture and ill-treatment occurs, the consequences of the torture and ill-treatment, and the availability of and accessibility of reparation and redress. Torture and ill-treatment of women often has a sexual nature, including rape, sexual abuse and harassment, forced virginity testing, or forced abortion or sterilisation. Although men are also targeted with rape, the threat of rape and other forms of sexual violence, sexual forms of torture and ill-treatment are more consistently perpetrated against women.

2. The use of sexual violence against women by a state agent may have a particular negative impact on women's access to redress and reparation. In certain societies victims of rape or other forms of sexual violence are threatened with expulsion from their home or community, are at risk of being killed or subjected to further violence at the hands of members of their family or community, or are forced into marriage. In other countries, women victims of rape may run the risk of being charged and punished with adultery. Faced with these consequences, women victims of sexual torture and ill-treatment at the hands of State officials or politically organised groups in these societies are even more reluctant to report out of fear and shame.

1. Introduction

3. This report is submitted by the La Morada Women's Development Corporation, the Woman's Foundation Institute, both renowned non-profit organisations in Chile, together with the International Women's Human Rights Clinic of the City University of New York School of Law, all bringing vast experience in the promotion and defence of women's human rights. In 2002, La Morada obtained consultative status with the ECOSOC of the United Nations and is currently registering before the Organisation of American States.

4. The information used to produce this report was culled from government statistics, existing legal bodies, research carried out by non government organisations and universities, relevant jurisprudence, as well as from work carried out by the two organisations submitting the report to the Committee against Torture. However, there are still obstacles to collecting valid information regarding some of the aspects covered by this report, which constitute cause for concern among human rights organisations in general.

5. The methodology used follows the same pattern as parallel reports submitted to treaty and convention bodies, in particular before the Committee against Torture. This report submits a juridical analysis of legislative measures, public policies and institutionalised measures that the Chilean state has taken over the last five years as a member of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and stemming from the international juridical obligations said status implies.

6. Specifically, this report aims to analyse the Chilean state's compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment from a gender perspective that focuses principally on the difference in treatment of men and women regarding legal actions, public policies and practice, which result in forms of discrimination against women. It also focuses on the analysis of the specific interests and needs of women, which have received little attention and which at times, are practically omitted by state practices. Indeed, the fact that women continue to assume traditional roles in the private sphere; the fact that torture is understood to constitute an explicit action by

state agents in the public sphere; the low number of women imprisoned in relation to men, and thus their relatively low criminal incidence and their general “under representation” in the areas related to this report, all have led to the reality of women frequently being ignored and made invisible. This is often in breach of the international human rights framework and the principle of non-discrimination.

7. This report emphasises some aspects that particularly affect women, and which constitute conducts that fall within the definition of torture, and cruel, inhuman or degrading treatment, according to the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of which the Chilean state is a member State:

a) Absence of information on the number of women who suffered torture and other cruel, inhuman or degrading treatment during the dictatorship, the existence of impunity in the spheres of investigations, verdicts and sentences, and inadequate mechanisms of victim reparation within the framework adopted by the Chilean state to overcome the violations that took place in the 1973-1990 period.

b) Torture, cruel, inhuman, degrading or intimidating treatment towards women who are hospitalised (in public sector hospitals) as a consequence of clandestine abortions.

c) Torture, cruel, inhuman or degrading treatment of female sex workers upon being arrested by Chilean police.

d) Absence of sex-desegregated data, which would allow researchers to establish the existence of cruel, inhuman or degrading treatment of women deprived of their freedom.

8. The analysis of each of these aspects will establish the conclusive data regarding the practices that fall under the definition of torture, and cruel, inhuman or degrading treatment; the measures currently in place to prevent them; the practices and conducts of state agents, and the juridical basis that enables its presentation before the Committee against Torture.

2. General Background

9. The Chilean state began its process of political reconstruction in 1990, following 17 years of military regime. The transition was based upon a series of agreements between the outgoing administrators and the new ones. These agreements have conditioned the structure of the political system as well as of democratic practices. Indeed, despite Chile's political constitution²²⁸, which establishes a presidential based civilian government, a series of obstacles remain that, contrary to Chile's constitutional traditions, hinder the application of a democratic system based on the representation of the majority. Thus, this *suus generis* electoral system favours the second largest majority; establishes designated and life long senators; guarantees the immobility of the Armed Forces' commanders-in-chief, and appoints a National Security Council, a body composed mainly of the Armed Forces' commanders-in-chief, and empowered to oversee the administration of the country's democratic system.

10. The changeover from dictatorship to democracy implied the restoration of human rights and freedoms for all Chilean citizens, and the abolishment of practices that violate human rights, such as summary executions, detentions and disappearances, torture and cruel, inhuman or degrading treatment, exile, relegation, etc. In this aspect, one of the key reforms was the amendment of Article 5 of Chile's Political Constitution. This reform incorporated international human rights treaties into Chile's juridical system, once formal observations had been met as established by Chilean law.

²²⁸ Approved in 1980, during the military regime, through a national plebiscite.

11. Chile is currently a member state of various international and regional treaties, besides the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, including the Convention on the Elimination of All Forms of Discrimination against Women, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, the American Convention on Human Rights, the American Anti Torture Convention, and the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment. Ratification of other international juridical instruments is still pending, reflecting the inner difficulties the Chilean state faces regarding International Law on Human Rights. These include the Rome Statute, the Inter-American Convention on Forced Disappearance of Persons and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, among others.

12. Even so, Chilean society, like other societies who have undergone similar experiences, is still experiencing tension between past grievous human rights violations, and the present, with its new conflicts that reflect the disadvantages in the area of human rights that specific groups in society experience. The high degree of impunity regarding some of the worst human rights violations carried out in the past is one of the consequences of this experience that has an impact on Chilean culture. In the present day, impunity also hinders the full exercise and satisfaction of the rights in democracy of other groups and social categories, including women and ethnic groups.

13. According to the most recent Population and Housing Census, Chile's current population stands at 15,116,1435, with women constituting 50.73% of the global population. The economically active population stands at 5,948,830, of which 1,982,620 are women²²⁹, equivalent to 35.6% of the work force, a relatively low figure for the region. Female participation in power, particularly in the political sphere, is also lower than the regional average. In effect, although the rate of female participation in high profile positions such as heads or under secretaries of Ministries varies, it currently stands at 5.47%, whilst female participation in the Senate and the Chamber of Deputies stands at 5.26 and 12%, respectively. As regards the judicial sphere, with one woman currently participating in the Supreme Court, female participation is so low that it is impossible to conclude that women participate on an equal footing with men.

14. Despite the measures taken by Chile's successive governments since 1990, the violence women in Chile are subject to, along with its invisibility, is a concrete reflection of the cultural environment surrounding women. It reflects a highly discriminatory society that in general terms influences the full exercise of women's rights as well as the abiding lack of information that exists in many spheres regarding women. The most recent survey carried out by the National Women's Service on violence against women, shows that 50.3% of married women or women that cohabit, currently or in the past, have been subjected to violence by their partners, whilst 34% of women have experienced physical and/or sexual violence, and 16% psychological abuse. In 88% of these cases, the aggressor is the partner²³⁰. However, this data, which reveals women's reality in the home, cannot be used to analyse episodes of violence experienced by women in the public sphere, and carried out by state officials and non-state particulars. Furthermore, there is no data available to establish how many women die every year as a result of gender violence. This not only makes it impossible to design concrete measures regarding the problem, but also contributes to maintaining high levels of impunity regarding the perpetrators of violence, both in the private and public spheres, in the

²²⁹ National Statistics Institute (INE), National Employment Survey, 2001.

²³⁰ « Detección y Análisis de Prevalencia de la Violencia Intrafamiliar » (« Detection and Analysis of the Prevalence of Domestic Violence »), Centro de Análisis de Políticas Públicas (CEP), written at the behest of the Chile's National Minor's Service, (SERNAM), Universidad de Chile, 2001.

past and in the present. This report aims to record the more extreme forms that this discrimination takes, and contribute to overcoming it.

15. The Chilean state returned to democracy in 1989, following 17 years of a military regime that violated the fundamental rights and liberties of Chilean citizens. A number of official studies, by both the United Nations and the Chilean state, have acknowledged that during the 17 years of the military regime, its repressive state agents carried out a systematic and generalised policy of human rights violations, which included summary executions, forced disappearances, arbitrary detentions, torture, inhuman and degrading treatment, and other violations of International Human Rights Law.

16. The process of transition that began in 1990 was based on a series of agreements that have constituted the framework of said transition. The main such human rights related accord, is the continuation of the Amnesty Law and the modification of Article 5 of Chile's Political Constitution, which incorporates international human rights into Chile's sovereign framework. This is one of many agreements that currently prevent the political system from operating in the style traditionally exercised in Chile. In effect, the 1980 Constitution, a key set of laws created and ratified by the military regime, still preserves elements that hinder the consolidation of a political system that drew from past Constitutions and formed part of Chile's political biography. Amongst these is the creation of the National Security Council, which oversees the workings of Chile's democracy and which is made up of the commanders-in-chief of the four divisions of Chile's Armed Forces; the preservation of designated and lifelong senators; an electoral system that punishes the first majority in favour of the second majority; quorums that impede significant reforms of the constitution, and the fact that the government is prohibited from naming or removing the commanders-in-chief of the Armed Forces.

17. In 1990, the Chilean state, principally through the government, assumed the task of acknowledging the human right violations that took place during the dictatorship. "During the first stage, the government created the Truth and Reconciliation Commission, known as the Rettig Commission²³¹, charged exclusively with investigating the most grievous human right violations, which categorically refers to those persons who died during the period of dictatorship, including the disappeared. Made up of figures from across the political spectrum, said commission did not enjoy the faculties to either determine individual responsibilities or pass judgement, and so those cases that could be further investigated were sent to the tribunals. The Commission came to the conclusion that there was a total of 2,279 individual victims, of which 2,115 are cases of human right violations and 164 are victims of political violence"²³².

18. The Commission's final report established a series of recommendations including the creation of the National Reparation and Reconciliation Corporation²³³. This organisation was charged with driving forward a human rights and reparation policy for the victims through the concession of certain benefits. These included a monthly readjustable pension of US\$ 200, plus a percentage destined to the payment of health security for the relatives of the victims named by the report, and other victims identified as such by the corporation; free access to public health services through the PRAIS; educational benefits up to age 35, and inclusive of higher education; and exemption from Chile's obligatory military service for the offspring of the victims.

19. The Frei government (1996-2000), introduced the gradual elimination of initiatives in the area of human rights that had been driven forward by the Concertacion's first government,

²³¹ Created by Supreme Decree number 355, April 25, 1990.

²³² "El mal Estado de los Derechos Humanos" ("The Poor State of Human Rights"), Citizenry and Human Rights Division, Corporacion La Morada, Santiago, 2003.

²³³ Law 19.213, February 8, 1992.

leaving the main prospect of development in said area in the hands of the law tribunals. The case against Pinochet brought to light Chile's unresolved past. Pinochet was detained October 16 1998 following an order from a British judge in response to a petition from Judge Baltasar Garzón²³⁴. Beyond its well known outcome, in Chile the episode generated the creation of the Dialogue Table²³⁵ driven forward by the government, and in particular by the Defence Ministry.

20. The principal aim of the Dialogue Table, constituted by persons from the human rights sphere, the Armed Forces, and the academic and religious spheres, was to investigate the whereabouts of the disappeared, a minimum obligation for the authorities following the demands unleashed by the Pinochet case. The results of the work carried out by the entity, which did not have the support of the associations of the relatives of the disappeared and executed, were a step forward. However, this progress corresponded more to an agreed perspective regarding the historical context in which the violations took place and the expression of an aspiration that such violations would never again occur, rather than as to the gathering of concrete information as to the whereabouts of the disappeared. The information handed over by the representatives of the Armed Forces through the Dialogue Table was not significant in that it only alluded to 180 cases of the total of 1,234 cases recorded by the Rettig Report and the Reconciliation and Reparation Commission. Furthermore, this information was not necessarily accurate. One of the measures consequently adopted was the appointment of special judges charged with studying those cases, which according to the information handed over seemed to be making advances as regards their investigation. For the rest of the cases, and considering that according to the Dialogue Table report the corresponding bodies had been thrown into the sea or rivers, the trials continued their slow and uncertain development²³⁶. Faced with the impasse generated by the doubts shed over the results of the Dialogue Table, the government, through the Justice Minister José Antonio Gomez, compelled the Supreme Court to name nine judges exclusively committed to the investigation of 49 human rights trials for a three month extendable period. It also appointed another 51 judges with special commitment charged with investigating 51 trials²³⁷. In July 2002, following successive time extensions on the work carried out by the exclusive commitment judges, the totality of the Supreme Court approved an Interior Ministry petition to increase the quantity of said judges by six judges who were charged with investigating 600 trials on the disappeared. The end results of these efforts has not managed to satisfy the demands for justice made by human rights organisations. Furthermore, they omit a huge range of human rights violations that have not been considered by the government.

21. The Interior Ministry's human rights programme, created by Law 19,213, is one of the few Interior Ministry entities charged with dealing with past human rights violations. It encompasses necessary reparations of human rights violations, in part inherited from the Rettig Report. It is not a human rights policy, rather, it is a condensed version of human rights violations that took place during the dictatorship at the hands of state agents, and by no means does it aim to face the challenges posed by the need for a human rights policy. Said reparations comprise: "a material reparation established by law including economic benefits, pensions, etc., for the relatives of victims... symbolic reparations seek to repair the good name of the victims, and restore their quality as people with ideals... and reparation as justice, that is, the investigation of the truth, to determine, as established by law, the whereabouts of the victims and the circumstances leading to their disappearance or death"²³⁸. During the Frei government, when the issue of human rights and their past

²³⁴ Pinochet was under investigation by the Spanish National Audience in relation to the disappearance of Spanish citizens, and also by Judge Garzón in relation to Operation Condor.

²³⁵ Created August 21, 1999.

²³⁶ Judges Carreño and Valdovinos.

²³⁷ Report on Human Rights 2003, Law Department, Diego Portales University, p. 176.

²³⁸ Interview with Luciano Foullicieux, Director of the Human Rights Programme, in the context of the report written by the Citizenry and Human Rights Division of La Morada Corporation, "The Poor State of Human Rights 2003," 2003.

violations was not included in the government agenda, the allocation of human and economic resources was closely linked to the need to solve pending problems regarding the disappeared. The inauguration of President Ricardo Lagos' government, and more categorically the month of June 2001, marked the beginning of a process aimed at extending said programme. This mainly incorporated the restoration of the social considerations that existed with the National Reparation and Reconciliation Corporation, and the analysis of the concept of reparation from a perspective that goes beyond the juridical aspect. The latter grants the concept a greater time permanence as opposed to the transient nature bestowed upon it by the previous government.

22. However, as a result of the absence of a perspective that took into account the experiences of female victims eligible for benefits for the death or disappearance of their loved ones, the mothers of illegitimate children had no rights to pensions. Likewise, the mothers of legitimate children who had already annulled their matrimony at the time that the victims were qualified as such, were also denied reparation²³⁹. Furthermore, the lack of personnel trained in gender issues in these entities, made and make it even more difficult to overcome the discriminatory consequences of the application of said policies and benefits.

23. "On November 11 2003, the National Commission on Political Imprisonment and Torture (CNPPT) began operating after being established by a government mandate²⁴⁰ in the context of the commemoration of the 30th anniversary of the military coup. The commission, principally made up of persons involved in the defence of human rights during the dictatorship, and in particular through the Pro Paz Committee and the Vicaría de la Solidaridad, was given the mandate to *"determine the identity of those persons who were deprived of their freedom or underwent torture for political reasons, at the hands of state agents or people at their service, in the period beginning 11 September 1973 and ending 10 March 1990. It must also propose, upon ending its mandate in May 2004, the establishment of the conditions, characteristics, forms and modes of reparation measures, both austere and symbolic, that may be granted to those persons recognised as political prisoners and who underwent torture"*.

24. The main problem currently faced by the CNPPT is the small amount of people who have proceeded to denounce torture or imprisonment endured during the military regime. Originally, the commission calculated it would record 70,000 cases, yet to date, it has recorded 14,000 cases, less than 25% of the initial estimates.

25. The CNPPT must, at the end of its mandate, make recommendations to the President of the Republic regarding measures to be taken to meet the objectives of reparation. However, the commission is limited by its own constitution, which was shaped by the criteria put forth by the president, and which states that reparations should be "austere and symbolic". According to International Law, the concept of reparation goes beyond monetary compensation, which in any case should cover the damage inflicted and the total of earnings lost through said damage: it includes a set of measures that rehabilitate the victim, as well as measures that allow the victim's reinsertion into society. In the case of female victims of sexual violence in the form of torture, the law requires that reparation be in accordance with the type of violation endured, in this case, torture based on gender discrimination, which in the first place calls for the acknowledgement that sexual violence is used as a form of torture inflicted upon women because of their gender. No assurance exists, however, that this will be the case. Initially, the CNPPT did not consider the necessity to provide different treatment to women victims of sexual torture, nor did it consider the need to train its personnel to ensure that the data be effectively recorded. Moreover, the questionnaire given to those who decide to make the denouncements (accessible via Internet), only asks the person to state

²³⁹ Report on Human Rights 2003, Law Department, Diego Portales University, Santiago, 2003, pp. 149 – 150.

²⁴⁰ Supreme Decree number 1040.

his or her quality as detained and/or tortured, it does not include acts of sexual violence that could help women victims identify said violence with torture.

26. Alongside said acknowledgement, there exist a number of measures that contribute to the reinsertion of the victims and which also refer to the necessity of ensuring that such situations, at the hands of state agents and third parties acting with their acquiescence, never take place again. Legislative measures that prohibit and sanction this type of conduct; the production of data regarding sexual and gender violence taking place currently and that took place during the military regime; the approval of official documents on truth etc., are all exemplary actions for society and contribute to decreasing the levels of impunity as regards sexual and gender violence in Chilean society.

27. An important consequence of the return of democracy was the normalisation of the tasks carried out by the state and the permanence of a set of guarantees and freedoms for the country's citizens, which although feebly protected by the Constitution, permit a normal development of Chile's institutions. In this initial stage and as part of the process of democratisation, the government created a series of entities, which inspired by international human rights treaties, seek to develop public policies aimed at different sectors of society that are highly discriminated against and/or experience vulnerability in the exercise of their rights, including young people, women, indigenous peoples²⁴¹, among others.

28. The National Women's Service created by Law 19,023 on January 3 1991, uses the UN Convention on the Elimination of All Forms of Discrimination against Women as the basis for the design of social policies aimed at women, with the goal of contributing to overcome the ways in which gender discrimination is expressed in Chilean society. In practice, and despite its achievements, the entity has been unable to intervene in certain spheres due to its unsubstantial political weight. For instance, it has been unable to intervene in reparation policies for women victims of human right violations including torture, nor has it been able to intervene in the penal reform process, one of the most important reforms carried out by the Chilean state, and which this document will look into in more detail below. Thus, the major developments the government has generated in this area, apart from a series of legal reforms aimed mainly at achieving greater equality between men and women in the family and workplace, include the collection of sex-desegregated data, the incorporation of positive gender discrimination in social investment projects, and the application of gender indicators to measure the impact of sectorial policies. The political limitations of the Chilean state's gender policies have not allowed the transversal and specific development of women's themes, interests and necessities. This contributes to maintaining the invisibility of discriminatory conduct at an institutional and societal level, which affects the comprehensive exercise of their rights.

29. The process of social reparation for victims of systematic and generalised torture and other inhuman treatment has been unable to create an institutional basis reflecting a political will to ensure this does not happen again. In this context, 1990 saw the beginning of a debate regarding the creation of an Ombudsman or Public Defender. However, this has yet to materialise institutionally. What currently exists is the Presidential Commission for the Protection of the Rights of Persons, created by Supreme Decree and which began functioning 26 July 2001, faced with the paralysis of the bill to create the Citizens' Defender and which has lain dormant in Senate since 2000. On 15 April 2002, seven senators²⁴² introduced three amendments to the constitutional reform bill mentioned above, generating such major modifications that they constitute a text in itself that substitutes the original bill. On 30 January, the Citizens' Defender was incorporated as a result of an agreement between

²⁴¹ This generated protection and/or recognition bills aimed at these sectors, as well as the establishment of institutions charged with designing and/or implementing policies aimed at said sectors, such as, the Youth Institute, the National Indigenous Development Corporation and the National Women's Service.

²⁴² Senators Naranjo, Ominami, Gazmuri, Nuñez, Flores, Muñoz Barra and Viera-Gallo.

opposition and government parties, which materialised as a constitutional reform bill aimed at promoting integral legislation regarding the modernisation of the state and transparency.

30. Moreover, it is evident that as a result of the return of a democratic political system, the composition and magnitude of human rights violations have changed as have the institutional spaces where these are expressed. This is specifically true in the case of torture and other cruel, inhuman or degrading treatment; these currently materialise in the penal system, and it is thus police personnel and other related state officials that are currently responsible for human rights violations. Nevertheless, despite current information available to determine the existence and magnitude of such practices in Chile, there is relatively scarce data regarding women who for whatever reason fall into the hands of state agents. This report refers specifically to women deprived of their freedom, women who as a result of clandestine abortions end up in public health centres suffering serious complications, and the situation of female sex workers. In these cases, the problem is the application of institutional norms and practices that reflect the gender prejudices that state officials harbour regarding women and the role that is attributed to them. Thus, rather than delve into the pertinent existing institutional structure, this report emphasises the lack of data that would allow measures to be taken regarding the treatment of women in these situations. Reliable information however, does indicate that women are exposed to torture and other cruel, inhumane and degrading treatment.

31. Currently, torture is a much lesser problem in Chile than it was in the past²⁴³. The information available is mainly confined to the Penal Reform Process, which is being implemented in some of Chile's regions. According to the data available, in general the practice of torture is carried out at the time of detention. In the majority of cases, judges and defenders claim that beating, kicking and blows are continued beyond persecution and arrest of the accused, and are used as punishment for eventual resistance or to obtain desired information. In general, these aggressions occur mainly in police vans and in police stations, and the totality of perpetrators are police officials from the Chilean Carabineros corps. The magistrates deny these claims on the basis that under the new penal legislation police agents are compelled to immediately inform the magistrates of a person's detention. In any case, there are currently no denunciations of so-called traditional torture practices, although in those regions of the country where the penal reform project was first introduced, some defenders claim that "at the beginning there were more serious complaints, for example, claims that prisoners were put into cells naked, and beating, but nothing as severe as disfigurement or mutilations". Said cases disappeared gradually with the consolidation of the reform and the new role that the Chilean Carabineros police have been compelled to assume regarding the rights of the accused.

32. Although current studies²⁴⁴ do not include information on women in this matter, testimonies from women indicate that state officials do carry out torture and other cruel, inhuman and degrading treatment against women, based on their gender.

3. The practice of torture and other cruel, inhuman and degrading treatment of women, during the 1973-1990 period.

3.1 The facts and institutional, legislative and administrative measures

33. A key element of past human rights violations, that is, those that correspond to torture and other cruel, inhuman or degrading treatment, were not included in the Rettig Report, nor were they included in the report produced by the Dialogue Table. Furthermore, torture, as a

²⁴³ Annual report on Human Rights in Chile 2003, Law Department, Diego Portales University, Santiago, 2003, and Torture, Human Rights and Criminal Justice in Chile, Law Department, Diego Portales University and CEJIL. August, 2002.

²⁴⁴ Report on Human Rights 2003, Law Department, Diego Portales University, and Alternative Report on Torture in Chile 2003, CEJIL, Chile.

consequence of political repression during the dictatorship, only became recognised as a problem as a result of the commemoration of the 30 years that marked the military coup, when Chilean society and human right organisations, alongside the gradual progress that was being made in the legal area, brought this reality to light. During the two previous administrations, no initiatives were developed aimed at revealing past situations of torture, which affected an estimated 300.000²⁴⁵ Chilean citizens. Victims of torture have had to present their cases before the ordinary tribunals, subject to the restrictions that exist in this respect in Chile. The only exception, which was an initiative by the Health Ministry that offered psychological and physical attention to the victims²⁴⁶ via the public health system, was not applicable to torture victims but to the relatives of people executed and/or disappeared by state agents.

34. The current government²⁴⁷ announced the creation of the National Political Imprisonment and Torture Commission²⁴⁸, the aim of which is to “identify those persons who were deprived of their freedom or underwent torture for political reasons, at the hands of state agents or people at their service, in the period beginning 11 September 1973 and ending 10 March 1990; and to propose reparation measures according to the criteria established by the President of the Republic”. The Commission was given a six-month period beginning 11 November 2003, at the end of which it has to present a report with conclusions and recommendations.

35. It is worth mentioning, however, that after 30 years, it is somewhat difficult to establish the extent to which torture was inflicted in Chile during the military regime. The existing records on torture are not necessarily reliable, and only some cases of torture were denounced given the fact that for a prolonged period of time, making such statements meant taking a life risk. During the military regime, behind the recording of said experiences was a pressing need to obtain testimonies that would reveal the state and whereabouts of persons who had been detained under illegal circumstances and who ran the risk of “disappearing”, rather than a need to merely record torture cases.

36. In effect, professionals from the Vicaría de la Solidaridad²⁴⁹ organisation have stated in interviews that they focused on the urgent need to locate persons who had been detained and who were in danger of disappearing, relegating torture to second place. This can currently be appreciated in the form in which the Vicaría de la Solidaridad data is structured, given that it does not help to establish the extent nor the type of torture inflicted upon Chilean citizens. Another element that hampers the viability of determining the extent to which torture was inflicted in Chile, is the fact that during the period in question there existed a wide range of organisations dedicated to defending and assisting victims of repression. The diverse systems of recording, as well as the lack of continuity in said systems, with some organisations terminating their operations and others initiating them at different stages of the dictatorship, hinder the possibility of constructing an accurate universe of torture victims. Thus, current estimates place the figure between 70,000²⁵⁰ and 500,000²⁵¹ persons.

37. Women were also subject to political repression in Chile during the military regime. The number of women executed, killed and disappeared is lower than the number of men, a fact which makes it possible to conclude that the same situation applies to torture. The differences in the number of men and women affected can be explained by the unequal participation of women in the structures and spaces that constituted the political sphere;

²⁴⁵ There exists a consensus on this figure among human rights organisations.

²⁴⁶ Integral Health Assistance Programme (PRAIS)

²⁴⁷ President Ricardo Lagos (2002-2006)

²⁴⁸ Created by Supreme Decree number 1040, 2003.

²⁴⁹ Lawyer, Roberto Garretón and social worker, Maria Luisa Sepulveda.

²⁵⁰ Data culled by the National Commission on Political Imprisonment and Torture. Press clippings attached.

²⁵¹ Data from the National Report on Torture produced by the Ethical Commission on Torture, a coalition of human rights organisations historically involved in the issue.

women did not have the same access to these as men. Thus, the gender of the victims, be they from the government, parliament, official political parties and trade unions, reflect the period's gender priorities²⁵². In the context of a study carried out into sexual violence as a form of torture during the military regime, one of the women interviewed stated: *"...the majority of women, I would say almost 90% of women kidnapped, were subject to sexual violence. As they were transferred from one place to another, and once interrogation sessions were over, they were raped not just by one person, but by many"*²⁵³.

38. The most common forms of this practice are described in a series of testimonies given by women who underwent such treatment. These included: being stripped naked; insults with sexual connotations ("you're worth nothing, you're ugly, whore, you're not even worth raping, you must have gone to bed with who knows how many men, trollop, bitch"); rape threats, be these by one individual, a gang, using animals and/or objects; sexual touching up all over and especially on the breasts and genitals; individual rape; gang rape; rape using animals and/or objects; continuous or irregular rape; rape in front of loved ones and children; being cleaned up before raping; application of electricity on the womb of pregnant women; being forced to participate in "sexual games"; abortions as a result of rape and torture in general; placing rats in the vagina; human biting of the breasts and nipples; gynaecological check ups by unqualified personnel; forcing victims to touch and suck the genitals of animals; groups of men masturbating over the body of a woman tied to a bedstead used to apply electricity to victims; forcing women to touch the genitals of their wardens; applying the vaginal fluids of animals on women to incite the male to copulate with them.

39. As regards to this, the victims state²⁵⁴:

*"...I was 14 years old, still a child, just beginning to live my life. It was September 9 1975, when they went to get me at my house at 2.30 a.m.... I was a student. I was arrested in my house along with many others... When they arrested me, they took my name and surname, they took me in a white Peugeot, which I'll never forget because it was parked in the square near my house. They blindfolded me, they threw me to the ground, there were many vehicles, they were transporting people from all over the place. Once we arrived, I knew I was in the Villa Grimaldi detention centre because they were talking about it. I was arrested by people from the DINA. We got there and the interrogations started at once. I spent four months in solitary in a small room, they would take me out day and night, I never knew whether it was day or night. They applied electricity, torture, blows, but because I was too young, they didn't rape me, but they did force me to go and watch others being raped, it was very shocking... One thing followed another. For instance, first it was electricity, then blows, then they took me to see, well, I had never seen a naked man before, so imagine what it's like to be placed on the electricity bedstead and have 20 men masturbating over you. I was tortured by Romo, the so called Fatso Romo; Moren Brito was also there, he was there with three other men, and a group from Investigations police, military officers. I had really long hair at the time, and they chopped it off with a knife... The other thing that really shocked me were the rapes using dogs carried out by Major Olderock; they were massive Dobermans, and they raped men and women with the dogs, it was hard to comprehend, her manner... I saw many kinds of torture, they took me to see many forms of torture, it was a form of intimidation, for instance, when women were menstruating they would place mice in their vaginas, and they would bite all over"*²⁵⁵.

²⁵² For a more in depth analysis, see: "Memoria y género" ("Memory and Gender"), Elizabeth Jelin, Siglo XXI, 2000.

²⁵³ The woman interviewed, is a victim of sexual violence as a form of torture, and is a professional working with a human rights organisation that since 1980 offers legal aid to victims of repression during the dictatorship.

²⁵⁴ Interviews from research carried out by the Corporación La Morada and the Fundación Instituto de la Mujer, as part of the "Violencia sexual como tortura ejercida contra mujeres en el período 1973-1990: Un secreto a voces" ("Sexual Violence as a Form of Torture Against Women from 1973 to 1990; A Loud Secret") research, Corporación la Morada and the Fundación Instituto de la Mujer, 2003-2004.

²⁵⁵ Testimony NN 14. Names have been omitted at the request of the victims, but tape recordings of the interviews exist.

"I was arrested September 16 1975... I was two and a half months pregnant... I was detained for a year... I was tortured during many hours, and they knew I was pregnant but they still did it, they did it anyway, and not just that... I was tortured until I miscarried, ... then when I miscarried, when I had the haemorrhage no one did anything...I think they did the same with other women who were pregnant like I was, women that were arrested before or after... it's terribly cruel, because knowing that you're pregnant they took advantage of the fact, and one can't do anything about it. I mean, I was tied to a bed, by the hands and legs, and they do what they like to you, and they said... 'here's some electricity for the baby'"²⁵⁶.

" I was 29 years old ... I was working in a house looking after the children...I was arrested in 1975...I was taken to Investigations Police, and the Villa Grimaldi and Cuatro Alamos detention centres. At first, when I arrived, it went on all morning, they applied electricity, they would rape me, then they took me to a yard where they soaked me in water, then the electricity again... when I was raped I lost all track of time, it could have been all afternoon, or all night, it might have been 5 or 10 minutes, but sometimes I was there all morning... the sexual violence consisted of being raped in the bathrooms, or when I was in Cuatro Alamos when I was in solitary, they would force me to go and get a shower, but they would wash me, the women couldn't go into the shower unless they went in with you...I was in terror in Cuatro Alamos of going to the shower, I spent all day not wanting the next day to arrive because I was terrified of having to go and get a shower, ... once they did it in front of a child, a boy who must have been five or six years old, it was incredible, I've never forgotten the look on that child's face...I never knew what that boy had to do with me, and they never said anything... I had never even had sexual relations before all this so for me it was horrendous...and I kept this to myself, I never told my parents, ...I never spoke about it with anyone"²⁵⁷.

" I was 37 years old...I was arrested July 14 1982. I was arrested along with my mother... I remember I was on a rostrum, it was a very unusual room, a spacious room, about four metres by four, and at one end there was a two meter rostrum, and this man had bedsteads, I know because of the way I banged my hips that it was a bedstead, maybe it was the torture room, there were people who described it, a man dressed in white, a woman from the CNI. This man examined me, I suffer from low blood pressure, and with no food, no salt, it was even lower. Maybe when I lost my memory it was due to a lack of sodium or potassium, I'm not sure, some mineral was lacking and I lost my memory, I'm also epileptic, but that examination was more than a routine, it was worse than any I've experienced in the public health clinics. The torture continued, with drugs, or the torture sessions they subjected my mother to, they forced objects into her vagina, they raped her, they hung her from the back of her knees... they would leave her hanging for a while, naked of course, I think it's worse than being shamed for a person aged 65 to be stripped naked...My mother was subject to sexual violence, it was horrible, horrible, ... they put something in her vagina and a green fluid came out... I know of terrible, horrible things, but I don't know if the women are willing to make it public because it really is humiliating, degrading...there was that policewoman with a German surname, she mastered dogs and she would take the dogs on heat and she would, I assume that's what she did, she would take the liquid that the bitches leak when on heat, which is very strong, and she would spread it on the vagina of one of the women, they tied her as if she were a dog, so then she wouldn't wash with us, and we respected her a great deal... at first some of the other women would ask why she didn't wash with us...and then we found out she had been raped by dogs, her whole stomach was covered with dog scratches, ... I knew about another woman, ... she wasn't raped, but they raped her little two-year-old daughter, in front of her, and she could do nothing about it."²⁵⁸.

²⁵⁶ Testimony NN7. Idem.

²⁵⁷ Testimony NN8.

²⁵⁸ Testimony NN4

“I was tortured in front of my father and brother, and once they tried to force me to have sex with father and brother... Tejas Verdes was the place where they trained military officers to become torturers, and it was there that I was subject to brutal torture. They would force me to have sex with a dog trained to participate in tortures. They would place rats in my vagina and then they would give me electricity shocks. The rats would panic and dig their claws into my vagina. They would urinate and defecate on my body and eventually I caught toxoplasmosis. The torturers raped me on many occasions and they would touch me sexually, insulting me, and forcing me into oral sex with them. They cut me with knives; once they cut the top layers of my belly and I lost a lot of blood. They also cut my ears. I still have the scars. Another torture consisted of tying my arms and legs, I would be lying on a table, and they would stretch my limbs until my blood stopped circulating. They would frequently torture me without interrogating me. I didn't understand why they kept on torturing me... In Tres Alamos, where I was kept until 1976 I was subject once more to rape, threats, insults, and other psychological tortures. Commander Pacheco, who was in charge of the Tres Alamos camp, constantly abused me, subjecting me to sexual harassment for three years...”²⁵⁹.

40. Sexual violence was carried out as described by the testimonies recorded²⁶⁰, in all detention centres, legal or illegal, and throughout the whole period of military regime²⁶¹, during torture sessions as well as in other moments. Perpetrators of sexual violence came from the four divisions of the Armed Forces and from the repressive agencies created by the military regime²⁶². The majority of victims were female members of political parties; women related to men (husbands, partners, sons) who were members of political parties that backed the overthrown government, or that were created to oppose the regime; members of social and trade union organisations (that continued to function clandestinely or that were created to resist the military regime). Their ages fluctuate from 2 years old²⁶³ to 65 year, in other words, they covered the whole cycle of a woman's life, and they came from a wide range of economic backgrounds.^{264 265}

41. According to the women interviewed²⁶⁶, they did not consider sexual violence as a form of torture. When asked about the type of torture they were subjected to, they made reference to blows, the application of electricity, hanging, sleep and food deprivation, immersion in excrement and urine, solitary confinement, etc. They exclusively mentioned the methods that do not allude to their female condition and that are perceived as “abnormal” by society as a whole. The normalisation of violence against women in Chile has made it possible, both in the past and in the present, to conceal this serious damage inflicted against the majority of women detained during the military regime. It is the same silence that exists respect the violence inflicted upon women both in periods of peace and during periods when human rights are systematically violated.

42. The lack of social, cultural and political-institutional conditions that would allow the identification of women tortured in Chile and establish how this treatment affected them, poses a risk to the process of truth and justice in the country, given that it conceals a percentage of the population affected. In effect, Chilean society still does not consider this violence as part of the systematic and generalised practices carried out by state agents

²⁵⁹ Declaration made by Luz de las Nieves Ayressel at the Chilean consulate in the United States.

²⁶⁰ Interviews with 20 women and systematised information from CODEPU.

²⁶¹ It is important to emphasise that during its first stage, repression was massive. Later, with the creation of the National Intelligence Agency (CNI), it became more selective, targeting female members of leftist political parties, be these official or unofficial with regards to the past government.

²⁶² National Intelligence Direction and National Intelligence Agency.

²⁶³ Testimony NN4.

²⁶⁴ This is initially deduced from the sectors the women resided in at the time of their arrests.

²⁶⁵ There are no studies that discern what influence ethnic origin had on torture methods.

²⁶⁶ Interviews carried out as part of the “Violencia sexual como tortura ejercida contra mujeres en el período 1973-1990: Un secreto a voces” (“Sexual Violence as a Form of Torture Against Women from 1973 to 1990: A Loud Secret”) research, Corporación la Morada and the Fundación Instituto de la Mujer, 2003-2004.

against women. The “normalisation” of sexual violence is an element that exists among all political and social actors, as well as among some government authorities. In 2003, former political prisoner, Odette Alegría, recognised Chile’s Investigations Director (civilian police organisation) Mr. Nelson Mery, as her torturer. She accused him of rubbing his penis against her face whilst she was seated and tied in a corridor outside the interrogation room. Along with denying this claim, the person accused was vindicated, prior to any investigation, by legislators²⁶⁷ who were recognised for their participation in the defence of human rights and even though Mery’s participation (not central) in one of the period’s repressive organisations, Investigations Police, was publicly acknowledged.

43. In a series of interviews, professionals from the Vicaría de la Solidaridad²⁶⁸, when asked about the absence of records on sexual violence as a form of torture, stated that at the time the urgent needs were others and that they had understood that such issues corresponded to female social workers because they “could” handle “intimate” topics with which some lawyers felt inhibited. Asked about the issue, the same social workers stated “all the women were subject to sexual violence although the question was not always asked, and in few cases did the women declare it out of their own volition”²⁶⁹. According to the social workers, the reasons for which the women victims did not denounce sexual violence, include their embarrassment at having to ask, respect for the suffering of the victim and the desire not to force them to make such declarations. They also stated that women were reluctant to do it, and they also said they believed this was because the women were accompanied by their partners or relatives when they went to denounce the facts.

44. In effect, many of the women who were subject to sexual violence as a form of torture did not claim they had been victims of said violence. According to specialised sources from the period, in some cases this was due to shame and guilt²⁷⁰, in others, because the women victims did not associate the sexual violence they were subject to with torture, and other cruel, inhuman and degrading treatment. Many of the women interviewed, who were in fact subject to sexual violence as a form of torture, clearly identified torture as being beaten; having electricity applied; hanging (pau de arara); immersion in excrement; the telephone (simultaneous pounding on both ears causing rupture of the eardrum); etc. It is only when specifically asked about sexual violence that they incorporate it as part of the aggressions they were subject to.

45. Government authorities have also contributed to this silence by not taking the necessary measures to employ specialised personnel to work with the particular characteristics of victims of repression. For instance, during an interview to determine to what degree the Interior Ministry’s Human Rights Programme incorporated a gender and women’s rights perspective into its work, the programme’s former Director, Luciano Foulleaux, stated: “This programme does not discriminate on the grounds of sex or condition ... the violation of the human rights of women are dealt with within a global human rights perspective”²⁷¹. The *non-existence* of women as specific victims of repression (and in particular of torture) as regards the initiatives that the transition governments have taken to date, has contributed to the permanence of impunity and is a contributing factor to the victims’ sensation of being unprotected. The CNPPT currently has a unique historical opportunity to guarantee reparation for each of the victims of torture and political imprisonment. Moreover, the experiences of Yugoslavia and Rwanda’s ad-hoc tribunals; the international juridical debate

²⁶⁷ Juan Bustos, Sergio Aguiló, Jaime Naranjo, among others.

²⁶⁸ Catholic Church organisation that currently possesses the most substantial information on political repression in Chile, 1974 – 1990.

²⁶⁹ María Luisa Sepulveda, Head of the Social Assistance Department of the Vicaría de la Solidaridad and current Executive Secretary of the National Torture Commission.

²⁷⁰ It is a widely documented fact that women tend to feel guilt over acts of sexual violence they are subject to. This is a product of the prejudices and stereotypes that are culturally imposed upon society and women, and that compel victims to believe that, to a certain degree, they contributed to the aggression.

²⁷¹ “El mal Estado de los Derechos Humanos: Práctica y discurso” (“The Poor State of Human Rights: Practice and Discourse”), Santiago, 2003.

as regards the drafting of the Rome Statute; and the United Nation Rapporteur's account of violence against women, compel states to take more care over the measures taken in this field, guaranteeing women victims their right to be recognised as such and to receive reparation. By overlooking this and failing to provide the mechanisms, measures and actions required to fulfil this objective, is equivalent to engaging in discriminatory conducts that constitute a juridical responsibility for states according to International Law.

46. The majority of unpunished torture actions occurred during the military regime, and therefore are prior to the Chilean state's signing and ratification of the Convention against Torture. Nevertheless, the prohibition on torture is part of common international law and prior to the aforementioned convention. For this reason, the Chilean state is responsible for investigating, judging, and sanctioning the perpetrators, as well as for providing repair to the victims, and specifically in this case, the female victims of sexual violence as a form of torture during the military regime.

47. As a member state of the Convention against Torture, Chile is clearly compelled to grant reparation. It is under the obligation to grant reparation to the victims of torture carried out by state agents as part of the events that occurred between 1973 and 1990. In this sense, the National Commission on Political Imprisonment and Torture constitutes a great step forward, yet it does not guarantee the acknowledgement of and reparation for women who were subject to sexual violence as a form of torture and other cruel, inhuman or degrading treatment during said period.

3.2 Juridical foundation of the Convention Against Torture

Rape and sexual violence constitute torture under international law. Article 1 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter the CAT or the Convention), defines torture as requiring: (1) an intentional infliction of severe physical or psychological pain or suffering; (2) committed for such purposes as interrogating or obtaining confession, intimidating, coercing, punishing or discriminating against the person or another; and (3) when committed or instigated by a government official or when committed by an individual with the consent or acquiescence of an official.

48. Rape and sexual violence have been widely recognised by the United Nations system as forms of torture under human rights, humanitarian and international criminal law. Although the definitions or their interpretation vary somewhat among the different UN bodies charged with implementation of the norm against torture, the recognition by other bodies of rape and other sexual violence as torture is consistent with the application of the three elements of the Convention against Torture and its Committee.

49. There has been no questioning regarding the way that men have documented common forms of torture include beatings and electric shock to the genitals. Although recognition of sexual violence as torture and inhuman treatment constituting crimes against humanity and crimes of war, dates back to the Nuremberg and Tokyo Tribunals, rape and sexual violence have, until more recently been largely ignored in the official discussions of torture. This discriminatory absence of condemnation and sanction has, in the last decade or so, been widely corrected in international law as a result of the mobilisation of a global women's human rights movement to seek recognition and redress for gender violence. Nonetheless, patriarchal cultural attitudes persist that consistently dismiss rape and other forms of sexual violence as trivial rather than grave, and as a private indiscretion rather than a gross abuse of power, or as the woman's rather than the perpetrator's fault.

50. It is thus of the utmost importance to those Chilean women, entitled to compensation for the sexual tortures they endured and the physical and emotional effects they continue to

suffer, as well as to women world-wide, that this Committee makes explicit its view that rape and sexual violence, when committed for the purposes outlined in the Convention and with the requisite official involvement, constitute torture under the Convention against Torture.

51. It should be noted that the definition of rape has also evolved in international law in recognition of the gross suffering and of the purposive attack on dignity inflicted by rape and other invasive forms of sexual violence, which are disproportionately practised against women.

52. For the purposes of this report, it is sufficient to use the definition of rape recently accepted by consensus in the negotiations of the Elements Annex to the Rome Statute of the International Criminal Court²⁷² as intended to guide the Court. This definition embraces what has been traditionally viewed as sodomy, whilst emphasising that the sexual invasion or penetration need be only slight, and recognising that a broad range of coercive situations undermine the ability of women to exercise autonomy in sexual decision making and have their fundamental dignity respected²⁷³. The ICC definition represents an amalgam of the decisions made by the International Criminal Tribunal for the former Yugoslavia and for Rwanda²⁷⁴.

53. Various UN bodies have identified rape and/or other forms of sexual violence as torture. The UN Special Rapporteurs on Torture, have consistently recognised rape and sexual violence as torture²⁷⁵, as has the Special Rapporteur on Violence Against Women, Its Causes and Consequences²⁷⁶. Several UN treaty bodies have also recognised that gender

²⁷² Rome Statute of the International Criminal Court, U.N. Doc. A/Conf. 183.9(1998), amended text available at http://www.un.org/law/icc/statute/99_corr/corr.html (hereinafter ICC Statute), Article 9(1).1.

²⁷³ Elements of Crimes PCNICC/2000/1/Add.2, Article 7(1)(g)-1 defines the two elements particular to the crime of rape as a crime against humanity as:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

See also, identical definition of rape in Elements Annex, Articles 8(2)(b)(xxii)-1 and 8(2)(e)(vi)-1 applicable to war crimes in international and non-international armed conflict.

²⁷⁴ See, e.g., Akayesu Trial Judgement, para. 688 (rape defined as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive" and further stating that "sexual violence which includes rape, [is]...any act of a sexual nature which is committed under circumstances which are coercive"); Prosecutor v. Furundzija, Case No. IT-95-17/1 (Trial Judgement) (10 December 1998) [hereinafter Furundzija Trial Judgement] para 185 (rape defined as: "(i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; and (ii) by coercion or force or threat of force against the victim or a third person"); Prosecutor v. Kunarac, Case No. IT-96-23 (Trial Judgement) (22 February 2001) at paras. 440-460 (adopting Furundzija's standard but expanding on the concepts of coercion, force and threat of force by introducing the idea of "violations of sexual autonomy" and requiring that such assessment be made "in the context of the surrounding circumstances")

²⁷⁵ See, e.g., Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Mr. Koojijmans, U.N. ESCOR, 44th Sess., 21st mtg. at 8, U.N. Doc. E/CN.4/1992/SR.21 at 35 (1992)(hereinafter Koojijmans); Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Mr. Nigel S. Rodley, E/CN.4/1995/34, paras.15-18, 23 (12 January 1995)(hereinafter Rodley 1995)(as a result of a special inquiry into women and torture, he found that "rape and other forms of sexual assault were reported to be common forms of torture and that in the "vast majority" of reports, women were the targets, id para. 17); Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Mr. Nigel S. Rodley, Addendum :Visit by the Special Rapporteur to Chile, UN Doc. E/CN.4/1996/35/Add.2, para. 24 (4 December 1996) para. 24(identifying rape as a form of torture); and Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Theo van Boven, UN Doc. (23 December 2003)(hereinafter vonBoven)(emphasizing impact of transmission of HIV/AIDs as aspect of sexual violence as torture and emphasizing the urgency of stopping sexual violence in custody and generally).

²⁷⁶ Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, UN Doc. E/CN.4/1997/47, paras., e.g.,19-20, 33 (12 February 1997) (hereinafter Coomaraswamy).

violence can constitute torture²⁷⁷, as has the UN General Assembly in the Declaration on the Elimination of Violence Against Women²⁷⁸.

54. The adjudicatory bodies in the regional and UN systems have also frequently identified rape and sexual violence as torture, including the Inter-American Commission and Court on Human Rights²⁷⁹ (hereinafter IAComm.HR and IACHR, respectively) and the European Court on Human Rights²⁸⁰ (hereinafter ECHR). Most significantly, the International Criminal Tribunals of the Former Yugoslavia²⁸¹ (hereinafter ICTY) and Rwanda²⁸² (hereinafter ICTR), based on careful assessment of facts and canvassing of the authorities under international law, have repeatedly held rape and sexual violence to be forms of torture meriting criminal punishment under their respective statutes. Although the standard of torture may differ slightly among these different authorities, they collectively confirm that the three elements of torture provided in the Torture Convention are met.

55. Rape and other forms of sexual violence inflict the requisite severe level of physical and/or psychological pain or suffering to constitute torture. The UN Special Rapporteurs on Torture have recognised “rape or other forms of sexual assault against women in detention, were particularly ignominious violations of the inherent dignity and the right to physical integrity of the human being, and they accordingly constituted an act of torture”²⁸³.

56. Rape has been recognised as causing “an especially traumatic form of torture”, which “may have insidious correlative consequences”²⁸⁴. The consequences of rape and other forms of sexual violence include “physical and mental pain and suffering, disfigurement, miscarriage, maiming, death”²⁸⁵, in addition to HIV/AIDS²⁸⁶ infection, infertility²⁸⁷ and forced pregnancy²⁸⁸. Many have stressed the profound psychological trauma inflicted by rape and sexual violence. A study by the UN Rapporteur on Torture on women and torture emphasises that the trauma as well as “the stigma attached in many communities to a woman who has been raped may result in particularly dire consequences for the private and

²⁷⁷ U.N. Committee on the Elimination of Discrimination Against Women, General Recommendation No. 19: Violence against women, Adoption of Report, U.N. Doc. CEDAW/C/1992/L.1/Add.15 (1992) para. 7(b) (recognizing that gender-based violence impairs the enjoyment by women of human rights and fundamental freedoms including the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment). See also, U.N. Human Rights Committee, General Comment No. 28, Equality of rights between men and women (article 3), U.N. Doc. CCPR/C/21/Rev.1/Add.10, para. 11 (2000) (calling for information on violence against women including rape and medical reporting of illegal abortion. Pursuant to Article 7).

²⁷⁸ Declaration on the Elimination of Violence Against Women, U.N. G.A. Res. 104, U.N. GAOR, 48th Sess., Supp. No. 49, U.N. Doc. A/48/49 (1993) (article 3 recognizes that the prohibition on gender-based violence is based in part on the right of women not to be subjected to torture, or other cruel, inhuman or degrading treatment or punishment).

²⁷⁹ Mejia v. Peru, Case 10.970, Inter-Am. C.H.R. 157, OEA/se. L./V/II 91, doc. 7 rev. (1996) at para. 86; Inter-Am. Comm.H.R.; Report on the Situation of Human Rights in Haiti, OAE/Ser.L./II.88, doc.10 rev. (1995) [hereinafter Haiti Report] at para. 133.

²⁸⁰ See, e.g., Aydin v. Turkey, 1997-IV Eur. Ct. H.R. 23178/94, at para. 488.

²⁸¹ Prosecutor v. Delalic, Case No. IT-96-21/T (Trial Judgement) (16 November 1998) [hereinafter Celebici] para. 496 (rapes and other forms of sexual violence which occurred on a detention center constitute acts of torture); Prosecutor v. Furundzija, Case No. IT-95-17/1-A (Appeal Judgement) (21 July 2000) [hereinafter Furundzija Appeal Chamber] at para. 113 (upheld Trial Chamber's finding that acts of rape and other forms of sexual violence committed during interrogation constitute torture); Prosecutor v. Kunarac et al., Case No. IT-96-23/I-A (Appeal Judgement) (12 June 2002) [hereinafter Kunarac Appeal Chamber] paras. 134-156, 185 (upheld the Trial Chamber's convictions of torture for acts of rape and other forms of sexual violence including the nightly threat of rape involved in a selection ritual and being passed around for “processing.” Id 185).

²⁸² Prosecutor v. Akayesu, Case No. ICTR-96-4-T (Trial Judgement) (2 September 1998) at para. 685-90 (rape and sexual violence charged as “other humane acts” and so adjudged, noting that rape compares to torture “as a violation of personal dignity” when inflicted for the purposes of “intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person, by or at the instigation of a public official or other person acting in an official capacity.” Id 687).

²⁸³ Koojijmans, para. 35. also cited in. Rodley 1995, para. 16.

²⁸⁴ Id (Rodley), para. 18.

²⁸⁵ See, e.g., Aydin v. Turkey, supra note 6, at para. 189 (stressing the physical and psychological suffering inflicted through rape as an “acute physical pain of forced penetration, which must have left...[the victim] feeling debased and violated both physically and emotionally”); Medical and social science describe some of the common physical consequences: see, e.g., Ann W. Burgess & Lynda L. Holmstrom, Rape Trauma Syndrome, 131 Am.J. Psychia U.N. Center for Social Development & Humanitarian Affairs, Violence Against Women In the Family at 21, U.N.Doc. ST/CSDHA/2, U.N. Sales No. E.89.IV.5 (1989), try 981, 982-3 (1972) (hereinafter VAW in the Family) (physical symptoms include “general soreness and bruising from the physical attack in various parts of the body such as the throat, neck, breasts, thighs, legs and arms...vaginal infection, discharge, itching, a burning sensation on urination and generalized pain”);

²⁸⁶ ; vonBoven, para.____(stressing the additional danger of transmission of HIV/AIDS);Haiti Report, supra note 5, at para. 125.

²⁸⁷ VAW in the Family, para. 123 (recognizing other forms of sexual torture including “blows to the breasts and stomach, often inflicted on pregnant women with the intention of causing them to abort or damage their ability to have children”).

²⁸⁸ Mejia v. Peru, para. 50.

public life of the woman"²⁸⁹. The ICTY, in the Celebici case, emphasised that rape inflicts particularly severe psychological suffering that "may be exacerbated by social and cultural conditions and (that) can be particularly acute and long lasting"²⁹⁰. The UN Special Rapporteur on Violence Against Women emphasises that: "rape is an intrusion into the most private and intimate parts of a woman's body, as well as an assault on the core of her self" and stresses the frequency of post-traumatic stress disorder²⁹¹.

57. In dealing with rape as a form of torture in a detention setting, the European Court has also emphasised the "psychological scarring of the victim, which does not respond to the passage of time as quickly as other forms of physical and mental violence"²⁹².

58. Even where sexual violence does not involve rape, in the form of a physical invasion or touching, such violence may constitute psychological torture under the Torture Convention²⁹³. This was recognised by the ICTY Appeals Chamber of the ICTY, when rape and other forms of sexual violence, such as the threats of rape, are repeatedly inflicted on women, "the physical pain, anguish, uncertainty and humiliation...elevate...(such) acts (of violence) to those of torture"²⁹⁴.

59. The severity or degree of suffering is not assessed on the basis of each separate act of violence, rather it is evaluated on the basis of the cumulative effect of the acts or the conditions visited upon the victim²⁹⁵. The Appeal Chamber in the Kunarac case held that rape qualifies as one of the "acts that establish per se the suffering of those upon whom they were inflicted. Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture"²⁹⁶. In addition, the severity of harm has also been assessed in view of the second element of the Convention against Torture, namely the presence of a prohibited purpose²⁹⁷.

60. On analysing the effect of sexual violence in terms of severity of harm or magnitude, there exists a generalised perception in international law that states that when rape, characterised as any form of physical invasion of a sexual nature has occurred²⁹⁸, the act

²⁸⁹ *Rodley 1995*, para. 18

²⁹⁰ *Celibici*, para. 495.

²⁹¹ *Coomararswamy*, para. 19. *See also, Mejia v. Peru* ("psychological trauma...from having been humiliated and victimized, and on the other, from suffering the condemnation of the members of their community if they report what has been done to them.")

²⁹² *Aydin v. Turkey*, *supra* note 6, at para. 189; *see also for example, Dorothy J. Hicks, Rape: Sexual Assault*, 7 *Obstet. & Gyn. Ann.* 447, 452-55 (1978) (recognizing the link between common forms of torture and rape as both are not necessarily designed to leave any physical traces, but rather "to change the mental balance of individuals").

²⁹³ *Herman Burgers & Hans Danelius, The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 258, at 177-78 (1988) (stressing the sufficiency of the intentional infliction of psychological suffering as meeting the first element of torture under the Torture Convention); *see also for example, Report of the Human Rights Committee (Muteba v. Zaire)*, U.N. GAOR Hum.Rts.Comm., 39th Sess., Supp. No. 40, Annex 13, at 187, U.N.Doc. A/39/40 (1984) (mock executions were found to constitute a form of torture); *Report of the Human Rights Committee (Estrella v. Uruguay)*, U.N. GAOR Hum.Rts.Comm., 38th Sess., Supp. No. 40, Annex 12 at paras 1.6, 8.3, U.N.Doc. A/38/40 (1983) (the victim, a concert pianist, had been threatened with amputation of his hands by an electric saw for hours, resulted in the loss of sensitivity in his hands and arms for about a year).

²⁹⁴ *Kunarac Appeals Judgement*, *supra* note 7, at para. 185 (Appeals Chamber concludes that the sexual violence was carried out deliberately, in a coordinated fashion, over a long period of time and "whether rousted from their unquiet rest to endure the grim nightly ritual of selection or passed around in a vicious parody of processing at headquarters, the victims endured repeated rapes, implicating not only the offense of rape but also that of torture under Article 5 [of the ICTR statute]"); *see also for example, Burgess and Holmstorm*, *supra* note 10, at 982 (the psychological effects of rape, recognized as a manifestation of Post-Traumatic Stress Disorder, "an acute, long-term reorganization process that occurs as a result of forcible rape or attempted forcible rape...as behavioral, somatic, and psychological reactions...to a life-threatening situation").

²⁹⁵ *Furundzija Appeals Judgment*, *supra* note 7, at para. 114 (Appeals Chamber finds it "inconceivable that it could ever be argued that the acts charged...namely, the rubbing of a knife against a woman's thighs and stomach, coupled with a threat to insert the knife into her vagina, once proven, are not serious enough to amount to torture").

²⁹⁶ *Kunarac Appeals Judgement*, *supra* note 7, at para. 150.

²⁹⁷ *Celibici case*, *supra* note 7, at para. 508 (Trial Chamber notes "the presence of the prohibited purpose of punishment may raise the causing of great suffering or serious injury to the level of torture...").

²⁹⁸ *Akayesu Trial Judgement*, *supra* note 8, at para. 688 (defined as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive...sexual violence which constitutes rape, is considered to be any act of a sexual nature which is committed

clearly constitutes an act of both physical and psychological torture. It has been established that where other forms of sexual violence have been executed, and in cases where threat and fear of more violence is palpable, said acts also constitute forms of psychological torture, even where a physical invasion of a sexual nature has not taken place. Thus, the seemingly less invasive forms of sexual violence, such as forced nakedness, the threat of rape, harassment and insults, being forced to hear the screams of other women being raped or tortured, and other psychologically terrorising assaults on physical and mental integrity, may also constitute torture depending on the context in which they occur.

61. The conditions faced by women prisoners or women otherwise taken into custody by the officers of the Pinochet regime thus qualify as torture. Rape and other misogynistic and invasive forms of sexual violence were commonly inflicted upon women along with the full range of non-sexual tortures. The application of electric shock on the sexualised parts of the body constituted rape. In addition, women were detained in an atmosphere and in institutions where rape and other forms of sexual violence and abuse were systematic and formed part of the daily fear. The threat of rape was communicated physically and explicitly as well as implicitly to women. For example, being forced to sit naked while surrounded by male guards is not only a sexual cruelty, but also a degradation that was so severe as to qualify as torture.

62. There is also no question that rape and sexual violence are, by definition, inflicted upon women in detention for the range of impermissible purposes identified in Article 1 of the Convention against Torture including interrogation, punishment, intimidation, coercion and discrimination²⁹⁹. In *Celebici*, the ICTY Trial Chamber stated that it would be difficult to envisage circumstances in which rape, by, or at the instigation of a public official...or acquiescence of an official, could be considered as occurring "for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation". It found that these prohibited purposes are "inherent in situations of armed conflict"³⁰⁰. The UN Special Rapporteur on Torture has also noted that rape in detention serves many of the prohibited purposes.

*When sexual abuse occurred in the context of custodial detention, interrogators were said to have used rape as a means of extracting confessions or information, to punish, or to humiliate detainees. In some instances, the gender of an individual constituted at least part of the very motive for the torture itself, such as in those where women were raped allegedly for their participation in political and social activism.*³⁰¹

63. The IACComm.HR, in its Report on Haiti, likewise recognised that rape and other sexual abuse of Haitian women "inflicted physical and mental pain and suffering in order to punish women for their militancy and/or their association with militant family members and to intimidate or destroy their capacity to resist the regime..."³⁰².

under circumstances which are coercive"); *Prosecutor v. Furundzija*, Case No. IT-95-17/1 (Trial Judgement) (10 December 1998) [hereinafter *Furundzija* Trial Judgement] at para 185 (defined as: "(i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; and (ii) by coercion or force or threat of force against the victim or a third person"); *Prosecutor v. Kunarac*, Case No. IT-96-23 (Trial Judgement) (22 February 2001) at paras. 440-460 (adopting *Furundzija's* standard but expanding on the concepts of coercion, force and threat of force by introducing the idea of "violations of sexual autonomy" and requiring that such assessment be made "in the context of the surrounding circumstances");

²⁹⁹ Torture Convention, art. 1; see also Burgers & Danelius, at 118 (discussing the decision to identify the most common purposes preceded by the words "such...as" to make it clear that the list is not meant to be exhaustive); *Celibici*, para. 470 (recognizing that the prohibited purposes enumerated in the Torture Convention after the words "for such purposes as" do not constitute an exhaustive list, and should be regarded as merely representative").

³⁰⁰ *Celibici* paras. 471-495 (such purposes in the context of armed conflicts characterized as being "often integral components of behavior").

³⁰¹ *Rodley 1995*, para. 17.

³⁰² *Haiti Report*, para. 134. *Coomaraswamy* notes that in the United States, "rape was a common method of torture slavers used to subdue recalcitrant black women." *Id.* para.33.

64. The Trial Chamber in Furundzija, recognised that intimidation should be expanded to include the goal of humiliating the victim, stating, in terms equally applicable to the prohibition on torture by state officials, that "this proposition is warranted by the general spirit of international humanitarian law: the primary purpose of this body of law is to safeguard human dignity"³⁰³.

65. Finally, it has also been widely recognised that rape and sexual violence are committed a fortiori for the purpose of discrimination based at least on gender, often intertwined with discrimination based on ethnicity, race or political opinion. The Haiti report states: "rape and the threat of rape against women also qualifies as torture in that it represents a brutal expression of discrimination against them as women"³⁰⁴. It is also highly significant that both the CEDAW Committee and the UN General Assembly recognised that violence against women is an integral part of the practice of discrimination against women³⁰⁵.

66. Finally, it should be noted that the impermissible motives need neither be sole or dominant, but "simply part of the motivation behind the conduct"³⁰⁶. On appeal in Kunarac, defendants argued that they engaged in sexual intercourse to satisfy themselves sexually and did not intend to torture their victims. The Appeal Chamber rejected this contention out of hand, relying on the Furundzija Trial Judgement, for the proposition that "acts need not have been perpetrated solely for one of the purposes prohibited by international law...If one prohibited purpose is fulfilled by the conduct, the fact that such conduct was also intended to achieve a non-listed purpose (even one of a sexual nature) is immaterial"³⁰⁷. Furthermore, it must be noted that the purpose requirement does not require that the perpetrator specifically intend to commit torture, nor concern itself with personal motivation³⁰⁸ but rather with whether the perpetrator acted in such a way as to make severe suffering "a likely or logical consequence"³⁰⁹. As the Furundzija Trial Judgement stated, where the perpetrator is an official, the impermissible purposes of intimidation, coercion, punishment or discrimination "are often integral components of behaviour"³¹⁰.

67. It is accordingly clear that the rape and sexual violence inflicted upon Chilean women under the Pinochet regime, as well as in the other instances presented in this Report, were carried out for impermissible purposes under the Convention against Torture. Women were seized or detained and then subjected to sexual violence because of their political activity, their relationship to partners or others who were politically involved, or for the purpose of spreading terror among women and the population in general.

68. Lastly, torture under the Convention against Torture requires some level of official involvement. The examples presented here, under the Pinochet regime, as well as in the present, all involve primarily rape and sexual violence committed by officials or agents of the state. In many cases, their acts reflect policy that implicates their superiors personally; but regardless of authorisation from above, their acts are imputed to the state under basic

³⁰³ *Furundzija Trial Judgement*, para. 162.

³⁰⁴ *Haiti Report*, para. 134.

³⁰⁵ CEDAW Committee, *Recommendation 19: Violence against women* states that discrimination, "includes gender-based violence, that is, violence that is directly against a woman because she is a woman or which affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty." U.N.Doc. A/47/38 (1992), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U. N. Doc. HRI/GEN/1/rev.5; *U.N. Declaration on the Elimination of Violence Against Women*, G.A.Res. 104, U.N. GAOR, 48th Sess., Supp. No. 49, U.N.Doc. A/48/49 (1993) (recognizing in the Preamble and article 3 that violence against women is rooted in and perpetuates discrimination and the subordinate status of women in society, operating as an obstacle to women's full participation and equality).

³⁰⁶ *Celibici*, para. 470.

³⁰⁷ *Kunarac Appeal Judgement* para. 155 citing *Furundzija Trial Judgement*, para. 470.

³⁰⁸ *Kunarac Appeal Judgement*, para. 153.

³⁰⁹ *Id* para. 153,180.

³¹⁰ *Furundzija Trial Judgement*, para. 471.

principles of state responsibility. Where the state fails to take steps to prevent privately inflicted harm of which it is aware, the element of state consent or acquiescence applies. This Committee has applied this standard of acquiescence under Article 16³¹¹; where the state knows or has reason to know there is a threat of torture, the failure to act must constitute acquiescence; otherwise the CAT's goal of preventing torture is undermined.

4. Torture and other cruel, inhuman and degrading treatment of sex workers by police authorities

4.1 The facts and institutional, legislative and administrative measures

69. In Chile, prostitution is a legal activity, regulated principally by Article 41 of the Sanitary Code that compels the government to compile health statistics regarding those persons dedicated to sex work. The law prohibits sex workers from organising "brothels or tolerance houses". It states that, "The overseeing of this article is the responsibility of district Carabineros police, who should organise and carry out the closure of places where said brothels operate, regardless of the sanctions imposed by the National Health Service".

70. Despite the fact that prostitution is legal, Article 373 of Chile's Penal Code imposes legal sanctions for those persons who "in any form offend integrity or good customs by outrageous or scandalous conduct", whilst Article 495, number 5, imposes sanctions on those persons who "publicly offend integrity with dishonest actions or remarks". Both female and male sex workers are frequently arrested under said codes. The Penal Code also sanctions those who foster or facilitate the prostitution of minors (Article 367), or the entry into or departure from Chile of persons with the aim of prostitution (Article 367 bis).

71. The Health Ministry oversees the health statistics established by Article 41 of the Sanitary Code. According to Health Ministry data, in Chile there are currently some 15,700 registered sex workers of both sexes. These statistics contrast sharply with data culled by non-government organisations, such as the "Angela Lina" Syndicate of Sex Workers, which claims that the number of unregistered sex workers in Chile stands at 60,000.

72. In line with Article 41 of the Sanitary Code, Chile's Carabineros police is responsible for carrying out the so called "hygiene control" on sex workers. This control consists of inspections to ensure that sex workers carry on their person up to date health cards (health controls have to be carried out every two months). Likewise, it is the responsibility of Carabineros police to arrest those persons infringing the law, and they have the faculty, although not the obligation, to do so. In these cases, the objective of the arrest is to verify the address of the transgressor or to compel the transgressor to pay a fee that will guarantee their appearance before tribunals.

74. According to sex workers' associations, all arrests made by Carabineros police in this sphere are arbitrary. They claim this is due to the extensive and vague nature of existing legal norms, such as Article 495, number 5 of the Penal Code. In effect, the police do carry out illegal arrests; for instance, where sex workers are not carrying their health cards on them, or said card is not up to date. In these cases, according to the law, the offender should be taken by Carabineros to the nearest health centre where they should subject themselves to a health check, but in practice, these women are always arrested and taken to police stations.

75. Moreover, arrests based on Articles 373 and 495, number 5 of the Penal Code are also carried out by Carabineros police, in cases where sex workers are discovered in situations

³¹¹ Communication No 161/2000: Yugoslavia. Committee Against Torture, 29th Sess. (11-12 November 2002).also available at <http://www.unhchr.ch/tbs/doc.nsf/>

(actions, dress, etc.) that according to the criteria of the persons carrying out the arrest, can be classified as “dishonest”. Yet sex workers claim that they are usually arrested merely because they are prostitutes, claiming that the Carabineros police “know them” beforehand.

76. Upon arrest for any of the above mentioned motives, sex workers are subject to severe physical and verbal ill-treatment by those who have arrested them, and sexual abuse in all its forms, including rape, is frequently carried out.

77. It is at the time of arrest when the worst physical mistreatment occurs, given that sex workers usually try to dodge arrest, which increases the violence inflicted by the police. Verbal abuse, which includes insults of all kinds, is generalised both during arrest and throughout the period of detention.

78. Although it is known that in some cases sex workers have been severely beaten, these cases are not normally denounced. The reasons for this include the fact that all cases of police violence are tried in military tribunals as opposed to ordinary tribunals, which means there are less guarantees of impartiality. Furthermore, in these trials the personnel accused of said conduct normally rely on the resolute support of other officers from their unit, thus, the police version is always more solid, in contrast to the generalised lack of credibility that women sex workers face. Finally, another hindrance to these denouncements of aggression is the fact that police personnel continue to indiscriminately detain sex workers as well as threatening reprisals against their families. In Chile’s capital, Santiago, the 1st, 2nd, 4th and 17th Police Stations are renown amongst sex workers as being the most repressive and violent.

79. As regards the infringement of Article 495, number 5 of the Penal Code, the habitual procedure entails the arrest of the transgressor who should then be ordered to appear before the corresponding Local Police Tribunal. In order to ensure said appearance, the address of the transgressor should be verified, a bail payment should be demanded, following payment of which the transgressor is freed. According to qualified sources³¹² “the abuse of power is expressed in arbitrary and aggressive detentions carried out under the pretext of identity and sanitary control”. These sources claim that sex workers are stripped naked and body searches are carried out on them in police stations, “under the pretext of looking for drugs, or stolen goods or identity cards”. Cases of rape through the use of force have been known to take place as well as rape through the use of intimidation including women who are coerced to have sex a condition for being allowed to go without having to pay bail have also been documented. In all such cases, compiled by the Syndicate of Sex Workers, the victims have been reluctant to give their testimony.

4.2 Juridical foundation of the Convention against Torture

Article 1

80. The juridical analysis made in point 3.2, in relation to rape and sexual violence as a form of torture, can be applied in the case of imprisoned women and female sex workers detained and/or abused by police officials. In accordance with the official report presented by the Chilean state to this Committee, there exist few cases of complaints of rape by officials. However, the report makes no reference to the extent of the problem, whilst the absence of information is in direct contrast with the recurrent nature of this practice in some specific situations.

81. Rape and sexual violence during detention constitute torture, and when they lack severity or a prohibited purpose, said acts constitute cruel, inhuman or degrading treatment or

³¹² Eliana Dentone, President of the “Angela Lina” Sexual Workers’ Syndicate.

punishment. Studies carried out in other countries on women in detention, have established that they are subject to sexual violence and rape on grounds of race, ethnicity, or sexual orientation³¹³. It is accordingly feasible to suppose Chile is no exception and that urgent measures are required to determine the extent of these practices against women in detention. Furthermore, the torture and sexual abuse that women have anonymously denounced confirm the existence of a model based on the abuse of power by public officials, composed of rape and sexual violence.

82. Being a sex worker, male or female, is no impediment to being protected by the CAT. However, the type of work they perform makes sex workers an easy target for illegal detention, rape and/or sexual violence, and abuse. Rape and sexual abuse constitute a prohibited cause under the CAT, which also includes the punishment and discrimination that make up the basis of said conduct. Such cases aim to punish those persons who transgress gender-defined mandates and roles, whilst simultaneously overlooking the fact that the demand originates from another person, namely a socially established man or woman. Sex workers have less possibilities than other persons of denouncing situations of the kind aforementioned given that the permanent vigilance they are subject to, as well as their socially disadvantaged position, makes them liable to reprisals and further abuse should they speak up.

83. In such cases where exceptionally the suffering inflicted by sexual violence is not severe, or prohibited causes are absent, the acts clearly constitute cruel, inhuman or degrading treatment making Article 16 of the Convention against Torture applicable.

5. Torture and other cruel, inhuman and degrading treatment of women that access public health services as consequence of the practice of illegal abortion

5.1 The facts and institutional, legislative and administrative measures

84. Current Chilean law on abortion is unequivocally restrictive. Abortion is prohibited under any circumstance, even where a woman's life is at risk. The crime of abortion is regulated by Chile's Penal Code, Articles 342 to 345, and is included in the category of crimes that attempt against the canons of the family and public morals. The corresponding prison sentences for said crime fluctuate between three years and one day to five years for women who abort, and may be lowered to 541 days to three years if proved that the woman aborted to conceal her dishonour. The sentences for persons who carry out the abortion fluctuate from 541 days to three years, with longer prison sentences for health professionals³¹⁴. The absolute prohibition on abortion is product of the repeal in 1989 of Article 119 of the Sanitary Code. Despite its absolute prohibition, Chile has a high abortion rate, and it is calculated that approximately 160,000 abortions are carried out annually³¹⁵. Likewise, health problems as a result of clandestine abortions constitute the major cause of maternal death in Chile, making up 26.6% of such deaths³¹⁶. Researchers and health professionals calculate that one of every five women that undergo illegal abortion require hospitalisation and medical treatment as a result of the health problems that the abortion generates³¹⁷. In 1990 alone, 31,930 women in Chile were hospitalised as a result of health problems due to illegal abortions³¹⁸.

³¹³ See, e.g., Human Rights Watch, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons*, Human Rights Watch, New York, 1996, 2; Amnesty International, *Not Part of My Sentence: Violations of the Human Rights of Women In Custody*, Amnesty International (March, 1999).

³¹⁴ Chilean Penal Code, Articles 342 - 345.

³¹⁵ The Alan Guttmacher Institute, « El Aborto Clandestino una Realidad Latinoamericana » (« Clandestine Abortion, A Latin American Reality »). New York, 1994.

³¹⁶ Casas, Lidia . « Derechos Humanos. Derechos de las Mujeres. Obligaciones y desafíos para el estado chileno » (« Human Rights. Women's Rights, A Challenge for the Chilean State »), Instituto de la Mujer, CEDEM, Corsaps. March, 2001.

³¹⁷ Centre for Reproductive Rights. « Mujeres tras las rejas : Legislación sobre aborto en Chile, un análisis desde la perspectiva de derechos humanos » (“Women Behind Bars: Abortion laws in Chile, an analysis from a human right perspective”)

³¹⁸ Idem.

85. The practice of clandestine and unsafe abortion constitutes a threat to women's health, and the laws that prohibit abortion compel women to carry out abortions on themselves using dangerous methods, or to seek the intervention of persons who are not qualified to carry out said practices. Even where those persons carrying out the abortion do so under safe procedures, women fear being prosecuted. This means that frequently, women avoid seeking professional help until it is absolutely unavoidable and when their well-being is seriously endangered. The consequences of illegal abortion include permanent damage to women's sexual and reproductive health³¹⁹. Women who choose to carry out abortions on themselves use drugs, objects or other substances not designed for said use, and which can have the aforementioned effect on their health. Current practices include the introduction of catheters, caustic soda and parsley in the uterus, or the oral or vaginal introduction of powerful drugs³²⁰.

86. The World Health Organisation has identified the following repercussions as a result of the aforementioned type of abortions:

“Sepsis, haemorrhage, and uterine perforation all of which may be fatal if left untreated and often lead to infertility, permanent physical impairment and chronic morbidity; gas gangrene and acute renal failure, which contribute to abortion deaths as secondary complications; chronic pelvic pain pelvic inflammatory disease, tubal occlusion, secondary infertility, as well as a high risk of ectopic pregnancy, premature delivery and future spontaneous abortions; and reproductive tract infections, of which 20-40% lead to pelvic inflammatory disease and consequent infertility”³²¹.

87. Said complications constitute one fifth of the principal causes of maternal death in Chile³²². Long term damage as a consequence of unsafe abortion practices include, “chronic inflammation; sterility; alterations in the menstruation cycle; complications in future pregnancies and when giving birth, and the potential rupture of internal scars caused by perforations from past abortions”³²³.

88. Chilean law compels health professionals to report all acts that constitute infractions³²⁴, including abortion³²⁵. Thus, women who access the health system due to complications from clandestine abortions run the risk of being prosecuted. Between 75 to 80% of abortion trials against women originate in accusations made by health system personnel. The largest proportion of accusations correspond to women admitted to the public health system with complications as a result of clandestine abortions. These women are from the lowest income groups in society³²⁶. Women with higher incomes are able to induce abortions in places that use proficient techniques under safe health conditions. This not only guarantees the absence of subsequent complications, but it also guarantees that they will not be reported or prosecuted given that they can rely on the acquiescence and confidentiality of the doctor. The obligation to report said cases as regards health professionals, is in serious breach of the doctor-patient relationship. There are cases of women who fearing being reported, do not access health services and simply bleed to death at home³²⁷.

89. As a result of the judicial status of abortion, women are compelled to seek illegal and clandestine forms of abortion regardless of the subsequent risk to their lives and physical

³¹⁹ CRR- Safe Abortion: A Public Health Imperative 2

³²⁰ Clandestine Abortion In Latin America. 5

³²¹ World Health Organization, Unsafe Abortion 3 (1998).

³²² Population Reports.1The report further states that, “The five main causes of maternal mortality are hemorrhage, obstructed labor, infection, pregnancy-induced hypertension, and complications from unsafe abortion.”

³²³ Molina Lopez, Orellana et. al. “Características del aborto en Chile” [“Characteristics of Abortion in Chile”], in *Cuadernos Médico Sociales [Social and Medical Notebooks]* Vol. XIX, No. 1, p.9, Santiago, 1978 cited in *Women Behind Bars*.

³²⁴ Article 84 of Chile's Penal Procedures Code.

³²⁵ Idem.

³²⁶ Lorenzini, Kena. Informe Alternativo sobre el cumplimiento de la CEDAW en Chile (Alternative Report on the compliance of CEDAW in Chile), Citizenry and Human Rights Division, Corporación la Morada. Santiago, 2003, p..33.

³²⁷ Lagos, Claudia. « Aborto en Chile » (« Abortion in Chile »), LOM ediciones, Santiago, April 2001, p. 100

and mental health this implies. The medical complications caused by illegal abortion are so serious that low income women are forced to access public hospitals in search of assistance. According to reliable sources, instead of receiving treatment that is adequate and timely, women who access the emergency sections of public hospitals are treated as criminals and not as patients. Research carried out in the city of Temuco by health professionals themselves, concluded that women who access hospitals due to abortions, are frequently treated in a prejudiced, punishing and coercive fashion, even where there is no certainty that the women being treated has induced the abortion or is miscarrying. The ill-treatment includes smacking, insults and even carrying out scrape procedures without anaesthetics, and varies according to the personnel in charge at the time of admission³²⁸. Unquestionably, women do not denounce these acts because of the great vulnerability they are faced with, that is, the very fact that they are undergoing a life threatening experience due to an illegal abortion, and the fact that they are being accused of committing a crime.

90. The information available indicates that many public hospitals function more like an investigative sub-division of the police, rather than providing effective and immediate treatment to women that present with complications as a result of clandestine abortions. In this sense, they deliberately exacerbate the women's pain and suffering, and increase the health risk the women are exposed to. Some of the women denounced are detained whilst in hospital, whilst others are interrogated even before they receive emergency treatment³²⁹. The following declarations³³⁰ give testimony of the fear these women feel of medical personnel, as well as of the intimidating and coercive behaviour of said personnel, and their failure to comply with the obligation of providing health care:

"A woman from Valparaiso was admitted to the hospital with symptoms of abortion. Whilst she waited to be seen to, she heard the staff saying they would report her, and so she escaped. However, she got worse and was compelled to return".

"Erica was undergoing symptoms of abortion. She was hospitalised, given bed rest and medication. But she asked to be allowed to leave the hospital because her three children, including an 18 month-old baby, needed her. She argued with the head doctor regarding her decision and she was allowed to leave under her own responsibility. But the doctor warned her that should she return, he would not treat her. The woman had a miscarriage at home. When she arrived at the hospital, she was reported by the doctor".

"Luzmenia was seven months pregnant when she fell down a flight of stairs carrying water. She was given emergency treatment by the rural midwife. She was told to take bed rest, suppositories and diazepam. As the symptoms worsened, the woman tried to get to the hospital, but her husband took too long getting a horse to try to get help. She miscarried at home. At the hospital, the doctor took no notice of the woman's account. She said: "I was waiting for my baby... I wanted this baby. The doctor treated me very badly, he asked me what had I put in my vagina, I told him I had done no such thing, I explained about falling, but he didn't seem to believe me". Luzmenia was denounced for bringing about her miscarriage".

91. Frequently, the right to prompt treatment is conditioned on the handing over of information and admitting having carried out an abortion. Suffering is thus deliberately increased and prolonged. In addition, the treatment that is provided, rather than reduce the pain and suffering, provokes an intolerable physical and mental pain and suffering. The

³²⁸ Lagos, Claudia. « Aborto en Chile » (« Abortion in Chile »), LOM ediciones, Santiago, April 2001, p. 103

³²⁹ Centro Legal para Derechos Reproductivos y Políticas Públicas y Foro Abierto de Derechos Sexuales y Reproductivos (Law Centre for Reproductive Rights, Public Policies and Open Forum on Sexual and Reproductive Rights), « Encarceladas : Un análisis desde los derechos humanos » (« Jailed : An Analysis from a Human Rights Perspective »), 1998.

³³⁰ Idem.

medical personnel, all of whom are state employees, violate their basic ethical obligation to provide health care as stated by the constitution. They exacerbate the woman's suffering and the health risks, subjecting women to torture and cruel, inhuman and degrading treatment, as well as to exposing them to the risk of death or of long term damage to their health, including their capacity to have children in the future. Where medical staff deny women the emergency treatment that is their right, they inflict a serious and severe suffering in order to interrogate them so that they confess. This intimidation, punishment and discrimination constitutes torture, and cruel, inhuman and degrading treatment as stated by the Convention against Torture.

92. The Colegio Médico medical association's Medical Ethics Code aims to incorporate the promotion and protection of human rights into the framework within which doctors perform³³¹. The ethical principles that constitute the basis of the exercise of the medical profession, are the right and obligation to patient confidentiality and professional secret³³². These principles determine the relationship that should exist between the doctor and his/her patient, and which is fundamental to saving lives. The World Medical Association Declaration of Tokyo is at the basis of this Code, and in particular of Article 25. The preamble of said declaration states that "It is the privilege of the medical doctor to practise medicine in the service of humanity, to preserve and restore bodily and mental health without distinction as to persons, to comfort and to ease the suffering of his or her patients"^{333 334}. The declaration states that, "The doctor shall not countenance, condone or participate in the practice of torture or other forms of cruel, inhuman or degrading procedures, whatever the offence of which the victim of such procedures is suspected, accused or guilty, and whatever the victim's beliefs or motives, and in all situations, including armed conflict and civil strife"³³⁵. It is worth noting that the declaration indicates that "A doctor must have complete clinical independence in deciding upon the care of a person for whom he or she is medically responsible". The doctor's fundamental role is to alleviate the distress of his or her patient, and no motive whether personal, collective or political shall prevail against this higher purpose³³⁶.

93. Stressing the importance of patient confidentiality, Article 247 (2) of the Penal Code, categorises as crime, "the acts of anyone who whilst exercising their profession reveals the secrets or confidential information of patients undergoing treatment". Where women receive treatment for complications as a result of clandestine abortion, it is fundamental that the women feel free to inform the doctor of the facts. The aim of patient confidentiality is to ensure that doctors provide treatment based on accurate information, and to guarantee medical attention to patients. Said information could be essential to saving lives in the case of women undergoing the aforementioned experiences³³⁷.

94. The conduct of medical teams working in Chilean state hospitals is contrary to Article 25 of the Medical Ethical Code, based on the Tokyo Declaration. The objectives of improving the quality of services, and ensuring that said services are coherent with international human rights standards, are forsaken by health professionals who present the police with information on almost all cases of complications due to clandestine abortions. Public health services should promote and guarantee the best treatment to each patient. Nonetheless,

³³¹ Official report submitted by the Chilean state to the CAT committee. CAT/C/39/Add.14 Chile p.26

³³² Medical Ethics Code

³³³ Ibid.

³³⁴ The Tokyo Declaration establishes guidelines for doctors in relation to torture and other cruel, inhuman and degrading treatment, or to punishment in relation to detention and custody procedures.

³³⁵ Tokyo Declaration (1975)

³³⁶ Ibid.

³³⁷ In October 2000, the bill outlining sexual and reproductive rights was presented before Chile's Congress. The project consecrates patient confidentiality in relation to the sexual and reproductive health of patients. It compels staff to refrain from reporting any assistance provided in relation to this matter, including cases of abortion. This would allow women to seek medical assistance in public hospitals without fear, diminishing the maternal death rate. However, those who oppose the project consider it a form of camouflaged abortion since doctors are not obliged to denounce abortion cases to the authorities.

public health officials assume the role of judges and condemn those women who require of their services to save their lives.

95. The Chilean government could argue that the interrogations women are subject to in these cases and which often condition the provision of treatment, is legitimised by Article 84 (5) of the Penal Procedure Code, which compels health professionals to report said situations. However, this regulation does not justify the conduct of public health professionals that denounce women who have induced abortion. These regulations should be interpreted in the context of the obligation to maintain patient confidentiality and to give priority to providing adequate health care, regardless of the patient's involvement in activities classified as criminal. It is clear that the fear of being reported prevents women from seeking prompt medical assistance and hinders the handing over of information required by the doctor to provide adequate treatment. Doctors and other health professionals should by no means be placed in situations where their professional obligations are in conflict with their legal obligations. Criminal sanctions should not justify delay in treatment, nor should it hinder medical care in favour of interrogations before or during treatment.

96. Furthermore, in the context of the official report on the International Covenant on Civil and Political Rights, the Human Rights Commission recommended Chile to review its prohibitive legislation on abortion, as well as the conflict it generates for medical staff forced to choose between reporting an infraction and complying with their medical obligations:

The penalisation of all abortion, without exception, poses serious dilemmas, especially in the light of unquestioned reports according to which many women undergo illegal abortions at the risk of their lives. The legal obligation imposed upon health personnel to inform of cases of induced abortion, may discourage women to seek medical treatment, thus risking their lives. The signatory state is compelled to adopt the necessary measures that guarantee the right to life of all persons, including pregnant women who choose to terminate their pregnancies... In this sense: The Commission recommends that the law be reviewed so as to establish exceptions to the general prohibition on abortion, and protect patient confidentiality³³⁸.

5.2. Juridical foundation of the Convention against Torture

Article 1 of the Convention

97. Complications of clandestine abortion almost invariable entail severe physical and psychological pain and suffering, as well as the possibility of dying or permanent damage to the woman's health. Avoiding or delaying treatment unnecessarily prolongs the severe pain and suffering involved. The impending threat, alongside the punishing attitude of hospitals, exacerbate the very real threat of death and permanent damage, constituting psychological torture.

98. The UN Special Rapporteur on Torture has stressed the close relationship between the right to health, especially the right to sexual and reproductive health, and the defence against torture inasmuch as it affects both the general population and persons deprived of their freedom. Its most recent report to the Human Rights Commission, states that:

"The right to health is closely related to and dependent upon the realisation of other human rights, including the prohibition against torture....Regarding the prohibition of torture in the context of HIV/AIDS, the Special Rapporteur draws attention to the freedom to control one's health and body, including sexual and reproductive freedom,

³³⁸ CCPR/C/79/Add.104, March 30, 1999.

and the right to be free from interference such as the right to be free from non-consensual medical treatment and experimentation, especially for people in custody....The right to health also gives rise to entitlements including to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable standard of health. In particular, States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including persons deprived of their liberty, to preventive, curative and palliative health services. In addition, States should refrain from limiting access to contraceptives and means of maintaining sexual and reproductive health from censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information³³⁹.

99. Although the UN Special Rapporteur on Torture does not make special reference to the problem of women seeking medical assistance for complications of abortion, these women, as well as women suffering from HIV/AIDS, risk being treated in an arbitrary and punishing manner rather than with compassion and respect. This was emphasised by the international community, Chile included, in the framework of the International Conference on Population and Development action programme.

100. The lack of prompt and adequate treatment aimed at reducing pain and suffering in women who are admitted into public hospitals due to complications of clandestine abortions, is, in this context, conscious and deliberate. Under the Convention against Torture, it qualifies as inflicting damage intentionally. Moreover, treating these women as criminals is contrary to the compassion they merit as patients in distress, while intentionally exacerbating their suffering. It is public knowledge that women in Chile avoid or delay seeking assistance in public hospitals until they are at the point of dying or suffering extreme pain, for fear of being denounced as criminals. The suffering of these women is evident to medical staff that are aware of and observe the conditions in which the women arrive.

101. The legal obligation to denounce all women who seek treatment for complications of abortion, induced or spontaneous, in itself increases the women's refusal to seek medical help and also their exposure to severe physical and psychological pain, further suffering, and the risk of death or permanent damage. Furthermore, medical personnel that deliberately expose women to severe physical and psychological pain and suffering, particularly when there is risk of death, are not only acting contrary to medical norms, but also inflicting severe harm and suffering. Both the gender biased legal norms and practices that exist meet the first requisite that constitutes torture in accordance with Article 1 of the Convention against Torture, that is, to intentionally inflict serious pain or suffering on a person. They also constitute cruel, inhuman or degrading treatment in accordance with Article 16 as regards exceptional cases where punishment does not amount to torture.

102. The presence of unjustifiable and unacceptable motives that impulse the refusal or delay in the provision of treatment and care by health staff, constitute reason to consider as tantamount to torture the treatment meted out to women that seek assistance in the public health system following complications of abortion.

103. As regards the interrogations and extractions of confession, it is evident that public hospital medical staff delay and/or condition emergency health care on the willingness of the affected woman to confess to having induced an illegal abortion, the circumstances under which this took place, and those responsible for carrying out the abortion. It appears also,

³³⁹ Report of the Special Rapporteur on Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (Mr. VonBoven), para.56. (hereinafter, *Rapporteur on Torture*)

that in breach of Article 15 of the Convention against Torture, said “confessions” are subsequently used in the lawsuits filed against the women.

104. Along with the interrogation and confession, the treatment of women who seek health care for complications of abortions (which deliberately exacerbates severe pain and mental and physical suffering), is in itself a punishment for having induced the abortion. According to those persons who for religious motives are opposed to abortion, the desperate act of self determination that women effect when they choose to abort, is condemned from a religious stance, and merits religious punishment.

105. It has been widely shown that in other contexts where abortion is illegal, medical staff who ascribe to certain religious doctrines inflict different types of punishment on women who seek their assistance due to complications of abortion. The UN Special Rapporteur on Torture stated that persons suffering from HIV/AIDS and who identify with a sexual minority, commonly undergo punitive treatment by medical staff, which constitutes torture. The following circumstance is applicable to women who seek medical assistance due to complications for clandestine abortions:

Attitudes and beliefs stemming from myths and fears associated with HIV/AIDS and sexuality contribute to stigma and discrimination against sexual minorities. In addition, the fact that members of these minorities are perceived as transgressing gender barriers or challenging predominant conceptions of gender roles seems to contribute to their vulnerability to torture as a way to “punish” their unaccepted behaviour....It was also reported that members of sexual minorities receive inadequate medical treatment in public hospitals on grounds of their gender identity, which, in case of people living with HIV/AIDS, could lead to very serious consequences³⁴⁰.

106. Regardless of personal opinion on abortion or its legal status, the intimidation or punishment of women who seek or are granted medical assistance in said conditions, is unjustified.

107. In recognition of the aforementioned situations, the International Conference on Population and Development action programme, of which Chile is a signatory state, indicates that:

All Governments and relevant intergovernmental and non-governmental organisations are urged to strengthen their commitment to women’s health, to deal with the health impact of unsafe abortion as a major public health concern and to reduce the recourse to abortion through expanded and improved family-planning services ...Women who have unwanted pregnancies should have ready access to reliable information and compassionate counselling...In all cases, women should have access to quality services for the management of complications arising from abortion.³⁴¹

108. The treatment meted out to women who seek assistance for complications of clandestine abortion amounts to a double discrimination. On the one hand, the laws that penalise abortion perpetuate paternalistic control over the reproductive lives of women, denying them their equal rights to life, freedom, and personal safety, as well as to voluntary maternity. They also constitute a form of gender based discrimination. The Commission on Discrimination Against Women states in its recommendation number 24 that,

³⁴⁰ Idem., para. 64

³⁴¹ Cairo Programme of Action, 8.25; Beijing Platform, 106 (k). (CRR ft. nt. 57).

“ Measures to eliminate discrimination against women are considered to be inappropriate if a health care system lacks services to prevent, detect and treat illnesses specific to women. It is discriminatory for a State party to refuse to legally provide for the performance of certain reproductive health services for women. For instance, if health service providers refuse to perform such services based on conscientious objection, measures should be introduced to ensure that women are referred to alternative health providers³⁴² .

109. Failing to provide women with medical assistance and delaying or refusing treatment when and as required, is equivalent to inflicting additional pain and suffering because of the disapproval regarding the decision to terminate the pregnancy. According to the Convention, this is an unjustified discrimination. As stated by the Special Rapporteur on Torture, this discriminatory conduct includes punishment for “transgressing gender barriers and mandates or challenging predominant conceptions of gender roles”³⁴³. In addition, it is doubly discriminatory given that this type of treatment is only meted out to poor women who have no other health alternatives, even more so in high risk conditions. The fact that it is poor women who undergo medical treatment delays and upon whom avoidable pain and suffering is inflicted reflects a great disparity in society. It is also the case as regards the fact that it is poor women who are reported to the police.

110. Torture practices involve officials of the Chilean state, and it is they who inflict this ill-treatment upon poor women who seek assistance in the public health system. The Convention against Torture makes reference to all public authorities, all the persons who are employed by or work in public hospitals, and to those persons responsible for the policies and practices of said institutions. The actions of said individuals are thus directly imputable to the state. Furthermore, it should be of no importance whatsoever whether the condition of pain is due to an infringement of the law, or to a personal decision, or whether the women are confined in hospital. The element that constitutes involvement of state officials refers in these cases to whether or not legitimate force and/or the acts of state officials intentionally inflict avoidable serious pain and suffering.

111. In exceptional cases that do not amount to torture, Article 16 of the Convention against Torture is applied. As regards this, it is important to note the outcome of the D V versus United Kingdom, 37 (Eur. Ct. H.R. 777) (1997). The European Court of Human Rights determined that the United Kingdom could not deport a person without documents suffering from HIV/AIDS to St. Kitts, given that there, the person would not have access to continuous medical and psychological treatment comparable to that he had been receiving in the United Kingdom. D. argued that although deportation was legal, he would be exposed to “a real risk of death in the most angst ridden circumstances that would amount to inhuman treatment”, in accordance with Article 3 of the European Human Rights Convention³⁴⁴. The Court rejected the arguments invoked and which claimed that the Convention was not applicable given that the petitioner was involved in dishonest acts, or because the additional risk the petitioner would be exposed to did not mean a transgression of Article 3 by the member state³⁴⁵.

³⁴² The Convention on the Elimination of All Forms of Discrimination Against Women [Women’s Convention] General Recommendation No. 24, 20th Sess. at Art. 12 (1) (11) (1999).

³⁴³ Rapporteur on Torture, para. 64.

³⁴⁴ D V. United Kingdom, 37 Eur. Ct. H.R. 777 (1997). at para. 53. We note that the Commission had determined that the suffering would be severe though none of the impermissible purposes connected with torture are present in that case, as they are here. Id. para 45.

³⁴⁵ Id. at para. 46-47. The Court opined that, “It is not therefore prevented from scrutinising an applicant’s claim under Article 3 (art. 3) where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article (art. 3). To limit the application of Article 3 (art. 3) in this manner would be to undermine the absolute character of its protection. In any such contexts, however, the Court must subject all the circumstances surrounding the case to a rigorous scrutiny, especially the applicant’s personal situation in the expelling State.”

6. Inhuman and degrading treatment of women in prison

6. 1 The facts and institutional, legislative and administrative measures

112. The living conditions of persons incarcerated in the penitentiary system constitutes one of the more serious dilemmas the penal system in Chile currently faces. The system finds itself in a state of collapse, and it has become a matter of urgency to introduce structural reforms that will provide conditions that meet international imprisonment standards. In 1991, the Chamber of Deputies created a special commission to analyse the problem; its final report lists a series of problems, the most important of which include high indices of overcrowding, a lack of prison personnel, and a deficiency in treatment. The report also proposed a series of measures to be taken to overcome the crisis. Nevertheless, over the following years, little has been done to implement the suggested reforms and the problems have worsened; the prison population has increased and so has overcrowding, there is a greater deficit in personnel and security systems have deteriorated³⁴⁶. As regards women in prison, in addition to a collapsed prison system, women female inmates suffer from a general invisibility and a lack of information on the treatment they are subject to within the penal system.

113. The number of women in prison has grown steadily over recent years. In 1998, there were 1,887 adult female inmates out of a global prison population of 23,485 inmates³⁴⁷, within the so called “closed system”³⁴⁸. By November 2002 the number of women inmates had grown to 2,189 out of a global prison population of 34,550 inmates³⁴⁹. The types of transgressions committed by women have also changed within this time period. This is reflected in the fact that between 1980 to 1990, the prevailing infractions amongst women were crimes against property³⁵⁰. In contrast, the current prevailing infraction amongst women is that of drug trafficking, which makes up 34% of all crimes committed by women³⁵¹.

114. Chilean prisons are run by the Gendarmería de Chile public service, which is a subsidiary of the Ministry of Justice, and which is responsible for assisting, supervising and rehabilitating those persons who by virtue of the competent government authorities are arrested or deprived of their freedom, and for fulfilling other duties as established by law³⁵². Penitentiary activity is supervised by the Penitentiary Code, recently modified by the 1998 Decree number 518. The main aims of this code refer to the attention, custody and assistance of prison inmates, subject to preventive imprisonment or sentenced, as well as the granting of the education required for the social reinsertion of those persons sentenced to imprisonment³⁵³. However, the problems Chile’s prison system faces, such as overcrowding, promiscuity, the forced inactivity of the majority of prison inmates, a scarcity of leisure and educational activities, and precarious living conditions, lead us to conclude that the concept of reinsertion, as outlined in said code, has not been taken seriously.

115. The penal system’s closed prison establishments can be classified both in penal and gender terms into: Preventive Detention Centres (CDP), which incarcerate detained or

³⁴⁶ Annual report on Human Rights in Chile 2003. Law Department, Diego Portales University, Santiago 2003, p. 61.

³⁴⁷ Anthony, Carmen, “La Mujeres Confinadas: estudio criminológico sobre el rol genérico en la ejecución de la pena en América latina y Chile” (“Women in Custody: Criminological Study of the Role of Gender in Sentence Executions in Chile and Latin America”), Editorial Jurídica de Chile, Santiago 1998, p. 84.

³⁴⁸ The closed system refers to male and female inmates incarcerated in penal institutions.

³⁴⁹ See www.gendarmeria.cl for data.

³⁵⁰ Cooper-Mayr, Doris, “Delincuencia Común en Chile” (“Common Delinquency in Chile”), Editorial Lom, Santiago 1994.

³⁵¹ Statistics Compendium, Gendarmería de Chile, 2003.

³⁵² Article 1, Organic Law, Gendarmería de Chile.

³⁵³ Article 1; Penitentiary Institutions Code.

sentenced males; Penitentiary Penal Centres (CCP), which incarcerate sentenced males; Female Incarceration Centres (CPF), which exclusively incarcerate women who have been detained, are on trial, or have been sentenced; Feminine Sections, which are located within some CDP and CCP centres, and are used for the incarceration of women who have been detained, are on trial, or have been sentenced. Adult women are incarcerated in two types of institutions; CPF centres and the feminine sections located within male prisons. CPF centres exist only in some regions; there are six such centres throughout the whole of Chile, accommodating 48% of the incarcerated female population³⁵⁴. Thus, over 50% of women are imprisoned in mixed sex prison centres.

116. Moreover, in contrast to what is provided for some of the male prison population, there are no exclusive prisons for female inmates according to penal condition. On the contrary, the majority of female prisons accommodate women who are being tried or have been sentenced; separation on the basis of penal quality only exists in prisons with a significant number of female inmates and only if there is enough space to implement the separation.

117. Overcrowding is one of the major problems of Chile's prisons. According to Justice Ministry data, in 2002 there were 33,131 persons imprisoned in Chile, whilst the country's prison system only had capacity for 12,340 inmates, which is equivalent to a 59% deficit. As can be seen from the following data, this situation also affects women. In 1999 the Rancagua CPF centre had a population of 55 women, in contrast to its capacity for 22 inmates, equivalent to a 150% deficit; the Santiago CPF, which houses the greatest quantity of female prisoners in Chile, had a population of 623 women in 1999, its capacity was for 180 persons, which meant a 246% deficit³⁵⁵. This situation not only makes it impossible to provide female inmates with the most basic living conditions, but it also deteriorates the quality of the service and security provided, and generates precarious hygiene conditions, given that the system exposes the inmates to destitute living conditions. In this context, and although the situation for women has not yet improved, the government announced a bidding process for the improvement of prison infrastructure, open only to the private sector. The aim of the bidding process, which was initiated in 2001, is to build 10 new prisons by the end of 2006.

118. A second problem, and in this case specific to women inmates, is the dilemma that imprisoned mothers face. The Chilean system allows imprisoned mothers to keep their children with them until the latter turn two years old. However, the physical space to rear their children is restricted and, in general, they lack the differential treatment their special condition requires. Once a child turns two, he or she is separated from his or her mother. For many inmates, this is a type of double punishment, especially for those women who have no one to leave their children with. This is further compounded by the fact that the existing programmes are only accessible to women who have been sentenced, when the latter constitute only 50% of women incarcerated under the closed prison system³⁵⁶. The two available programmes in this area are the Paternitas Foundation project, which has a reception centre for the children of men and women who have been deprived of their freedom, and the government "Conozca a su Hijo" (Know your Child) programme³⁵⁷. Although these two programmes provide great support for women in this situation, they are unable to meet existing needs.

119. The Penitentiary Code sets out the disciplinary regulations applicable to persons deprived of freedom³⁵⁸. This legal body states that no inmate shall be subject to torture or

³⁵⁴ See www.gendarmeria.cl for data.

³⁵⁵ Report on Human Rights 2003, Law Department, Diego Portales University, Santiago, 2003, pp. 66 - 67.

³⁵⁶ See www.gendarmeria.cl for data.

³⁵⁷ This programme has been operating for three years in Chile's prison system. It aims to teach imprisoned mothers and children up to age six their roles, and improve the physical, psychological and social development of the whole family group involved.

³⁵⁸ Article 81 to 91; Penitentiary Institutions Code.

other cruel, inhumane and degrading treatment, verbally or physically, nor shall persons be subject to unnecessary harshness in the application of the norms established by the code. In the case of disorder or lack of discipline, the code categorises said transgressions into grievous, less grievous, and slight, establishing sanctions that correspond to each of these categories. These sanctions range from a verbal warning to solitary confinement for up to 15 days. The code also declares that sanctions can only be applied by the head of the establishment in which the inmate is imprisoned, once he or she has studied the accusation and interviewed witnesses and the affected party, and where necessary, invited the recommendations of the Technical Council. The code states that the punishment should be as just, prompt and proportional as possible.

120. Although the procedures used by the Chilean prison system to apply sanctions is regulated in accordance with international standards, major transgressions have been observed in the application of sanctions by personnel of Chile's prison service³⁵⁹. In the first place, there are no clear, transparent procedures in place regarding the application of sanctions³⁶⁰. Frequently, there are no concrete accusations, or those that are made are not included in the code as transgressions which require punishment. Often, the conduct of an inmate is punished directly by the officer in charge, without any information relayed to the internal guards, thus side-stepping the corresponding procedure³⁶¹. Recent studies³⁶² record a series of abuses carried out against inmates, including degrading and humiliating solitary confinement conditions, beating, being subject to exhausting periods of exercise, being threatened with arms, etc. None of these studies, however, contain sex-desegregated data, for which reason they do not describe the specific situation of women. They only state that according to those interviewed the restriction of visits as a form of punishment is a mechanism preferred by the Santiago CPF, which does not imply it is not used in other prison centres³⁶³.

121. A contributing factor to this degrading and abusive conduct towards inmates is the absence of administrative and judicial control mechanisms. In the administrative sphere, Chilean penal law establishes a set of official petition and complaints procedures, yet in practice these are not implemented³⁶⁴. In the first place, there is no system that records the major demands or complaints by inmates. In the majority of cases, the prison head who must administer petitions is unaware of complaints; in other cases, the inmates do not dare to make them for fear of reprisals. In 2001, an information and complaints office was created, but the administrative procedure for complaints has not yet been established, thus said procedures will have to be established through practice. Likewise, in 2002 the government announced the creation of an Internal Inspection unit, aimed at controlling the conduct of prison staff.

122. As regards judicial control, the sentencing judge figure does not exist in Chile. This means that the task is derived to the criminal court judges or the Appeals Court through a protection order. Neither of these systems have been efficient. Moreover, although judges are compelled to visit inmates in prison the majority do not fulfil this obligation.

³⁵⁹ Institution annexed to Chile's judicial system; charged with execution of sentences.

³⁶⁰ "Torture, Human Rights and Criminal Justice in Chile; An Exploratory Study", Law Department, Diego Portales and CEJIL, August 2002, p. 78.

³⁶¹ Anthony, Carmen, "La Mujeres Confinadas: estudio criminológico sobre el rol genérico en la ejecución de la pena en América latina y Chile" ("Women in Custody: Criminological Study of the Role of Gender in Sentence Executions in Chile and Latin America"), Editorial Jurídica de Chile, Santiago 1998, p. 106.

³⁶² Annual Report on Human Rights in Chile, 2003, Law Department, Diego Portales University, Santiago 2003, and "Torture, Human Rights and Criminal Justice in Chile". Law Department, Diego Portales and CEJIL, August 2002.

³⁶³ Torture, Human Rights and Criminal Justice in Chile; An Exploratory Study", Law Department, Diego Portales and CEJIL, August 2002, p. 88.

³⁶⁴ Annual Report on Human Rights in Chile, 2003, Law Department, Diego Portales University, Santiago 2003, p.84

123. In relation to visiting rights, inmates have rights to one to two visits of approximately three hours each per week. This is the case of the Santiago CPF women's prison where the inmates have the right to receive visits twice a week between 2 to 5 p.m.; however, these time periods are often shorter, given previous control delays or because the large number of visits due to the volume of inmates generates long queues. As regards intimate visits, the deficiencies are serious. Very few prison centres have private and adequate rooms where inmates can meet up with their partners. In the majority of prison centres, inmates are compelled to have sexual relations during visit hours in the visiting room itself, improvising measures that give the impression of intimacy. In the case of women, the situation is even worse given that they are prohibited from having sexual relations with their partners, except for two pilot programmes; one implemented in Concepción city prison, and the "Venus programme", implemented in the Santiago CPF centre. In order for inmates to be eligible for the Venus Programme, they must meet a series of requirements, including having already been sentenced, having a stable partner and good behaviour, and to not be carrying sexually transmitted diseases³⁶⁵. This is a clear case of gender discrimination, given that while for men that right is satisfied, even in the most adverse conditions, in the case of women it is prohibited and, in the only two pilot programmes being implemented, this right is subject to maintaining good behaviour.

124. One serious problem related to visiting rights is the searches that persons visiting imprisoned relatives are subject to. Although searching people is justified on security grounds, the way in which these are carried out in Chile's prisons is abusive and degrading to a person's dignity. This is particularly true in the case of women, who have to undress in the presence of female prison staff and are often forced to bend over whilst they are strip searched. This frequently deters women from visiting inmates again. In 2002, a woman who was strip searched when visiting her son, filed a lawsuit. The Santiago Appeals Court ruled a verdict stating that such treatment was degrading and harmful, and that it was preferable to run some security risks than to transgress a person's right to physical and psychological integrity, and to free will. It is yet to be seen whether this recent verdict will affect the continuation of this type of practice³⁶⁶.

125. In conclusion, the lack of information regarding the conditions for female prisoners in Chile hinders efforts to attain an accurate overview of the situation. Current studies on the precarious living conditions in Chile's prisons and the abuses inflicted upon inmates do not include sex-desegregated data, and so provide a partial overview of the situation. This constitutes an obstacle to analysing torture and other cruel, inhuman and degrading treatment against women. Because the problem is made invisible, it is not possible to design adequate measures to ensure the respect of the human rights of incarcerated women.

6.1 Juridical foundation of the Convention against Torture

126. The juridical analysis made in point 3.2, in relation to rape and sexual violence as a form of torture, can be applied in the case of imprisoned women and female sex workers detained and/or abused by police officials. In accordance with the official report presented by the Chilean state to this Committee, there exist few cases of complaints of rape by officials. However, the report makes no reference to the extent of the problem, whilst the absence of information is in direct contrast with a practice that is recurrent in some specific situations.

127. Rape and sexual violence during detention constitute torture, and when they lack severity or a prohibited purpose, said acts constitute cruel, inhuman or degrading treatment or punishment. Studies carried out in other countries, have established that women in

³⁶⁵ Ibid. p.89

³⁶⁶ "Torture, Human Rights and Criminal Justice in Chile"; Law Department, Diego Portales and CEJIL, August 2002, p. 90.

detention are subject to sexual violence and rape on grounds of race, ethnicity, or sexual orientation³⁶⁷.

128. In such cases where exceptionally the suffering inflicted by sexual violence is not severe, or prohibited causes are absent, the acts clearly constitute cruel, inhuman or degrading treatment making Article 16 of the Convention against Torture applicable.

³⁶⁷ See, e.g., Human Rights Watch, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons*, Human Rights Watch, New York, 1996, 2; Amnesty International, *Not Part of My Sentence: Violations of the Human Rights of Women In Custody*, Amnesty International (March 1999).

GENERAL RECOMMENDATIONS

In order to guarantee the right to physical and mental integrity in Chile, the effective democratisation of the Chilean State is a fundamental requirement. So long as the Constitution and laws are not the product of national majorities, and so long as there is no clear subordination of the Armed Forces and Carabineros to civilian authority, all progress in this field will be limited and precarious.

Another fundamental requirement involves a profound change in government attitude. As long as the government does not become truly conscious of the importance of the prevention of torture, and as long as it does not resolutely face up to the issue of sanctioning tortures during the dictatorship and the maximum possible reparation of victims, very little progress will be achieved in this area:

7.1 Adequately adapt domestic legislation in line with the contents of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Sentences. This requires, at least, the following legislative reform:

- Define the crime of torture in accordance with the Convention.
- Abolish the principle of due obedience in Armed Forces and Carabineros laws and regulations.
- Substantially increase penalties for this crime.
- Establish that it cannot be extinguished.
- Stipulate the extra-territoriality of torture, in the terms established in Article 5 of the Convention.
- Approve special legislation to enforce Article 14 regarding reparation, compensation and rehabilitation of torture victims.
- Make the optional declarations of Articles 21 and 22 of the Convention.

7.2 Promptly ratify the Optional Protocol of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Sentences.

7.3 Repeal the 1978 amnesty decree-law, thus also complying with the relevant categorical resolutions of the Interamerican Commission on Human Rights and of the United Nations Human Rights Committee (of the Civil and Political Rights Agreement)

7.4 Guarantee respect for the rights of prison inmates, especially the right to life, to being free of torture, cruel, inhuman and degrading treatment, and in general, to be recipients – both themselves and their visitors – of treatment that respects their human dignity. Take all necessary measures to eliminate overcrowding in detention areas so that imprisonment can indeed lead to the rehabilitation of inmates.

7.5 Repeal all arrest (or “retention”) faculties on the grounds of suspicion, which in addition to the ensuing torture and maltreatment clearly contravenes Article 9 of the International Agreement on Civil and Political Rights.

7.6. Guarantee that the crimes of torture and cruel, inhuman or degrading treatment and sentences be dealt with by an impartial judiciary. Therefore, military justice may deal with no such crime, and that those presently in that sphere be transferred to the realm of civilian courts.

7.7. Restrict the competency of military courts to crimes of an effective military nature, committed exclusively by the military.

7.8 Comply fully with the recommendations made by the Special Rapporteur on the situation of human rights and fundamental liberties of the native peoples in Chile.

7.9 Eradicate what is virtually the slave society “Colonia Dignidad”, take its leaders to court and re-socialize and repair – together with Germany – its subjugated population.

7.10 Design a system for the comprehensive reparation and vindication of people detained and tortured during the dictatorship that at least implies the following:

- Officially accredit a list containing people (alive or dead) that suffered detention for political reasons and torture between 1973 and 1990.
- Establish by law ways to achieve moral vindication and material reparation (benefiting descendants in the case of those deceased), as well as comprehensive rehabilitation.
- Immediately eliminate all legal or administrative sequels that still have an effect on victims of political detentions during the dictatorship.

7.11 Establish a Defender of the People with wide ranging faculties to act in cases related to the violation of the right to physical and mental integrity, be it in military, police or prison environments.

7.12 Include, throughout school education, a civic and human rights subject enabling the education of citizens fully aware of their rights and respectful of the rights of others.

7.13 Incorporate wide-ranging education in human rights and international humanitarian law within military, police and prison-warden training programs, with contents and its teaching supervised jointly by public power and the main academic centres in Chile.

7.14 Prevent the appointment of people responsibly involved in serious violations of human rights to top positions in the Armed Forces and Carabineros, as well as to high public office or diplomatic positions.

7.15 Adopt measures needed to guarantee the independent and respectful compliance of the judiciary with the international treaties signed by Chile in order to resolve and duly sanction crimes against humanity – including torture – committed during the Pinochet dictatorship.

RECOMMENDATIONS WITH REGARDS TO CHILDREN

- Regarding the legal system of Chile on torture, Opcion and OMCT recommend the Committee Against Torture :

- to ask the Chilean government to establish protection measures and in cases where a state agent or state official is prosecuted for acts of torture or abuse against a child particularly to suspend him/her from his functions immediately and to strengthen penalties if he/she is found to be guilty.

- to check the effective implementation of the Law n°19927 by the Chilean authorities, especially through the courts.

- Regarding the complaints procedure in case of torture, Opcion and OMCT recommend the Committee Against Torture to ask the Chilean government:

- to establish a special procedure of complaint to denounce, sue and effectively try state agents accused of torture and ill-treatment of a child.

- to facilitate children's access to such a procedure.

- Regarding the juvenile justice reform, Opcion and OMCT recommend the Committee Against Torture to ask the Chilean government:

- to ensure that in the light of the current reform in the juvenile justice system affecting minors age 14-18, that the civil rights and protections be applicable to all persons without any exception nor conditionality, as is outlined by the CRC. Similarly in accordance with CRC and other international agreements, to ensure that those minors under the age of 14 be treated as legally incapable of committing crimes ensuring that there is no punitive action taken by the state. Furthermore, OMCT and Opción recommend that until this reform is fully in place that no minor under age 18 be tried as an adult for a crime.

- to allow every minor to obtain legal counsel from the first hour of the police custody and during all the proceedings.

- since it has been noticed that there is no juvenile court in some small communities of Chile and that some legal cases involving minors are heard by ordinary judges³⁶⁸, to guarantee to the fullest extent the rights and minimum guarantees of the minor according to the CRC and other international agreements, regardless of his city of residence. Beyond the short-term OMCT and Opción welcome the judicial reforms in process that will replace minors judges with family judges and provide a more specialized program for adolescent offenders,

- to check whether this reform is fully in conformity with Riyadh Guidelines and Beijing Rules and whether it provides all the adequate material, professional and financial resources in order to ensure the effective implementation of the new system.

- Regarding police custody, Opcion and OMCT recommend the Committee Against Torture to ask the Chilean government:

³⁶⁸ CRC/C/65/Add.13 Periodic report of Chile § 427 (25 June 2001).

- to establish precise guidelines and generally limit the cases where a child may be held in police custody. It emphasizes the fact that a child who has not infringed the law but who is in need of care and protection would rather have to be into the care of specialized social workers instead of the police.

- to implement effective procedures for internal monitoring and disciplining of the behaviours of public officials, including provisions allowing a child to be assisted by a lawyer and informed of her rights.

- to adopt and enforce appropriate sanctions for public officials who are found to have held a child in custody without immediately notifying the prosecutor, or interrogated a child without the presence of a prosecutor or a lawyer.

- to ensure that independent and qualified medical and social personnel is require to carry out regular examinations of child under arrest.

- Regarding deprivation of liberty, Opcion and OMCT welcome the current efforts to distinguish between cases of an infraction of the law versus situations of a violation of a minor's rights and recommend the Committee Against Torture to ask the Chilean government:

- to ensure a clear distinction between child offenders and child in need of protection, in order for the latter to be protected and assisted, rather than deprived of freedom.

- to comply with and not exceed the legally provided periods of detention whatever their purpose.

- to make the juvenile justice reform in conformity with all the relevant international standards and, concerning the legislation currently in force, to strictly implement Act n°19343 on the removal of children from adult prisons so that no more minor is detained inside an adult prison but only in a specific centre conforms to the minor's special needs, development and rehabilitation. In this framework the Chilean authorities should always keep in mind that the detention of a person under 18 must remain a measure of last resort, secondary to social programmes.

- Regarding schools, Opcion and OMCT welcome the current project and recommend the Committee Against Torture to ask the Chilean government:

- to expressly ban corporal punishment as well as every physical and mental abuse in schools and to lay down measures to punish persons responsible of these acts while providing assistance to children victims.

RECOMMENDATIONS WITH REGARDS TO WOMEN

7.1. General recommendations

129. *Because the Chilean state has not ratified a series of international human rights treaties, Chile's citizens are subject to a great lack of protection. This is even more so if we consider that human rights were dramatically violated during Chile's recent past. We express our concern over the fact that President Ricardo Lagos' resolution is weakened by parliament, thus making the ratification of said treaties impossible. These treaties include the Rome Statute, which establishes the International Criminal Tribunal, the Convention on Imprescriptibility of Crimes of War, the Convention on Forced Disappearance of Persons and the Optional Protocol of the CEDAW, among others.*

130. *We are also concerned over the fact that from 1990 onwards, legal reform bills that promote the creation of public and autonomous institutional human rights measures have not been approved, despite the support of civil society for said measures. In effect, the Public Defender or Ombudsman figure, which would guarantee the respect of human rights and which would ensure that systematic violations of human rights would never again occur in Chile, has been substituted by the Citizen's Defender model, which refers only to the quality of public services and makes no reference whatsoever to the international human rights framework Chile ascribes to.*

7.2 *Specific recommendations regarding the aforementioned issues*

7.2.1 Sexual violence as a form of torture and other cruel, inhuman or degrading treatment

131. According to the Convention against Torture, the Chilean state is under the obligation to provide "reparation and the right to a just and adequate compensation" and "the means for the most comprehensive rehabilitation possible". In accordance with said obligation, the process of compensation for female victims of torture during the military regime is by all accounts deficient.

132. In the first place, and in relation to the concept of a "just" reparation, rape and other forms of sexual violence were common forms of torture practised against women during the military regime. The fact that the victims have not reported these acts immediately and spontaneously, indicates that the Chilean government should ensure its reparation measures are gender specific and should facilitate the procedures whereby women may apply for compensation. In order to implement the principle of non-discrimination or gender inclusion in the aforementioned cases, the government should introduce measures that stimulate and encourage women to register claims for compensation for sexual violence as a form of torture, as well as other forms of torture. This would be coherent with the concept of "just and adequate" compensation as established by Article 14 of the Convention against Torture as well as with Article 4(1) of the Convention on the Elimination of All Forms of Discrimination against Women, which calls on its member states to "take special temporary measures aimed at quickening the process of de facto equality between men and women...".

133. In order to comply with this obligation, we consider it necessary that the state:

- a) Extend the deadline for denouncements before the National Political Imprisonment and Torture Commission, given that to date only a small percentage of women victims of sexual violence have actually registered their denouncements. The acts referred to in this report constitute crimes against humanity regarding which no restrictive statutes exist under international law. We call on the government to extend the deadline to 10 years, and to be under obligation to extend it further should it prove necessary. This is essential if the measures are to reach the whole community, including persons who were exiled and are still living outside Chile. A number of obstacles hinder victims from denouncing their past experiences. These obstacles, which include fear of reprisals; the passing of time; and, in the case of women, cultural impediments and barriers, can only be overcome in the right conditions, which need extended periods of time for their generation. Such is the case of "comfort women" used as sex slaves during World War II. It was only in 1991 that they revealed for the first time ever their former conditions as "comfort women"³⁶⁹. To date, they are

³⁶⁹ McDougall report.

still in the process of denouncing said acts. In addition, the Chilean government should implement an integral programme to inform all Chilean citizens, in Chile and living abroad, of the possibility that exists to denounce any torture they were subject to during the military regime. This programme should use for this purpose all existing mass means of communication, public transport, and informative leaflets aimed at heads of households.

- b) Given the historical difficulties that exist regarding the characterisation of rape and sexual violence as a form of torture, the Chilean government should create a list of said acts that amount to torture, so that women who underwent ill-treatment at the hands of state officials or third parties acting with the latter's consent, can more easily identify these acts. This list should be incorporated into the information package made available to Chilean society, and should be attached to the denouncement questionnaires that victims have to fill in.
- c) Fear of disclosure and of reprisals seriously hinder any possibilities of denouncing. This is particularly so in the case of women who were subjected to rape or sexual violence as a form of torture. Measures should be taken to protect the confidentiality of victims and survivors who choose to denounce, and restrict any publicity and disclosure of names if the person denouncing has not given his/her approval. This can be carried out by allowing the persons denouncing to decide whether or not to opt for confidentiality; allocating a specialised team to systematise and process information under the obligation of following the same norms of confidentiality that doctors, for example, are subject to; keeping archives clearly marked as confidential, which would prevent their public exposure by non-authorised state officials or privates; and drawing up sanctions for those who infringe upon said confidentiality.
- d) As regards the personnel carrying out the interviews at the National Political Imprisonment and Torture Commission, there exists concern as to whether or not they are properly trained and prepared to deal with aspects that have not traditionally been categorised as torture practices. Indeed, the lack of awareness and preparation regarding these issues may affect both the Commission personnel as well as the victims, who might be exposed to greater pain and suffering. It is commonplace for victims to relive their trauma once more when describing their experiences of torture. Given that rape and other forms of sexual violence constitute one of the more profound and permanent traumas, the lack of preparation amongst personnel that receive and record these experiences hinders the process of denouncement. For this reason, ensuring that only trained personnel receive sexual violence denouncements is a matter of the utmost urgency. Women denouncing should be informed that there exists an option to talk with specialised personnel of the same sex if desired, so as to guarantee the best possible conditions for making the denouncement. This information should be included in the publicity strategy indicated above.
- e) Lastly, it is essential to facilitate access to this entity (or to any other that may be created with this aim in mind). This specially applies to persons who reside in isolated and/or rural areas, or areas difficult to access. Some people may require special assistance to fill in the questionnaire forms.

134. Secondly, and in relation to the concept of "adequate" reparation: We express our concern over the words used by Chile's President during the creation of the CNPPT. Indeed, the term used, "austere and symbolic" to describe the reparations, does not comply with international standards. It is impossible to financially compensate persons for the suffering and losses as a result of imprisonment and torture under the Pinochet regime, or for the permanent consequences of these types of criminal acts. However, compensatory and rehabilitation measures should not trivialise the suffering of persons whilst simultaneously reducing the government's obligations in this area.

135. In this context, we express our concern regarding the fact that the Chilean state has not yet announced levels of compensation, neither has it revealed the criteria it is considering for the creation of measures in this sphere. We demand that the Committee call on the Chilean government to prepare a compensation plan that takes into account the international law progress and criteria developed by other committees and organisations. The plan should be submitted to this Committee for review. There are but few international examples of compensation for rape and other forms of sexual violence, but considering the high degree of trauma the latter induce, along with the long term consequences, it is evident they amount to the most grievous violations. Examples that should be considered when conceiving the compensation plan, include the case of María Mamerita Mestanza Chaves, a poor indigenous woman forced to undergo sterilisation and who was later denied medical assistance for complications of the operation. In a "friendly agreement" published by the Inter-American Commission of Human Rights, the eight surviving relatives were paid compensation of US\$ 10,000 each, along with

substantial compensations in health care, education and housing³⁷⁰. In the case of Carmelo Soria Espinoza, a Chilean-Spanish citizen kidnapped and assassinated by DINA agents, the government agreed payment of US\$ 1,5 for the family³⁷¹. In another friendly agreement involving Chilean citizens incarcerated for over five years, the government agreed to compensatory measures of individual character consisting of a discretionary pension payment³⁷².

136. It is important to note that Article 14 is not restricted to compensation and includes providing “the means for the most comprehensive rehabilitation possible”. The aforementioned cases illustrate this principle. They do not only include a compensation, but they also provided individual and social/historic rehabilitation along with measures to prevent their repetition. In the Mestanza case, the Peruvian government also agreed to undertake an investigation; sanction those responsible; modify discriminatory legislation; and take measures to implement policies that protect the autonomy of women in decision making, and prevent abusive sterilisation³⁷³. In the Carmelo Soria case, along with the modest compensation paid to his relatives, the Chilean government also agreed to build a monument in memory of Mr. Soria, and emit a public declaration acknowledging the responsibility of the state in his death. In the case of Juan Manuel Contreras and others, the Chilean government agreed to finance courses for the development of working skills that would allow them to earn a decent and dignified living. It also agreed to reform existing regulations regarding compensation for judicial errors³⁷⁴.

137. When drawing up the compensation measures and rehabilitation programmes, it is just and adequate that the government should consider the gravity over time of physical and mental suffering inflicted by the practice of rape and sexual violence. It should also include non discriminatory measures that aim to improve the health, education and daily life of the women affected, and their offspring, and measures that aim to repair the suffering and deprivation the latter have endured as a result of the torture inflicted upon their mothers. The government should also promote the public recognition of rape and sexual violence against women as a form of torture; impulse measures to prevent their happening again such as memorials, historical research, and the inclusion in school text books of a condemnation against sexual violence in all its forms; and the implementation of expedite procedures to aid denouncements and ensure a prompt investigation, prosecution of those responsible, and reparation on the terms stated above.

138. In those exceptional cases where the suffering inflicted by sexual violence is not severe or in which unjustified motives are absent, then unquestionably the acts put forth by this report amount to cruel, inhuman or degrading treatment, in accordance with Article 16. According to this Committee, the Convention, in relation to the Yugoslavia case, imposes the obligation to provide compensation, as part of the obligations established by Article 16 aimed at preventing future ill-treatment³⁷⁵.

139. We also require, in reference to the request for measures aimed at alleviating the suffering of women victims of torture, that the Committee call on the Chilean state to draw up a report on the measures adopted, within 90 days. This measure was also requested in the Yugoslavia case³⁷⁶.

140. In order to eliminate sexual violence against women, the Chilean state should review all its laws and policies, and should include rape and sexual violence as forms of torture. In addition, the Chilean state must develop adequate procedures to prevent and sanction such acts in the future, including those that could take place in the context of arrests, detention or prison. (Articles 2,4,5 CAT)

³⁷⁰ Case of Maria Mamerita Mestanza Chavez (Peru), Report No. 71/03, Petition 12.191, Friendly Settlement (October 22, 3003).(hereinafter Mestanza)

³⁷¹ Inter-American Commission on Human Rights, Report num. 19/031 [1], Compliance Agreement of Carmelo Soria Espinoza v. Chile, Case no. 11.725, March 6, 2003. Available at <http://www.cidh.org/annualrep/2003eng/chile.11725.htm>.

³⁷² “The State adds that “the nature of the discretionary annuity is that of a special measure adopted by law, whose effects last for the duration of the beneficiaries’ lifetimes,” and enables them “satisfactorily to cover the costs of their upkeep and those of their immediate family.” Case of Juan Manuel Contreras San Martin, Victor Eduardo Osses Conejeros, and Jose Alfredo Soto Ruz (Chile), Inter American Commission of Human Rights, Report Num. 32/02, Friendly Settlement, Case 11.715, March 12, 2002, available at, <http://www.cidh.org/annualrep/2002eng/chile11715.htm>.(hereinafter, Contreras)

³⁷³ Mestanza, Section “Eleventh.”

³⁷⁴ Contreras.

³⁷⁵ Communication No 161/2000: Yugoslavia. 02/12/2002. CAT/C/29/D/161/2000. (Jurisprudence), Committee Against Torture, Twenty-ninth session (11 - 22 November 2002) para.9.6.

³⁷⁶ Id para. 11.

141. The Chilean state must take the measures required to undertake, in the immediate future, research on the practices applied by personnel that have the faculty to arrest, detain or imprison women, or to submit them to custody or control. Where it is established that there are reasons to believe women are being subject to rape or other forms of sexual violence or abuse, the state must promptly initiate investigations aimed at determining the course of events and sanctioning those responsible. (Articles 6 and 7)

142. It is also essential that the armed forces and police institutions receive information on the prohibition of sexual torture or other abuses. (Article 10 of the Convention)

143. We also recommend that the state establish a systematic review of rules, instructions, methods and practices applied in relation to women under custody, aimed at preventing rape or abuse in the context of arrest, detention and imprisonment. In this context, the access to sex and age-desegregated data is key (Article 11 of the Convention).

144. Where reason exists to believe that a woman has been subject to rape, sexual violence or abuse in its territory, the Chilean state must guarantee an impartial investigation carried out by persons competent in the matter. (Article 12)

7.2.2 Torture and Other *Cruel, inhuman and degrading treatment of female sex workers upon arrest and of women deprived of freedom in general*

145. In order to prevent sexual violence against women, the state must categorically review all related laws and policies with the aim of explicitly incorporating abuse during the detention of female sex workers, and the practice of rape and sexual violence as a form of bribery to prevent detention, and as a practice against women who are confined. (Articles 2, 4 and 5 of the Convention)

146. We also call on the Chilean state to conduct an investigation into the practices adopted by personnel who have the faculty to arrest, detain, imprison or in any other way confine or control women, including sex workers. Where reason exists to believe said women are being subjected to rape or sexual violence, the state must guarantee an immediate and impartial investigation (Article 6 and 7 of the Convention).

147. We demand that the Chilean state increase investment in the training and preparation of police personnel, and that it incorporate a categorical prohibition on rape and sexual violence in the rules and instructions of the relevant entities.

148. Likewise, where reason exists to believe that a woman, be she a sex worker or not, has been subject to rape or sexual violence in its territory, the Chilean state must guarantee a competent and impartial investigation. (Article 12 of the Convention)

149. In relation to all cases covered by the Convention, the state is obliged to provide “just and adequate compensation” and provide “the means for the most comprehensive rehabilitation possible” to all women, including sex workers, subject to sexual torture or cruel and inhuman treatment. (Articles 13 and 14 of the Convention) Furthermore, as this Committee has already mentioned in relation to Yugoslavia, the Convention imposes the obligation to provide compensation as part of the obligations established by Article 15 aimed at preventing future ill-treatment³⁷⁷. In this context, we call on the Chilean state to take the corresponding measures to comply with this obligation, and present a report on the progress being made in relation to this point, within 90 days³⁷⁸.

7.2.3 Torture and other cruel, inhuman or degrading treatment of women who seek medical assistance for complications of abortion

150. So as to protect women from torture and/or other cruel, inhuman or degrading treatment in the future, the Government of Chile should issue immediate administrative directives to public hospitals to cease reporting women presenting with complications of abortion and to treat them compassionately and humanely, and in accordance with the best medical standards applicable to their situation. In addition, the Government of Chile

³⁷⁷ Communication No 161/2000: Yugoslavia. 02/12/2002. CAT/C/29/D/161/2000. (Jurisprudence), Committee Against Torture, Twenty-ninth session (11 - 22 November 2002) para.9.6.

³⁷⁸ Id para. 11.

should take such legislative means as it deems necessary to provide for judicial remedy for women so treated. This includes repeal of Criminal Procedure Code Article 84 (5) insofar as it applies to women presenting with illegal abortion, a punishable offence in Chile. In order to prevent the recurrence of said situations in the future, the Chilean government should establish a system of monitoring to ensure compliance with its directives and law. The above would be in accordance with Article 2 of the Convention.

151. The Chilean state should undertake an investigation of the practices of the public hospitals to determine whether they have delayed or disrupted medical treatment by conducting interrogations or otherwise violating the Convention and should institute criminal proceedings where appropriate against both medical staff and persons responsible for the hospital (Articles 6 and 7 of the Convention). In addition, the state should incorporate a protocol of *treatment for women with complications of abortion*, so that institutions and personnel directly involved *in their assistance comply with its norms, and be subject to sanctions where they fail to do so* (Article 10 of the Convention). Moreover, the state should establish a regular procedure whereby the treatment of women in said cases is periodically reviewed (Article 11 of the Convention).

152. Where there is reason to believe that women presenting with abortion complications have been subject to torture or cruel, inhuman or degrading treatment, the Chilean government shall ensure that the case be investigated immediately and impartially (Article 12 of the Convention).

153. The government should establish a mechanism whereby women who have been or may be subject to the aforesaid treatment, can complain to the authorities with guarantees of confidentiality of their identity should they request it; respect for their person; and protection against intimidation or ill-treatment as a consequence of the request. In addition, the Chilean state should facilitate their access to compensation, whether through administrative or judicial means, and provide the necessary rehabilitation (Articles 13 and 14 of the Convention).

154. Finally, the Chilean state should carry out a review of all the proceedings brought against the women affected and charged with illegal abortion, in which statements of theirs taken at the hospital or as a result of reporting by the hospital, were used. The requirement to denounce said cases in itself constitutes a violation of the Convention. Convictions based on reporting by medical staff or persons responsible for the hospital should be nullified as well as those in which the statements taken under coercive or intimidating circumstances were used. (Article 15 of the Convention)

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