



SUBMISSION

on

**Chile's Fifth Periodic Report to the UN Human Rights
Committee**

focus on Freedom of Expression

**ARTICLE 19
Global Campaign for Free Expression**

**London
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I. Introduction

Since 1990, Chile has undergone a progressive transition to democracy through institutional and legislative reform. A systematic review of the constitutional framework has been carried out, and there is greater recognition of freedom of expression in Chile now than there has been in previous decades. However, ARTICLE 19 maintains a number of concerns about the full implementation of the right to freedom of expression in Chile. In this Submission, we draw the attention of the Committee to these concerns and respectfully request that it urges the Chilean government to take remedial steps.

In summary, our concerns are:

- the retention of certain old criminal defamation laws (commonly known as 'desacato' laws) that restrict criticism of public authorities and the armed forces;
- continuing incidents of harassment and violence against journalists;
- the failure to implement the right of access to information;
- the artificial statutory distinction between recognised and accredited 'journalists', who enjoy a range of rights including to protect confidential sources of information, and unaccredited journalists who do not enjoy these rights;
- the failure to recognise community broadcasting; and

- reservations Chile has entered to international human rights treaties limiting the jurisdiction of complaints bodies to events that occurred after March 1990.

This Submission elaborates on these concerns.

II. International and Constitutional Guarantees

International Guarantees

Chile is party to the International Covenant on Civil and Political Rights (ICCPR)¹ and the American Convention on Human Rights (ACHR)², both of which recognise freedom of opinion and expression and the right to access information. Chile has also recognised the competence of the Human Rights Committee to receive complaints from individuals about alleged violations of their rights.³ However, Chile has made reservations to all these treaties to exclude any complaints concerning alleged violations of human rights that occurred before 11 March 1990. We are concerned that this prevents victims of human rights violations committed by the previous regime from obtaining just redress.

In 1997, Chile officially endorsed the Declaration of Chapultepec, a set of principles on freedom of expression adopted on 11 March 1994 by the Hemisphere Conference on Free Speech.⁴ However, some of the principles enshrined in the Declaration have not been implemented. This concerns in particular the principles on access to information, protection of sources, desacato laws and violence against journalists. These issues are addressed in the relevant sections, below.

Constitutional Guarantees

Chile's Constitution protects freedom of expression in the following terms:

Freedom to express opinions and to disseminate information without prior censorship in any form and by any means, without prejudice to assuming the responsibility for any crimes or abuses committed in the exercise of such freedoms, in conformity with the law which is to be passed by a qualified quorum.

In no case may the law establish a state monopoly over the mass media.

Any individual or body corporate offended or unjustly alluded to in a mass medium, has the right to have his declaration or rectification disseminated for free, under the conditions determined by law, by the mass medium having issued such information.

All individuals or bodies corporate shall have the right to establish, edit or maintain newspapers, magazines and periodicals, under the conditions prescribed for by law.

¹ Adopted by the UN General Assembly Resolution 2200A (XXI) of 16 December 1966, in force as of 23 March 1976. Chile ratified on 10 February 1972.

² Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, on 22 November 1969 and entered in force on 18 July 1978. Chile ratified it on 10 August 1990.

³ Adopted by the UN General Assembly resolution 2200A (XXI) of 16 December 1966, in force as of 23 March 1976. Ratified by Chile on 28 May 1992.

⁴ To date, the Declaration has been endorsed by 32 Latin American Heads of States or Governments and by the Inter-American Commission on Human Rights.

The State, such universities and other persons or entities as prescribed by the law, may establish, operate and maintain television stations.

There shall be a National Council for Radio and Television, having autonomy and legal status, which shall be in charge of supervising the proper functioning of these mass media. A law passed by a qualified quorum shall determine the organization and other functions and authorities of said Council.

The law shall establish a system of censorship for the exhibition and publicity of motion picture production and the general norms governing public expression of other artistic activities.

While we welcome this detailed statement of constitutional protection, we are concerned that, in many instances, freedom of expression may be limited by any law, without posing any further requirements. This falls short of the level of protection required to be implemented under Article 19(3) ICCPR, which states that freedom of expression may be limited only by law and when this is necessary for the protection of a limited number of legitimate aims.

Article 8 of the Constitution additionally provides that that actions and decisions of state authorities belong on public record and should be open to public access. However, this right of access is heavily qualified; certain categories of documents may be declared confidential or classified when “their publicity would affect the implementation of the duties of such authorities, the individual rights, the safety of the Nation or the national interest”.⁵ Article 8 also fails to grant a right of access to all state-held information. We elaborate on this in further detail in the section on access to information, below.

We request the Committee to urge the government to take the following steps:

- The limitation on the jurisdiction of human rights bodies to receive complaints of human rights violations that occurred before March 1990 should be lifted.
- The constitutional limitations on freedom of expression should be brought in line with international standards.
- The right to access all information held by the state, subject only to narrowly defined limitations, should be constitutionally protected.

III. Criminal Defamation / Desacato Laws

Over the last five years, most of the provisions sanctioning criminal defamation against public authorities – or *desacato* laws – have been removed from the Criminal Code and from the text of the Constitution. Some, however, remain:

- Article 264 of the Criminal Code, which prohibits “threats and attacks on public officials”, such as MPs, judges, government and other institutions;⁶

⁵ Article 8 No. 2, Political Constitution.

⁶ Art. 264, Criminal Code: “Anyone who during the sessions of the legislative bodies or in the hearings of the courts of justice threatens a deputy or a senator or a member of the above-mentioned courts, or a deputy or a senator for the opinions expressed in the Congress, or a member of a court of justice for the sentences

- Article 276 of the Code of Military Justice, which introduces the crime of “improper sedition”;⁷ and
- Article 284 of the Code of Military Justice, which retains the crime of *desacato* and which extends the jurisdiction of military courts in such cases to civilians.⁸

These provisions have been criticised by the Inter-American Court of Human Rights in its November 2005 judgment in the case of *Palamara v. Chile*, which involved a former civilian navy employee convicted by a naval court in 1995 for *desacato*.⁹ The Court stated that such provisions violate the right to freedom of expression and required that Chile should repeal Article 284 of the Code of Military Justice, and either repeal Article 264 of the Criminal Code or limit its application so that it no longer impedes on the legitimate exercise of freedom of expression.¹⁰ The Chilean government has failed to comply with these recommendations to date.

As has been acknowledged by both the Inter-American Court and by other international human rights courts and bodies, one of the key problems with criminal defamation is that a breach may lead to a custodial sentence as well as a substantial award of damages. The harsh nature of these potential sanctions means that they exert a profound chilling effect on freedom of expression. As a result, many journalists impose a substantial degree of self-censorship. The fact that *desacato* laws limit criticism of public figures and institutions, which should be open to greater criticism than ordinary individuals, adds to the problems.

In a joint Declaration in 2000, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression stated:

- All Member States should review their defamation laws in order to ensure that they do not restrict the right to freedom of expression and to bring them into line with their international obligations.
- At a minimum, defamation laws should comply with the following standards:

pronounced or the State ministers or any other authority in the performance of their duties, will be punished with lesser incarceration in any of its degrees.

Anyone who gravely perturbs the order of the sessions of the legislative bodies or of the hearings of the courts of justice, or causes tumult or perturbs the performance of a public authority or institution to the point of impeding their actions shall be punished with lesser incarceration of minimum degree and a fine of six to ten monthly wages, or only with the latter.

⁷ Article 276, Code of Military Justice: “Anyone who, in the case established in the previous article, incites or instigates via any means the military personnel to disorder, indiscipline or disobedience of its military duties, shall be punished with major military incarceration in its minimum degree if he is an Official, with lesser military incarceration in its maximum degree if he is a sub-official and with the lesser incarceration in any of its degrees if he is a simple soldier or a civilian.”

⁸ Article 284, Code of Military Justice: “Anyone who, as established in Article 296 of the Criminal Code, offends or insults verbally or in writing or via any other means the Armed Forces, their units, branches, armies, classes or special corps, or one of its integrating members with the awareness of his role within such institutions, shall be punished with lesser incarceration in its medium to maximum degree.”

⁹ *Humberto Antonio Palamara Iribarne v. Chile*, Judgment of 22 November 2005, Series C No. 135 (available in Spanish only).

¹⁰ *Ibid.*, paras. 230 (d) and 67-95.

- the repeal of criminal defamation laws in favour of civil laws should be considered, in accordance with relevant international standards;
- the State, objects such as flags or symbols, government bodies, and public authorities of all kinds should be prevented from bringing defamation actions;
- defamation laws should reflect the importance of open debate about matters of public concern and the principle that public figures are required to accept a greater degree of criticism than private citizens; in particular, laws which provide special protection for public figures, such as *desacato* laws, should be repealed;
- the plaintiff should bear the burden of proving the falsity of any statements of fact on matters of public concern;
- no one should be liable under defamation law for the expression of an opinion;
- it should be a defence, in relation to a statement on a matter of public concern, to show that publication was reasonable in all the circumstances; and
- civil sanctions for defamation should not be so large as to exert a chilling effect on freedom of expression and should be designed to restore the reputation harmed, not to compensate the plaintiff or to punish the defendant; in particular, pecuniary awards should be strictly proportionate to the actual harm caused and the law should prioritise the use of a range of non-pecuniary remedies.¹¹

It is clear that the existence and continued use of criminal defamation laws in Chile is incompatible with these standards.

We request the Committee to urge the government to take the following steps:

- All remaining criminal defamation norms should be removed from the law, and replaced, to the extent necessary, with appropriate civil defamation laws. In particular, we urge the following:
 - Article 284 of the Code of Military Justice should be repealed.
 - Article 276 should be repealed or amended to ensure that it does not inhibit legitimate criticism of the armed forces and to withdraw civilians from its scope.
 - Article 264 of the Criminal Code should either be repealed or be amended to ensure that it does not restrict the legitimate exercise of freedom of expression.

IV. Violence against the Media

The last few years have seen a resurgence of physical attacks against journalists, perpetrated by police as well as private actors. Attacks became more frequent in December 2006, after the death of the late former dictator General Pinochet, when supporters of his regime assaulted several foreign and national journalists, holding them responsible for General Pinochet's negative image abroad.

The following attacks can be seen as representative of the increasingly volatile climate:

- In May 2005, Chilean radio reporter Paola Briceño Verdina was beaten and illegally detained by national police agents after covering a student protest in Santiago. A national police agent detained Briceño Verdina after she aired a report for private radio station *Radio Bío-Bío*. Although Briceño Verdina had identified herself as a reporter and showed the agent her press credentials, she was taken to a police vehicle, beaten with a police baton and taken to a police station, where she was accused of

¹¹ UN Doc. E/CN.4/2001/64, 13 February 2001, Annex V.

disorderly conduct and resisting authorities and then jailed. A colonel of the national police later ordered her release and apologised.¹²

- In July 2005, graffiti including swastikas were spray-painted on the walls of the studios of TVN in Valparaíso, following the airing of a programme about the surge of neo-Nazi groups in Chile. As well as insulting and threatening the television station, the graffiti included death threats against TV presenter Mauricio Lombardi and other journalists. Those responsible for the acts were never found¹³.
- In May 2006, Marcos Cabrera, a cameraman for the Santiago television station *RedTV*, Fernando Fiedler, a photographer for the Santiago daily *Diario Financiero*, and Livio Saavedra, a cameraman for *Canal 9 Regional de TV*, were assaulted by the police during the coverage of a student protest in the capital. During the same demonstration, Julio Oliva, editor of the Santiago-based weekly *El Siglo*, and two of his reporters, Iván Valdés and Marcos Díaz, were punched by police agents and thrown into a truck with other protesters even though they had showed the police their press credentials. The journalists were then taken to a local police station and held for three hours before being released without charge. The President subsequently ordered an investigation which led to the dismissal of chief of the special forces of the police responsible for the attacks.¹⁴
- Also in May 2006, *Associated Press* photographer Santiago Llanquín and Danny Alveal, a photographer for the newspaper *Las Últimas Noticias*, were wounded by unidentified people while they were covering a march organized by the workers' union Central Unitaria de Trabajadores (CUT) to commemorate May Day in Santiago de Chile.¹⁵
- On 10 December 2006, following the death of former dictator Augusto Pinochet, thousands of loyalists mobbed foreign and national journalists who were covering the news outside Santiago de Chile's Military Hospital, where the former dictator had died.
- On the evening of 11 December 2006, another group of Pinochet's supporters insulted and threw objects at *Televisión Española's* team of journalists, led by reporter María José Ramundo, while they covered the general's funeral at the Military School in Santiago de Chile.¹⁶
- On 12 December 2006, while Pinochet's funeral was taking place in the military compound, some of those attending assaulted the *Televisión Nacional Channel 7* team of reporters. On the same day, the mob also assaulted a journalist from the Argentinean network *TELEFE* after he mentioned the word "dictator" in relation to Pinochet.¹⁷

Although some of these attacks and threats have been investigated by the authorities, we are concerned that not enough is done to prevent them. At a minimum, police should be properly trained on the role of the media in a democracy, and proper steps should be

¹² Reporters without Borders, 11 May 2005.

¹³ Reporters without Borders, 15 July 2005.

¹⁴ Committee to Protect Journalists, 1 June 2006.

¹⁵ Instituto Prensa y Sociedad, 8 May 2006

¹⁶ Instituto Prensa y Sociedad, 20 December 2006.

¹⁷ *Ibid.*

taken to protect the media when media harassment is foreseeable (as was the case in the violence following Pinochet's death).

We request the Committee to urge the government to take the following steps:

- The authorities should react more promptly and effectively to ensure that the perpetrators of violence and harassment to journalists and media representatives are brought to justice.
- The authorities should identify those public events most likely to trigger tensions between different political factions and take preventative measures to allow the media to perform their tasks in a safe environment.
- The police and other law enforcement authorities should receive training on the role of the media in a democracy.

V. Freedom of Information

The right of access to information, recognised under Article 19 ICCPR, Article 13 ACHR and in Principle 3 of the Declaration of Chapultepec, has not been fully implemented in Chile.

Legislation enacted in 1999 and constitutional amendments put in place in 2005 only recognise a partial and heavily qualified right of access to administrative acts. The 1999 Transparency Act¹⁸ amended general administrative legislation¹⁹ to establish that the administrative acts of State bodies are public, with the exception of documents that are secret or classified. A 2001 governmental decree,²⁰ adopted to implement the Transparency Act, established a number of broad and open-ended classification criteria, with the result that it became practically impossible to obtain all but the most mundane information from public bodies.²¹ The new Article 8 of the Constitution, which entered into force in August 2005 and which was adopted several months after a critical report by the Inter-American Commission on Human Rights, retained the main weaknesses of this earlier legislation. In particular, it fails to establish a constitutional right of access, and it defines information narrowly as pertaining to formal administrative decision making.

This unsatisfactory state of affairs was condemned by the Inter-American Court of Human Rights in its recent ruling in *Marcel Reyes et al. v. Chile*, a case concerning three environmental activists who were refused access to information from the Government on

¹⁸ Ley sobre probidad administrativa aplicable de los órganos de la administración del Estado, No. 19.653 de 1999.

¹⁹ Ley orgánica constitucional de bases generales de la administración del Estado – No. 18.575 de Diciembre 1986.

²⁰ Decree No. 26 of 28 January 2001.

²¹ In November 2001, a new consolidated version of the framework law of 1986 was approved, to incorporate the amendments introduced in 1999 and 2001: Ley orgánica constitucional de bases generales de la administración del Estado. Ministerio Secretaría General de la Presidencia, 17 de Noviembre de 2001.

a controversial logging project.²² The Court stated that Article 13 ACHR, the relevant parts of which are formulated in similar terms to Article 19 ICCPR, protects the right to access information held by public bodies and called on the Chilean government to adopt the necessary measures to guarantee this right. The Court stated:

Chile must adopt the necessary measures to guarantee the protection of the right of access to State-held information, and these should include a guarantee of the effectiveness of an appropriate administrative procedure for processing and deciding requests for information, which establishes time limits for taking a decision and providing information, and which is administered by duly trained officials.

...

[T]he State should provide training to public entities, authorities and agents responsible for responding to requests for access to State-held information on the laws and regulations governing this right; this should incorporate the parameters established in the Convention concerning restrictions to access to this information that must be respected.²³

We request the Committee to urge the government to take the following steps:

- Chile should implement the judgment of the Inter-American Court of Human Rights in the *Reyes* case and enact a full right of access to information held by the State. The current Transparency Act should be reviewed to establish the principle of maximum openness to information held by public bodies, subject only to narrowly defined and legitimate exemptions.
- Appropriate training must be provided to all public bodies to ensure the effective implementation of the right of access to information.

VI. Regulation of the Media and Journalists

Regulation of Journalists and Protection of Sources

The Freedom of Opinion and Information of Journalism (Professional Exercise) Act, adopted in 2001, regulates the journalistic profession in Chile.²⁴ It requires that all individual journalists who started their profession in 2001 or later should hold a degree from an accredited journalism school and only recognises rights such as the privilege to protect confidential sources to those journalists. We are concerned that this legislation acts as an illegitimate bar on entry into the profession, in apparent violation of long-established jurisprudence of the Inter-American Court of Human Rights.²⁵ We are also concerned that the right to protect confidential sources should be available to all who use their right of free speech to communicate to a larger audience, whether employed or freelance, and whether accredited or not.

²² *Claude Reyes et al. v. Chile*, 19 September 2006, Series C No. 151.

²³ *Ibid.*, paras. 163, 165.

²⁴ Ley No. 19.733 de Junio 2001 sobre Libertades de Opinión e Información y Ejercicio del Periodismo.

²⁵ See, in particular, the Court's judgment in Advisory Opinion OC-5/85, Serie A No.5 (1985).

Community Broadcasting

At present, there are more than 300 community-based radio stations in Chile. These stations provide essential services to local communications, fulfilling their right to know and to communicate. They are regulated through a 1994 law that limits the area of coverage to a few square kilometres, which may be extended only in exceptional circumstances.²⁶ Community stations are barred from carrying any advertising and are licensed for three-year periods only - commercial radio stations receive 25-year licences.

These restrictions, coupled with recent deregulation of the commercial market, have seriously weakened community radio broadcasting in Chile. We are concerned that this will deprive local populations from a vital source of information and deny them their right of equitable access to the airwaves. Commercial radio stations replace community radio but do not provide the same news and cultural services; many focus on music or provide syndicated output that is of limited local relevance.

This situation is, however, beginning to receive some attention. In 2006, the President, Michelle Bachelet, announced her government's intention to adopt new legislation on community broadcasting, and the National Association of Community Radios (ANARCICH) has since presented a draft legislative proposal to secure the position of community broadcasters.²⁷ We have not examined the text of this proposal in detail but we urge that consideration is given to measures such as allowing limited advertising (without abolishing community radio's non-profit status), boosting radius and issuing longer licences. We would also recommend the introduction of practical support measures.

We request the Committee to urge the government to take the following steps:

- The law on the profession of journalism should be amended to abolish all illegitimate bars on entry into the profession.
- The right to protect confidential sources should be available to all, not just to accredited journalists.
- Legislation and practical support initiatives should be introduced to allow community broadcasters, who provide a vital service to local communities that cannot be provided by the private sector, to flourish.

²⁶ Ley 19.277 de 1994 de 20 de Enero de 1994, which modifies the General Law on Telecommunications of 1982.

²⁷ ANARCICH, VII Encuentro Nacional de Radios Comunitarias Ciudadanas de Chile 26 - 27 - 28 January 2006, Santiago de Chile: <http://www.radioscomunitariaschile.cl/>