UNITED
NATIONS

CCPR

International covenant on civil and political rights

Distr.
GENERAL

CCPR/C/95/Add.11
3 December 1998

ENGLISH
Original: SPANISH

HUMAN RIGHTS COMMITTEE

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT

Fourth periodic reports of States parties due in 1994

Addendum

CHILE

[6 October 1997]

GE.98-14759 (E)

CONTENTS

INTRODUCTION

A. Historical summary

1. Chile was one of the first democracies to be established in America. The Constitution adopted in 1833 instituted a political system based on the separation of public powers and a periodic re-election of Congress and the President of the Republic by general election in accordance with the system of suffrage in operation at the time.

2. Chile thus went on to establish the rule of law in a process interrupted only three times: first during the 1891 civil war, which ended in the victory of the parliamentary system over the presidential system; then under a series of military governments in power between 1924 and 1932, reflecting a crisis in traditional society as the middle and working classes took shape; and, lastly, the collapse of the democratic institutional structure brought about by the overthrow of the constitutional Government on 11 September 1973 and the inauguration of a military regime that lasted until 11 March 1990.

3. The adoption of the 1925 Constitution removed any possibility of parliamentarism and consolidated the presidential system. From 1932 onwards, under the guidance of this Basic Charter, Chile was long able to produce its rulers in the normal way and consolidate the democratic system. Constitutional reforms gradually broadened popular participation in the political process. The last amendments, made in 1971, aimed to provide better safeguards for the rule of law and to modernize social and individual rights by explicitly incorporating political rights, giving constitutional status to political parties, extending freedom of thought in pursuit of the pluralism of a democratic system, encouraging community participation through constitutional recognition of community organizations and making important changes in order to strengthen the freedom of education.

4. On 11 September 1973 the democratic institutional framework collapsed with the overthrow of the constitutional Government and the establishment of a military regime which lasted until 11 March 1990. That period saw what the National Truth and Reconciliation Commission described after its investigation as a situation of systematic violation of human rights.

5. On 11 March 1990 President Patricio Aylwin Azócar took office, having been democratically elected for a four-year term, after which he was replaced in the same way by the current President, Eduardo Frei Ruiz-Tagle, who will remain in office until 11 March 2000. At the same time, a National Congress was also formally instituted and Chile embarked on the re-establishment of the system of democratic institutions disrupted by the military regime. The period since then has been characterized by the normal functioning of the rule of law, with State bodies, the armed forces, the police, political parties and trade union and social organizations operating within the framework of their functions under the law and the Constitution.

6. There have been no declarations of a state of emergency, the institution that made possible the serious violations of the rights to life, security and personal freedom that took place under the previous regime. The fundamental rights and freedoms guaranteed under the Constitution have not been restricted

in any way under the democratic Governments. This situation has affected the attitude of the higher courts of justice towards checks on the legality of detentions through the correct application of habeas corpus, a remedy that has recovered its customary validity.

7. This return to political and judicial normality has brought about a considerable change with regard to the fundamental rights and freedoms embodied in Chile's Constitution and the Covenant. The normal functioning of a democratic institutional framework is not without its problems. The end of the military regime was brought about through a political, non-violent settlement that entailed acceptance of the 1980 Constitution adopted by that very regime. On 5 October 1988, under a constitutional mandate, a referendum was held to decide whether to endorse or reject the ruling junta's nomination of General Pinochet for President during the transition to democracy, a term that would last, under the Basic Charter, until 1997. In the last days of the military regime, after the “no” vote won in the 1988 referendum, the coalition that is now in office was able, through negotiation with the military authorities and the political forces supporting the regime, to change some of the most authoritarian aspects of the Basic Charter. Nevertheless, certain obstacles remained that have had adverse effects in a number of human rights-related areas owing to the retention of constitutional provisions concerning the dual system for electing public authorities, the system of appointing senators, the selection and composition of the Constitutional Court, the situation regarding commanders-in-chief of the armed forces and the composition and powers of the National Security Council. The civil Governments have submitted constitutional amendments to the Congress in an attempt to change the situation, but have not received the support of the political opposition; nevertheless, President Frei remains willing to press for such amendments.

8. In addition, the 1978 Decree-Law on amnesty has made it harder to secure proper justice for the victims of violations of the right to life during the military regime.

B. Chile and the International Covenant on Civil and Political Rights

9. The Covenant was ratified by Chile on 10 February 1972 and promulgated on 30 November 1976 (promulgation Decree No. 778 of the Ministry of Foreign Affairs). As is well known, the procedure for incorporating international conventions into the domestic legal framework was never completed, since, despite its promulgation, the Covenant and the promulgation decree were not published in the Official Gazette. As a result, the higher courts of justice denied its domestic validity every time it was invoked. Before the military regime left office, on 29 April 1989, the Covenant and Decree were published, giving the Covenant the full force of law in Chile.

10. In a statement notified to the United Nations on 7 December 1990 and published in the Official Gazette on 24 October 1991, the Government of President Aylwin recognized the competence of the Human Rights Committee under article 41 of the Covenant in relation to any act that occurred or commenced after 11 March 1990. On 27 May 1992 the same Government ratified the Optional

Protocol to the Covenant, as announced in the Official Gazette on 20 August 1992, with a statement recognizing the competence of the Human Rights Committee to receive and examine communications from individuals relating to acts taking place after that instrument's entry into force in Chile, and in any case acts that occurred or commenced after 11 March 1990.

11. The last three reports submitted by Chile to the Human Rights Committee under article 40 of the International Covenant on Civil and Political Rights - the initial report and a supplement (CCPR/C/1/Add.25, of 27 April 1978, and CCPR/C/1/Add.40, of 20 March 1979); the second report and a supplement (CCPR/C/32/Add.1, of 7 May 1984, and CCPR/C/32/Add.2, of 18 June 1984); and the third report and a supplement (CCPR/C/58/Add.2, of 23 May 1989, and CCPR/C/58/Add.4, of 8 August 1989) - were prepared by the former military regime that governed the country from 1973 to 1990.

12. This is the fourth periodic report, and the first one submitted under the democratic regime restored in Chile on 11 March 1990. The information supplied in the report covers the period between 11 March 1990 and December 1996.

C. International conventions in domestic law

1. Incorporation into domestic law

13. In the absence of any legislation specifically regulating this area, the legal theory favoured by academics considers that international conventions are incorporated into the domestic legal order in three stages: adoption by the Congress, promulgation by the President and publication of the text of the Convention and of the promulgation decree in the Official Gazette. The basis for this interpretation in the courts is to be found in article 50, paragraph 1, of the Constitution, which attributes to Congress the exclusive power to “adopt or reject international treaties submitted by the President for ratification. Adoption of a treaty shall be subject to the same procedures as those prescribed for an act.”

2. Status in domestic law

14. In relation to other items of domestic legislation, international conventions are of the same status as an act. This conclusion is drawn from prevailing case law and the consensus of authors, in the absence of a specific prescription to that effect.

D. Precedence of international human rights conventions

15. In July 1989, as a result of political negotiations between the regime of General Augusto Pinochet and his supporters, and representatives of groups opposed to the regime, several amendments to the 1980 Constitution were adopted, including changes to article 5, paragraph 2. This clause stated that “the exercise of sovereignty is acknowledged to be limited by respect for the fundamental rights that have their origin in human nature”. The amendment added, “It is the duty of the organs of State to respect and promote the rights guaranteed by this Constitution and by the international conventions ratified by Chile and currently in force.”

16. This reform has provoked debate, even though it is almost universally understood that, in order to reinforce respect for and the protection of human rights in Chile, the legislative force of the international conventions embodying those rights has been altered to give them constitutional status and create an important distinction between them and international conventions on other subjects. As a result, the fundamental rights, responsibilities and guarantees contained in the international conventions ratified by, and in force in, Chile, must be understood to augment and supplement the list of rights embodied in article 19 of the Constitution, and to have the same constitutional status. The continuing debate in Chile on human rights violations under the military regime makes it difficult to reach a solid consensus on the legal theory and case law in this field.

E. Incorporation of international human rights instruments into domestic legislation after 11 March 1990

17. One subject to which particular attention was paid when democracy was restored was the implementation of the proposal in President Aylwin's Government's programme to incorporate into the domestic legal order the human rights instruments to which Chile had not acceded.

1. Ratification of human rights conventions

18. Chile has ratified the following human rights conventions:

Convention on the Rights of the Child, ratified on 31 August 1990, in force since 27 September 1990;

American Convention on Human Rights, ratified on 21 August 1990, in force since 5 January 1991;

Protocols I and II Additional to the Geneva Conventions of 12 August 1949, ratified on 24 April 1991, in force since 28 October 1991;

Optional Protocol to the International Covenant on Civil and Political Rights, ratified on 27 May 1992, in force since 20 August 1992;

Slavery Convention, Protocol Amending the Slavery Convention, and Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, accession on 20 June 1995, in force since 7 November 1995;

Agreement establishing the Fund for the Development of the Indigenous Peoples of Latin America and the Caribbean, ratified on 31 October 1995, in force since 26 February 1996;

Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, ratified on 15 November 1996.

2. Withdrawal of reservations

19. Chile has withdrawn its reservations to:

The Inter-American Convention to Prevent and Punish Torture, on 21 August 1990;

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, on 7 September 1990.

3. Human rights conventions currently before the Congress

20. International Convention on the Suppression and Punishment of the Crime of Apartheid;

International Convention against Apartheid in Sports;

ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries;

Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity;

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families;

Inter-American Convention on Forced Disappearance of Persons.

F. Measures relating to human rights violations committed under the military regime

21. In order to resolve the human rights problems inherited from the military regime, President Aylwin's Government took a series of legal and administrative steps to shed light on massive, systematic violations of fundamental rights, set in motion the appropriate mechanisms of justice and compensation, facilitate the return of exiles and deal with the problem of political prisoners by reinstating the right to justice and due process.

22. On 25 April 1990, the National Commission on Truth and Reconciliation was established by government decree to investigate the most serious human rights violations committed between 11 September 1973 and 11 March 1990, i.e. situations in which detained persons disappeared, were executed or died under torture and the State appeared to bear moral responsibility for the actions of its agents or persons in its service.

23. Working to a deadline that was extended until December 1996, the National Compensation and Reconciliation Board established by law in January 1992 implemented the recommendations in the report put out by the National Commission on Truth and Reconciliation, particularly those concerning the assessment of cases which the Commission had not resolved and moral and material compensation for the victims of human rights violations and their families.

24. Another body set up to resolve outstanding human rights problems was the National Office for Returnees, whose purpose was to assist with the reintegration of returning Chilean exiles.

25. President Aylwin submitted various bills aimed at solving the problem of the military regime's political prisoners. After a long discussion in Parliament, lasting nearly a year, these bills were enacted in 1991. [1] Not only did this legislation address the question of political prisoners and reinstitute the right to due process, it also represented an important step forward in bringing Chilean law on criminal procedure into line with international human rights law, in that it established rules inter alia protecting prisoners from torture, making preventive detention an exceptional measure and requiring greater equality before the law.

G. Other human rights protection measures

26. The democratic system, under the Governments of both President Patricio Aylwin and President Eduardo Frei, has not only dealt with the serious effects of the violations of basic rights that occurred under the military regime and incorporated international instruments protecting and complementing those rights into the domestic legal order, but has also taken a series of measures of various kinds to give effect to the International Covenant on Civil and Political Rights and other human rights conventions to which Chile is party.

1. Protection of children, women and indigenous peoples

27. Special attention has been paid to protecting the most vulnerable sectors of society. The measures taken include giving priority to social and economic policies on behalf of minors, with the ratification of the Convention on the Rights of the Child and the adoption of a national plan of action for children; in favour of women and family, with the establishment of the National Women's Service; and on behalf of ethnic minorities, with the enactment of the Indigenous Peoples' Bill.

2. Reform of the criminal justice system

28. As mentioned above, the legislation enacted by President Aylwin's Government to solve the problem of political prisoners is in part intended to bring Chilean criminal procedural law into line with international human rights law. In that regard, President Frei's Government has taken a decisive and important step forward by preparing, as part of a series of reforms aimed at modernizing the judicial system, a draft new Code of Penal Procedure, which is now before Congress.

29. Chile's modernization of its system of justice is intended to bring the various institutions involved in the administration of justice into step with political and economic developments that have taken place in the country in the last 20 years. Whereas Chile's justice administration system, which was basically designed and constituted around the mid-nineteenth century, has not changed since then. Chilean society has changed both economically and politically. The protectionist economy has given way to a market economy in which the State has taken on a regulatory role and relinquished its role as

producer, a shift that entails decentralization in order to encourage private initiative. In the political arena, the consolidation of the democratic model has relied on respect for human rights as the basic principle of legitimacy. There is a consensus in the country that both these developments make it necessary to modernize the judiciary in order to ensure governability in the political system, social integration and the viability of this model of economic development.

30. Three areas for reform have been identified: access to justice, child law and the penal system. The draft new Code of Penal Procedure is the first substantive step towards reform of the penal system as a whole. In the view of the current Government, now that democratic coexistence has been restored, putting an end to gross human rights violations, it is in the penal procedure system that the greatest abuses of power might arise. The draft therefore proposes amendments to the Code in order to guarantee more effective enjoyment of such rights in everyday life. One of the general principles underlying the proposed system - in the words of the President's statement introducing the draft - is “the direct application of constitutional and international human rights standards to the regulation of penal procedure”. It notes that “the basic guidelines used in the design of the project were the Constitution of the Republic and the international human rights instruments by which the country is bound, special account being taken of the American Convention on Human Rights and the International Covenant on Civil and Political Rights”. The rationale for this is the need to strengthen the idea that penal procedure begins with the general principles of legal order governing the relationship between the State and its citizens that are set forth in such legislative texts. The aim is to emphasize the importance of these principles over and above the specific procedural mechanisms embodied in the law. Judges' work should be a matter of marrying procedural rules with constitutional or international standards, interpreting and applying the former in such a way as to meet the requirements imposed by the latter.

31. The draft new Code of Criminal Procedure was sent to Congress on 9 June 1995. [2] The House of Representatives Constitutional, Legislative and Justice Committee approved the full text, which will continue its constitutional path through the House and later through the Senate. As part of this procedural change, a draft constitutional reform relating to the Public Prosecutor's Office is currently before the Senate Constitutional, Legislative, Justice and Regulatory Committee. [3] At the same time, the Public Prosecutor's Office (Organization) Act is being examined by the House of Representatives Constitutional, Legislative and Justice Committee. [4] Further contributions to the reform of procedure will be made by other bills, due to be presented to Congress in the near future, dealing with the establishment of an Office of the Criminal Defender and amendments to the Courts (Organization) Code and other legal texts.

32. The broad political consensus over this reform has enabled it to be implemented. The Government hopes to keep up the momentum so that Congress can finish enacting the legislation during the current President's term of office, which is due to end in 2000. The Executive has therefore included the bill in its special legislative sessions. When the definitive text comes into force - the date of publication in the Official Gazette - this legislation will begin to be brought in (over a period of 10 years) throughout the

national territory. It is important to note that all provisions of the new Code guaranteeing the fundamental rights of the parties to criminal proceedings will come into force on the date of publication throughout the national territory, including places where current legislation still applies while the new Code is gradually being implemented. [5]

33. This proposal, sent by the Government to the House of Representatives on 10 April 1996, called for immediate changes in the protection of detainees' human rights: the abolition of detention on suspicion; the recognition of the offence of torture within the meaning of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and amendments to the legislation on informing detainees of their rights. On 13 August 1996, by a vote of 76 to 6, the House of Representatives passed the bill on condition that it would be brought into line with the new Code of Criminal Procedure, in order to give practical expression to the procedural reforms on detention. [6]

II. INFORMATION RELATING TO THE ARTICLES

(for the period March 1990-December 1996)

Article 1

Restoration of the right to self-determination (art. 1, para. 1)

34. The restoration of this right, embodied in articles 4 and 5 of the Chilean Constitution but violated under the military regime, came about as a result of an agreement among the various forces opposed to General Pinochet's Government to accept the rules laid down in the 1980 Constitution, as approved by the Government and the ruling military junta, in order to move towards presidential and congressional elections. On 5 October 1988 a referendum was held to confirm or reject General Pinochet's appointment as President during the period of transition to democracy, which, under the Basic Charter, would last until 1997. The “no” vote won by an absolute majority, with 54.71 per cent, against a “yes” vote of 43.01 per cent in favour of General Pinochet, after a vast turnout in which abstentions amounted to a mere 2.47 per cent.

35. A process of political negotiation then began between the military regime, its supporters and opposition groups, with the aim of preparing the ground for democratic elections and reforming the more authoritarian parts of the 1980 Constitution. This led to a range of constitutional reforms which were ratified by an overwhelming majority of voters - 85.70 per cent - in a referendum on 30 July 1989.

36. Presidential and congressional elections were held on 14 December 1989. On 11 March 1990 President Patricio Aylwin took office after winning the 53.79 per cent of the vote in an election with an abstention rate of 5.3 per cent. The National Congress also began work that day, with a governing coalition known as the Pro-Democracy Alliance, obtaining 50.83 per cent of votes in the Senate and 50.55 per cent in the House of Representatives. On 28 June 1992, during President Aylwin's period of office, municipal elections were held for the first time in 21 years thanks to a reform initiated by his Government.

37. On 11 December 1993, the current President, Eduardo Frei Ruiz-Tagle, was elected with 54.77 per cent of the vote. Fresh elections were also held for the entire House of Representatives and a part of the Senate, in accordance with the Constitution. [7]

38. Several parts of the institutional structure established under the 1990 Constitution do, however, present obstacles to self-determination:

(a) The list-based electoral system, which is not part of Chilean tradition or its multiparty political scene, does not allow adequate proportional representation of majorities and minorities, gives the second electoral list an advantage over the first and pushes out minority groups, which are left with no parliamentary representation unless they form electoral coalitions;

(b) The existence of nine senators not elected by popular vote but appointed before President Aylwin took office by the members of the Supreme Court, the National Security Council and General Pinochet;

(c) A Constitutional Court whose composition is not democratic since some members are appointed by the National Security Council. It also includes three members of the Supreme Court - in effect a duplication of functions. Its composition is restricted owing to the nature of the qualifications required to be elected a member. The Constitutional Court currently has seven members: three Supreme Court judges elected by the Supreme Court itself, two lawyers elected by the National Security Council, one lawyer appointed by the President and one elected by the Senate;

(d) The way in which the National Security Council passes resolutions and operates allowing it to take decisions by absolute majority, with the representatives of the armed forces (four members out of a total of eight) having a decisive influence. The National Security Council is currently chaired by the President of the Republic; its members are the Chairmen of the Senate and the Supreme Court, the Commanders-in-Chief of the armed forces, the Director-General of the Carabineros and the Comptroller-General of the Republic;

(e) Under the Constitution, the position of the Commanders-in-Chief of the armed forces (army, navy and air force) and the Director-General of the Carabineros, who cannot be removed from office by the President, is as follows. According to article 32, paragraph 18, the President has the power to appoint and remove the incumbents. Under article 93, they are appointed by the President for a period of four years, during which they cannot be removed and may not be appointed for a further term. Under article 94, appointments, promotions and retirements of officials of the armed forces and the Carabineros are to be made by presidential decree “in accordance with the relevant organization act which shall set forth the respective basic regulations”. At the same time, the organization acts constituting the armed forces and Carabineros reaffirm that official appointments, promotions and retirements shall be carried out by presidential decree but add a requirement for “a recommendation by the Commander-in-Chief of the service or the Director-General, as appropriate”. This regulation thus effectively robs the

Head of State of the power to make decisions in this area, since, without a recommendation from the military high command or the Director-General of the Carabineros, he cannot exercise his constitutional powers.

39. With the aim of correcting these institutional deficiencies and strengthening democracy, the Government of President Frei in August 1995 sent the Senate a draft set of constitutional amendments [8] aiming to: abolish the non-elected Senatorial positions as of 11 March 1998, curtail the National Security Council's influence on the appointment of members of the Constitutional Court and increase Congress's role in such appointments; alter the status and number of persons designated by the Supreme Court to sit on the National Security Council (from three members of the Court to two lawyers unconnected with it); make the Speaker of the House of Representatives a member of the Security Council; provide for Security Council meetings to be called by the President ex officio or at the request of at least three Council members; and give the President the casting vote in the event of a tie. Before the December 1997 parliamentary elections, the Executive will ensure that these institutional reforms are referred to Congress, pressing particularly for the abolition of appointee senators and proposing reforms to the list-based election system and election campaign financing.

40. In addition to these reforms, President Frei sent to the Senate a bill similar to one sponsored by President Aylwin, amending the organization acts constituting the Chilean armed forces and Carabineros so as to allow the President to order the retirement of senior officers without a recommendation from the relevant Commander-in-Chief. [9]

41. Neither the constitutional reform bill nor the bill to amend the armed forces and Carabineros organization acts has been successful, being condemned by legislators opposed to the Government.

Administration of Non-Self-Governing and Trust Territories (art. 1.3)

42. Chile does not administer any Non-Self-Governing or Trust Territories. In the international arena, Chile has supported resolutions in the Third Committee of the United Nations General Assembly on “the right of the Palestinian People to self-determination” (A/C.3/51/L.25), the “universal realization of the right of peoples to self-determination” (A/C.3/51/L.28) and the “Use of mercenaries as a means to violate human rights and to impede the exercise of the rights of peoples to self-determination” (A/C.3/51/L.26).

Article 2

Ensuring the rights recognized in the Covenant (arts. 2.1)

43. The rights embodied in the Covenant apply explicitly to everyone living in Chile without distinction of any kind, under the Constitution of the Republic of Chile (art. 19), which stipulates in article 5 that “the exercise of sovereignty is acknowledged to be limited by respect for the fundamental rights that have their origin in human nature”.

44. Like any other international treaty the Covenant itself, as explained in the introduction to this report, entered into force once the requirements for

its incorporation into the domestic legal order had been met. Being an international human rights agreement, the Covenant is of constitutional rank by virtue of the amendment to article 5 of the Constitution. As previously explained, that amendment is of immense importance to the Chilean State's undertaking to guarantee individual rights. The aim of the reform was to strengthen the position of human rights in the domestic legal order.

45. The exercise of public power through a government apparatus based on a democratic institutional framework has restored the State's capacity to guarantee the free exercise of the rights recognized under the Covenant. Since 11 March 1990, when a democratic regime was reinstated in Chile, there have been two successive democratic Governments which have maintained normal institutional order without recourse to states of emergency; hence there has been no restraint on the exercise of the rights recognized under the Covenant. The enjoyment and exercise of human rights in Chile are guaranteed by the proper functioning of the remedies designed to protect them.

46. The State's obligation to guarantee these rights has not been limited to legal and institutional stability. It has also taken the form of legal steps to bring domestic legislation into line with international standards, thus improving the conditions under which the rights can be exercised as illustrated by the 1991 reform of penal procedure [10] and the draft new Code of Penal Procedure and supporting bills. [11]

47. In the same way, realizing that the obligation to guarantee these rights goes beyond their protection in the courts and through appropriate legislation, the democratic Governments have devised policies to implement the principle of non-discrimination against women, children and indigenous peoples, attempting to affect social and cultural change in these areas and bring the rights of these disadvantaged groups into line with those of the rest of the national community (see paras. 56ff, 249ff and 261ff).

Legislative or other measures to give effect to the rights recognized in the Covenant (art. 2, para. 2)

48. Beginning on 11 March 1990, a series of legislative and other measures - described in detail in this report - have been introduced with the aim of giving effect to the rights recognized in the Covenant.

Effective remedy for the protection of rights (art. 2, para. 3)

49. The country's constitutional and legal provisions guarantee all its inhabitants judicial and administrative remedies to reassert their rights if they are violated. The remedies of protection and amparo are now fully applied, both in normal times and during states of constitutional emergency; this was not the case until the 1989 constitutional reform, since neither remedy had been applicable during states of emergency and siege.

Remedy of protection

50. In accordance with article 20 of the Constitution, this remedy is intended to safeguard the fundamental rights specifically mentioned in the article in the event of their denial or infringement or a threat to their

lawful exercise due to arbitrary or illegal acts or omissions. Although the Constitution does not say so, case law has determined that protection proceedings may be initiated in the event of infringements committed by the political or administrative authorities, individuals or bodies corporate. In keeping with the nature of the remedy, applications are dealt with by the Court of Appeal in summary manner and without formalities, with a view to affording effective protection. The facts and the evidence are assessed freely. The judgement of the Court of Appeal is final and may be appealed against to the Supreme Court within a short period. The decisions of the courts must be handed down within specific time limits and there are broad powers for immediately taking the necessary measures to restore the rule of law and ensure the protection of the person concerned.

51. This remedy applies to most of the rights guaranteed in the Covenant: right to life and right to physical and psychological integrity of the individual; equality before the law; right to be tried not by special courts but by a court stipulated in law and previously established by law; respect for and protection of private and public life and the honour of the individual and his family; inviolability of the home and any form of private communication; freedom of conscience; right to choose a health system; freedom of education; freedom of opinion and freedom to impart information, without prior censorship; right to assemble peacefully without prior authorization and without arms; right of association without prior authorization; freedom of work; right to join a trade union; right to engage in an economic activity; freedom to acquire property; right to own property; copyright; right to live in an unpolluted environment. Individual freedom and security are protected by the remedy of amparo.

52. The remedy of protection is fully in force in Chile. There is considerable case law attesting to its normal operation as an effective mechanism for safeguarding individuals' fundamental rights. During the period 1990-1993 decisions were reached on a total of 2,046 applications for protection lodged with the Santiago Court of Appeal. [12]

Year	1990	1991	1992	1993	TOTAL
Decisions	519	448	442	657	2 046

Most of the applications during this period concerned the right to own property, the right to life and the right to equality.

Year	1990	1991	1992	1993	TOTAL
Property	105	102	98	113	438
Life	57	52	47	75	231
Equality	43	52	46	81	222

Among the information given in this report are examples of applications for protection allowed in order to safeguard rights established in the Covenant (see paras. 86, 111, 161, 187, 207, 236 and 260).

Remedy of amparo (habeas corpus)

(See information in para. 129.)

Recommended reforms

53. The report of the National Commission on Truth and Reconciliation has recommended legal and constitutional reforms relating to the remedies of protection and amparo with the aim of improving safeguards for human rights. [13] The recommendations include: widening the range of rights safeguarded by the remedy of protection, or establishing protective measures for those rights which it is not advisable to protect by means of this remedy; making it an obligation - during amparo proceedings - to keep the detainee at the disposal of the court and requiring the agency appealed against to reveal the identity of the arresting officers; and allowing courts hearing applications for amparo and protection during states of emergency to pronounce on the reasons adduced by the authorities for adopting the measures appealed against.

Administrative remedies

54. In accordance with the Organization Act establishing the General Bases of the Administration of the State (No. 18,575, art. 9), "Administrative acts shall be open to challenge by means of the remedies established by law. An application for reconsideration may always be made to the organ where the act in question originated and, where appropriate, to the next level of authority above it, without prejudice to such judicial action as may be required".

55. The Organization Act establishing the Office of the Comptroller-General of the Republic (No. 10,336, arts. 6 and 10) stipulates that any decree issued through the administrative organs of the State shall be subject to constitutional review. Under this procedure the Comptroller-General's Office exercises broad powers of oversight in rulings, binding on the Administration, which are based on the full range of national legislation, including legislation to protect individuals' fundamental rights. Cases in point are the rulings cited under a number of articles in this report (see paras. 99, 191 and 207).

Article 3

A. Legal framework

56. Despite the fact that a number of legislative amendments have been introduced in the course of this century, there are still areas where sometimes married women, sometimes all women, are discriminated against. A woman married under the matrimonial regime of joint ownership of property has limited capacity with respect to her own assets, inherited assets and joint assets since they are administered by the husband (Civil Code, Book IV, Title XII, third para., arts. 1.749 and 1.752). The legal representation of children and the administration and enjoyment of their assets (parental authority) are the responsibility of the father and, only in his absence, the mother (Civil Code, Book I, Title X, art. 240).

57. In criminal matters, discrimination can be discerned in the concept of womanhood underlying most offences of a sexual nature. Particularly serious was the discrimination with respect to the duty of fidelity between the spouses; infidelity was treated and punished under the heading of adultery, and penalties were heavier for the woman. A recent legal reform has ended this inequality.

58. Labour legislation now contains no direct discrimination in view of the recent abolition of the only existing discriminatory provisions, which forbade women to perform certain types of work. However, there is still de facto discrimination deriving from women's cultural role.

59. According to data from the national employment survey by the National Institute of Statistics, covering the period September-November 1993, women over the age of 15 accounted for 34.4 per cent of the workforce as against 76.7 per cent for men. The corresponding survey for the fourth quarter of 1992 shows that women are employed mainly in the services sector, where labour discrimination is greater. The average income earned by women is 68.3 per cent of men's average income in financial services and 60.7 per cent in social and personal services. As one goes further up the jobs ladder, differences in earnings increase. Thus in the occupational group “office and related staff”, women's average earnings stand at 70.5 per cent of men's earnings, but they are at 45 per cent of the male level in the case of professional, technical and related staff.

1. Legal reforms since 1990

60. (a) Act establishing severance pay for women working in private homes. This is financed by a monthly employer's contribution equivalent to 4.11 per cent of the woman's taxable remuneration. When the period of employment comes to an end, regardless of the reason for termination, the employee is entitled to withdraw the accumulated funds; [14]

(b) Act rescinding the rules against women performing specific types of work (work in mines and night work); this law establishes working hours and a minimum wage for women working in private homes and the employees of commercial establishments, hotels, restaurants or clubs; it also establishes obligations with regard to meals, transport and accommodation for seasonal women workers in the agro-industrial sector. It enables fathers to take leave upon the birth or sickness of a child if the mother has died in or in consequence of childbirth, and in the event of serious illness in a child under the age of one year if the mother so chooses. This has initiated a change of attitude, in that men can also share and shoulder their responsibilities as fathers for the care of their children; [15]

(c) Act abolishing the offence of adultery, for which penalties were heavier for women; [16]

(d) Act establishing an alternative form of ownership of property for married couples (see para. 243);

(e) Act on domestic violence (see paras. 240 and 241).

2. Bills under consideration

Proposed constitutional reform

61. The existing article 1 of the Constitution stipulates: “Men are born free and equal in dignity and rights”. This wording will be replaced by the following: “Men and women are born free and equal in dignity and rights”. In addition, the bill calls for an amendment of article 19, paragraph 2, of the Constitution, explicitly incorporating the principle that there should be no arbitrary discrimination between men and women. The following sentence will be added: “Men and women are equal before the law”. This bill builds upon the Convention on the Elimination of All Forms of Discrimination against Women and strengthens the constitutional underpinnings of legal, political and social equality and equality of opportunity.

Other bills

62. (a) Will add the offence of sexual harassment to the sexual offences covered by the Penal Code;

(b) Will establish penalties for sexual harassment in the workplace;

(c) Will prohibit requiring a pregnancy test before hiring a woman;

(d) On antenatal and postnatal leave. The objective is to give working mothers the opportunity to delay their antenatal leave and add the days worked to postnatal leave, thus giving them more time to spend with their newborn child. This bill will be supplemented by a governmental initiative to pay a maternity allowance to women working in private homes, thus enabling them to meet the continuous employment requirements for eligibility for maternity allowances. This will improve the current situation of these women who, having no maternity rights, are in many cases dismissed once their employers learn that they are pregnant;

(e) Will amend the offences of rape and abduction.

B. Policies for the advancement of women

63. The democratic Governments have initiated important measures with the aim of overcoming the remaining imbalances between men and women as regards the enjoyment of their rights.

1. National Women's Service

64. The starting-point for the institutionalization of the task of improving the status of women was the establishment of the National Women's Service (SERNAM) in 1991. [17] The establishment, consolidation and strengthening of this national agency for the advancement of women has been the main achievement in efforts to secure equal rights for women. SERNAM is a decentralized public service answerable to the President of the Republic through the Ministry of Planning and Cooperation. Its Director has ministerial rank. The purpose of SERNAM is spelled out in article 2 of the Act establishing it: “The National Women's Service shall be responsible for

collaborating with the Executive in the study and proposal of general plans and measures to allow women equal rights and opportunities with men in the process of political, social, economic and cultural development of the country, while respecting the nature and specificity of women deriving from the natural differences between the sexes, including their appropriate embodiment in family relations".

65. In the area of public policy, SERNAM has from its inception carried out programmes in conjunction with other ministries, municipalities and public services. Some of the most important are mentioned below:

(a) Support for female heads of household: SERNAM has, since its inception, concerned itself with the situation of female heads of household, initially by generating strategies to enable families headed by such women to be recognized as such, and providing them with opportunities in the areas of health, education and employment. Some 300,000 families, mainly in the poorest sectors of the country, are dependent on women at the head of the household. At present programmes aimed at female heads of household are being carried out in 72 communes and progress towards the autonomy of such women is planned in the various municipalities. The problem is approached through the formulation of comprehensive and intersectoral measures ranging from vocational training to infant care;

(b) Prevention of teenage pregnancy: In 1991, SERNAM began the teenage pregnancy programme, which brings together a wide range of specialists and researchers on the subject. The goals are to ascertain the actual situation with regard to such pregnancies, to examine the problem as it affects society and the Government, and to coordinate proposals for public policies with the various ministries providing assistance in this area. The programme began with a diagnostic study designed and executed by a team from the University of Chile, in conjunction with SERNAM. Subsequently, national and regional seminars were held to ascertain the views of experts on the subject and the actual nature and extent of the problem throughout the country. At the same time, a pilot project was designed and put into effect in a district of Santiago involving health officials, teachers, parents, guardians and students. Methodologies and contents were tested, materials were produced, and the project ended with an external evaluation which showed its successes and failures. At present, SERNAM's concern is reflected in its membership of an inter-ministerial commission on the subject. The commission is carrying out a project centred on community debates about the affections and sexuality, which are being held at schools in several parts of the country. SERNAM's responsibility within the commission is to gather information and consider the question as it is seen by young people and their families;

(c) Other programmes: Vocational training; support for micro-enterprises; sports and recreation; kindergartens for women working part-time; child care; prevention of domestic violence (see paras. 240 and 241).

2. Equal Opportunities for Women Plan, 1994-1999

66. At present, with the experience gained during its first years of activity and in order to fulfil its central objective of involving various sectors of the State administration in transforming the situation of women, SERNAM has formulated the "Equal Opportunities for Women Plan, 1994-1999". [18] This sets targets for the period, defines coherent and systematic measures for attaining them and means of evaluating the measures, and identifies the agencies involved in executing them. The Plan is a substantial undertaking, aimed at making public policies more efficient. Within its framework, action is already being undertaken through various ministries. For example, the Ministry of Health has converted the Perinatal Maternal Programme into a Women's Total Health Programme; the Ministry of Education has incorporated the gender perspective into the bidding conditions for publishing houses preparing teaching material for courses in municipalities; the Ministry of Justice has sponsored two legislative proposals relating to the plan for the advancement of women and protection of the family: the Domestic Violence Act and the Sharing of Earnings Act (see paras. 240 and 241). As has already been stated, there is also a proposal to amend article 1, paragraph 1, of the Constitution by making an express reference to "women"; the Equal Opportunities for Women Plan has thereby acquired constitutional support for the development of positive State action in the field of discrimination against women.

C. Cooperation with the international protection system

Reports to the Committee on the Elimination of Discrimination against Women

67. In September 1991, the Government submitted its first report on implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW/C/CHI/1 of 3 September 1991). In January 1995, the second report was submitted, describing achievements during the period 1991-1995 (CEDAW/C/CHI/2 of 19 October 1995).

Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women

68. This Convention was signed by the Government of Chile on 9 June 1994, approved by the National Congress on 24 June 1996 and ratified on 15 November 1996.

Article 4

69. At present the Constitution provides for the following states of exception: in the event of foreign war, the state of alert; in the event of civil war or internal disturbance, the state of siege; in serious cases of disruption of public order or harm or danger to national security, due to internal or external causes, the state of emergency; in the event of public disaster, the state of disaster (arts. 39 et seq.).

70. During the military regime these states of exception were all declared, in addition to that provided for in transitional article 24 of the Constitution, which was known as a "state of danger of disturbance to the internal peace". From 11 September 1973 onwards, Chile lived under one or

more of the above-mentioned states of exception. The state of siege was not lifted until June 1995, and the states of emergency and danger of disturbance to the internal peace remained in effect until August 1988. In such a setting, almost any human rights could be violated.

71. The victory of the opposition over General Pinochet's supporters in the 1988 referendum enabled it to reach agreements on amending the 1980 Constitution. The regulations on states of exception were amended in 1989 as indicated below, with the aim of strengthening respect for human rights while states of exception are in force, limiting the rights that can be affected and stipulating that measures adopted during states of exception may not extend beyond the duration of the state of exception in question.

72. The remedies of amparo (habeas corpus) and protection were recognized as admissible during a state of alert or state of siege with the proviso that the courts may not pronounce on the grounds and circumstances adduced by the authorities as their reasons for wielding the exceptional powers conferred on them by the Constitution. The application for and processing of these remedies do not suspend the effects of the measures decreed, without prejudice to the final decision of the courts. It has been reported that the National Commission on Truth and Reconciliation has recommended the possibility of abolishing the above-mentioned proviso. [19]

73. Presidential authority to deport people, prevent them entering or leaving the country, restrict the right of association and the right to join a trade union, and impose censorship of correspondence and communications during a state of siege has been terminated. Only the freedoms of information and opinion may be restricted, not suspended as the Constitution allowed prior to the reform.

74. The effects of a state of emergency have been limited to restrictions on freedom of movement and freedom of assembly. Previously, restrictions could also be imposed on the freedoms of information and opinion, specific individuals could be barred from entering or leaving the country, and correspondence and communications could be censored.

75. Since March 1990 no states of exception have been declared in Chile. Consequently, the fundamental rights guaranteed in the Constitution and the Covenant have not been suspended or restricted.

Article 5

76. Article 19, paragraph 26, of the Constitution expressly guarantees that provisions regulating or elaborating on the fundamental rights recognized by the Constitution may not affect the essence of those rights or impose conditions, levies or requirements which prevent their free exercise. Reinforcing this principle, the constitutional reform of August 1989 repealed the second paragraph of the article, under which “provisions relating to the states of exception and others provided for in the Constitution” were exempted from this guarantee.

77. In a decision of 24 February 1987, the Constitutional Court ruled on the meaning of the expressions “affect the essence of a right” and “prevent its

free exercise". The ruling stated that "the essence of a right is affected when it is deprived of that which is intrinsic to it with the result that it is no longer recognized" and "free exercise is prevented in those cases in which the legislature makes it subject to requirements that render it infeasible, impede it beyond a reasonable extent or deprive it of its legal protection".

78. In a decision of 7 June 1985, published in the Official Gazette dated 14 June 1985, the Constitutional Court, reviewing the constitutionality of a draft Organization Act on states of exception, defined the expression "suspend" a right as temporarily preventing its exercise in its entirety, and the expression "restrict" as circumscribing or reducing its exercise to a lesser extent, thereby establishing a yardstick for determining whether a limitation is permissible or not.

Article 6

A. Legal framework

Right to life (art. 6, para. 1)

79. The physical and psychological aspects of this right are protected in the Constitution, which includes protection of the life of an unborn child (art. 19, para. 1, first and second subparas.). The same article of the Constitution protects health and provides for preservation of the environment (art. 19, paras. 8 and 9).

Extrajudicial executions and enforced disappearances

80. Given the normal operation of the rule of law, the absence of states of exception and the approach taken by the higher courts to the protection of individuals' rights, the actions of State officials are constrained within legal bounds. These institutional bounds have put an end to the enforced disappearances and extrajudicial executions that occurred on a massive and systematic scale in the recent past. Exceptionally, deaths which have been reported as possible instances of excessive use of force by law enforcement officials have immediately been referred to the courts for investigation. [20]

Death penalty (art. 6, para. 2)

81. Chilean law provides for the death penalty (Penal Code, art. 21), with legal and procedural safeguards which make it applicable only in exceptional cases. Laws establishing it must be passed by a qualified majority and the penalty is rarely pronounced, death not being a single penalty but as one of several on a scale. On this question the Penal Code states that "if there is no higher penalty on the scale in question or the next would be the death penalty, the penalty imposed shall be rigorous imprisonment for life" (art. 77, second para.). The court of second instance, when reviewing a death sentence, must uphold it by unanimous vote; otherwise the immediately inferior penalty shall be applied. The judgement of this court is transmitted to the President of the Republic through the Ministry of Justice so that he can exercise his powers of pardon or commutation of the sentence.

Commutation of the death penalty (art. 6, para. 4)

82. No death sentence has been carried out since 11 March 1990. In the period since then, President Aylwin commuted to life imprisonment the death sentences imposed on two defendants, on 26 August 1992 and 29 January 1993, for the offences of robbery with homicide and aggravated homicide respectively. On 28 August 1996, President Frei commuted to life imprisonment the death penalty imposed by the courts on a defendant convicted of homicide, robbery and the rape of a minor.

Non-imposition of the death penalty on persons below 18 years of age (art. 6, para. 5)

83. Persons below 18 but over 16 years of age who are declared to be of sound mind are liable to the lowest penalty on the scale laid down for adults for the offence in question. This precludes imposition of the death penalty (Penal Code, art. 72).

Non-imposition of the death penalty on pregnant women (art. 6, para. 5)

84. The Penal Code (art. 85) stipulates that the death penalty shall not be carried out on a pregnant woman, and that she shall not be informed of a sentence imposing the death penalty on her until after the birth of the child.

1. Legal reforms since 1990

85. In 1990, the Government of President Aylwin submitted a bill for the abolition of the death penalty under Chilean law. The Senate - where the political bloc which supports the Government did not have and currently does not have a majority - rejected this initiative, although it agreed to reduce the number of crimes for which the death penalty may be imposed. The enactment promulgated lists the provisions that were amended in the Code of Military Justice, the Penal Code, the State Security Act and the Weapons Control Act to reduce the number of crimes which carry the death penalty. The draft sent by the Executive called for the abolition of the death penalty for all crimes. The Senate abolished it for more than half of them. Most of the crimes which still carry the death penalty may be committed only in time of war. [21]

B. Effective remedy

86. (a) The courts decided to break hunger strikes by prisoners (decision of the Santiago Court of Appeal of 23 March 1994, on an application for protection, ordering the Chilean prison service to take all necessary measures to end a hunger strike; decision of the Santiago Court of Appeal of 7 September 1995, on an application for protection, ordering a person to be taken to hospital in order to force him to stop refusing food; decision of the Santiago Court of Appeal of 24 May 1996 on an application for protection).

(b) It was decided to set aside decisions by patients to refuse blood transfusions ordered by a treating physician (Supreme Court decision of 5 May 1992, on an application for protection; Supreme Court decision of 2 November 1995, on an application for protection, ordering a blood

transfusion to be given to a patient against his will in order to restore his health and keep him alive; decision of the Court of Appeal of 1 December 1995, on an application for protection, granting a hospital police assistance to prevent relatives and members of the same faith as the patient from impeding the carrying-out of a blood transfusion).

C. Cooperation with the international protection system

Position vis-à-vis the death penalty

87. The legislative programme of the Government of President Frei calls for the complete abolition of the death penalty. [22] Confirming this position, the delegation of Chile to the 1994 regular session of the United Nations General Assembly co-sponsored a draft resolution submitted by Italy calling for a worldwide moratorium on the imposition of the death penalty, with a view to its complete abolition by the year 2000.

Inter-American Convention on the Forced Disappearance of Persons

88. Chile took an active part in the drafting of this Convention and signed it on 10 June 1996. The Convention is currently before the Congress for approval, which will be especially important for the future regulation of the prevention, investigation and punishment of this crime in national legislation.

D. Violations of the right to life committed under the military regime

1. Investigation of violations of the right to life

89. The investigation of violations committed under the military regime and the public and private compensation of victims and their relatives have been central tasks of the democratic transition in Chile. The task initially undertaken by the National Commission on Truth and Reconciliation ended with a report whose recommendations were implemented by the National Compensation and Reconciliation Corporation.

(a) National Commission on Truth and Reconciliation

90. This Commission was established by Supreme Decree [23] to ascertain what actually happened to detainees who disappeared, were executed or died under torture, where the State appeared to bear responsibility for the actions of its agents or persons in its service, and the truth about abductions and attempted killings by private individuals on political pretexts under the military regime. The Commission was given broad powers to undertake inquiries, but not to summon people to appear before it. It was expressly forbidden to pronounce on the possible responsibility of individuals for acts it was investigating, it being considered that determining any offences that might have been committed, identifying the culprits and inflicting penalties were the exclusive responsibility of the courts.

91. In February 1991, after nine months of work, the Commission delivered a report to the President of the Republic. [24] The report analyses the political context of radicalization and violence in which the 1973 coup d'état occurred

and the institutional system established by the military regime, making special reference to the repressive legislation imposed. It then describes the repressive measures used by the Directorate of National Intelligence (DINA) and the National Information Centre (CIN), the serious deficiencies of the judiciary in its role as protector of human rights, the positive role played by the churches and human rights organizations, the violent protests of the 1980s and, in general, the most striking features of the political process during the previous regime in Chile.

92. The report concluded that there had been very serious violations of human rights resulting in death between 1973 and 1990. The Commission found the following cases to be fully proven:

Killings by agents of the State	1 068
Killings resulting from detention-disappearance	957
Killings attributable to political violence (persons killed since 1973 in clashes and protests)	164
Victims of private individuals acting on political pretexts (the Commission acknowledges that such incidents are not traditionally considered violations of human rights)	90
Total	2 279

In addition to the cases mentioned, 614 remained unclarified since the Commission was unable to reach a conclusion for lack of relevant information.

93. The Commission's determination of the facts about human rights violations between 11 September 1973 and 11 March 1990 was a way of restoring the victims' dignity. The President, announcing the publication of the Commission's report to all Chileans in March 1991, publicly and solemnly honoured the personal dignity of the victims “denigrated by accusations of crimes that were never proved, against which they never had the opportunity or adequate means to defend themselves”.

94. The report ended by proposing moral and material compensation for the victims and their relatives. It also made specific recommendations to prevent future violations of human rights in Chile and to consolidate a culture of respect for these rights.

National Compensation and Reconciliation Corporation

95. This body was established by law [25] and operated as a decentralized public service under the authority of the Ministry of the Interior. It was set up for a limited period of 24 months as from 8 February 1992. This period was extended annually until December 1996, when the Corporation was wound up.

The “programme to investigate the fate of the victims”, which reports to the Ministry of the Interior, has been maintained as the depositary of the Corporation's archives. When the Corporation was wound up, it issued a final report summarizing the work it had carried out during its four and a half years of activity. [26]

96. The general purpose of the Corporation is stated in article 1 of the Act establishing it: “Its purpose shall be to coordinate, implement and promote activities to give effect to the recommendations contained in the report of the National Commission on Truth and Reconciliation”. In accordance with these terms of reference, the Corporation's High Council defined specific tasks to be carried out through various programmes. With regard to compensation for the victims and families of violations of the right to life, particular reference should be made to the “case classification programme” and the “programme to investigate the fate of the victims”:

(a) The case classification programme was designed to investigate and collect information for the classification of cases of victims of human rights violations which were not resolved by the National Commission on Truth and Reconciliation because information was lacking, as well as new complaints received by deadlines set by the Corporation. The High Council started this programme on 5 August 1992 and completed it on 28 February 1994. At 90 working meetings, it discussed and decided on 2,188 reported cases, of which 899 were classified as cases involving victims. Six hundred and forty-four were declared cases of victims of human rights violations and the remaining 255 were deemed cases of victims of political violence. In the other 1,289 cases, such a decision was not reached because it was considered that there was insufficient evidence. The process of recognition by the State ended with the classification by the Corporation of the above-mentioned 899 victims. The work carried out by the Corporation and the Commission included the investigation of 4,750 complaints and the declaration of 3,197 persons as victims; 2,095 were determined to have died and 1,102 to have disappeared after their arrest.

(b) The purpose of the programme to investigate the fate of the victims was to determine the whereabouts of 1,054 missing detainees and 197 persons whose remains had not been located, although their deaths had been legally acknowledged. The remains of 54 missing detainees and 90 people acknowledged to be dead had been found before the Corporation started work. A total of 1,254 cases were investigated by the team in charge. The investigations conducted under the programme led to the discovery of the remains of 117 persons: 79 missing detainees and 38 people acknowledged to be dead. It is particularly significant that bodies exhumed in section 29 of the General Cemetery were identified following proceedings in Santiago Criminal Court No. 22 in which the Corporation helped to identify the remains. [27]

97. When the Corporation was wound up, the whereabouts of 975 missing detainees and 159 persons who had been executed, but whose remains had not been handed over to their families, still had to be determined. As indicated, this programme continues under the authority of the Ministry of the Interior.

2. Compensation of victims and their families

Material compensation

98. The following financial benefits and assistance were established by law [28] for victims' families:

(a) An adjustable monthly allowance for the families of the victims referred to in the report of the National Commission on Truth and Reconciliation and for others deemed by the National Compensation and Reconciliation Corporation, through its case classification programme, to be in the same situation. The allowances have been paid out as of 1 July 1991 for the victims classified by the Commission. In the case of the beneficiaries of the persons entitled and classified as such by the Corporation, the allowances have been paid as of the date when the High Council handed down the relevant classification decision. Beneficiaries of this allowance are: the surviving spouse, the mother or, in her absence, the legitimate father, the mother of the victim's natural children or their father, when the mother is the victim, children aged under 25 years and disabled children, regardless of age. The allowance is divided among the beneficiaries according to percentages set by law. These percentages are as follows:

40 per cent for the surviving spouse;

30 per cent for the mother of the victim or, in her absence, the father;

15 per cent for the mother or the father of the natural children;

15 per cent for each child aged under 25 years and for disabled children, regardless of age.

Where there is more than one child, these percentages are payable to each one, even if they amount to more than 100 per cent of the allowance. According to data made available by the Social Security Institute (INP) in December 1996, the amount of the allowance was Ch$ 161,906 (US$ 387) with one beneficiary and Ch$ 226,667 (US$ 542), with more than one beneficiary. On that date, the allowance was being received by 4,570 persons. According to INP, allowances are paid to the following persons:

1,330 spouses;

1,524 mothers or fathers;

260 mothers or fathers of a natural child;

1,405 children aged under 25 years;

89 disabled children.

(b) In addition to the monthly allowance, the law granted the above-mentioned beneficiaries a one-time compensatory bonus equal to 12 months of the allowance.

(c) The law also provides free medical benefits for all beneficiaries and help with school expenses for the victims' children, who are also exempted from compulsory military service. School assistance includes the annual enrolment fee, the monthly fee for secondary and higher education students (universities and vocational institutes), and a subsidy during the school year. These educational benefits may be applied for up to age 35 and be used at any age. According to Ministry of Education data, 1,021 persons were receiving educational benefits in December 1996, as follows:

158 monthly subsidies for secondary students;

689 enrolment fees, school fees and monthly subsidies for students in universities, vocational institutes and technical training centres without government funding;

174 enrolment fees, school fees and monthly subsidies for students in universities and vocational institutes with government funding.

Effective remedy

99. With regard to human rights violations, particular reference should be made to the decision, taken by the Office of the Comptroller-General of the Republic on the basis of the protection that the Chilean Constitution and the Inter-American Convention on Human Rights grant to unborn children, that the interruption of the life of an unborn child is a violation of human rights and a ground for the benefits provided for in Act No. 19.123 on compensation (ruling by the Office of the Comptroller-General of the Republic, dated 21 August 1995).

Moral compensation

100. (a) Memorial Foundation: On the basis of a petition by the Association of Relatives of Missing Detainees and the Association of Relatives of Persons Executed for Political Reasons, the Government enacted a decree [29] on 13 March 1991 establishing the Memorial Foundation for Missing Detainees and Persons Executed for Political Reasons. The Foundation is chaired by an official from the Ministry of the Interior and composed of representatives of the two Associations and well-known figures in the human rights field. It undertook to build a plaza and a mausoleum in the Santiago General Cemetery in order to preserve the historical memory and bury the remains of any victims found. The monument was designed by well-known national artists. The first stone was laid in September 1990. The plaza has a marble plaque on which the names of the missing detainees and persons executed for political reasons are engraved. The plaza and the mausoleum were completed in March 1994. Some missing detainees whose remains were found are buried there; [30]

(b) Hornos de Lonquén Monument: This place, where the remains of 15 missing detainees were found in 1978, has been declared a historical monument by the Ministry of Education. The first stone was laid during a ceremony held in February 1996;

(c) Memory House: During a solemn ceremony held in the reception room of the Ministry of National Assets on 7 November 1996, the Minister gave the

Chairwoman of the Association of Families of Missing Detainees the keys to a building in the city of Santiago where the Memory House will house offices and the archives and documents collected during nearly two decades of searches and complaints. It will have a meeting room and a special display showing pictures of missing detainees and the photographic history of the activities carried out by the Association and the human rights movement in all parts of the country.

3. Judicial investigation of violations of the right to life

101. Investigating violations of the right to life committed during the military regime and identifying the culprits and the penalties to which they are liable are the responsibility of the courts of justice. During the trials for offences committed between 11 September 1973 and 10 March 1978, penalties could not be imposed on the culprits because the Amnesty Decree Law enacted during the military regime was still in force. The proceedings were instituted by the relatives of victims in civil courts, which conducted the investigations properly. In most cases, however, the culprits were not brought to trial because of the way in which the courts interpreted the Amnesty Decree Law. In cases where the investigation showed the involvement of members of the armed forces or Carabineros, the military courts either assumed jurisdiction by means of an order of prohibition or the civil court declined jurisdiction. The first situation involved a conflict of jurisdiction between the ordinary courts and the military courts, which must, in accordance with the rules in force, be settled by the Supreme Court. The majority on the Supreme Court decided to award jurisdiction to the military courts, in accordance with a broad interpretation of the concept of a "service-related act", which is defined in the Code of Military Justice as "any act which relates to or is connected with the functions of any member of the military as a result of membership of the armed forces" (art. 421). Once the jurisdiction of the military courts had been established, they applied the Amnesty Decree Law without bringing anyone to trial who appeared to be justifiably suspected of having taken part in the offences in question. In most of the cases which reached the Supreme Court as a result of procedural appeals, the Court upheld a reading of the Amnesty Decree Law that held that it was immediately applicable and there was no need to determine criminal responsibility first.

4. Amnesty Decree Law

102. Decree Law No. 2.191 was enacted by the Military Junta and published in the Official Gazette on 19 April 1978. It granted a general amnesty to anyone who might have committed offences during the period from 11 September 1973 to 10 March 1978 while the state of siege was in effect. The democratic Governments have maintained a clear-cut position of opposition to the Amnesty Decree Law, claiming that it is unlawful and regretting that it is impossible to repeal it because the necessary parliamentary majority is lacking. Although President Aylwin's Government proposed that the country should try to reach a national consensus on the repeal of the Decree Law, this was not feasible. It must be borne in mind that there has been no conjuncture of political forces in the Senate in favour of a legislative proposal to this effect, which has to originate in the Senate. The democratic Governments have maintained that the legislation in force does not prevent investigations by

the courts from continuing until the offences under investigation have been sufficiently clarified and the identity of the culprits determined. This is what is stated by the so-called "Aylwin doctrine", with which the current Government agrees. On forwarding the report of the National Commission on Truth and Reconciliation to the Supreme Court in March 1991, the President of the Republic expressly stated, in the accompanying letter, that: "In my view, the amnesty, which the Government respects, cannot be an obstacle to the judicial investigation and the determination of responsibility, especially in cases of missing persons". Despite the situation created by the Amnesty Decree Law, it is a definite step forward that 15 police officers, who include the head of the National Intelligence Department (DINA) during the most critical period of human rights violations in the time of the military regime, are serving sentences for human rights violations in Punta Peuco Prison. [31]

Article 7

A. Legal framework

Torture

103. The prohibition of ill-treatment is one of the guarantees that the Constitution offers to all inhabitants of the Republic (art. 19, para. 1 (4)). Article 150 of the Penal Code provides for penalties ranging from 61 days to 5 years for anyone who unlawfully orders or extends the detention of a prisoner incommunicado, applies torture or uses unnecessary force and anyone who arrests or detains people in places other than those designated by law. On the Government's initiative, the National Congress is discussing a bill designed to amend the above-mentioned article and make torture a specific offence subject to harsh penalties in proportion to its seriousness (see para. 107). The Code of Military Justice, which is applicable to members of the army, the navy, Carabineros and the air force (art. 6), provides that members of these institutions who use unnecessary violence or order it to be used are liable to penalties ranging from 60 days to 15 years (art. 330). Title IV, article 19, of Decree Law No. 2.460 (Chilean Police Department Organization Act) reads: "Chilean Police Department officials shall be prohibited from committing any act of violence designed to obtain statements from a detainee". The penalties for violations of these rules vary in the same way as those referred to in the above-mentioned article of the Code of Military Justice.

1. Legal reforms since 1991

1991 criminal procedure reform

104. To prevent torture, one of the reform acts [32] amended the Code of Criminal Procedure to protect the physical and mental integrity of detainees by requiring a medical examination of the detainee and his protection during any exceptional extensions of periods of detention (art. 272 bis, paras. 3, 6 and 11); prohibiting any prolongation of detention incommunicado beyond 10 days (arts. 299 and 300); limiting the severity of detention incommunicado by allowing a lawyer to be present when the detainee is at the disposal of the police or the court (art. 293, para. 3, and art. 303); and requiring the court to ascertain that the detainee has not been subjected to torture or any threat

of torture when making a confession (art. 323, para. 2). Serious negligence by the court in guaranteeing due protection of a detainee is punishable as dereliction of duty. As a result of transitional provisions of the above-mentioned Act, many cases initially handled by the military courts during the military regime were referred to the civil courts. In view of the likelihood that these proceedings against civilians were based on extrajudicial confessions obtained by means of ill-treatment, it was provided that accused persons were entitled to withdraw statements made before military courts and that civil courts would regard such new testimony as though it were the first confession of participation in the offences under investigation.

New prison regulations

105. This text [33] amends the earlier rules governing prisons, which dated from 1928. It proposes that a successful prisons policy should be based on respect for the fundamental rights of detainees and should impose penalties on Gendarmería officials (in charge of prisoners) for any use of torture, cruel, inhuman or degrading treatment, either in word or in deed, and for unnecessary harshness against detainees.

2. Bills under consideration

New Code of Criminal Procedure [34]

106. Basically, this initiative means that the present Chilean inquisitorial procedure will be replaced by a criminal procedural system that will meet the requirements of oral, public and adversarial proceedings conducted by a collegiate court which assesses the evidence and hands down a ruling, and investigations carried out by an office of public prosecutions with the help of the police. It is hoped that the separation of investigatory functions, on the one hand, from the prosecution on the other, will make for more diligent, thorough and technical police investigations based on a variety of types of evidence, thereby preventing the possibility of ill-treating an accused person to secure a confession as a basis for proceedings. If the court does not have to investigate cases it can focus on trying them by the rules of law and guaranteeing the rights of the persons involved. The new procedural system gives the Public Prosecutor's Office broad powers during the investigation of the case, limited only by individual human rights, which can be upheld by the courts if they are violated. The precautionary measures taken against the accused are the first, according to the bill, to require such monitoring. This bill will make considerable changes to guarantee the protection of detainees, having an impact on the right not to be tortured (see para. 131).

Government proposal for a bill to amend the Code of Criminal Procedure and the Penal Code in respect of detention and to establish rules for the protection of the rights of citizens [35]

107. In addition to making torture a specific offence, as referred to below, this initiative is designed to eliminate detention on suspicion and to improve the current legislation on providing detainees with information on their rights (see para. 133).

Definition of the offence of torture

108. At present, anyone who unlawfully extends an accused person's detention incommunicado, tortures him or uses unnecessary force (art. 150 of the Penal Code) is liable to penalties ranging from 61 days to 5 years. The bill adds another category to the article in question, with the same penalty, for anyone who, in the exercise of his functions, has knowledge of such offences and could prevent them, but does not do so.

109. The bill also proposes that the offence of torture should be expressly defined as follows, in accordance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: “The term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.” Penalties ranging from 541 days to 10 years are laid down for this offence, in addition to suspension or disqualification, as appropriate. If the offences of rape, sodomy, murder or serious injury are committed in connection with torture, the culprit is liable to the maximum penalties prescribed for them.

110. These proposals by the Government are in keeping with recommendations 1 and 4 made by the Committee against Torture on the second periodic report of Chile, considered on 8 November 1994 (CAT/C/SR.191 and SR.192).

B. Effective remedy

111. It was resolved by the courts that no procedural value should attach to an extrajudicial statement made by a defendant as evidence of his involvement in an offence, since it had probably been obtained by means of ill-treatment. That practice, it was pointed out, was prohibited in international treaties, such as the Pact of San José, Costa Rica, the International Covenant on Civil and Political Rights and others, which were valid under domestic law by virtue of article 5, paragraph 2, of the Constitution and were binding on the courts, as well as forming part of the law of rational and due criminal process (decision by the Santiago Court of Appeals on 11 April 1995, during the review of a criminal judgement in first instance).

Remedy of amparo

(See para. 135.)

C. Cases of torture

112. Now that the institutional framework that allowed the use of torture during the last regime has been eliminated and the political and legal situation in the country has returned to normal, the status of the right to

personal integrity has changed considerably. The situation described in the report of the National Commission on Truth and Reconciliation, which states that “Because there were so many and they were virtually all the same, there is no denying that cases of torture did occur.” It should be emphasized that the democratic Governments are determined to implement a policy designed to prevent abuses, to punish them when they occur and to change the legal framework which may make them possible.

113. As stated by the Special Rapporteur on torture in the report on his visit to Chile in 1990, the civilian Governments have achieved considerable progress in re-establishing human rights and have made a real commitment to the need to eliminate the practice of torture. [36] At present, torture is not systematically practised in Chile as a matter of government policy. [37]

114. The Special Rapporteur reports on cases of torture which occurred from 1992 to 1995 at the hands of Police Department (civilian) and Carabineros (uniformed) officials. The Special Rapporteur states that he could always count on the Chilean Government for prompt replies to the complaints which he transmitted. These are isolated incidents, gradually decreasing in number, not at all the outcome of planned methods such as occurred under the military regime. The cases reported by victims are investigated by the courts of justice. [38]

115. The civilian Governments' commitment to human rights has been reflected in their sincere concern to ensure that such problems are solved. As recognized in the report by Mr. Rodley, [39] institutional changes have been taking place in the Police Department since March 1990 for the purpose of eliminating abuse of detainees by Department staff and promoting and guaranteeing respect for detainees' rights through educational measures and effective disciplinary monitoring of police officers. For example, there has been a refocusing of the subjects taught at the Police Department School, which provides career training for those admitted to the Police Department, and by the Higher Institute, whose specialization and post-graduate courses are required in order to move up in rank in police work. During President Aylwin's Government, moreover, the Police Department staff underwent major restructuring. About 20 per cent of the staff retired for various reasons, one being that administrative reports called for such a measure, in some cases, on the grounds of physical ill-treatment of detainees by police officers. [40] The Carabineros have also been making efforts to prevent acts contrary to human dignity from being committed in the course of duty. Officials whose conduct departed from the rules have therefore been dismissed. [41]

116. Both the Police Department and the Carabineros receive complaints relating to violations of fundamental human rights: the civilian police, in Department V, Internal Affairs; and the uniformed police, at the Office of the Director-General of the Carabineros.

D. Cooperation with the system of international protection

Withdrawal of reservations to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

117. This Convention was incorporated into the Chilean internal legal system in 1988, under the former regime, but with reservations which were contrary to its purpose relating to article 2, paragraph 3, and articles 3, 20 and 30, paragraph 1. In September 1991, during President Aylwin's Government, the instrument of withdrawal of reservations to the Convention, including recognition of the competence of the Committee against Torture under article 20, was deposited with the Secretary-General of the United Nations. The only reservation still in force relates to article 30 of the Convention and the declaration that the Inter-American Convention takes precedence over the United Nations Convention in the event of incompatibility between the two Conventions in Chile's relations with American countries. In August 1990, a similar instrument was deposited with the Secretary-General of the Organization of American States for the purpose of withdrawing the reservations to the Inter-American Convention to Prevent and Punish Torture.

Reports to the Committee against Torture

118. The Committee considered the second periodic report of Chile (CAT/C/20/Add.3) at its 191st and 192nd meetings held on 8 November 1994 (CAT/C/SR.191 and SR.192). Previously, during President Aylwin's Government, Chile had submitted an additional report (CAT/C/7/Add.9) to the first report prepared by the military regime in 1989 and an addendum to that report, which were introduced at the Committee's sixth session in April 1991 (CAT/C/SR.77 and SR.78).

Visit to Chile by the Special Rapporteur on torture

119. In a note dated 12 April 1995, the Special Rapporteur on torture of the Commission on Human Rights, Mr. Nigel S. Rodley, informed the Government that he wished to visit Chile as part of his mandate, the better to evaluate the situation of torture in the country. On 31 May 1995, the Permanent Mission of Chile to the international organizations in Geneva received Mr. Rodley, telling him that the Government looked favourably on his request, since it was in keeping with Chile's position, as a member of the Commission on Human Rights, of encouraging visits by special and thematic rapporteurs to various countries and generally supporting the international human rights monitoring machinery. The official invitation to the Special Rapporteur was extended in June 1995. During his visit from 21 to 26 August 1995 in the city of Santiago, the Government made available all the facilities he needed to carry out his work, for which the Special Rapporteur expressly thanked the Government in his report. [42] In January 1996, the Special Rapporteur completed the report, which was submitted to the Commission on Human Rights at its fifty-second session.

Contribution to the United Nations Voluntary Trust Fund for the Victims of Torture

120. The Government decided to increase its contribution from 1997 onward. [43]

E. Violations of the right to physical and mental integrity committed during the military regime

Programme of Compensation and Full Health Care for Victims of Human Rights Violations (PRAIS)

121. The National Commission on Truth and Reconciliation dealt only with cases of torture resulting in death and disappearance. It therefore did not provide compensation to other people who had been tortured. In 1991, however, the Programme of Compensation and Full Health Care for Victims of Human Rights Violations (PRAIS) was established in response to recommendations from the National Commission for compensation for victims of torture under the military regime, as something the State could contribute and as a tangible form of reparation designed to bring out into the open what a large sector of the Chilean population had undergone. In 1993, seven PRAIS teams were working in State health services in various parts of the country and were funded by contributions from those services and international cooperation. At present, there are 13 teams. In addition to victims of torture, PRAIS beneficiaries include the relatives of missing detainees, people executed for political reasons and exiles. According to partial figures made available by PRAIS, covering seven of its teams, assistance was provided, between 1992 and 1995, to 1,339 families with one or more members who were tortured, as stated during interviews for admission to PRAIS. Alongside this figure, PRAIS records show that 2,858 detentions were reported on admission to the Programme, since, in the majority of cases, the victims were subjected to torture of some kind. This results in a total estimate of 4,197 family groups (with a member who was a victim of torture) that were cared for by PRAIS during the four-year period.

Villa Grimaldi Park

122. Through the Housing and Urban Development Service (SERVIU), which is under the authority of the Ministry of Housing, the Government expropriated the land where the Villa Grimaldi operated; a park was laid out and the first stage, now complete, will be inaugurated in early 1997. It is a memorial to the victims of the main torture centre of the National Intelligence Department (DINA), which operated at the Villa Grimaldi from 1974 to 1977.

Article 8

123. Chile was one of the first countries in the world to abolish slavery, in July 1823. Slavery is prohibited by the Constitution (art. 19, para. 2) and by the international human rights instruments in force in the country, which prohibit it in all its forms. However, Chile had not yet ratified the 1926 Slavery Convention, the 1953 Protocol and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices

Similar to Slavery. In order to change this situation and help strengthen the international legal system seeking the elimination of any vestiges of slavery and similar institutions or practices that may still exist, the President sent a message to the House of Representatives on 8 March 1994 with a view to the adoption of the Conventions and the Protocol. After adoption by the National Congress, the instrument of accession was deposited with the United Nations on 20 June 1995 and the Conventions have been in force in the country since 7 November 1995.

Article 9

A. Legal framework

124. The Constitution provides for the right to personal liberty and individual security (art. 19, para. 7).

Legality of detention (art. 9, para. 1)

125. Normal democratic existence has put an end to arbitrary arrests. At present, detentions are governed by a legal framework, and problems are being dealt with as indicated below. The Constitution (art. 19, para. 7 (c)) specifically indicates the two situations in which detention is applicable: when a person is caught in the act of committing an offence (in flagrante delicto) or when detention is ordered by a government official empowered to do so by law. The Code of Criminal Procedure (arts. 251, et seq.) governs detention. Article 260 gives the police powers of arrest in the cases it lists. The existence of so-called “detention on suspicion”, as provided for in article 260, paragraphs 3 and 4, has given rise to problems in respect of the legality of detention. The imprecise nature of the wording in such cases gives the police broad scope for interpretation, thus giving rise to situations that overstep the Constitution and international standards. During the visit to Chile by the Special Rapporteur, Mr. N.S. Rodley, Carabineros authorities told him that the force had issued internal instructions to limit such detentions, as a result of which they had dropped from 190,000 in 1992 to 15,000 in the first seven months of 1995. [44] In order to solve this problem and bring the rules on detention into line with constitutional and international standards, the Government has submitted a legislative proposal to Congress which will be commented on below (see para. 132).

Information for detainees on their rights (art. 9, para. 2)

126. Article 19, paragraph 7 (c), of the Constitution refers in general terms to the duty to provide notification of an arrest warrant in the manner prescribed by law. Under the procedural rules, one of the requirements is that the warrant should indicate the reason for the arrest (art. 281, para. 4, of the Code of Criminal Procedure), but there is no express obligation to inform a person of his rights at the time of his arrest. In order to guarantee this right, the Government has submitted a proposal to Congress on this matter, which will be referred to below (see para. 133).

Periods of custody, pre-trial detention and right to be tried within a reasonable time (art. 9, para. 3)

127. Article 19, paragraph 7 (c), of the Constitution states that a person may be held in custody for up to 24 hours if caught in flagrante delicto and for up to 48 hours otherwise, when he is arrested on the orders of a judicial or administrative authority or "on suspicion". This period of police custody may be extended, by means of a reasoned court decision, for up to 5 days, or up to 10 days when terrorist offences are being investigated. According to the regulations giving effect to the Code of Criminal Procedure, police custody ordered by a court embraces investigatory powers for the police, which may interrogate witnesses and the accused before placing him at the disposal of the judge. It has been pointed out that one of the problems with the procedure at this stage - when the accused is making a statement to the police - is that the guarantees protecting him are not as precisely regulated as in the case of judicial interrogation; it is thus easier to violate his rights. A step to remedy this situation was taken with the 1991 criminal procedural reform. Addressing problems resulting from the length of time a detainee spends in police custody, the draft new Code of Criminal Procedure proposes various changes which are referred to below, the most important being abolition of the periods of custody now in force. Pre-trial detention is governed by the Constitution and by Title IX, articles 356 et seq., of the Code of Criminal Procedure. A detainee must be released whenever the offence under investigation does not warrant corporal punishment (fewer than 540 days' imprisonment), or when surety is offered for the appearance of the accused at the trial and for execution of the court's judgement, and the offence does not warrant an afflictive penalty (less than three years). Where the offence does warrant an afflictive penalty, the accused may be released on bail on the recommendation of the Court of Appeal. In cases specifically provided for by law, the court must state its reasons for refusing to grant bail. The most telling yardstick of the right to be tried within a reasonable time is the length of pre-trial detention. Although there are no specific limits, article 356 of the Code of Criminal Procedure requires officials involved in proceedings to "prolong the custody of accused persons and person in pre-trial detention as little as possible". It also indicates that "pre-trial detention shall last only as long as necessary to achieve its purpose". According to statistics from the Chilean National Gendarmerie Department covering all parts of the country for the period 1980-1992, more than half the prison population, i.e. between 51 and 61 per cent of the total, is composed of persons in custody or awaiting trial, with persons in custody accounting for only 9 to 12 per cent and those awaiting trial, for 41 to 51 per cent of the total. The proportion of convicts varies between 39 and 49 per cent of the total, but is not more than 50 per cent.

128. The 1991 criminal procedural reform reaffirms the principle that pre-trial detention is the exception. The draft new Code of Criminal Procedure would replace the current procedure by one which is oral, direct and speedy in order to guarantee the right to be tried within a reasonable time. It also places clear-cut time limits on pre-trial detention as a means of guaranteeing that it is exceptional in nature.

Remedy of amparo (art. 9, para. 4)

129. Article 21 of the Constitution uses this term to provide for habeas corpus. It is described as a special remedy for cases of deprivation of liberty in which the Constitution or the laws are infringed. Its purpose is to re-establish the rule of law and guarantee the person concerned proper protection. It is governed by the Code of Criminal Procedure and the 1932 agreed order by the Supreme Court, which states how it is to be handled and decided. Article 21 establishes a speedy and informal procedure for deciding on deprivation of liberty. The remedy may be applied for by any person to the Court of Appeal, does not require any formalities and must be decided on within 24 hours. Both the Constitution and the Code say that the court may order the detainee to be brought forward in person. In practice, the detainee's situation is ascertained by means of written communications and telephone calls to the arresting body. As indicated above, the report of the National Commission on Truth and Reconciliation recommended that an order for the personal appearance of the accused before the court should be compulsory as a means of increasing the protection offered to him by this remedy. [45]

1. Legal reforms since 1990

1991 criminal procedural reform

130. To address problems resulting from the length of time spent in police custody, this reform entitled detainees who had not been placed at the disposal of the court to confer with their defence counsel for 30 minutes a day on their rights, treatment and conditions of detention (art. 293 of the Code of Criminal Procedure). It also provided that, where custody is extended, the court must protect the physical integrity of the detainee by satisfying the requirements of article 272 bis of the Code of Criminal Procedure (see para. 104). The principle that pre-trial detention is exceptional was reaffirmed, since the reform expressly stated that: “Release on bail is the right of any detainee or prisoner. This right may always be exercised in the form and conditions provided for in this title” (art. 356 of the Code of Criminal Procedure). Presumptions of anti-social behaviour that formerly served to deny release on bail were abolished.

2. Bills under consideration

New Code of Criminal Procedure [46]

131. The draft Code of Criminal Procedure is designed to solve, inter alia, problems resulting from the regulations on deprivation of liberty.

(a) Guarantees of protection for detainees: draft article 6 says that detainees are entitled to the benefit of all safeguards from the moment proceedings are initiated against them; their rights are thus protected from the time of arrest. Detailed rules (arts. 108 and 109) govern the machinery for the protection of anyone arrested by the police and placed in pre-trial detention, including: information on the grounds for the arrest; notification of the arrest to the family, defence counsel or person indicated; the assistance of defence counsel in the early stages of the investigation; and the entitlement not to make a statement.

(b) Periods of police custody: draft article 162 indicates that a detainee must be brought "directly and immediately" before the prosecutor or the court; where this is not possible, he may be held in police custody for up to 12 hours. In addition (draft art. 102), the police may not question him without the authorization of the Public Prosecutor's Office.

(c) Detention incommunicado: is limited to five days at most (art. 168), but this does not prevent a detainee from conferring with his defence counsel before making a statement. During detention incommunicado, a detainee may confer with his defence counsel for one hour a day, in the presence of the prosecutor, on the state of his health, conditions of detention and possibilities of ending detention incommunicado.

(d) Presumption of innocence: according to the bill, one of the basic principles that governs criminal proceedings is that the accused must be presumed innocent until a final sentence has been handed down; he must not be prevented from enjoying or exercising any of his individual rights until a penalty has been imposed. The system of precautionary measures has thus been redesigned in recognition of the fact that such measures are exceptional in nature (arts. 3 and 153). Pre-trial detention is regulated to ensure that it does not become a penalty (art. 182).

(e) Exceptional nature of pre-trial detention: the bill provides for a set of individual precautionary measures which are less harsh than pre-trial detention (art. 187). The use of pre-trial detention is limited, to keep it in proportion to the penalty that is likely to be imposed (arts. 170 and 172).

(f) Duration of pre-trial detention: the bill sets a maximum duration of 18 months for pre-trial detention, and requires detention to cease when it matches the term of imprisonment likely to be imposed by the sentence (art. 183).

Government proposal for a bill to amend the Code of Criminal Procedure and the Penal Code in respect of detention and to establish rules for the protection of the rights of citizens

Elimination of detention on suspicion

132. The House of Representatives has passed this bill, which removes detention on suspicion from the existing Code of Criminal Procedure (art. 260, paras. 3 and 4). As a result, the rule governing police conduct in cases of this kind of detention (art. 270 of the Code of Criminal Procedure) is also repealed. The text adopted changes article 263, on flagrancy, to bring it into line with the wording in the new Code of Criminal Procedure, which is under consideration. This decision was based on the criterion that the rules on detention contained in this bill, which will be enacted as law before the new Code of Criminal Procedure, should match those in the new Code, thereby helping to ensure that the procedural reforms will be applied. [47]

Information for detainees on their rights and notification of their detention

133. The bill on detention on suspicion also contains revisions to current legislation on the rights of detainees. The Government's proposal seeks to strengthen the guarantees that must accompany detention as required by the Constitution and international treaties ratified by and in force in Chile. The aim is to amend article 253 of the Code of Criminal Procedure, making it an obligation on any public servant who effects a detention orally to inform the detainee of the reason for his detention and of his rights before conducting him to the police station; this without prejudice to the requirement that, at the police station, the detainee must be read a statement informing him of his rights, a record of which will be kept in the station logbook. A poster on such rights must be visibly displayed in all police custody premises. Article 319 of the Code of Criminal Procedure will also state that, if the court finds that these requirements as to information have not been complied with, it will invalidate any statement the detainee has made to the persons who arrested him and notify the administrative authority concerned that disciplinary measures should be taken. Article 293 of the Code of Criminal Procedure will be amended to establish the right of all detainees, even if held incommunicado, to send word, either personally or through the police or courts, by the swiftest means and in the shortest time possible, of their detention to their families, lawyers or such other persons as they may designate. Any official who violates this right will be liable to punishment.

Decriminalization of vagrancy

134. Another of the changes proposed in the bill is to remove this offence from the Penal Code, considering that vagrancy and begging are phenomena that should be treated as social issues and not from the standpoint of criminal law, with those affected being viewed as people in need of assistance, not as delinquents who deserve to be arrested and punished.

B. Effective remedy

Remedy of amparo

135. The fundamental rights of the individual have not been restricted under the democratic Governments of Presidents Aylwin and Frei. No states of emergency have been declared, a fact that has helped the higher courts to reassert their authority to check on the legality of detentions through the regular examination of applications for amparo. This remedy has come back into effect as a means of monitoring the lawfulness of detentions and protecting personal liberty. This is demonstrated by decisions of the Military Appeal Court granting amparo applications to remedy arbitrary acts committed in cases of detention during the years immediately following the end of the military regime; police officers and military courts have been instructed to correct procedural errors made on those occasions:

Application for amparo No. 215-92 of 1 April 1992, made before the Military Appeal Court on behalf of Mirentchu Vivanco Figueroa: the police were ordered to allow the detainee to exercise her right to meet her lawyer, in accordance with article 293 of the Code of Criminal Procedure;

Application for amparo No. 465-92 of 15 July 1992, made before the Military Appeal Court on behalf of Alejandro Rodríguez Escobar and Cristián González López: the military court and the Carabineros were instructed not to extend detention beyond the time-limit stipulated in article 272 bis of the Code of Criminal Procedure.

C. Violations of the right to liberty committed under the military regime

Release of persons imprisoned for political offences

136. One of President Aylwin's immediate tasks upon taking office was to put before the Congress a number of legislative proposals to resolve the issue of approximately 350 people who found themselves in this situation. These legal reforms [48] provided, inter alia, for abolition of the powers of the military courts to try civilians for some offences under the Code of Military Justice (threats or offences against the armed forces and Carabineros), the Weapons Control Act (bearing and possession of weapons, munitions and explosives) and the Terrorism Act, regardless of the identity of the victims; redefinition of the offence of “aiding and abetting”, which meant that legitimate actions that the military courts had treated as criminal offences would not be punished; and the abolition of offences deriving from the legislation of the military regime (for example, political offences and clandestine entry into the country).

137. The transitional arrangements under one of these laws allowed a large proportion of the cases brought by military courts to be transferred to the ordinary criminal justice system in order to expedite their adjudication and to put an end to trials of political prisoners. One provision specifically stated that persons convicted or due to be tried by military courts could be offered alternatives to the penalties depriving them of, or restricting, their liberty, such as suspended sentences, night-time confinement or probation.

138. Furthermore, whenever the sentences were still enforceable, presidential pardons were decreed after thorough study of each case. The Constitution was amended, [49] enabling the President to issue individual pardons to people convicted under the Terrorism Act and allowing the courts to grant bail to people awaiting trial for terrorist offences. The Executive issued pardons for 169 such persons, of whom 145 had been in prison. The rest of the prisoners obtained their release by other means, such as the granting of bail or the serving-out of sentences made possible by the changes in the law described above.

139. Together, these reforms made sure that the people imprisoned for political offences under the military regime had been released by the end of President Aylwin's term of office.

Article 10

A. Legal framework

140. The Code of Criminal Procedure sets out requirements for the humane treatment of persons deprived of their liberty and the separation of

unconvicted from convicted persons, and of minors from adults held in custody, in provisions that refer to the distribution of inmates within prisons, to the limits on detention incommunicado, to occupations and privileges consistent with the prison regulations and to the system of visits, communication and correspondence (arts. 292-295). The Code calls for the separation of detainees and convicts "insofar as possible" (art. 292).

141. According to information provided by the Office of the Director-General of the Gendarmería - the State prison service - only in the metropolitan region, where there are several closed penal institutions, is it possible to segregate the two categories of prisoners. In cities in other parts of the country, where there is usually only one closed institution, unconvicted and convicted persons sleep in separate dormitories at night but share common quarters during the day.

1. Legal reforms since 1990

Humane treatment of persons deprived of their liberty (art. 10, para. 1)

New Prison Regulations

142. Concerning respect for the dignity of persons deprived of their liberty, mention has been made above (see para. 105) of the recent issuance of new Prison Regulations which embody the principles set forth in international instruments. They emphasize respect for the convicted person's fundamental rights as the basis for a successful prison policy and as a means of preventing recidivism, they establish sanctions for any officials who use torture or unnecessarily harsh treatment against inmates, and they advocate non-discrimination and observance of the greatest possible number of human rights consistent with prisoner status. Article 13 of the Regulations calls for separate facilities to be provided for unconvicted prisoners, within the available financial resources of the prison system, and in any case requires special sections within each facility.

Abolition of solitary confinement as an accessory penalty

143. The 1991 legal reform [50] amended the Penal Code (art. 21) to abolish the accessory penalty of solitary confinement of a prisoner.

Removal of minors from prisons for adults (art. 10, para. 2 (b))

144. Persons over 18 years of age may be held criminally liable in Chilean law, and the same applies to minors between 16 and 18 years of age where the juvenile magistrate finds that they acted with discernment. This magistrate is empowered, under a special system governed by the Protection of Minors Act, to order precautionary measures for offenders aged under 16 years, and for those between 16 and 18 years of age who are considered not criminally liable because they are deemed to have acted without discernment. These measures include deprivation of liberty, a measure which may be enforced in penal institutions for adult prisoners under the authority of the National Directorate of the Gendarmería.

145. Various steps have been taken since 1993 to put an end to this situation, which is in breach of international human rights treaties and Chile's own internal legislation stating that juveniles shall serve their sentences in special institutions (art. 87 of the Penal Code). The first step, taken prior to the issuance of the legal instruments discussed below, was the creation in August 1993, by exempt decision of the Office of the Under-Secretary for Justice, of a task force at central and regional level on the removal of minors from penal facilities for adults. A study entitled "National Diagnostic Survey of Minors in Gendarmería Units in Chile", was undertaken, covering the first half of 1993. The object was to encourage action in response to the problems arising in each part of the country where juveniles are kept in penal institutions. Details were requested on the following: age, sex, type of court committing the juveniles, grounds for release, place of residence of the juvenile, number of juveniles readmitted to the institutions, length of stay in the facilities, level of staffing and institutional environment. These data provided an input to help tackle the problem from a broad-based national perspective. In addition, with a view to involving various organizations directly concerned with minors at risk, and especially juvenile offenders, a decree was issued [51] to set up task forces at national and regional level consisting of experts from the National Service for Minors (SENAME), the Carabineros, the Gendarmería and the judiciary, to study specific measures for removing minors from adult prisons. These permanent, intersectoral task forces are coordinating their efforts to prevent juveniles from being confined in penal institutions for adults by making specific recommendations to the authorities responsible for dealing with juveniles in trouble with the law and deprived of their liberty.

Decree barring the admission of minors not held to be criminally liable to adult prisons [52]

146. In order to prevent such minors from being admitted to prisons for adults, and pending the enactment of legislation to that end, it was decided to repeal article 12 of Decree No. 2.531 of 24 December 1928, issuing regulations pursuant to the Protection of Minors Act and amendments thereto. Article 12 of the decree stated: "where there is no home for juvenile offenders, a special department completely separate from that for adults shall be prepared in the existing penal institution or detention centre and shall be governed in its operation by the rules applicable to homes for juvenile offenders". Its repeal restricts the powers of the juvenile courts to use Gendarmería institutions for the confinement of minors.

Decree granting subsidies for the care of minors held criminally liable [53]

147. This decree authorizes the National Service for Minors to pay subsidies to the Gendarmería for all young persons under 18 years of age whether they are deprived of their liberty for behavioural maladjustment or for breaking the law. This makes it possible to put an end to a form of arbitrary discrimination that affected under-18-year-olds declared criminally liable, in places where institutions for juveniles either do not yet exist or do not have the capacity to accommodate them; in such cases the juvenile courts assign them to closed Gendarmería penal institutions, in blocks completely separate from those for adults.

Act prohibiting the confinement of persons under 18 years of age in penal institutions for adults [54]

148. This Act prohibits the admission of persons under 18 years of age into penal facilities for adults and restricts the confinement of minors awaiting examination for discernment to institutions specified by the President in accordance with the law. Furthermore, the Act creates homes for juvenile offenders to be operated by way of independent, autonomous centres of two kinds, namely:

(a) Transit and distribution centres, which look after minors who require diagnosis, assistance and protection pending a decision in their cases, and

(b) Observation and diagnostic centres, which will cater for minors who have committed serious or minor offences and who will stay in these centres until the courts reach a decision in their cases or make a determination concerning their discernment.

This legislation enables the President, by means of a supreme decree issued through the Ministry of Justice, to indicate the centres to which minors can be admitted when there are no observation and diagnostic centres locally. Transit and distribution centres, observation and diagnostic centres and, where no such centres exist, institutions catering for minors in which they can be examined for discernment have been identified by decree of the Ministry of Justice. [55]

149. The implementation of the above rules and measures has yielded positive results. According to SENAME, the number of young persons held in penal facilities fell by a third between 1990 and 1995, with specialized care and treatment centres being created to accommodate them. The figures show that 8,161 children and young persons were funnelled into adult prisons in 1990, whereas only 2,617 were in 1995.

Measures for the social rehabilitation of convicted persons (art. 10, para. 3)

150. The National Directorate of the Gendarmería has scheduled a total of 237 rehabilitation projects for implementation in 1997 in the country's closed institutions. These projects - relating to production, training, educational, psychosocial, sports and recreational or artistic and cultural activities and to prison classification - cover a total of 11,537 inmates. This is 52.5 per cent of the country's total prison population, of whom 46.2 per cent are convicts, 48.3 per cent are awaiting trial and 5.5 per cent are detainees. Funding of $183,630,956, or approximately US$ 442,484, is due to be provided from the service budget to carry out these programmes. That figure does not include transfers from the budgets of other State bodies, such as the Social Investment and Solidarity Fund, the General Directorate for Sports and Recreation, the National Training and Employment Service, the Ministry of Education and regional bodies, with which activities are pursued on the basis of contracts or open bidding during the year; these together add a further 30 per cent to the sums budgeted at the central level.

The figure cited also excludes productive activities, which take place under contracts with private entrepreneurs operating in the penal institutions and involve about 800 inmates.

2. Bills under consideration

151. The new Code of Criminal Procedure [56] expressly requires the courts to oversee the arrangements made for people held in pre-trial detention; it makes provision for their segregation from convicted persons, an extensive system of visits and the right of the inmate to communicate freely by any means (art. 182).

152. A bill on alternatives to imprisonment establishes penalties involving cooperation and work as alternatives to imprisonment and the payment of fines.

3. Legislative proposals under study

153. A proposal concerning juvenile crime is designed to change the thrust of the current legislation applicable to young offenders, emphasizing rehabilitation rather than punishment.

Article 11

154. This principle is not recognized in the Constitution, but there are no legal provisions setting custodial penalties for non-fulfilment of contractual obligations, except where the existence of malicious intent makes this an offence - as, for example, in the case of fraud. A question that has given rise to controversy and to many divided judgements is whether or not, in the case of the passing of a bad cheque, enforcement of the rule preventing release from custody without payment of surety equal to 100 per cent of the face value of the cheque, plus interest and costs, constitutes imprisonment for debt.

Article 12

A. Legal framework

155. The right to leave, enter and move freely throughout the country, as set forth in the Constitution (art. 19, para. 7 (a)), has not been subject to any restriction since 1990. The constitutional reform of 1989 eliminated the possibility of restricting this right, as had happened prior to the amendment, during states of emergency and siege.

B. Violations of the right to enter and leave the country committed under the military regime

Policies in favour of exiles

156. The Government of President Aylwin took various decisions to facilitate the reintegration of Chilean exiles, the great majority of whom were given permission to enter the country in the closing stages of the military regime. From 1990 onwards, once democracy had been restored, exiles returned home on a massive scale.

National Office for Returnees

157. The central measure was the creation of the National Office for Returnees (ONR), [57] which operated until August 1994. Its principal function was to expedite reintegration programmes for returning Chilean exiles and their children born aboard, handling a number of matters to do with material support and special treatment. During its three years of operation, ONR catered for a population of 19,251 returnees, or a total of approximately 56,000 persons if relatives are included. The main programmes implemented by ONR were as follows:

Validation of professional qualifications obtained abroad. [58] people showing that they had obtained degrees or diplomas abroad were authorized to practise their professions. Since the closure of the Office, validation has been handled by regional Education Ministry offices.

Issuance of certificates for free medical care in the public health system;

Granting of customs-duty exemptions for returning exiles. The law [59] allowed duty-free entry of a vehicle, household effects and work tools for returning Chilean nationals classified as exiles by ONR. This law lapsed on the day that the Office ceased to operate;

Administration of special credit facilities;

Registration in the scheme of housing allowances, whereby the Government bears part of the cost of a dwelling.

Article 13

158. Chile has been a country of immigration and an alien enjoys the same rights as Chileans, except for political rights; even here, aliens are allowed to vote in municipal elections if they have five years' residence. As of 31 December 1996, there were 131,490 aliens with permanent resident status and about 15,000 others with temporary resident status.

A. Legal framework

159. The grounds, regulations and procedure for expulsion from the country are set forth in the current legislation relating to aliens (Decree Law No. 1.094 of 19 July 1975, Ministry of the Interior; Supreme Decree No. 818 of 1983, Ministry of the Interior; Supreme Decree No. 597 of 1984, Ministry of the Interior). In general, Chile's legislation on migration views expulsion as a sanction applicable either to situations involving criminal matters as such or to those concerning restrictions on immigration. The latter would be the case, for example, where expulsion is ordered after a person fails to comply with a measure calling for him to leave the country voluntarily, or where a regional authority takes action in respect of persons who have stayed on after the expiry of their tourist visas. In any case, the legal description of the acts giving rise to the measure and the procedure for its enforcement are explicit and detailed, leaving no room for arbitrariness. The

person ordered to be expelled can avail himself of a judicial remedy which is expressly provided for in the Aliens Act and lies with the Supreme Court. Such protection is even further strengthened by the possible applicability of one of the remedies contemplated by the Constitution with regarding the basic safeguards established therein. It may be noted that - by express provision of the Office of the Comptroller-General of the Republic [60] - expulsion orders are now subject to constitutional review (by the supervisory body) as an additional means of guaranteeing their legality.

Bill under consideration

160. A bill on migration is currently before the Congress. It was referred to the House of Representatives by the President on 7 October 1993. Two of the innovations proposed in this bill regarding the expulsion of aliens are the submission of a petition to the respective appeal court - so that action can be taken more quickly - and the extension of the time-limit for filing such an appeal to 48 hours, the object being to safeguard even further the rights of the person concerned.

B. Effective remedy

161. (a) It has been determined that the remedy of submitting a petition as provided for in article 174 of the Regulations on Aliens is admissible against arbitrary decisions of the Ministry of the Interior. Such remedy is based on there having been a violation of the Regulations on Aliens, the Constitution and the Inter-American Convention on Human Rights (Supreme Court decision of 19 March 1992).

(b) Cancellation of an alien's permanent residence permit, as ordered by the Ministry of the Interior, was ruled to be arbitrary since no legal consideration was adduced to justify the measure, which was furthermore in breach of article 19, paragraph 2, of the Constitution (Santiago Court of Appeal decision of 15 May 1996 on an application for protection).

Article 14

A. Legal framework

Equality before the courts and tribunals and right to a fair and public hearing by a competent, independent and impartial tribunal established by law (art. 14, para. 1)

162. The judiciary functions as a safeguard under the Constitution. No one may be tried by special commissions, but only by a tribunal established by law prior to the act which gives rise to the proceeding (art. 19, para. 3). This precept implies equality before the law, the competence of the court that will try a case and the impossibility of changing it retroactively. The Code of Criminal Procedure affords the means to render this safeguard effective as it indicates, for example, that there are grounds for vacating a judgement for error of form if it is handed down by a manifestly incompetent court (art. 541, para. 6).

163. It should be noted that the need to guarantee due process is reflected in article 19, paragraph 3, subparagraph 5, of the Constitution, which states that "it shall be the responsibility of the legislator to establish, at all times, the guarantees for a rational and just procedure".

164. The Constitution provides for a State structure based on the separation and independence of the public powers. Chapter VI of the text establishes the independence and key features of the judiciary (arts. 73 et seq.). The Courts Organization Code lays the foundations for the organization of the courts, defines their powers and reaffirms their independence (arts. 1 and 2). A law reform concerning the judicial profession (qualifications, appointments and promotions), which places emphasis on the independence of judges, has recently been approved.

165. The impartiality of the courts is guaranteed by the rules set forth in chapter VI of the Constitution; these rules, relating to the appointment, competence and oversight of members of the judiciary, are spelt out in detail in the Courts Organization Code, which enables sanctions to be imposed on judges for breach of public trust or failure to observe the law in the performance of their duties (art. 76 of the Constitution and art. 545 of the Code).

166. That judicial proceedings should be public is not stipulated in the Constitution. The Courts Organization Code (art. 9) does make it clear that this is the general rule "except for cases in which the law provides otherwise". This refers to the fact that the pre-trial or examination stage of proceedings relating to an offence is confidential (art. 78 of the Code of Criminal Procedure); the accused is entitled to see the record of the proceedings 40 days after committal for trial, unless the court denies this right on the ground that its exercise could endanger the investigation. The 1991 criminal procedure reform set a limit to minimize any prolongation of the period of confidentiality.

Presumption of innocence (art. 14, para. 2)

167. This principle is recognized in the Constitution, which states that "the law cannot presume criminal responsibility as a matter of course" (art. 19, para. 3, subpara. 6). The Courts Organization Code further indicates that "no one shall be considered guilty or subjected to any penalty except by virtue of a judgement" (art. 42) and "the court must investigate with equal zeal not only the facts and circumstances that establish or aggravate the responsibility of the accused, but also those that might exempt the accused from responsibility or extinguish or extenuate such responsibility". Article 456 bis of the same text states that "no one may be sentenced for an offence unless the court has been persuaded, by legally obtained evidence, that a punishable act has actually been committed and that the accused is guilty of having taken part therein and must be punished by law". The needs of criminal procedure entail combining the presumption of innocence with measures to keep a check on the person being prosecuted, such as prohibiting him from leaving the country, entering his particulars in the register of criminal cases, suspending his right to vote if he is being tried for an offence warranting afflictive punishment and, most importantly, placing him in detention pending trial (see paras. 127, 128, 130 and 131).

Minimum procedural guarantees (art. 14, para. 3)

168. The Code of Criminal Procedure gives effect to the requirement in article 19, paragraph 3, subparagraph 5, of the Constitution, establishing guarantees for “a rational and just procedure”.

Informing the accused of the charge against him

169. The law indicates that the accused has the right to take cognizance of the decision to prosecute him, which must be substantiated, must state the elements taken into consideration when it was rendered, and must describe the constituent elements of the offence (art. 275 of the Code of Criminal Procedure). In articles 424 et seq., relating to trial proceedings, the Code defines the requisite components of the accusation, which must specify the punishable acts of which the accused is charged, the form and time limit for communicating the charge to the defendant, the statement of such counsel for the defence as may have been appointed by the defendant, or of the duty lawyer if no counsel was retained by him, the form of the pleading and the time limit for entering the plea.

The right to a legal defence

170. This right is set forth in the Constitution (art. 19, para. 3, subparas. 2 and 3) and further consolidated in the Code of Criminal Procedure (arts. 67, 278 and 303). It is obligatory as from the time that the person charged is committed for trial, as is the guarantee of assistance of counsel free of charge for anyone unable to afford counsel. Such assistance is provided by duty lawyers and also by the legal aid corporations, which employ contracted lawyers alongside graduates from law faculties, who work without payment as one of the requirements for qualifying as a lawyer. This latter system works better than the former. The Government has sent a bill to the Congress with a view to enhancing the guarantee of free counsel.

The accused's rights with respect to the submission of evidence

171. Witnesses are presented and are questioned and cross-examined during the trial (the adversarial stage of the proceedings). At the pre-trial stage, the defendant and his lawyer are not entitled either to be present when witnesses make their statements or to cross-examine them (art. 205 of the Code of Criminal Procedure). They may only read the transcripts of these statements when the record of the pre-trial proceedings is made public and can only request the investigating magistrate to question particular witnesses. It is for the magistrate to decide whether such a step should be taken.

The right not to testify against oneself

172. The Constitution states that “in criminal cases, the defendant cannot be obliged to testify under oath as to his own actions” (art. 19, para. 7 (f)). The procedural rules do not allow a confession by the defendant to be taken by itself as objective proof that a crime has been committed (art. 481 of the Code of Criminal Procedure).

Trial without undue delay

173. The need for the prompt and full administration of justice by the courts is recognized in the Constitution (art. 74, para. 1) and in the law. In practice, the proceedings are lengthy, especially at the pre-trial stage. The Code of Criminal Procedure sets time limits for investigation of robbery with violence or intimidation, indicating that the examination proceedings in such cases must be completed within 40 days of the committal of the accused for trial, a deadline that may be extended only once and the same length of time (art. 80, para. 2).

Review of the conviction and sentence by a higher tribunal (art. 14, para. 5)

174. This right is exercised through the remedy of appeal against the final judgement, and by means of a review of the judgement when certain penalties are imposed (arts. 510 et seq. and 533 of the Code of Criminal Procedure).

Compensation for a miscarriage of justice (art. 14, para. 6)

175. The Constitution guarantees the right to compensation by the State for loss or moral injury sustained by a person as a result of having been brought to trial or convicted - where a dismissal of proceedings or an acquittal should have been ordered - in a decision that the Supreme Court, upon application by either party, declares unjustifiably erroneous or arbitrary (art. 19, para. 7 (i)). Once this declaration has been obtained, the party concerned must apply to the competent civil court for it to determine the amount of such compensation.

Faults of the current criminal procedure

176. Current criminal procedure is designed on the inquisitorial model. It involves two stages, namely the examination or pre-trial stage, and the trial stage, which is of an adversarial character. This is a system in which all the procedural steps are accounted for in written communications that together form a record of the proceedings. The magistrate dealing with the case performs the roles of examiner, prosecutor and judge. This makes it difficult for him to show impartiality and fulfil his duty of protecting the rights of the accused throughout the proceedings as well as when passing judgement. Because he is overburdened, the judge in practice delegates the procedural steps to subordinate officials, and this results in a lack of personal contact with the defendant and of follow-up of the proceedings. The written system prevents this situation from being changed, and the judge finds out what steps have been taken by reading the record. Access to the information - and hence the possibility of entering a defence at the pre-trial stage - is hampered by the length of time for which it remains confidential. When it is made public, the system of reading records, which are not always immediately available to the defence, also makes it difficult to learn about earlier proceedings. The confidentiality of the pre-trial stage and the written nature of the procedure constitute a serious limitation on the principle of publicity and contribute to making the proceedings unduly long. Legally, the trial is the stage for the submission of evidence and for the adversarial proceedings as such. In fact, however, the pre-trial phase is the more important part of the process because of the nature of the steps which are performed then but validated

formally at the trial and serve as the basis for the judgement. Indeed, the Code of Criminal Procedure (art. 449) allows for the submission of evidence during the trial to be waived, expressly or tacitly, if the parties do not seek confirmation of the evidence given at the pre-trial stage and do not call for fresh evidence to be produced (art. 451).

177. The legal rules currently governing criminal procedure date from the last century. Their authors considered them inherently defective at the time and thought that they would apply only transitorily, yet they have remained in force for nearly a hundred years. This situation and the conditions, as already described above, of their operation in practice weaken the guarantees of due process, and for these reasons the Government of President Frei has urged a radical change and put the draft new Code of Criminal Procedure before the National Congress together with supplementary reforms.

1. Legal reforms since 1990

Criminal procedure reform of 1991

178. To ensure compliance with the time limits on the confidentiality of the pre-trial proceedings, the 1991 law reform provided that the defendant will always be entitled to take cognizance of the record of proceedings 120 days after the date of the decision committing him for trial. [61]

Reform to ensure that pleas are entered within a reasonable time

179. With a view to expediting criminal proceedings, the reform empowered the courts to sanction anyone failing to comply with this obligation. [62]

Judicial system

180. In November 1992 the Government of President Aylwin sent the Congress a set of legislative proposals with the object of making various changes in the organization and functioning of the judicial system. Two of those bills relate more specifically to the conditions for the independence of judges, one concerning the judicial profession and the other creating the Judicial Academy, a body governed by the Labour Code and not part of the judiciary, which is intended to provide initial and further training for judges and court officers. Both bills have been promulgated as laws of the Republic. The Judicial Academy is now beginning to take shape following the establishment of its Board of Directors in June 1995. [63]

2. Bills under consideration

New Code of Criminal Procedure [64]

181. The view has been expressed that current criminal procedure does not provide for genuine adversarial proceedings meeting the requirements of due process because it has an inquisitorial and confidential structure that depersonalizes the accused, does not properly guarantee his rights and runs counter to the basic principles of publicity and impartiality of judicial action. It is intended to change this situation by switching from the

inquisitorial model to an accusatory, public and adversarial system that will afford better safeguards. The procedure proposed is basically structured so as to guarantee public, oral proceedings before an impartial tribunal prior to its rendering of a judgement. The present method of taking cognizance of cases by means of reading records is to be transformed into one in which evidence is submitted and the parties debate directly, thus making the proceedings more lively. Members of the Public Prosecutor's Office will be in charge of the examination stage of the proceedings, directing the investigation in cooperation with the police. The oral proceedings will be held before a collegiate court that will be responsible for evaluating the evidence and passing judgement. As already indicated, this proposal guarantees the rights of the accused from the time of his detention and reformulates the current regulations on precautionary measures taken in the course of proceedings to uphold the presumption of innocence (see para. 131).

National Legal Aid Service

182. The present legal aid corporations are being replaced by this Service, which is taking over the function of providing free legal assistance to indigent persons through a national directorate and 13 branches operating in each region of the country. They will provide assistance using paid professionals, not only for situations involving judicial disputes but also to advise people on legal matters of various kinds where expert help is required.

3. Legislative proposals under study

Office of the Public Defender

183. This will complement the new Code of Criminal Procedure and the National Legal Aid Service now under consideration.

Family courts

184. A proposal concerning family courts will be sent to the National Congress for consideration in 1997. It is one of the central parts of the plan to modernize the judicial system. These courts are to replace the present juvenile courts. Their jurisdiction will include matters relating to minors dealt with by the National Service for Minors (children in conflict with the law, children whose rights have been violated and neglected children), as well as matters pertaining to the family, filiation, custody, maintenance, property rights arising from marriage and domestic violence. The courts will act on the basis of a streamlined oral procedure, with prior mediation efforts entrusted to experts. They will be multi-member courts with 10 judges handling all matters within their jurisdiction and alternating as presiding officer for the administration of court business. Each court will be advised by a multidisciplinary expert panel of professionals.

4. Military courts: powers and impartiality

185. Although the 1991 law reform reduced the powers of the military courts in some circumstances (threats and offences against the armed forces and Carabineros), there is concern about the fact that they still try civilians for offences punishable under the State Security Act, the Weapons Control Act

and the Terrorism Act. The impartiality of the military courts is questioned whenever military personnel are put on trial for ordinary offences, since the members of military courts are not irremovable and are subject to disciplinary action by higher-ranking officers, while an esprit de corps predominates in their decisions. Furthermore, the competence of the judges to conduct proceedings in keeping with the rules of due process, while ensured in the ordinary courts by the requirement that judges should be lawyers, is not guaranteed in the military justice system.

186. One of the key proposals of President Aylwin's Government in one of the bills forming part of the 1991 criminal procedure reform was to restrict the powers of the military courts to considering and judging military offences and to prevent them from trying civilians. The political opposition did not agree to these changes. Later, on 6 November 1992, the former incumbent put before the House of Representatives a legislative proposal designed to make sure that the military justice system "would under no circumstances try civilians or military personnel for acts detrimental to civilians or directed against democratic institutions". In October 1992, with a view to re-establishing the basic principles of due process, the impartiality of the courts and equality before the law, a group of members of parliament also tabled a motion to reduce the powers of the military courts. They proposed leaving the military courts to deal only with offences under the Code of Military Justice committed by military personnel, and giving the ordinary courts the power to try both ordinary offences committed by military personnel and military offences committed by civilians. Those initiatives have also not prospered.

B. Effective remedy

187. (a) It has been decided that the judgement of a court of first instance which has failed to admit material evidence, thereby infringing the safeguard of due process, should be officially invalidated (Supreme Court decision of 4 January 1994, annulling a decision of its own motion).

(b) The privilege that exempted a defaulting defendant from criminal responsibility must, it was ruled, also extend to persons accused of the same acts who were not in default. The decision cited the principles of equality before the law and of equality before the courts, as set forth in article 19, paragraphs 2 and 3, of the Constitution (Valparaiso Appeal Court decision of 31 December 1993, rendered on appeal).

(c) It was decided that a simulated trial produces a legal fiction which does not meet the requirement of article 19, paragraph 3, subparagraph 5, of the Constitution, since any judgement of an organ which exercises jurisdiction must be reached on the basis of prior proceedings conducted in accordance with the law (Santiago Appeal Court decision on review of judgement, upheld by the Supreme Court in a decision of 22 December 1991).

C. Violations of the right to due process committed under the military regime

Re-establishment of the right to due process for persons charged with political offences

188. It has been pointed out that one of the aims of the 1991 criminal procedure reform was to remedy injustices committed against civilians brought before the military courts by restoring the right to due process of people charged with political offences during the military regime. A constitutional reform was thus approved for the purposes of allowing bail for persons awaiting trial for terrorist offences, and of granting pardons or amnesties to people convicted of such offences, since they had been denied such guarantees. People convicted by the military courts were offered alternatives to the penalties depriving them of, or restricting, their liberty. Offences proper to the legislation of the military regime were abolished. Offences were redefined so as to avoid punishing legitimate actions that military law treated as criminal. To afford greater safeguards of the rights of people facing prosecution, arrangements were made for individuals in detention or awaiting trial to undergo medical checks and keep in permanent contact with their lawyers, and detention incommunicado was restricted to the established time-limits (see para. 104). Furthermore, the jurisdiction of the military courts over certain offences committed by civilians was abolished. Accused persons were given the opportunity in the ordinary courts to retract statements they had made before the military courts, given the probability that the proceedings against them would have been based on extrajudicial confessions obtained under duress; this was made possible by requiring the military courts to transfer the majority of the cases being handled by them to the ordinary courts. The Documentation and Archives Foundation of the Vicaría de la Solidaridad reports that, as a result, 220 judicial proceedings involving 416 political prisoners had been moved from the military to the civil courts by the end of 1992. This figure is part of a larger number of court cases transferred, since it refers only to those defended by the Vicaría de la Solidaridad and does not include cases taken up by other non-governmental human rights organizations.

Greater equality before the law

189. With a view to greater equality before the law, the 1991 reform allowed judicial review proceedings to be brought by victims against judgements of the military courts.

Article 15

A. Legal framework

Non-retroactivity of the criminal law and principle of interpreting the law in favour of the accused (art. 15, paras. 1 and 2)

190. Both of these principles are embodied in the Constitution (art. 19, para. 3, subparas. 7 and 8) and in the law (art. 18 of the Penal Code) and are protected by judicial and administrative procedures.

B. Effective remedy

191. The ceiling of 20 years' imprisonment as a condition for qualifying for parole is not applicable to those sentenced to rigorous imprisonment for life whose offences were committed prior to the entry into force of the law setting the ceiling (which no longer obtains), whether they were sentenced before or after that date. This conclusion derives from the application of the principles of non-retroactivity of the criminal law and of interpretation of the law in favour of the accused, as set forth in articles 19, paragraph 3, of the Constitution and 18 of the Penal Code (Opinion of the Office of the Comptroller-General of the Republic of 21 April 1994).

Article 16

Legal framework

Recognition of legal personality

192. Merely by existing, individuals incur rights and responsibilities. The Civil Code distinguishes between individuals and bodies corporate (art. 55). The former are separated into those designated under the Constitution as Chilean and the remainder, who are aliens (art. 56). The law does not distinguish between Chileans and aliens in the acquisition and enjoyment of civil rights (art. 57). Bodies corporate are abstract entities (corporations, societies, foundations etc.) to which the law ascribes rights and upon which it imposes obligations once they satisfy the requirement of acquiring legal personality in accordance with the law. Chilean legislation establishes machinery for the conferral of legal personality that is intended to ensure the fullest possible exercise of the right of association. Bodies corporate are regulated by Book I, Title 33, of the Civil Code.

Article 17

A. Legal framework

Protection of individuals' privacy, families, honour and reputation

193. These rights are constitutionally guaranteed (art. 19, para. 4). Violations of people's rights to protection of their privacy, families and honour committed through an organ of the media are an offence and incur the corresponding penalty as laid down in the Constitution. These rights are protected by Titles VI, VII and VIII of the Penal Code establishing the offences of slander and insult, and by Acts Nos. 16.643 on abuse of publicity, 12.927 on State security and 12.045 establishing the Journalists' Association.

Protection of the home and correspondence

194. The Constitution guarantees "the inviolability of the home and all forms of private communication" (art. 19, para. 5) except in the cases and manners determined by law. The constitutional reform of 1989 put an end to the possibility of censoring correspondence during states of emergency and states

of siege. A home may be legally entered to look for wrong-doers, and correspondence and private documents may be ordered to be withheld, recorded or seized during the investigation of a crime.

B. Effective remedies

195. (a) The import into and sale in Chile of a book by a journalist was prohibited when a conflict between freedom of expression and the right to respect for honour and privacy was settled in favour of the latter (ruling by the Santiago Court of Appeal on 31 May 1993 on an application for protection, upheld by the Supreme Court in a decision dated 15 June 1993). [65]

(b) Since authorization had not been obtained beforehand, the entry of personnel extraneous to the needs of a medical examination into premises where such an examination was taking place and their filming of the examination were found to be illegal, as violating a person's right to respect for and protection of his or her privacy. The cassette of film was ordered to be confiscated and destroyed (ruling by the Supreme Court on 16 December 1992 on an application for protection).

(c) The material gathered in a case established that a crime within the meaning of Act No. 19.048 (Abuse of Publicity), article 19, had been committed, it being clear from published material that the fact that the plaintiff was infected with AIDS had been publicized, thus infringing her dignity. The owner of the media organ was sentenced to a fine under the Act, and ordered to pay the damages sought by the plaintiff (ruling by the Supreme Court on 1 June 1993 in an appeal to vacate a judgement for error of law).

Article 18

A. Legal framework

Freedom of conscience and religion

196. Freedom of conscience, the expression of any belief and the free exercise of any form of worship not inconsistent with public morals, customs or order are constitutionally guaranteed, as is the freedom to teach any of the above (arts. 19, paras. 6 and 11).

197. All educational establishments in Chile are required to offer optional religion classes (Supreme Decree No. 924, 1984). Religious communities are at liberty to set up their own educational institutions, any of which – provided that they are not private, paying schools – may receive State subsidies without discrimination. Religious institutions offering classes must send the Ministry of Education a copy of their curriculum and the teaching content of the classes in order to obtain the requisite authorization.

198. The Roman Catholic Church was made separate from the State by the 1925 Constitution, which contained a guarantee of freedom of conscience and worship similar to that in the current Constitution. The only explicit difference is that the current Constitution makes landed property intended for places of worship and ancillary premises exempt from tax provided that it is used exclusively for worship; the 1925 Constitution did not impose that condition.

It was determined by administrative and juridical interpretation of the 1925 Constitution that the Catholic Church had legal personality under public law whereas all other religions had to be legally established as corporations under private law – making them dependent to some extent on the administrative authorities, a situation that persists today. There have been no court decisions under the current Constitution that have implied any privilege for the Catholic Church. On the other hand, over the past few years of normal democratic life no religion has been denied or suffered withdrawal of legal personality. Protestant sources calculate that the country has at present between 600 and 700 Protestant and Evangelical corporations.

199. According to the latest population census, in 1992, 76.7 per cent of the 9,660,367 people aged over 14 in the country said they were Roman Catholics; 12.4 per cent were Evangelicals (including members of churches originating in the United States); 0.83 per cent were Protestants (a category including historical churches such as the Lutheran Church); 4.24 per cent practised other religions; and 5.82 per cent were atheists.

Bill under consideration

200. The present Government has studied ways of improving the legal regime applicable to churches and religious faiths in order to ensure maximum freedom of conscience and religion and eliminate all forms of intolerance and discrimination based on religion. With that in mind, it sent the Congress a bill in October 1994 on “standards governing the legal creation and operation of churches and religious organizations”, which would grant such entities the right to constitute themselves legally without the need for prior authorization, once they had satisfied the requirements laid down in the bill.

Article 19

A. Legal framework

Right to freedom of expression

201. The freedom to express opinions and convey information without censorship in any form and by any means is constitutionally safeguarded (art. 19, para. 12).

202. The freedom to receive information is not expressly protected but is to be understood as included within the reigning concept of freedom of opinion and information, according to case-law from the Constitutional Court. Ruling on 30 October 1995, on an application by members of the House of Representatives to have declared unconstitutional a provision in a bill before the Congress on freedom of expression, information and the exercise of the profession of journalist, the Constitutional Court said that the right to receive information “formed a natural part of, and was implicit in, the freedom to express opinions and convey information, because those freedoms would serve no purpose if [the information was] not intended for real recipients”.

203. The Constitution lays down strong safeguards of the freedom to express opinions and convey information. Restrictions must be imposed by a law passed

by qualified majority; the State may not have a monopoly on any public medium of communication, and prior censorship is forbidden except as regards the screening and publicizing of cinematographic works. Film censorship is performed by the Film Ratings Board, a technical body operating under the authority of the Ministry of Education and regulated by Decree-Law No. 679. The criteria under which, according to this law, a film may be rejected give the Board such latitude that they are inconsistent with freedom of expression; because of this, and because the regulations have given rise to increasing outcry among the public, the Government is considering sending to Congress a constitutional amendment that would abolish film censorship.

204. The Constitution and other legislation impose restrictions and establish liability for offences and abuses committed in exercise of the freedoms of opinion and information. The State Security Act punishes offences committed through the press, radio or television against the internal or external security of the State, public order or normal life in Chile; the Abuse of Publicity Act makes it a punishable offence to broadcast false or unauthorized reports, and punishes crimes against public morals and individuals; the Penal Code prescribes penalties for the offences of gross insult and public libel, and for hindering the free publication of opinions; the Health Code prohibits publications and publicity apt, in the view of the National Health Service, to mislead the public or compromise the health of the community or individuals.

1. Legal reforms since 1990

The 1991 reform of the penal process [66]

205. The 1991 reform annulled Act No. 18.662, which punished conduct in breach of article 8 of the Constitution, itself repealed in the constitutional reform of 1989. It amended the definitions of offences against the armed forces and Carabineros punishable under articles 284 and 417 of the Code of Military Justice, reducing the associated penalties and specifying that, in order to constitute the offences concerned, the threats must be uttered in the terms set forth in the Penal Code (art. 296) and it must be known to the perpetrator that the recipient of the threats is a member of the armed forces or Carabineros. It also amended the Abuse of Publicity Act, reducing the penalties for offences against the armed forces or Carabineros committed by means of a broadcast medium and establishing that whenever such offences are committed by civilians the judicial investigation is to be conducted by the ordinary courts. The new wording expressly indicates the difference between criticisms and insults. Under the transitional measures for this Act, cases pending before military courts within the eight days following publication of the reform were referred for consideration to the civilian courts.

2. Bill under consideration

206. The bill on freedom of expression, information and exercise of the profession of journalist is designed to afford protection for those exercising the profession of journalist; to limit objective responsibility and standardize its application across the media; to give the ordinary courts jurisdiction to investigate and hand down judgements on cases concerning offences committed through a public medium of communication in supposed

exercise of the freedoms of opinion and information, and to recast scattered provisions in order to make the penalties applicable to such offences more uniform.

B. Effective remedies

207. (a) A ruling by the Santiago Court of Appeal on 31 May 1993, upheld by the Supreme Court in a decision dated 15 June 1993, found in favour of an application for protection and prohibited the import into and sale in Chile of a book by a journalist, thus settling a conflict between freedom of expression and the right to respect for one's honour and privacy in favour of the latter. [67] The journalist complained about the decision to the Inter-American Commission on Human Rights. In its response, the Government pointed out that: "There is a strict separation of powers between the Executive and the Judiciary in Chile. The challenged ruling was handed down by the Judiciary in complete independence and with no intervention of any kind from the constitutional Government of the day. It may readily be seen from the documentation accompanying the petition and from the petitioner's own expansion thereupon that senior authorities in the Government disagreed with the Santiago Court of Appeal's judgement which, by choosing the legitimate option of protecting the honour of those attacked in the book, set aside the other, equally legitimate option of favouring freedom of expression."

(b) It has been determined that the National Television Council could not penalize a concessionaire for conduct not attributable to him as either deliberate or unintentional wrong-doing, because that conduct stemmed from the unpredictable behaviour of a participant in a programme that was being broadcast live. The decision was based on the fact that the Constitution guarantees everybody complete freedom of opinion and information without prior censorship except in the case of film screenings. The ruling, interpreting a provision in the law that set up the National Television Council, governing the responsibility of television channels for the opinions and information they broadcast said that the provision concerned must be read in a restrictive sense, and that channels are liable only for the recorded programming they broadcast, not for live broadcasts. (Ruling by the Court of Appeal on 18 December 1992, upheld by the Supreme Court in a judgement dated 18 March 1993, on an appeal against a ruling by the National Television Council dated 28 September 1992.)

(c) It has been determined that laser discs, computer programmes and compact discs for use in computers are not covered by the concept of a cinematographic film, and are as such excluded from prior censorship by the Film Ratings Board (Opinion by the Comptroller-General of the Republic dated 6 November 1995).

C. Existing communications media

(Background information from the National Statistics Institute (INE))

Television channels

208. The Constitution allows the law to indicate which universities and individuals or entities shall be authorized to establish, operate and maintain

television stations, and specifies that the State may also do so (art. 19, para. 12, subpara. 5). A legal reform in 1992 reserved to bodies corporate under public or private law that are incorporated and domiciled in Chile all concessions to broadcast television programming for general reception. State television broadcasting is handled by Chilean National Television (TVN), an independent State-owned entity with legal personality under public law and control of its own assets.

General reception	Cable
11	51

Television channels for unrestricted reception

Chilean National Television (Santiago)
Catholic University of Chile Television (Santiago)
University of Chile Television (Santiago)
Chile Television S.A. (Santiago)
Televisa Megavisión (Santiago)
La Red Televisión S.A. (Santiago)
Rock & Pop (Santiago)
University of the North Television (Antofagasta)
Catholic University of Valparaiso Television (Viña del Mar)
9 R.D.T. (Concepción)
3 Vicariato Apostólico Aysén (Coyhaique)

Radio transmitters

Type of transmission			
	AM	FM	TOTAL
1991	157	267	424
1992	170	379	549
1993	174	474	648
1994	175	502	677
1995	179	613	792
1996	179	685	864

209. These figures are for the number of amplitude-modulation (AM) and frequency-modulation (FM) radio transmitters with valid concessions as of 15 May 1996, though some were not operating at that time.

Radio broadcasters – type of operation

State-run	Commercial	Non-profit making	Other	Total
18	547	37	18	620

210. These figures cover the broadcasters that replied to the INE Annual Radio Survey, 1994.

Newspapers, reviews and national journals

211. The Constitution guarantees that "Any individual or body corporate is entitled to launch, publish and maintain journals, reviews and periodicals subject to the conditions laid down by law" (art. 19, para. 12, subpara. 4).

Numbers

Year	Newspapers	Reviews	Journals	TOTAL
1990	80	226	64	370
1991	84	254	72	410
1992	97	355	60	512
1993	94	351	88	533
1994	84	453	95	632

Circulation (annual)

Year	Newspapers	Reviews	Journals	TOTAL
1990	275 115 131	22 917 319	1 238 210	299 270 660
1991	249 534 082	27 937 698	2 318 873	279 790 653
1992	257 465 900	44 129 786	1 321 954	302 917 640
1993	275 117 808	37 565 885	1 973 879	314 657 572
1994	291 211 530	30 762 066	2 022 640	323 996 236

D. Violations of the right to freedom of opinion committed under the military regime

Action in favour of journalists and others put on trial under the military regime for exercising their freedom of opinion

212. A considerable number of journalists, political leaders, lawyers, priests and others who exercised their freedom of opinion were put on trial in military courts under the military regime for offences against the armed forces and Carabineros as provided for in the Code of Military Justice. The reform of the Code of Military Justice and the Abuse of Publicity Act (see para. 205) has been of undoubted benefit to them.

Article 20

Legal framework

Prohibition of propaganda for war (art. 20, para. 1)

213. While enshrining freedom of opinion and information, the Constitution also indicates that liability can be incurred for offences and abuses committed in exercise of that freedom. In the case of propaganda for war,

anyone who induces a foreign power to declare war on Chile is punishable under the Penal Code (art. 106). The State Security Act punishes anyone who in any manner or by any means rises up against the established Government or provokes civil war, especially anyone who by means of the spoken or written word or any other medium spreads or foments doctrines aimed at the violent destruction or alteration of the social order or the republican and democratic form of government (art. 4 (f)) and anyone who promotes doctrines advocating crime or violence in any form as a means of bringing about political, economic or social change (art. 6 (f)).

Prohibition of advocacy of national, racial or religious hatred (art. 20, para. 2)

214. Chilean legislation deals with this through the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Prevention and Punishment of the Crime of Genocide, both of which are in effect in the country. The Constitution contains no express wording on the subject. The Abuse of Publicity Act (art. 18) makes it an offence, in the exercise of the freedom to express opinions and convey information, to "produce publications or broadcasts stirring up hatred, hostility or contempt for individuals or groups on account of their race or religion".

Article 21

Legal framework

215. The right of peaceful, unarmed assembly is guaranteed by the Constitution (art. 19, para. 13) and governed by various pieces of legislation, one of which regulates public meetings (Supreme Decree No. 1.086 of 16 September 1983). This states that the organizers of such meetings must give prior notice to the authorities, and that the forces of law and order are empowered to break up only meetings of which no notice has been given. It also states that meetings may be prevented from taking place for reasons which it indicates. The Penal Code makes it an offence for a public authority to prevent or cause to be broken up any legal meeting or public demonstration (art. 158).

Article 22

A. Legal framework

The right to freedom of association (art. 22, para. 1)

216. Under Chilean legislation, the State may not interfere with the exercise of this freedom. The right to associate without prior permission is enshrined in the Constitution (art. 19, para. 15, subpara. 1).

Safeguards

217. The Chilean State has legal machinery for granting legal personality to associations and ensuring unhindered freedom of association consistent with the relevant constitutional requirement: "To enjoy legal personality,

associations must be constituted in conformity with the law" (art. 19, para. 15, subpara. 2). Legal personality may be conferred in a number of ways, depending on whether the association is a public-law or private-law one and whether it is commercial or non-profit-making in nature.

Restrictions

218. The Constitution prohibits associations contrary to public morals, public order or the security of the State (art. 19, para. 15, subpara. 4).

Freedom not to associate

219. Under article 19, paragraph 15, subparagraph 3, of the Constitution, "No one may be obliged to belong to an association". This is in keeping with the tenor of international human rights jurisprudence on the matter.

220. There is no provision under current legislation for any system of legally established professional bodies to which individuals must belong, such as there used to be in Chile; it is possible to set up voluntary professional associations. Some within these associations have indicated concern at this situation, arguing that obligatory membership needs to be reinstated in order to fill the current void where the associations used to serve as ethical and legal watchdogs over their members.

The right of association and political parties

221. Article 8 of the original version of the 1980 Constitution imposed severe restrictions on the activities of political parties, groups and individuals, which could be declared unconstitutional if they acted or defined themselves in accordance with certain objectives it specified. The article contained loose definitions that allowed scope for sweeping interpretations, punishing behaviour and ideas and thus violating not only the freedom of association but also the freedoms of conscience, expression and education. It was rescinded in the constitutional reform of 1989. At the same time, a section of article 19, paragraph 15, of the Constitution was amended to facilitate the activities of political parties.

222. The current Constitution (art. 19, para. 15, subpara. 6) states: "The Constitution guarantees political pluralism. Parties, movements and other types of organization whose objectives, actions or conduct are inconsistent with the basic principles of democratic, constitutional rule, which seek the establishment of a totalitarian system, or which use, advocate or incite to violence as a means of political action, are unconstitutional." These restrictions do not refer to ideas or doctrines or make any mention of the family, and the kinds of conduct that are considered unconstitutional are clearly defined. The penalties applicable to those who take part in activities that lead to a party or organization being declared unconstitutional do not include restrictions on the freedoms of expression or education as the rescinded article 8 did. In any event, the legal scope of the subparagraph must be interpreted in the light of the initial reference to political pluralism, which serves as the main guideline in this matter: the unlawful conduct referred to is necessarily exceptional, and the only source of restrictions on pluralism.

223. To guarantee their independence of party interests, the Political Parties Organization Act does not allow members of the Electoral Commission, the Electoral Service, the armed forces or the forces of law and order to join political parties.

Right to form trade unions (art. 22, para. 1)

224. The right to form trade unions is established separately in the Constitution from the right to freedom of association. Article 19, paragraph 19, subparagraph 1, guarantees "the right to form unions in the circumstances and manners prescribed by law".

Legal reforms since 1990

Amendments to the Labour Code

225. The provisions of the 1987 Labour Code governing the right to form trade unions have been legally amended a number of times. [68] The changes listed below deserve especial attention.

Private-sector workers' right to unionize

Extension of unions' legal capacity

226. Unions have been granted the capacity to represent workers in the assertion of rights deriving from collective labour agreements; to represent them in the various collective bargaining forums; and to set up provident and health-care institutions of any legal nature. The latter capacity enables them to engage in lucrative activity (which was prohibited under the 1987 legislation), on the understanding that the fruits of such activity should be devoted to the accomplishment of their specific objectives.

Amendments relating to unions covering more than one business, and to temporary workers

227. The number of workers required to form a union covering more than one business has been reduced from 75 to 25. The field of activity of unions of casual and temporary workers has been extended. Under the 1987 Code, these were intended to find jobs for their members; besides, they could have only shipboard workers and seafarers, dock workers, building workers, artists and performers as members. The new Code defines unions of casual and temporary workers as those uniting workers who are employed "for cyclic or intermittent periods". As such, they are governed by the usual rules (they cease to be mere labour exchanges). Additionally, the new Code explicitly acknowledges their capacity to engage in collective bargaining, although not in a regulated form.

Independence of trade union organizations

228. The eligibility criteria for becoming a trade union leader have been reduced, and anyone serving as a union leader has the right to appeal to the courts in the event of being declared unqualified by the Department of Labour. Union privileges and permits have been refined and extended; privileges have

been retained for those who cease to be leaders of grass-roots union organizations; the Department of Labour's administrative authority to order an external audit has been abolished, and the new Code makes such an audit subject to a decision by 25 per cent of the union membership.

Trade union groupings

229. One amendment has consisted in the incorporation into the Labour Code of Chile's first ever body of regulations on trade union groupings. Historically, Chile has had such groupings (Chilean Federation of Labour; Confederation of Chilean Workers; Single Union of Workers), but they operated as de facto organizations. The purposes of the present union groupings are to represent the general interests of the workers before the public authorities and employers' organizations - internationally, this function extends to trade union, employers', governmental and non-governmental bodies, notably the International Labour Organization (ILO) and other United Nations agencies; to participate in national, regional, sectoral and professional bodies, whether State-run or not; and to engage in other activities as defined in their statutes provided that they are not inconsistent with the legal order, and are related to the objectives and needs of their constituent organizations.

Unfair and anti-union practices

230. The new regulations contain revised definitions of the kinds of behaviour that constitute anti-union practices. The most important amendment has been to procedure: under the 1987 Code, hearings into infractions of this kind were governed by the rules of ordinary labour proceedings, whereas under the current regulations, their investigation and settlement is a matter for the labour court, sitting in final instance without any prescribed form of proceedings and working on the basis of information supplied to it by the contending parties.

Right of public-sector workers to unionize

231. The revised text governs civil servants' right to form professional associations in a manner similar to that of private-sector workers. The right of public-sector workers to form or join unions or professional associations used not to be recognized. Over the decades, nevertheless, associations of civil servants had been set up pursuant to the general right of association and the provisions of the Civil Code. This meant that their statutes had to be approved and legal personality conferred by the President of the Republic in a supreme decree. That being so, such associations could not – at least explicitly, in their statutes – embrace any union-related objective.

Right of self-employed workers to form unions

232. The amendments passed in 1994 made applicable to unions of self-employed workers the general rules governing unions of private-sector employees (acquisition of legal personality, purposes, statutes, dissolution, right to federate and form confederations, etc.), a minimum of 25 persons being required to establish such a union.

Right of individuals or bodies corporate in the business and professional sectors to form corporations or associations

233. There have been no changes in this regard. Such corporations or associations may be established by 25 individuals and bodies corporate or by four bodies corporate; they acquire legal personality by depositing their instruments of incorporation and statutes with the Ministry of the Economy and publishing an abstract in the Official Gazette. Members of the professions, especially those with professional bodies (lawyers, social workers, engineers and so forth), have organized into associations. The umbrella organization for the various associations of employers and businessmen is the Confederation of Production and Commerce, which the authorities have taken to be the organization most representative of the employers for the purposes of consultation, framing agreements and complying with the ILO Tripartite Consultation Convention, No. 144.

Right of Armed Services personnel to form unions

234. The right of Armed Services and Police Force personnel to form and join unions is not recognized or regulated. There are also bans on the establishment of trade unions or associations by employees at State-owned ventures subordinate to, or with connections to the Government through, the Ministry of National Defence.

Establishment of non-governmental development agencies

235. Following a study on the subject by the Ministry of Planning and Cooperation, the Ministry of Justice issued a decree [69] to facilitate the establishment of non-governmental development agencies, including human rights bodies. The decree endorsed a model set of statutes to speed the acquisition of legal personality as a corporation under private law without greater delays and at lower cost.

B. Effective remedies

236. (a) Expulsion of a trade union member without establishing that the member had engaged in practices seriously damaging to union interests, and a fortiori if the individual concerned had been deprived of his right to defend himself, was found to be illegal and arbitrary. It violated the right freely to belong to an association, which included the right to remain a member and not to be deprived of membership arbitrarily or illegally (Constitution, art. 19, paras. 15 and 24) (ruling by the Pedro Aguirre Cerda Court of Appeal, 19 March 1996, on an application for protection; ruling by the Pedro Aguirre Cerda Court of Appeal, 19 April 1996, on an application for protection).

(b) The right of all individuals to form trade unions recognized in article 19, paragraph 19, of the Constitution, was found to extend to all trade union organizations governed by Book III of the Labour Code without distinction; hence there were no grounds for excluding temporary workers (ruling by the Court of Appeal on 24 December 1991 in appeal proceedings, upheld by the Supreme Court in a judgement dated 15 July 1993).

(c) Judgement was awarded against an employer who had illegally threatened the legitimate exercise of the right to form trade unions enshrined in article 19 of the Constitution (ruling by the Supreme Court dated 26 January 1993, on an application for protection).

(d) The expulsion of a member of a professional association was found to be illegal and arbitrary (ruling by the Santiago Court of Appeal dated 3 July 1995 on an application for protection, upheld by the Supreme Court in a judgement dated 16 August 1995).

Article 23

A. Legal framework

Protection of the family (art. 23, para. 1)

237. The Chilean Constitution regards the family as a fundamental institution – the "basic core of society" (art. 1, para. 2) – and goes on to say that it is "the duty of the State to safeguard ... the family [and] promote the strengthening of the latter" (art. 1, para. 5), an obligation which the State discharges by means of a variety of public policies.

The right to found a family and to marry with the free and full consent of the intending spouses of marriageable age (art. 23, paras. 2 and 3)

238. This is governed by Book I, Title IV, of the Civil Code, the Civil Marriage Act of 1884 and the Civil Registry Act, No. 4.808 of 1930. The age requirements for marriage have been changed by virtue of a recent legal reform (see para. 242).

Equality of rights and responsibilities of spouses during marriage and in the event of its dissolution. Protection of children in this eventuality (art. 23, para. 4)

239. Duties and rights between spouses and regarding children are regulated by Book I, Titles VI to XVIII, and Book IV, Title XXII, of the Civil Code. Chilean legislation does not explicitly define the family but does define marriage, regulating the effects on each family member of the relations created by marital and adoptive ties. The regulations mentioned above emphasize the property-related aspects of marriage and reveal persistent differences in rights between the spouses as regards the matrimonial regime governing married life. This is an extension of the wishes of the parties, to which the married couple are committed by the simple fact of marrying unless they declare otherwise. It is considered the norm, but a couple can reject the regime by opting explicitly for the arrangement known as separation of assets whereby the partners each administer their property as if they were single. In this case marriage does not affect the partners' assets because property is not owned or administered jointly. Current legislation accords unequal rights to children depending on whether they were conceived while the parents were married (legitimate) or out of wedlock (illegitimate). Amendments originating in the Ministry of Justice and the National Women's Service are intended to bring the law governing family relations into line

with the present-day social and economic situation in the country and end such discriminatory treatment. This is similar to what is happening with the legal reforms establishing the matrimonial regime of income-sharing and the bill to amend the current arrangements governing adoption (see paras. 243 and 245).

1. Legal reforms since 1990

Domestic Violence Act [70]

240. This Act makes a punishable offence of "any mistreatment that affects the physical or mental health of any person, even of full age, who is related to the perpetrator as ascendant, spouse or sibling or, if minor or incapacitated, is the perpetrator's descendant, adopted child, ward or related to the perpetrator up to and including the fourth degree of consanguinity, or is under the guardianship of or dependant on any member of the family group living under the same roof". Any such violent conflict within the family falls within the jurisdiction of the civil circuit court for the district where the victim's home lies. The proceedings are governed by special rules that emphasize mediation, oral presentations and brevity. The punishments applicable are preventive measures, a fine or imprisonment, as appropriate.

241. The Act grew out of the National Women's Service's priority concern with the problem of domestic violence. The Executive endorsed the legislative proposal in 1991, together with training for public officials and studies on domestic violence and the status of women in Chile. Between 1992 and mid-1993, a first task force was assembled to implement a prevention programme, with activities at the national level such as a campaign publicizing the problem, the appointment of intersectoral government commissions, and the promotion of municipal centres to deal with domestic violence. Between mid-1993 and late 1994, community, provincial and/or regional support networks were set up throughout the country to prevent domestic violence, as a necessary adjunct to the work of the commissions. The first step was to organize seminars on the establishment of such support networks. All in all, this was an innovative and interesting State initiative on a social problem which has been taken up at governmental level only very recently. There is now an entire plan of action on the non-violent settlement of disputes, under which families, and especially young people, are helped to find peaceful means of settling disputes. The National Women's Service has launched 56 municipal programmes with trained personnel to give preliminary support and provide references to specialized institutions. In addition, it is providing technical advice to the municipalities on the establishment of domestic violence centres. Sixteen such centres have already been set up in the Santiago area and elsewhere. Unlike the programmes, these centres, besides working on prevention and network promotion also offer psychological and legal help to both victims and aggressors.

Lowering of marriageable age

242. As a result of a legal reform lowering the age of majority from 21 to 18, a person has full capacity to enter into marriage at 18. A woman under 18 but over 12, and a man under 18 but over 14, requires the express consent of the persons specified in the relevant law.

Alternative matrimonial regime for the ownership of property [71]

243. Known as the earnings-sharing regime, this offers the following advantages over joint property and the separation of assets, the only possible choices before the law came into force:

The new regime guarantees the husband and wife full equality before the law with regard to the matrimonial regime for the ownership of property.

It grants both spouses genuine capacity to administer and dispose of their property and to fulfil and enter into legal commitments and contracts.

It embodies the principle of the shared life and interests that marriage should represent by establishing that, upon termination of the regime, such earnings as each spouse may have received from his or her assets and personal efforts are adjusted so that half goes to each spouse. This is of especial benefit to a wife who has not had a paid job, granting her express recognition of her contribution in the form of housework.

It establishes the institution of family assets, including the immovable property owned by either or both spouses which serves as the family's main residence, and the furniture it contains.

This may not be encumbered or transferred without the consent of both spouses; moreover, the use or usufruct may be awarded by the courts to whichever spouse continues to care for the common family in the event of dissolution of the marriage, divorce, de facto separation or the death of one of the spouses.

2. Bill under consideration

Amendment of the filiation regime

244. Recent studies show that more than 35 per cent of the children born in Chile today are illegitimate. This represents a considerable and steady increase since 1960. According to the National Statistical Institute, in 1971 approximately 19.9 per cent of births were illegitimate; by 1993 the figure had risen to approximately 38.1 per cent.

245. The bill will make far-reaching changes to the Civil Code governing filiation and succession. Its fundamental objective is to establish a new filiation regime, putting an end to the differences between legitimate and illegitimate children and giving equal treatment to all, irrespective of their parents' status at the time of their conception and birth. It will remove obstacles to the investigation of paternity, admitting all kinds of evidence, including biological evidence (DNA testing, etc.), provided only that the request is supported by information attesting to the likelihood of the paternity or maternity claimed. Parental authority is also the subject of far-reaching amendments, and will be exercised jointly by the father and the mother. The bill sets out - in addition to the details on ownership of assets

which it now comprises - the duty of parents to bring up and support their children. Custody is, in principle, the responsibility of both parents, but if they live apart custody goes to the mother unless, for sound reasons and in the interests of the child, the courts award it to the father.

3. Legislative proposal under study

Family courts

246. This proposal is part of the plan to modernize the judiciary; it seeks to establish systematic legal protection in matters relating to the family, marriage, the matrimonial regime for the ownership of property, filiation and minors (see para. 184).

B. National Commission for the Family

247. In view of the United Nations decision to proclaim 1994 the International Year of the Family, the National Commission for the Family was established in 1992, during the Government of President Aylwin; it comprised well-known figures in this field, drawn from the public and private sectors and representing different strands of public opinion. In 1993, after it had been in existence for a year and a half, it published a voluminous report on the situation of the family in Chile, [72] which is based on recognition of the diverse and heterogeneous nature of families and living conditions. The study highlights the strains placed on families by changes in various aspects of social, political, economic and cultural life, and the consensus on the family as a basic unit for people in particular and for the country in general. The valuable information assembled in this report serves as a basis for the Government's current policies on women and the family.

C. Policies for the benefit of the family

248. President Frei's Government has announced in its programme [73] its intention to pay increasing attention to Chilean families in public policy, confirming the National Women's Service as the body responsible for this undertaking as stated in the Act establishing it. The Equal Opportunities for Women Plan 1994-1999 (see para. 66), which sets out the Service's terms of reference, provides the starting point for the relevant strategies: “Foster equal opportunities for all types of family and help to ensure that they become a means of generating equal rights and opportunities for women and men”. [74] It calls for greater flexibility of roles with regard to domestic and family responsibilities, notably the care of children; acceptance by men and women of the social responsibility that goes with motherhood and fatherhood, and the promotion of non-discriminatory models and systems of socialization. For these purposes it proposes action to promote, adapt and create new support infrastructure, appropriate legislation, and campaigns promoting patterns of behaviour appropriate to women's new status. It identifies as important legal reforms to bring legislation into line with families' current needs, and comprehensive programmes of support for especially vulnerable kinds of family. The Plan outlines a number of strategic courses of action vis-à-vis families. It is on the basis of these courses of action and institutionally defined priorities that the objectives and goals of the “Family Policies” programme have been defined.

Article 24

Children's rights to measures of protection on the part of their family, society and the State, without discrimination (art. 24, para. 1)

249. With the return of democratic government, children were identified as a priority group for social and economic policy. This can be seen in two key measures: the ratification of the Convention on the Rights of the Child, and the launch of the National Action Plan for Children (PNI). Chile ratified the Convention on 13 August 1990 and it came into force on 27 September 1990. The Action Plan was brought in in 1993 to complement the Convention by guaranteeing the rights of the child. It identifies a series of lines of action to be pursued by the Government in close cooperation with civil society, to improve child survival, development and protection during the 1990s, particular attention being paid to the poorest. The Ministry of Planning and Cooperation (MIDEPLAN) is responsible for coordinating action under the Plan at national and regional levels and assessing the extent to which its stated objectives have been attained. It called together all public bodies involved in policy design and implementation in September 1993, with a view to harmonizing their activities in pursuit of the decade's proposed objectives. For that purpose an Intersectoral Committee on the National Action Plan for Children was set up to act as a technical secretariat, with representatives from various ministries and public bodies.

250. In April 1993, Chile presented its initial report on the measures adopted by the State to give effect to the rights recognized in the Convention on the Rights of the Child (CRC/C/3/Add.18), and this was considered by the Committee on the Rights of the Child at its 146th and 148th meetings (CRC/C/SR.146 and 148), held on 14 and 15 April 1994. The report gives a detailed account of the situation of children and young people in Chile in legal, social, health and educational terms, and of measures to improve their protection. In its concluding observations (CRC/C/15/Add.22), the Committee on the Rights of the Child

> "commends the State Party for its comprehensive report, which has been prepared in conformity with the Committee's guidelines and reflects a forward-looking strategy, and for the submission of detailed written replies to its list of issues. It notes with satisfaction that the detailed additional information provided by the delegation and its involvement in national policies concerning children made it possible to engage in an open and constructive dialogue with the State Party.
>
> "The Committee also notes with satisfaction that the report submitted by the State Party is the result of a wide consultation, at the national level, between the public authorities and the non-governmental coalition on the rights of the child."

The Committee welcomed the fact that the Convention on the Rights of the Child is self-executing in Chile, and the measures taken by the Government to promote and protect children's rights, in particular the National Plan of Action for Children, the harmonization of domestic legislation with the provisions of the Convention and the involvement of the National Service for Minors (SENAME) in protecting children and young people in particularly

difficult circumstances. In July 1994, the Government sent the Committee on the Rights of the Child additional information on the harmonization of domestic legislation with the provisions of the Convention relating to the administration of justice for children and on the progress made with the National Plan of Action and with social programmes in education, health and justice, in accordance with the Committee's recommendations on the initial report. In compliance with article 1 of the Convention, the law was amended to make provision for those who had reached the age of 18 to attain their majority. [75]

Registration and the right to a name (art. 24, para. 2)

251. The Civil Registration Act, article 31, provides for the right to a name and in article 28 establishes the obligation to register a birth within 60 days; article 33 sets forth the basic requirements for the registration of a birth - the baby's date of birth, given name, family name and sex. The preservation of identity is safeguarded inter alia by article 17 of the Act, which states that register entries may not be altered or modified other than by an enforceable court decision. The Act specifies who may request a new register entry or an amendment to their entry. In addition, under Chilean law the appropriation of another person's name is a punishable offence.

Right to acquire a nationality (art. 24, para. 3)

252. Nationality is a right enshrined in article 10 of the Constitution for:

Anyone born in Chilean territory, with specific exceptions;

Children born abroad of a Chilean father or mother, if either is in the service of the Republic;

Children born abroad of a Chilean father or mother, by reason merely of residence in Chile for more than one year;

Foreigners who have obtained naturalization in accordance with the law and expressly surrendered their former nationality; and

Individuals who have obtained special dispensation under the law for naturalization.

Article 25

Legal framework

Right to take part in the conduct of public affairs (art. 25 (a))

253. Chile is a democratic republic whose citizens periodically elect authorities to exercise political power (Constitution, arts. 4, 5, 26, 43, 45 and 108).

254. Political parties are defined in the Political Parties Organization Act (No. 18,603, art. 1) as “voluntary associations with legal personality, formed by citizens with shared doctrines of government for the purposes of

contributing to the operation of democratic, constitutional government and exercising legitimate influence in the conduct of the affairs of State in pursuit of the common good and in the service of the national interest". The 1989 constitutional reform, as well as rescinding article 8 of the 1980 Constitution, which had imposed tight restrictions on the activities of political parties, included an explicit guarantee of political pluralism in order to boost their activities (see paras. 221-223).

Right to vote and to be elected at periodic elections by universal, free and secret ballot (art. 25 (b))

255. According to the Constitution, the right to vote for candidates to popularly elected positions, and other rights granted under the law or the Constitution, belong to those who have the status of citizens, that is, Chileans who have reached the age of 18 and have not been sentenced to afflictive punishment (more than three years' imprisonment) (art. 13). In cases defined by the law, the Constitution (art. 14) also guarantees the right to vote to foreigners who, besides meeting the above requirements, have been resident in Chile for more than five years. The Constitution provides for a system of personal, equal and secret ballot and a general election system whose organization and operation are regulated by organization Acts governing: the electoral registration system and Electoral Service; popular votes and vote counting; and the Election Evaluation Board. With the victory in the 1988 referendum of those opposed to General Pinochet's appointment as President for the period of transition to democracy, Chile's citizens regained the right to vote and to be elected by universal, free and secret vote (see paras. 36 and 37).

Equal access to public office

256. Admission to all public offices and positions, with no requirements other than those imposed by the Constitution and the law, is provided for in the Constitution (art. 19, para. 17).

Article 26

A. Legal framework

257. Article 1 of the Constitution enshrines the general principle of non-discrimination by providing that "men are born free and equal in dignity and rights". It later states that in Chile there are no privileged persons or groups - neither the law nor any authority may draw arbitrary distinctions (art. 19, para. 2), - recognizes equal protection for individuals in the exercise of their rights, and guarantees the exercise of those rights in courts of justice (art. 19, para. 3).

258. This report provides information on the policies followed by Chile's democratic Governments to guarantee equal protection of the law to sectors that traditionally suffer from discrimination: women, children and indigenous peoples (see paras. 56 ff., 249 ff. and 261 ff.). It also mentions legislative amendments made for the sake of greater equality under the law in various areas of Chilean society, such as legislation on behalf of political exiles, authorizing those who have obtained degrees or certificates abroad to

exercise their professions; the bill on the legal constitution and operation of churches and religious organizations, seeking equality of legal status for all such organizations; and the bill on filiation, doing away with the inequality between legitimate and illegitimate children.

259. In addition to the aforementioned legislative proposals, the following should be noted:

Legislation to allow the full social integration of persons with disabilities; [76]

Legislation authorizing ex gratia social security benefits for persons dismissed on political grounds. [77] As regards the implementation of this legislation, as of 31 December 1996, 30,077 out of a total of 43,302 applications had been accepted and 7,000 rejected as ineligible. Six thousand applications were under review. Also by 31 December 1996, 24,187 persons had been granted ex gratia contributory service and 4,650 pensions had been awarded.

B. Effective remedy

260. A lower court decision to fine a health and leisure centre for unjustifiably refusing to provide a service to a Korean client was upheld and the fine increased. The grounds for the decision included the following: "The act of preventing access by a person or group of persons to a place generally open to the public, whether free of charge or otherwise, on the grounds of race, sex, language, religion or any other ethnic, social or cultural circumstance amounts to unequal and discriminatory treatment that contravenes the human rights principles prevailing today in modern societies and contained in the Charter of the United Nations, the International Covenant on Civil and Political Rights and the American Convention on Human Rights, which are laws of the Republic in accordance with article 5, paragraph 2, of the Constitution of Chile" (judgement of the Santiago Court of Appeal, 7 April 1993, upheld by the Supreme Court, 7 September 1993).

Article 27

A. Background

261. The State recognizes as the main indigenous ethnic groups in Chile the Mapuche, the Aymara and the Rapa Nui or Easter Islanders. It also recognizes the Atacameño, Quechua and Colla communities in northern Chile and the Kawashkar or Alacaluf and the Yámana or Yagán communities in the south. According to the 1992 population and housing census by the National Statistical Institute (INE), the indigenous population aged 14 and over can be broken down as follows:

Mapuche	928 060	Men	470 730	Women	457 330
Aymara	48 477	Men	24 898	Women	23 579
Rapa Nui	21 848	Men	9 358	Women	12 490

Mapuche

262. Much of the land in the south of the country remained in the hands of the Mapuche until it was occupied as part of the policy known as “the taming of Araucanía” in the final decade of the nineteenth century. As a result of this policy, the Mapuche were settled in an area corresponding to 5 per cent of their ancestral lands (500,000 hectares) through the issuance of land grants to the indigenous chiefs and their families, thereby giving rise to indigenous reserves or communities. Despite its size, this was enough land for the Mapuche to survive on. The remaining lands were auctioned off by the State to European settlers and individuals. During the early decades of the twentieth century the State encouraged the division of these indigenous communities, with a view to expanded farm development; as a result, the Mapuche lost more of their territory, which passed into the hands of private individuals. Legislation passed by the military regime led to the division of nearly all the communal lands into individual plots. These were not transferable but could be let or encumbered, so that, in practice, they fell into private hands. This situation explains the crisis in the rural Mapuche economy and the great wave of Mapuche migration to the cities.

Aymara

263. The Aymara territories became part of northern Chile in the late nineteenth century. These communities were not deemed to own their lands, which were considered government property. This situation led to disputes among the communities, because it set off a process whereby individuals registered title to communal lands, threatening the survival of the Aymara people. The situation was exacerbated by the entry into force of the Water Code, adopted in 1981 during the military regime, which allowed mining companies to appropriate the Aymara's ancestral waters, thereby causing a decline in agricultural activity and swelling the migration of members of this ethnic group.

Rapa Nui

264. The Rapa Nui live on Easter Island, which was annexed by Chile in 1888. The lands were registered in the name of the Chilean Treasury in 1933. In 1979, under Decree-Law No. 2,885, the Rapa Nui were authorized to apply for individual title to the land they occupied (7.5 per cent of the total surface of the island). Government ownership of the remainder of the island was institutionalized.

B. Policies in favour of indigenous peoples

265. In 1990, the democratic Governments began to recognize the demands of the indigenous peoples' organizations and, by means of legislative proposals and other measures, promoted a policy of greater openness with a view to genuine equality, a policy that has been widely discussed with indigenous communities themselves. When President Aylwin's Government took office, a Special Indigenous Peoples' Commission (CEPI) was established in order to coordinate State policies towards indigenous peoples and to draft a bill on behalf of their people and communities. This bill was discussed in indigenous

communities throughout the country and at the National Indigenous Peoples' Congress held in 1991. It was enacted in 1993. These measures were framed around the principles and appeals expressed in the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by the United Nations General Assembly in resolution 48/138, and in Commission on Human Rights resolution 1994/22 concerning the same rights.

1. Indigenous Peoples (Protection, Promotion and Development) Act [78]

266. With this Act, “assimilationist” policies on indigenous peoples were reversed for the first time in Chile's history and respect for their identity and rights on their own merits was promoted with a view to their genuine integration into the Chilean nation. The following is a summary of the main ways in which this Act benefits the indigenous peoples of Chile.

Recognition of Chile's ethnic and cultural pluralism

267. “The State recognizes that the indigenous inhabitants of Chile are the descendants of human groups that have existed in the national territory since pre-Columbian times, that they have kept their own cultural and ethnic features and that the land is the main basis of their existence and culture”; it also recognizes the duty of society and the State to respect, protect and promote their development and that of their cultures, families and communities. Specifically, the State recognizes as the main indigenous ethnic groups in Chile the Mapuche, Aymara and Rapa Nui or Easter Islanders; the Atacameño, Quechua and Colla communities in the north of the country; the Kawashkar or Alacaluf communities and the Yámana or Yagán communities in the south (art. 1).

Recognition of indigenous communities

268. The communities are recognized as legally constituted organizations enabling indigenous peoples to develop socially in accordance with their own cultural norms (arts. 9-11).

Protection of indigenous peoples' lands

269. In response to the demands made by indigenous peoples during the 1980s, to ensure the protection of the lands currently in their possession and to allow them to be extended in the future, the 1993 Act on indigenous groups devotes a long section (Title II) to the “protection and development of indigenous lands”. This section defines indigenous lands as lands held by virtue of titles granted and recognized by the State to indigenous peoples, under specified laws and texts from the nineteenth century up to the present; lands that indigenous “persons and communities have traditionally occupied and possessed”, provided that their title has been entered in the register of indigenous lands established by law; lands which, being held by virtue of prior title, are declared by the courts of justice to be henceforward the property or possession of indigenous persons or communities; and lands that indigenous persons or communities have received as gifts from the State (art. 12). Ownership of these lands is vested in the indigenous people or

communities identified in the Act. Indigenous lands may not be alienated, attached or encumbered, nor acquired by prescription, except between indigenous communities or persons of the same ethnic group. Community land may not be let, lent for use or ceded to third parties; land belonging to individuals may be, for a period not exceeding five years (art. 13). The Act establishes a public register of indigenous lands, to be kept by the National Indigenous Development Corporation (CONADI), and serve to attest to the status of indigenous land (art. 15). In addition, the law puts an end to the division of community land by stipulating that any division must be approved by an absolute majority of the holders of hereditary rights who are living on it (art. 16).

Extension of indigenous lands

270. With the aim of increasing indigenous people's inadequate land holdings, the Act establishes what is known as the “land and water fund”, which is administered by CONADI and is responsible for: granting subsidies for the acquisition of land by individuals, indigenous communities or parts of a community if they have too little land; financing arrangements to resolve land problems, particularly in pursuance of legal or out-of-court settlements relating to indigenous lands; financing the establishment, regularization or purchase of water rights; and funding irrigation works (art. 20). As regards implementation, the Act stipulates that regulations shall be drawn up, and these are already in force. The land and water fund will be financed on an annual basis with budget resources provided for that purpose, with funds from international cooperation, with land and property and water rights allocated by the State, and with private contributions (art. 21).

Protection of indigenous waters

271. Particular mention should be made of the Act's provisions on indigenous waters. Although, under the Water Code, water is public property, in practice the State is allowed to grant water concessions to individual applicants, even if they do not own the land where the water is found. Concern at this situation led to amendments of the law to protect the rights of indigenous peoples - in particular the Aymara and Atacameño people in northern Chile - to a resource vital to their survival. Thus, in its specific provisions for these groups, the Act stipulates that the water on their lands, such as rivers, canals, ditches and springs, shall be regarded as assets owned and used by the community, without prejudice to any rights registered by third parties under the Water Code. No further water rights will be granted over lakes, pools, springs, rivers or other waterways that supply the waters owned by various communities, unless a normal water supply is first ensured (art. 65).

Areas of indigenous development

272. These areas are tracts of territory that the Government (Ministry of Planning), on the basis of CONADI proposals, designates as targets for State action in favour of indigenous peoples and communities (art. 26). The Act stipulates a number of requirements for the establishment of such areas, including the existence of tracts of territory where indigenous ethnic groups have traditionally lived, a high indigenous population density, the existence

of lands belonging to indigenous communities or individuals, ecological homogeneity, and a dependence on natural resources in order to maintain the balance of such territories (art. 26). The most serious conflict to arise in this regard under the Government of President Aylwin involved the Pehuenche community of Quinquén, after an irrevocable judgement had ordered their eviction. The Government made an enormous financial effort and acquired the property in order to allow the indigenous inhabitants to remain on land that had belonged to them from time immemorial.

Fund for indigenous development

273. Although not directly connected with land rights, mention should be made here of the establishment under the Act of a fund for indigenous development, which is intended to further special credit plans, investment schemes and subsidies for indigenous individuals and communities. It will be administered by CONADI and, like the land fund, financed with annual budget allocations and contributions from the international community (art. 23).

2. Policies furthered by the State through the National Indigenous Development Corporation (CONADI)

274. CONADI, which is now in operation, was established under the Act to promote, coordinate and give effect to State action aimed at the comprehensive development of indigenous persons and communities, particularly in the economic, social and cultural spheres, and to promote their participation in the life of the nation. It includes a large number of indigenous people. Its governing body, the National Council, is composed of representatives of the various indigenous peoples of the country, and its senior executives at the national and regional levels are nearly all indigenous. Under the new Act, the indigenous members of the National Council stand for election in lists of three; the President of the Republic approves appointments to the Council from among the candidates with the largest majorities in their communities. The organization has chiefly directed its attention towards implementing the provisions laid down in the Act for the protection and extension of indigenous lands, and this subject, together with the promotion of development, has become the main focus of its efforts.

275. CONADI has taken the following action with regard to indigenous lands, according to its 1995 Annual Report.

Protection of lands to which indigenous peoples hold acknowledged title

276. CONADI has recorded a significant proportion of the existing indigenous lands in the Indigenous Lands Register, with the aim of avoiding their alienation or rent to private individuals, as has happened in the past. It has registered some 7,000 entries for indigenous lands with the property registrars, thereby making the lands eligible for tax exemption under the Act. The resources allocated for this purpose totalled 1.9 billion pesos (nearly US$ 5 million) in 1994, 2.16 billion pesos (just over US$ 5 million) in 1995 and 2.1 billion pesos in 1996, and have reversed the former trend in this area. Similarly, the task force set up to give legal advice to indigenous people in cases involving land disputes with other individuals has been strengthened.

Extension of indigenous lands

277. Significant resources have been allocated by the State for this purpose during the last two years through the indigenous lands and water fund, and this has allowed CONADI to restore a total of nearly 50,000 hectares to indigenous people in that time. The main courses of action taken have been:

(a) The purchase of disputed land by decision of the National Council. This resulted in the acquisition of 7,119.8 hectares of land from individuals in 1995 and 1,342.76 hectares in 1996, to be handed over to indigenous communities;

(b) Implementation of the policy of granting land subsidies to indigenous persons and communities. This practice was begun only in 1995, when a total of 2,007.32 hectares, the equivalent on average of 12.09 hectares per family, was acquired. The subsidy was awarded to both individual indigenous applicants and communities making collective applications;

(c) Acquisition by CONADI, at no cost, of public lands held by other State bodies and their subsequent transfer to indigenous communities. An important aspect of CONADI's land-extension efforts has been its concentration on arranging for State lands in indigenous areas to be handed over for restitution to their traditional owners. In the two years this policy has been in operation, CONADI has secured the transfer of six properties totalling 26,000 hectares in the southern region (Mapuche Huilliche territory) from the Ministry of National Assets and four properties totalling 4,800 hectares, also in the Mapuche region, from the National Institute for Agricultural Development (Ministry of Agriculture). These properties are now being made ready for handover as communal property to the indigenous people who claim them as their own and who, in many cases, live there. In 1995, CONADI requested the transfer of three State properties in the same area, totalling nearly 9,000 hectares, currently held by the Ministry of National Assets.

Protection and extension of indigenous water rights

278. The main thrust of action in this area has been to regularize indigenous peoples' water rights and finance irrigation works for their benefit. Legal teams working in indigenous areas have secured collective recognition of the ancestral waters of many communities, and reached important agreements with the National Forestry Corporation (CONAF), which is responsible for national parks, granting recognition of communities' ancestral waters for agricultural uses. In view of this, CONADI has decided to create eight such areas throughout the country, in the regions with the highest concentrations of indigenous populations. Although these areas are not yet legally in operation, since they must be constituted by decree of the Ministry of Planning, the Ministry has made significant efforts to lay them out and to propose administrative bodies and mechanisms drawn from among the State agencies with branches in the areas concerned and from indigenous organizations. In addition, the decision to establish these areas has strengthened the hand of the indigenous organizations in the regions concerned, which have been girding themselves to exert some influence on the management of these areas.

C. Cooperation with the international protection system

Agreement establishing the Fund for the Development of the Indigenous Peoples of Latin America and the Caribbean

279. President Aylwin sent this agreement to Congress for approval as part of the series of initiatives in favour of indigenous peoples. It has been in force in Chile since 26 February 1996.

ILO Convention No. 169

280. President Aylwin's Government sent the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries to Congress in 1990. Its ratification is pending.

Notes and annexes*

1.(a) Act No. 19.027 of 24 January 1991, amending Act No. 18.314 on terrorism; (b) Act No. 19.029 of 23 January 1991 abolishing the death penalty for a variety of offences; (c) Act No. 19.047 of 14 February 1991, amending Act No. 12.971 on State security. The Code of Military Justice, Act No. 17.798 on weapons control, the Penal Code and the Code of Criminal Procedure to provide better safeguards of individuals' rights; and (d) Act No. 19.048 of 13 February 1991 amending the legislation on freedom of expression. Annex 1.

2.Bill to establish a new Code of Criminal Procedure, dated 9 June 1995. Annex 2.

3.Draft constitutional reform regulating the Office of The Public Prosecutor, dated 1 April 1996. Annex 3.

4.Bill to establish the Office of the Public Prosecutor, dated 1 April 1996. Annex 4.

5.Government proposal for a bill to amend the current Code of Criminal Procedure and Penal Code in respect of detention and to set forth standards for the protection of citizens' rights. Annex 5.

6.Bill passed by the House of Representatives on 13 August 1996, to amend the current Government proposal for a bill to amend the current Code of Criminal Procedure and Penal Code in respect of detention and to set forth standards for the protection of citizens' rights. Annex 6.

7.The voting figures cited are those put out by the Electoral Service.

---

* The annexes may be consulted at the secretatiat.

8.Proposed reform of the Constitution, 22 August 1995. Annex 7.

9.Bill to amend the Chilean armed forces and Carabineros (Organization) Acts, 22 August 1995. Annex 8.

10.See note 1.

11.See note 2.

12.Study by Diego Portales University under the direction of the Professor of Constitutional Law, Mr. Gastón Gómez Bernales.

13.Report of the National Commission on Truth and Reconciliation, vol. 2, p. 847, recommendations b.4.1 and b.4.2 (in Spanish).

14.Act No. 19.010 of 29 November 1990. Termination of contracts of employment and job security. Annex 9.

15.Act No. 19.250 of 30 September 1993 amending the Labour Code, Civil Code and other legislation. Annex 10.

16.Act No. 19.335 of 23 September 1994 establishing earnings-sharing and amending the Civil Code, Civil Marriage Code, Penal Code, Code of Criminal Procedure and other legislation as indicated. Annex 11.

17.Act No. 19.023 of 3 January 1991 establishing the National Women's Service. Annex 12.

18.Plan de Igualdad de Oportunidades para las Mujeres 1994-1999, SERNAM Inscripción No. 89.505, 1994, Derechos Reservados, CYAN Producciones Gráficas Ltda. Annex 13.

19.See note 3.

20.Deaths of José Octavio Araya Ortiz and Sergio Leopoldo Calderón Beltramí, which occurred on 11 September 1993, supposedly at the hands of members of the Carabineros during incidents on the public highway on the anniversary of the military pronouncement of 11 September 1973. The cases were investigated - at the Government's request - by an Appeal Court judge who brought proceedings against one carabinero for the homicide of José Octavio Araya Ortiz. The case was transferred to the military courts on 9 November 1994.

Death of a 16-year-old minor, Nelson Antonio Riquelmme Albornoz, which occurred on 12 September 1995, supposedly at the hands of members of the Carabineros during incidents on the public highway commemorating the anniversary of the military pronouncement of 11 September 1973. Case investigated by the 11th San Miguel Criminal Court.

Background information on these deaths and the judicial investigations has been made available from time to time, in response to his requests, to the Special Rapporteur on extrajudicial, summary or arbitrary executions.

21.Act No. 19.029. See note 1.

List of crimes for which the death penalty has been abolished/retained. Annex 14.

22.Un Gobierno para los nuevos tiempos. Bases programáticas del segundo Gobierno de la Concertación, Derechos Humanos, p. 16, para. 11.

23.Supreme Decree No. 335 of 9 May 1990. Ministry of Justice. Annex 15.

24.Report of the National Commission on Truth and Reconciliation. Santiago, February 1991. Vols. 1, 2 and 3. Annex 16.

25.Act No. 19.123 of 8 February 1992, establishing the National Compensation and Reconciliation Corporation, instituting compensatory pensions and awarding other benefits to individuals as indicated. Annex 17.

26.Final report of the National Compensation and Reconciliation Corporation. Santiago, December 1996. Annex 18.

27.Background information on “Section 29”. Annex 19.

28.See note 25.

29.Supreme Decree No. 294 dated 13 March 1991. Ministry of Justice.

30.Commemorative pamphlet on missing detainees and persons executed for political reasons. Annex 20.

31.List of military personnel incarcerated at Punta Peuco. Annex 21.

32.Act No. 19.047. See note 1.

33.Supreme Decree No. 1.771 dated 30 December 1992. Prison Regulations. Ministry of Justice. Annex 22.

34.See note 2.

35.See notes 5 and 6.

36.Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1995/37 (E/CN.4/1996/35/Add.2, dated 4 January 1996), para. 71.

37.Ibid., para. 10.

38.For example, the case of the Brazilian citizen, Tania Cordeiro Vaz. The Government requested the appointment of a special inspecting magistrate to conduct the judicial investigation. Under this case, No. 122.319, proceedings have been in progress since 23 November 1993 against eight Police Department detectives on charges of illegal detention (Penal Code, art. 148). One of the eight is also facing charges of using violence to obtain a statement (Police

Department Organization Act, arts. 19 and 22). The case is currently at the trial stage, where defendants contest the charges against them in adversarial proceedings. The eight were formally charged on 30 January 1996.

39.See note 36. Paras. 39 and 40.

40.For example, the physical ill-treatment of Marcos Villanueva Vinet while in detention. As a result of this case, the Asaltos police prefecture was closed down, its chief left the Department, and three detectives were put on trial in the criminal courts in 1992.

41.On 24 January 1996 a public announcement by the Chilean Carabineros made known the decision by the Director-General, Mr. Cordero Rusque, to order the departure of 249 Carabineros “for conduct incompatible with the professional demands made by modernization plans now under way in the Carabineros”. The departures took effect on 1 February 1996. The decision was taken because a number of Carabineros were found to be involved in criminal activities in the latter half of 1995; the force launched an administrative review, with the outcome referred to above.

42.See note 36. Para. 38.

43.By decision of the present Government, Chile's contribution to the United Nations Voluntary Trust Fund for the Victims of Torture has been raised, as of 1997, to US$ 10,000.

44.See note 36. Para. 38.

45.See note 13.

46.See note 2.

47.See notes 5 and 6.

48.See note 1.

49.Act No. 19.055 of 1 April 1991 amending the Constitution of the Republic. Annex 23.

50.Act No. 19.047. See note 1.

51.Decree No. 509, dated 21 March 1994.

52.Decree No. 778, dated 18 May 1994.

53.Decree No. 1.103, dated 23 July 1994.

54.Act No. 19.343 of 31 October 1994, amending Act No. 16.618 and other legislation on the confinement of minors in institutions as indicated.

55.Decree No. 1.698, dated 27 December 1994. Decree No. 80, dated 20 January 1995. Decree No. 1.091, dated 22 January 1996. Ministry of Justice.

56.See note 2.

57.Act No. 18.994 of 20 August 1990, establishing the National Office for Refugees. Annex 25.

58.Act No. 19.074 of 28 August 1991, authorizing persons who have obtained qualifications or degrees abroad to practise. Annex 26.

59.Act No. 19.128 of 7 February 1992. Customs franchises for returning political exiles. Annex 27.

60.Ruling No. 55, 1992. Office of the Comptroller-General of the Republic.

61.Act No. 19.047. See note 1.

62.Act No. 19.225 of 22 June 1993, amending article 201 of the Code of Civil Procedure and article 448 of the Code of Criminal Procedure. Annex 28.

63.Act No. 19.346 of 18 November 1994, establishing the Judicial Academy. Act No. 19.390 of 30 May 1995, on the judicial profession of judges, ancillary officials and employees of the judiciary. Annex 29.

64.See note 2.

65.Impunidad Diplomática ("Diplomatic impunity") by the journalist Francisco Martorell, published in Buenos Aires, Argentina. Individuals referred to in the text made an application for protection of their right to honour.

66.Acts Nos. 19.047 and 19.048. See note 1.

67.See note 65.

68.Act No. 19.069 of 30 July 1991, setting standards for trade union organizations and collective bargaining. Act No. 19.296 of 4 March 1994, establishing regulations to govern associations of civil servants in the State administration. Annex 30.

69.Supreme Decree No. 292, dated 19 March 1993. Ministry of Justice.

70.Act No. 19.325 of 27 August 1994, establishing procedural rules and penalties for use in connection with domestic violence. Annex 31.

71.See note 16.

72.Report of the National Commission for the Family. Annex 32.

73.See note 23. The Family, p. 44, para. 30.

74.See note 18, II, p. 14.

75.See note 71.

76.Act No. 19.284 of 14 January 1994, laying down standards for the full social integration of persons with disabilities. Annex 33.

77.Act No. 19.234 of 12 August 1993, authorizing ex gratia social security benefits for persons dismissed on political grounds. Annex 34.

78.Act No. 19.253 of 5 October 1993, establishing regulations to govern the protection, promotion and development of indigenous peoples. Annex 35.
